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A BIG MISTAKE: ERODING THE DEFENSE OF MISTAKE OF FACT ABOUT CONSENT IN RAPE

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I. INTRODUCTION

Thirty years ago, for the first time, the defense of mistake of fact[1] emerged as a defense to a charge of rape.[2] Thirty years later, the availability of that defense has been suddenly and substantially eroded. By allowing the defense only where the evidence of consent is "equivocal," courts are establishing a standard for an instruction on mistake that has been applied in no other context in which the mistake defense arises.[3] This new rule of equivocality imposes limits on the role of the jury that are unique to rape, adding the defense of mistake of fact to a growing array of procedural and substantive rules of law that have singular application to that offense.

This Article examines the development of mistake of fact as a defense to rape from its adoption in 1964 to its virtual demise in the last year. I argue that the emergence of a rule of equivocality culminates from a growing judicial discomfort with the implications of an expan-

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1 The defense of "mistake of fact" as to consent is similar to, but not precisely coextensive with, the defense of "honest and reasonable belief" as to consent. As this Article will demonstrate, the difference in nomenclature has had a substantive impact on the scope of the defense.

2 *See* People v. Hernandez, 393 P.2d 673, 678 (Cal. 1964) (recognizing an honest and reasonable belief that a sexual partner is over the legal age of consent as a defense to a charge of statutory rape).

3 *See* People v. Williams, 841 P.2d 961 (Cal. 1992); Tyson v. Trigg, 50 F.3d 436 (7th Cir. 1995) (Posner, J.), *cert. denied* 116 S. Ct. 697 (1996); Tyson v. State, 619 N.E.2d 276 (Ind. Ct. App. 1993); Commonwealth v. Fionda, 599 N.E.2d 635 (Mass. App. Ct. 1992).

In 1992, as an associate of Alan M. Dershowitz, I participated in the appeal of Michael G. Tyson's conviction for rape and drafted that portion of the brief challenging the refusal of the trial court to instruct on the defense of mistake as to consent.

sive defense of mistake to a charge of rape. First, I consider the adoption of the rule of equivocality, examining its flaws both on its own terms and by considering application of that rule in other areas of criminal law, particularly self-defense. Next I consider the impact of a rule of equivocality on certain aspects of the role of the jury, concluding that the rule has the effect of transforming the jury function in fundamental ways. Then I consider the relationship of the rule of equivocality to rules that once governed rape prosecutions, in particular the requirement that the complainant's testimony be corroborated, and the admissibility of evidence regarding a complainant's prior sexual conduct. I argue that the rule of equivocality is a revival, albeit inverted, of legal rules that were largely repudiated by the rape reform legislation of the last twenty years, and that the discourse surrounding these decisions is a parallel inversion of the now repudiated discourse about women's sexuality that had accompanied those rules. Finally, I contend that to the extent criminal law should be concerned with improving communication about sexual behavior and consent, the requirement that a belief as to consent be reasonable adequately protects that interest without the costs imposed by a rule of equivocality.

Although this Article treats certain California decisions as critical references, the problem posed by the erosion of the defense of mistake is far broader. California was the first state in the country to recognize that a defendant who honestly and reasonably mistakes the age of a sexual partner may seek an acquittal on a charge of statutory rape on that ground. Other states promptly adopted that reasoning.[4] Similarly, when California expanded the rule to permit the defense of mistake of fact as to actual consent where the victim is of the age to give consent,[5] other states again followed suit.[6] This Article considers the rule of equivocality announced in California as one that, like the rules regarding mistake, is more than likely to have a similar influence nationwide.[7] It is for this reason that I discuss in detail the develop-

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[4] *See infra* note 29 and accompanying text.

[5] People v. Mayberry, 542 P.2d 1337 (Cal. 1975) (en banc). *See infra* part II.

[6] Since People v. Mayberry, nine other states have recognized the defense of mistake of fact as to consent in rape. *See* Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983); People v. Lowe, 565 P.2d 1352 (Colo. Ct. App. 1977); State v. Smith, 554 A.2d 713 (Conn. 1989); In Interest of J.F.F., 341 S.E.2d 465 (Ga. Ct. App. 1986); State v. Dizon, 390 P.2d 759 (Haw. 1964); State v. Williams, 696 S.W.2d 809 (Mo. Ct. App. 1985); Owens v. Nevada, 620 P.2d 1236 (Nev. 1980); People v. Crispo, No. 3105-85 (N.Y. Sup. Ct. October 16, 1988); Green v. State, 611 P.2d 262 (Okla. Crim. App. 1980). *See also* United States v. Short, 4 C.M.A. 437, 16 C.M.R. 11 (1954).

[7] Already, one United States court of appeals and at least two state intermediate appellate courts have applied an analysis similar to that of the *Williams* court, discussed herein. Tyson v. Trigg, 50 F.3d 436 (7th Cir. 1995) (applying Indiana law), *cert denied*, 116 S. Ct.

ments in California regarding mistake in rape law.

II. Background: The Development of the Defense

A. Mistake of Fact: A Summary of the Defense

Criminal offenses, at least those traditional offenses which carry with them serious sanctions such as imprisonment and its accompanying social stigma, are defined not only by conduct but also by a mental element,[8] variously embraced by the terms "fault,"[9] "mens rea," "culpability,"[10] "blameworthiness,"[11] or "intent," that must accompany the forbidden conduct. Where an offense requires a particular mental state, such as knowledge or purpose, an honest and reasonable belief that precludes a defendant from forming or maintaining that mental state will preclude conviction. Similarly, where knowledge of the existence of a certain fact is an essential element of an offense, a mistaken belief about that fact which, if true, would make the conduct innocent, also precludes criminal liability.[12]

Since a mistake of fact operates to negate the mental element of a charged offense, it is not so much a defense as a means of demonstrating the failure of the prosecution's proof of that essential element.[13]

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697 (1996); Commonwealth v. Fionda, 599 N.E.2d 635 (Mass. App. Ct. 1992); Tyson v. State, 619 N.E.2d 276 (Ind. Ct. App. 1993). *See also* Johnson v. State, 419 S.E.2d 96 (Ga. App. Ct. 1992) (holding that proof of the element of force negated any possible mistake as to consent).

[8] *See, e.g.*, Morissette v. United States, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory, 'But I didn't mean to' . . . .").

[9] *See, e.g.*, John C. Jeffries Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 Yale L. J. 1325, 1373-74 (1979) ("with respect to traditional crimes, it is a widely accepted normative principle that conviction should not be had without proof of fault") (footnote omitted).

[10] *See, e.g.*, Model Penal Code § 2.05 cmt. 1 (1985) ("Crime does and should mean condemnation and no court should have to pass that judgment unless it can declare that the defendant's act was culpable. This is too fundamental to be compromised.") (footnote omitted).

[11] Oliver Wendell Holmes, The Common Law 49-50 (1881) ("a law which punished conduct which would not be blameworthy in the average memeber of the coummunity would be too severe for that community to bear").

[12] In one familiar illustration of this principle, a person who, when leaving a restaurant, mistakenly takes not his own umbrella but that of another will, in most jurisdictions, not be guilty of larceny, because that crime is defined to require that the actor have the "intent to steal the property of another." Wayne R. LaFave & Austin W. Scott, Jr., Criminal Law § 5.1(a), at 406 (2d ed. 1986).

[13] *See, e.g.*, Edwin R. Keedy, *Ignorance and Mistake in the Criminal Law*, 22 Harv. L. Rev. 75, 86 n.4 (1908) ("Such defenses as mistake and alibi, each of which denies one of the

The defense of mistake of fact, it has been observed, is to that extent superfluous, since it merely restates the axiom that the prosecution must prove every element of an offense.[14] Nevertheless, a mistaken belief by an actor that precludes the required mental state which would make the conduct criminal has most often been treated as giving rise to a defense, with the initial burden of raising a reasonable doubt placed upon the defendant, and the prosecution required to disprove the defense beyond a reasonable doubt.[15]

Mistake of fact is available as a defense to a particular charge only where the definition of the offense makes a defendant's mental state as to a particular element material.[16] For rape, generally defined as sexual intercourse accomplished by force and without consent,[17] an

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elements of guilt, must not in this connection be confounded with defenses of an affirmative character under which the defendant admits the commission of the crime but claims exemption from punishment because of some excusing fact, such as self-defense.").

14 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 62(b), at 246 (1984) ("[i]f the defendant's ignorance or mistake makes proof of a required element impossible, the prosecution will necessarily fail in its proof of the offense"); LAFAVE & SCOTT, *supra*, note 12, § 5.1(a), at 406 ("[i]nstead of speaking of ignorance or mistake of fact, it would be just as easy to note simply that the defendant cannot be convicted when it is shown that he does not have the mental state required by law for commission of that particular offense"); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 173 (2d ed. 1963) (noting that the rule "is not a new rule; and the law could be stated equally well without reference to mistake"); MODEL PENAL CODE § 2.04 cmt. 1 ("[t]o put the matter as this subsection does is not to say anything that would not otherwise be true, even if no provision on the subject were made").

15 *See, e.g.*, LAFAVE & SCOTT, *supra*, note 12, § 5.1(a), at 406 ("the practice has developed of dealing with such mistakes as a matter of defense"); ROBINSON, *supra*, note 14, § 62, at 244-45.

16 *See, e.g.*, MODEL PENAL CODE § 2.04(1) ("Ignorance or mistake as to a matter of fact or law is a defense if: (a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense."); Keedy, *supra*, note 13, at 82 ("There is no saving power in mistake itself. . . . It is only by showing the absence of the criminal mind due to his mistake that he can escape punishment for his criminal act. It follows that the mistake is no defense, where there is a prosecution under a statute, in which the legislature has indicated that no criminal mind is necessary for a conviction of the crime created by the statute.").

17 *See, e.g.*, MODEL PENAL CODE § 213.1(1) (defining rape as sexual intercourse "by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping"); IND. CODE § 35-42-4-1 (1989) (defining rape as "knowingly or intentionally [having] sexual intercourse with a member of the opposite sex when . . . the other person is compelled by force or imminent threat of force"); IOWA CODE § 709.4(1) (1994) (defining rape as "a sex act . . . done by force or against the will of the other participant"); N.J. STAT. ANN. § 2C:14-2 (West 1989) ("[a]n actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person [and] . . . the actor uses physical force or coercion").

According to Blackstone, the common law defined rape as "the carnal knowledge of a woman forcibly and against her will." 4 WILLIAM BLACKSTONE, COMMENTARIES *209, *cited in* Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLO. L. REV. 1780 n.1 (1992). Dripps notes that "[t]echnically, rape was not a common-law crime after the Statutes of Westminster in the reign of Edward I," and that the second of these statutes, adopted in 1285, "made it a felony for a man to

actor must have a level of intent that is at least reckless and, more often, either purposeful or knowing. While states uniformly require that this mental state accompany the sexual conduct itself and the force, there is no similar consensus as to whether it must also accompany the element of non-consent. Some states require that a defendant be aware that a complainant does not consent in order to be guilty of rape,[18] while in other states the offense is complete if the complainant does not consent and the defendant knows only that he[19] is engaging in the sexual conduct through force.[20] Still other states have simply not resolved the question. This ambiguity gives rise to much of the conflicting decisional law attempting to apply mistake of fact to rape, for if a defendant need not be aware of a complainant's non-consent, then a mistaken belief that she is consenting will not relieve him of criminal culpability. Logically, a definition of the requisite mens rea, if any, as to non-consent in rape should precede any determination of the availability of mistake of fact as a defense. However, the history of the defense is that courts have not always applied this logical sequence.

B. *PEOPLE V. HERNANDEZ* AND THE ROOTS OF MISTAKE IN RAPE

Mistake of fact as a defense to a charge of rape has its origins not in adult rape, but rather in the derivative context of statutory rape. Curiously, the first approach to a mistake of fact defense to rape occurred in a California case where the defendant was mistaken not as to the complainant's actual consent, but as to her age. This development is noteworthy since nationally there had been a long and unbroken tradition of strict liability as to sexual conduct with minors.[21]

'ravish' a woman without her 'assent.'" Dripps concludes that "the common-law definition of rape is a gloss on the statute." *Id.*

18 *See supra* note 6 and accompanying text.

19 Although I recognize that both men and women have been victims of rape, for simplicity and clarity, I refer to defendants as male and to complainants as female throughout this Article. I also use the term "complainant" rather than "victim," since the latter term is an implicit resolution of issues that are the subject of dispute in the cases cited in this Article.

20 *See, e.g.*, State v. Reed, 479 A.2d 1291 (Me. 1984); Commonwealth v. Williams, 439 A.2d 765 (Pa. Super. Ct. 1982); State v. Houghton, 272 N.W.2d 788 (S.D. 1978). This approach is sensible in that a defendant has the capacity to know that he is using force, but lacks the capacity to know a victim's state of mind regarding consent except through her external manifestations of it.

21 Indeed, as to a number of other offenses, the majority of American states, including California, continue to treat the age of the victim as a strict liability element. These offenses can be grouped into two general categories. In the first are those offenses which would be offenses regardless of the age of the victim (such as distribution of narcotics), so that the victim's status as a minor merely aggravates already culpable conduct. *See, e.g.*, People v. Lopez, 77 Cal. Rptr. 59 (Cal. Ct. App. 1969) (mistake of age no defense to charge

In *People v. Hernandez*, the California Supreme Court reversed its prior rule of strict liability and required the trial court to admit defense evidence tending to show that the defendant had a good faith, reasonable belief that the complainant was over eighteen years old.[22] Essential to the court's decision was the proposition that in statutory rape the age of the complainant serves as a proxy for the element of consent; this proposition is based on the theory that a minor is legally incapable of giving valid consent.[23] As the court explained:

> We are dealing here, of course, with statutory rape where, in one sense, the lack of consent of the female is not an element of the offense. In a broader sense, however, the lack of consent is deemed to remain an element but the law makes a conclusive presumption of the lack thereof

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of furnishing marijuana to a minor). The second category involves offenses in which the threshold age of the victim is so low that an honest belief that the victim was somewhat older is deemed insufficient to alter the character of the actor's conduct. *See, e.g.*, People v. Olsen, 685 P.2d 52, 57 (Cal. 1984) (mistake of age no defense to charge of committing lewd and lascivious acts upon a child under age 14).

22 People v. Hernandez, 393 P.2d 673 (Cal. 1964). This rule had been firmly established in People v. Ratz, 46 P. 915 (Cal. 1896). The *Ratz* court held that the "object and purpose of the law [forbidding sexual intercourse with a girl under the age of 14] are too plain to need comment, the crime too infamous to bear discussion," and that the "protection of society, of the family, and of the infant, demand that one who has carnal intercourse under such circumstances shall do so in peril of the fact, and he will not be heard against the evidence to urge his belief that the victim of his outrage had passed the period which would make his act a crime." *Id.* at 916. *See also* People v. Griffin, 49 P. 711 (Cal. 1897) (defendant's lack of awareness of complainant's mental condition, which made her unable to give legal consent, no defense to rape).

At the time of those decisions, however, the age of consent was 14 years; at the time of the *Hernandez* decision, it was 18. As the age of consent is raised, the articulated legislative purpose of prohibiting sexual contact with minors diminishes, and the justification for recognizing the defense of mistake correspondingly increases. *See* Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105 (1964). *See also* MODEL PENAL CODE § 213.6 (forbidding the defense of mistake as to age whenever "the criminality of conduct depends upon a child's being below the age of 10" but permitting the defense whenever criminality depends on the child's being below a critical age above 10).

23 At the time of the *Hernandez* decision, California defined statutory rape in the same section as the offense of forcible rape, with the victim's age and force as alternative elements which, together with defined sexual conduct, gave rise to criminal culpability. Section 261 of the California Penal Code provided:

> Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances:
> 1. Where the female is under the age of 18 years;
> 2. Where she resists, but her resistance is overcome by force or violence;
> 3. Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution; . . . .

See People v. Collins, 351 P.2d 326, 327 n.1 (Cal. 1960) (superceeded by statute as stated in People v. Bradford, 27 Cal. Rptr. 2d 444 (Cal. Ct. App. 1994)). Applying the old version of § 261, the court in *Collins* noted that subdivisions of § 261 "do not state different offenses but merely define the different circumstances under which an act of intercourse constitutes the crime of rape." *Collins*, 351 P.2d at 328.

because she is presumed too innocent and naive to understand the implications and nature of her act.[24]

The court then considered the significance of a defendant's good faith, reasonable belief that the complainant was over the age of consent. Relying on section 20 of the California Penal Code,[25] the court recited the fundamental principle of criminal law "that it is not conduct alone, but conduct accompanied by certain specific mental states which concerns, or should concern, the law."[26] After considering the application of this principle in a 1956 decision in which a defendant's good faith, reasonable, but mistaken, belief that a first marriage had been terminated by divorce was held to be a valid defense to a charge of bigamy arising out of defendant's second marriage,[27] the court concluded, "[c]ertainly it cannot be a greater wrong to entertain a bona fide but erroneous belief that a valid consent to an act of sexual intercourse has been obtained."[28] On this basis, the court found that a good faith, reasonable belief that the victim was indeed over the age

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[24] *Hernandez*, 393 P.2d at 674. The notes to the Penal Code of 1872 explained the conclusiveness of the statute's presumption of non-consent: "[t]his provision embodies the well settled rule of the existing law; that a girl under ten years of age is incapable of giving any consent to an act of intercourse which can reduce it below the grade of rape." CAL. PENAL CODE § 261 comment (1st ed. 1872), *quoted in* Michael M. v. Superior Court of Sonoma County, 601 P.2d 572, 579 (Cal. 1979) (Mosk, J., dissenting) (examining legislative history of statutory rape), *aff'd*, 450 U.S. 464 (1981).

[25] That section codifies the principle of mens rea set forth above, see, *e.g.*, *supra* notes 9-12 and accompanying text providing that ("[i]n every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence.") CAL. PENAL CODE § 20, *cited in Hernandez*, 395 P.2d at 674..

The defendant in *Hernandez* also relied upon CAL. PENAL CODE § 26, *see Hernandez*, 393 P.2d at 674, which provides, in part:

> All persons are capable of committing crimes except those belonging to the following classes:
>
> . . . .
>
> Three — Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.

Although neither section refers to good faith belief, and indeed, § 26 refers instead to "mistake of fact," the court's analysis is framed in terms of defendant's "honest and reasonable belief" rather than his "mistake." *Id.* at 677 (citing *Ex Parte Ahart*, 159 P. 160, 161-62 (Cal. 1916) (quoting Regina v. Tolson, 23 Q.B.D. 168 (1889))). ("At common law an honest and reasonable belief in the existence of circumstances, which, if true, would make the act for which the person is indicted an innocent act, has always been held to be a good defense."). The reasonable belief is deemed to go "to the culpability of the young man who acts without knowledge," relieving him of criminal responsibility not because the belief was erroneous, but instead because it was actually and reasonably held. *Id.* at 675.

As is demonstrated more fully, *infra*, in cases following from *Hernandez* and culminating in *Williams*, judicial analysis of this issue has gradually shifted emphasis away from the good faith of a defendant's belief and toward mistake, with increasing significance imputed to this difference in diction. *See infra* notes 100-102 and accompanying text.

[26] *Hernandez*, 393 P.2d at 675.

[27] People v. Vogel, 299 P.2d 850 (Cal. 1956).

[28] People v. Hernandez, 393 P.2d 673, 677 (Cal. 1964).

of consent was a valid defense to what previously had been a crime of strict liability.[29]

The novelty of the *Hernandez* decision lies in its smooth elision of the correlation between age and actual consent, and in its automatic and unreflective application of principles of mens rea to an element—age—that might as easily have been treated as one requiring no proof of intent.[30] The court assumed, without discussion, that

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[29] The court explained that "the reluctance to accord to a charge of statutory rape the defense of lack of criminal intent has no greater justification than in the case of other statutory crimes, where the Legislature has made identical provision with respect to intent." *Id.* at 677. This observation begs the critical question of what intent, if any, is required as to the element of age. The legislative language offers no answer whatever, which may make it "identical" to that of other statutes, but which is no greater a source of insight for this identity. Moreover, the defense of lack of criminal intent was always, at least theoretically, available for the offense of statutory rape, so long as the intent at issue was the intent to engage in the sexual conduct. The narrower and harder question was the consequence of a lack of criminal intent as to a different element, the victim's age.

In the immediate aftermath of *Hernandez*, at least two states amended their criminal codes, adopting the *Hernandez* rule as law. *See* ILL. ANN. STAT. ch. 38, para. 11-4(c) (Smith-Hurd 1978) (repealed 1984) (providing that it is an affirmative defense that a defendant "reasonably believed that the child was of the age of 16 or upward at the time of the offense"); N.M. Stat. Ann. § 40A-9-3 (Michie 1963) (repealed 1979) (same). The Model Penal Code also permits a defense of reasonable mistake as to age, so long as the relevant age is over ten. MODEL PENAL CODE § 213.6(1).

In succeeding years, several more states added the defense of mistake as to age, either through broad revisions of their criminal codes adopting the Model Penal Code in some form, or through specific legislative enactment. *See, e.g.*, IND. CODE § 3 5-42-4-3(c) (Burns 1995) ("It is a defense [to the offense of performing sexual intercourse or criminal deviate conduct with a child under fourteen years of age] that the person reasonably believed that the child was sixteen (16) years of age or older at the time of the conduct").

Still, other states adopted the rule and reasoning of *Hernandez* through judicial decision, *see, e.g.*, State v. Guest, 583 P.2d 836 (Alaska 1978); Powe v. State, 389 N.W.2d 215 (Minn. Ct. App. 1986); State v. Elton, 680 P.2d 727 (Utah 1984), bringing the total number of states that permit the defense to seven.

Of those states that do not permit the defense, nearly all have rejected post-*Hernandez* challenges on the ground that, notwithstanding general principles of mens rea, age is not and has never been an element of the offense of statutory rape as to which intent need be proven, the very question that the California court evaded. *See, e.g.*, State v. Moore, 253 A.2d 579, 580 (N.J. Super. Ct. App. Div. 1969) ("it has been the universally accepted view of the courts of this country that defendant's knowledge of the age of the woman is not an essential element of the crime of statutory rape and that, therefore, 'it was no defense that the accused reasonably believed her to be of the age of consent'") (citations omitted); State v. Stiffler, 788 P.2d 220, 222 (Idaho 1990); State v. Stokely, 842 S.W.2d 77, 81 (Mo. 1992).

[30] The many states that continue to bar a defense of mistake of fact as to age for statutory rape, as well as those states that do not recognize a defense of mistake of fact as to actual consent to rape, have done so on this basis. *See supra* note 29 (statutory rape). *See, e.g.*, People v. Witte, 449 N.E.2d 966, 971 n.2 (Ill. App. Ct. 1983) ("the only intent necessary to support rape is the *general* intent to perform the physical act; 'whether the defendant intended to commit the offense[s] without the victim's consent is not relevant'") (alteration in the original) (citation omitted); People v. Christensen, 414 N.W.2d 843, 845 (Iowa Ct. App. 1987) ("a defendant's awareness of a putative sexual abuse victim's lack of consent

whatever might be said about an adult complainant's consent would be equally true of a minor complainant's age. Although the *Hernandez* court did hold that the complainant's age created a conclusive presumption about her actual consent, and the statute at the time did offer age and force as alternative circumstances creating liability for sexual intercourse,[31] neither circumstance compels the conclusion that these elements are equivalent with respect to the requisite intent. Yet the decision relies upon this equivalency, reasoning from bigamy to "valid consent to an act of sexual intercourse," and from there to statutory rape, without confronting the relationship between age and consent on the one hand, and intent on the other.

Still stranger, although the *Hernandez* decision is predicated upon an assumption that intent must be proven as to consent in adult rape, is that that assumption was not adopted as law either in California or elsewhere in the United States for over ten years after *Hernandez* was decided, and to date has not been adopted in a majority of American jurisdictions. Since the California court held that mistake as to age was a defense to statutory rape only because age acted as a proxy for actual consent, it would appear that the court should, *a fortiori*, have permitted mistake as to actual consent to operate as a valid defense to adult rape.[32] Yet, it was not until 1975, over ten years later, that any court adopted the rule implicit in *Hernandez* as a settled principle of law.[33]

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is not an element of third-degree sexual abuse"); Commonwealth v. Lefkowitz, 481 N.E.2d 227, 231 (Mass. App. Ct. 1985) ("the prosecution has proved rape if the jury concludes that the intercourse was in fact nonconsensual . . ., without any special emphasis on the defendant's state of mind"). *See also* LAFAVE & SCOTT, *supra* note 12, § 5.1, at 408 ("[t]he crime of rape must be understood as not including an element of knowledge of the woman's lack of consent, from which it follows that not every mistake by the defendant by which he believes the woman is consenting will be a defense").

31 *See supra* note 23 and accompanying text.

32 At least one commentator, however, has argued that the mens rea for statutory rape is clearer than that for adult rape. *Compare* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW § 9.2.2, at 698-707 (1978); and § 9.3, at 728 n.53 (arguing that "the factor of age is necessary to state the minimal set of incriminating criteria" for the offense of statutory rape) *id.*

33 *See* People v. Mayberry, 542 P.2d 1337 (Cal. 1975) (en banc). There are a very few jurisdictions that have preserved the doctrinal anomaly of that ten year period, permitting a defense of mistake as to age in statutory rape while refusing to recognize a defense of mistake of fact as to actual consent. *See, e.g.*, IND. CODE § 35-42-4-3(c) (mistake as to age); Tyson v. State, 619 N.E.2d at 294 n.19 (noting in dictum that "a credible argument can be made that the [defendant's] tendered instructions [on mistake of fact about consent] do not correctly state the law in Indiana because they incorrectly focus on [defendant's] perception of [the complainant's] consent."). *See also* MODEL PENAL CODE § 213.6(1) (mistake as to age with respect to sexual offense).

C. THE *MAYBERRY* STANDARD AND THE EVIDENTIARY PREDICATE FOR AN INSTRUCTION ON MISTAKE

In *People v. Mayberry*,[34] defendant Franklin Mayberry was charged with kidnapping, rape, and oral copulation based upon testimony by the complainant diametrically opposed to his own. Where the complainant described a barrage of threats and blows that so overwhelmed her as to make it impossible for her to seek help, the defendant described mutuality and consent. This evidentiary chasm nevertheless formed the basis for a new rule recognizing the mistake defense to rape. This new rule would later be transformed by decisions which emphasized aspects of the complainant's conduct that could be described as "equivocal," in order to redefine the quality of the evidentiary predicate that would support a mistake instruction.

To convey the depth of this transformation, it is necessary to detail the facts of *Mayberry*. The complainant, identified as Miss B., testified that she was walking past a liquor store one afternoon when the defendant, whom she had never seen before, grabbed her by the arm.[35] She dug her fingernails into his wrist and he released her. He kicked her, threw a bottle, which struck her, and shouted obscenities at her. She walked to a nearby grocery, saw no one who was near enough for her to gain their attention, and then accompanied the defendant outside the store "[b]ecause of her own confusion and fear of [him]." She remained with him for some twenty minutes.[36]

"In a threatening manner" the defendant mentioned having sex. When Miss B. refused, he again struck her, this time with his fist, knocking her down.[37] He spoke obscenities, and threatened to "knock every tooth out of [her] mouth." Then he seized her wrist and said, "come on."[38] Miss B. testified that in an effort to "buy time," she asked to purchase some cigarettes, and Mayberry agreed, taking her by the elbow and accompanying her to a store where she purchased cigarettes for herself and for him without mentioning her situation to the clerk.[39] She explained her behavior in the store by testifying that that she felt "completely beaten," and did not think the clerk would help her.[40]

Once outside, Miss B. sat on a curb and attempted to engage Mayberry in conversation. She testified that she "put on an act" and tried

[34] 542 P.2d 1337 (Cal. 1975) (en banc).
[35] *Id.* at 1340.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.* at 1340-41.

"to fool" Mayberry, thinking she might thereby escape.[41] Eventually, he said "we are leaving," seized her elbow, and started to guide her.[42] They walked several blocks to his apartment, where he barricaded the door. Mayberry then engaged in several acts of sexual intercourse and oral copulation with her. During the sexual attack, Mayberry again struck her.[43] While Miss B. was in the apartment, Mayberry's brother entered, dragged her to a mattress, threw her against a wall, and struck her face with his fists. When Mayberry stepped between his brother and Miss B., she broke free and left.[44]

Mayberry's testimony was entirely different.[45] He stated that he and Miss B. met and engaged in conversation, that he accompanied her both to the grocery store and to the store where she purchased cigarettes, and that they then walked to his home. He testified that he did not threaten her and that she did not protest, but instead accompanied him willingly and agreed to engage in intercourse. He denied seeing his brother hit Miss B., testifying instead that his brother laughed when he entered the apartment and upon noticing him, Miss B. looked upset, said "I'll fix you," and left.[46]

The defendant contended that he genuinely and reasonably believed that the victim had consented to return with him to his apartment to engage in sexual intercourse, and sought an instruction on the defense of mistake of fact as to consent, which was denied by the trial court. On appeal, the California Supreme Court analyzed the issue according to the same sequence it had applied ten years earlier in *Hernandez*, citing the provisions of sections 20 and 26 of the Penal Code,[47] and citing the bigamy case, *People v. Vogel*, that had formed a part of the *Hernandez* court's reasoning.[48] Similar to *Hernandez*, however, the court omitted to make a specific determination that intent was required *as to the element of consent*.[49] Instead, it noted that "there

[41] To explain why she did not flee, Miss B. testified that because of an arthritic condition, her leg was stiff and she could not run fast. *Id.* at 1341.

[42] *Id.*

[43] *Id.*

[44] *Id.* Miss B.'s testimony was corroborated in part by that of a police officer, who testified that he responded to her address and observed "much bruising and swelling on her face, left arm and leg," and by two other witnesses who testified to the bruises. *Id.*

[45] *Id.*

[46] *Id.*

[47] *See supra* note 25; People v. Hernandez, 393 P.2d 673 (Cal. 1964).

[48] People v. Mayberry, 542 P.2d 1337, 1344-45 (Cal. 1975).

[49] The court rejected the contention that recognition of a defense of mistake as to consent would promote greater resistance by a victim in her efforts to assure that there could be no misunderstanding as to her non-consent, and that such resistance could result in injury to the victim, holding that "[s]uch an argument, in our view, invokes a policy consideration for the Legislature." *Id.* at 1346. It further held that adoption of such a position "would result in effective nullification of Penal Code sections 20 and 26 when

is no rape if a female of sufficient capacity consents to sexual intercourse,"[50] and then considered intent as to the offense as a whole, concluding:

> Although *Hernandez* dealt solely with statutory rape, its rationale applies equally[51] to rape by means of force or threat and kidnapping. Those statutory provisions, like that involved in *Hernandez*, neither expressly nor by necessary implication negate the continuing requirement that there be a union of act and wrongful intent. The severe penalties imposed for those offenses and the serious loss of reputation following conviction make it extremely unlikely that the legislature intended to exclude as to those offenses the element of wrongful intent. If a defendant entertains a reasonable and bona fide belief that a prosecutrix voluntarily consented to accompany him and to engage in sexual intercourse, it is apparent he does not possess the wrongful intent that is a prerequisite under Penal Code section 20 to a conviction of either kidnapping or rape by means of force or threat.[52]

Having announced that the defense was, as a matter of law, available to a charge of rape,[53] the court then addressed the quality of

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applied to cases of kidnaping and rape." *Id.* (statutory citations omitted). Again, this holding fails to recognize that there can be a meaningful requirement of "joint operation of act and intent" in rape without necessarily applying an intent requirement to the element of consent. For example, the offense could be defined as sexual intercourse (purposefully or knowingly engaged in) with a person by force (applied purposefully or knowingly), and without consent (no inquiry into actor's state of mind as to this element).

The prosecution's prediction regarding the relationship of mistake and resistance has, in the view of at least one commentator, come to pass. *See* Dana Berliner, Note, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L. J. 2687, 2695-2700 (1991).

[50] *Mayberry* 542 P.2d at 1344 (citing People v. Nash, 67 Cal. Rptr. 621, 625 (Cal. Ct. App.), *cert. denied*, 393 U.S. 944 (1968), and 1 B. E. WITKIN, CALIFORNIA CRIMES §§ 173, 288 (1963)). The court made a parallel observation regarding the charge of kidnaping, noting that "[t]here is, of course, no kidnaping 'when one, . . . with knowledge of what is taking place . . . , voluntarily . . . consents to accompany another . . .'" *Id.* at 1344 (ellipses in original).

There is no mention of either consent or non-consent in California's statutory definition of rape. *See supra* note 25.

[51] Actually, according to the reasoning of *Hernandez*, it applies *a fortiori* to adult rape.

[52] *Mayberry*, 542 P.2d at 1345 (statutory citations omitted). Again, the court answered the wrong question. It is not whether the legislature meant to exclude the element of wrongful intent as to the offense as a whole, but as to one element only: consent. Requiring intent as to the use of force alone, for example, could be sufficient to impose punishment consistent with § 20. So, if a defendant knowingly used force, notwithstanding any genuinely held belief as to the victim's state of mind, he might still be guilty of rape. Many jurisdictions have held as much. *See supra* note 20.

[53] In addition to announcing the availability of a mistake of fact defense to a charge of forcible rape, the *Mayberry* court underscored the right of a criminal defendant "to have the jury determine every material issue presented by the evidence," and reaffirmed that failure to instruct on a matter as to which there is evidence deserving of consideration amounts to a miscarriage of justice requiring reversal. *Mayberry*, 542 P.2d at 1347 (citing People v. Modesto, 382 P.2d 33, 38 (Cal. 1963), *overruled by* People v. Sedeno, 518 P.2d 913 (Cal. 1974), *overruled on other grounds by* People v. Flannel, 603 P.2d 1 (Cal. 1979)). This corollary holding in *Mayberry* becomes more significant when examining the application of

evidence that would support such an instruction, rejecting the prosecution's contention that the facts of this case did not warrant the instruction. The court held that "[defendant's] testimony summarized above could be viewed as indicating that he reasonably and in good faith believed that Miss B. consented to accompany him to the apartment and to the subsequent sexual intercourse."[54] The mistake instruction, then, could be supported by the same evidence that supported Mayberry's defense of actual consent, namely a defendant's unequivocal denial of any use of force together with his unambiguous description of consensual conduct. Indeed, nothing in the decision suggests that this overlap was in any way odd or problematic.

But the court went further, observing that "[i]n addition, part of Miss B's testimony furnishes support for the requested instructions. It appears from her testimony that her behavior was equivocal."[55] The "part" to which the court referred was that which described her putting "on an act," as well as her "admitted failure physically to resist him after the initial encounter or to attempt to escape or obtain help," behavior that the court concluded "might have misled [Mayberry] as to whether she was consenting."[56] The court said nothing about the remainder of her testimony—including the kick, the bottle, the threat to knock all her teeth out, and the punch that dropped her to the ground—which was unequivocal and which, if credited, would presumably belie any belief by the defendant about Miss B.'s consent.

The phrase "[i]n addition," which prefaces the court's discussion of the complainant's "equivocal" conduct, is itself of uncertain weight. According to one reading, it established a requirement that, in addition to a defendant's testimony (or other testimony supporting an actual consent defense), evidence of equivocal conduct must be presented. This reading has given impetus to those courts eager to narrow the defense of mistake as to consent. A better reading, both grammatically and logically, construes the phrase "in addition" as a transition from the holding to the discussion of equivocality, *not* establishing "equivocal evidence" as an essential prerequisite for a mistake instruction, but marshalling other record evidence that augmented the defendant's testimony and underscored the sufficiency of the evidence supporting the instruction at issue. As is argued below, the latter reading is the only one which comports with generally applicable principles of criminal law and procedure.

In the twenty year period between *Mayberry* and *Williams*, the Cali-

the *Mayberry* defense in subsequent cases.

[54] *Mayberry*, 542 P.2d at 1346.

[55] *Id.*

[56] *Id.*

fornia Supreme Court case establishing the rule of equivocality in defense of mistake cases, courts nationwide have considered challenges to rape convictions that relied, with mixed success, upon the reasoning in *Mayberry*.[57] Some states embraced the *Mayberry* rule and required that their trial courts instruct on mistake as to consent or reasonable belief in consent in rape cases.[58] Others declined, reaffirming a definition of rape that made some mental states relevant—those relating to the conduct element of the offense or to the use of force—and others irrelevant, such as that relating to consent.[59] Within California, the *Mayberry* defense was frequently raised,[60] and while its availability against a charge of rape remained a settled principle of law, the evidentiary contexts in which it could be employed varied among districts of the lower appellate court.

Six years elapsed before California's intermediate appellate courts attempted to articulate general principles regarding the evidentiary predicate for a *Mayberry* instruction. At one pole, an appellate court held that trial courts must, *sua sponte*,[61] instruct on reasonable

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57 Additional ammunition for defense arguments as to the mistake defense in rape was provided by the decision of the British House of Lords in Director of Public Prosecutions v. Morgan, 2 All E.R. 347 (H.L. 1975). In that case, the defendants testified that they had been assured by the husband of the complainant that she wished to have sexual intercourse with them, but that she would put up a struggle because she was "kinky." *Id.* at 355. The British court reasoned that a wrongful intent was an essential element of the offense of rape, and that not only a reasonable belief but indeed any honestly held belief as to consent which precluded a defendant from maintaining that wrongful intent would bar a conviction. *Id.* at 361. No American court has adopted a rule of this breadth.

58 *See supra* note 6.

59 *See supra* note 20.

60 *Mayberry* has been cited more than 100 times in California appellate decisions, and may safely be presumed to have been raised at trial far more often than that. Search of WESTLAW, CA-CS database (Feb. 25, 1996).

61 The issue of when a court must, *sua sponte*, instruct on an issue, in the absence of a defense request for such an instruction, is ordinarily resolved upon an evidentiary threshold that is slightly different and somewhat higher than that for a requested instruction. A number of post-*Mayberry* cases discussing the quality of the factual record that can support a mistake instruction arise in this posture, and confuse the analysis of the fundamental issue of entitlement to a *Mayberry* instruction and presentation of a mistake theory to a jury. In California, as in many states, a trial court has a *sua sponte* duty to instruct on a defense wherever "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." People v. Sedeno, 518 P.2d 913, 921 (Cal. 1974), *overruled on other grounds by* People v. Flannel, 603 P.2d 1 (Cal. 1979). "Substantial" evidence in this context has been defined as evidence sufficient to "deserve consideration by the jury." People v. Flannel, 603 P.2d 1, 10 (Cal. 1979). *Compare* People v. Modesto, 382 P.2d 33, 37 (Cal. 1963) (standard for a requested instruction) ("However incredible the testimony of a defendant may be he is entitled to an instruction based upon the hypothesis that it is entirely true"; "The fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon"), *overruled by* People v. Sedeno, 518 P.2d 913 (Cal. 1974), *overruled on other grounds by* People v. Flannel, 603 P.2d 1 (Cal.

belief as to consent whenever consent was offered as a defense.[62] According to that court's reading, "*Mayberry* compel[led] the conclusion that, by itself, the testimony of a defendant in a rape case that the prosecutrix consented can be sufficient to require the giving of the reasonable belief instruction."[63] The court explained:

> the reasonable belief in consent defense is not inconsistent with the defense of actual consent; to the contrary, the defendant who relies on the defense of consent necessarily also relies on the defense that he had a reasonable and good faith belief that there was consent.[64]

A different division of the same court, presaging *Williams*, occupied the other pole. It held that a *Mayberry* instruction was not only *not* to be given whenever the defendant's theory was one of actual consent, but was to be given only in those cases in which a defendant produced "some evidence of equivocal conduct by the victim which led him to reasonably believe that there was consent where in fact there was none."[65] This language, which required evidence that the "manner in which the victim expressed her lack of consent [be] so equivocal as to cause the accused to assume that she consented where

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1979); *Flannel*, 603 P.2d at 10 ("'*any evidence deserving of any consideration whatever*'") ("The fact that the evidence may not be of a character to inspire belief does not authorize the refusal of an instruction based thereon. That is a question within the exclusive province of the jury.") (citations omitted) *with Flannel*, 603 P.2d at 7-8 (standard for an instruction *sua sponte*).

The second part of the above test for a *sua sponte* instruction requires a court to consider the instruction in the context of other defenses offered by the defendant, including a defense of actual consent. As a result of this part of the test, courts have considered the congruence of the defenses of mistake of fact and actual consent as a prerequisite for giving the instruction *sua sponte*. *See* People v. May, 261 Cal. Rptr. 502, 505 (Cal. Ct. App. 1989) (defenses are "compatible" but not "inseparable"), *review denied*, No. S012192, 1989 Cal. LEXIS 4812 (Cal. Nov. 15, 1989); People v. Romero, 215 Cal. Rptr. 634, 638 (Cal. Ct. App. 1985).

Several circuits of the United States Court of Appeals have recognized that the Fifth and Fourteenth Amendments guarantee a criminal defendant the right to have the jury instructed on any and all defenses that are supported by some evidence, even those that are inconsistent with other defense theories. *See* Whipple v. Duckworth, 957 F.2d 418, 423 (7th Cir.), *cert. denied*, 506 U.S. 876 (1992), *and overruled by* Eaglin v. Welborn, 57 F.3d 496 (7th Cir.), *cert. denied*, 116 S. Ct. 421 (1995); Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967). This rule of constitutional force suggests that the limitation, set out above, requiring consistency among defenses may be flawed.

62 People v. Hampton, 173 Cal. Rptr. 268, 272 (Cal. Ct. App. 1981).

63 *Id.*

64 *Id.* Note that the court makes no reference to the erroneous nature of the defendant's belief.

65 People v. Romero, 215 Cal. Rptr. 634, 638 (Cal. Ct. App. 1985) ("while we agree that the defense of consent and the *Mayberry* defense are compatible and often will be raised together, we cannot agree with the holding in *Hampton* that the two defenses are inseparable nor do we feel that the raising of consent necessarily compels a *sua sponte* instruction on the *Mayberry* defense"). *Id.* at 636. *See also* People v. May, 261 Cal. Rptr. 502, 505-06 (Cal. Ct. App. 1989) (same).

in fact she did not," was ostensibly rooted in *Mayberry* itself, and provided an outline for the California Supreme Court's decision in *Williams.*

Attempting to moderate between these extremes, a third appellate court held that evidence regarding consent did not automatically compel an instruction on mistake as to consent, but instead gave rise to an inference that the defendant believed the complainant consented.[66] This inference, the court held, would generally provide a sufficient basis for a *Mayberry* instruction, unless evidence suggested that the inference was "not deserving of any consideration whatever."[67]

In 1991, this last court again considered the issue, holding that no prior decision had gotten it exactly right.[68] In *People v. Vasquez,* the court refused to give the mistake instruction automatically in every consent case, but also agreed with earlier decisions that "equivocal conduct is not the *sine qua non* for determining whether the evidence supports a *sua sponte Mayberry* instruction."[69] Oddly, the court acknowledged that a defendant's testimony alone could trigger the duty to instruct *sua sponte* on mistake as to consent, but *only* if that testimony was not contradicted by the complainant. Where there is a conflict in testimony, the court held:

> [U]nless the evidence reveals *some way* to harmonize the conflicting accounts of defendant and prosecutrix through a mistake of fact, so that the jury can evaluate proof relating to defendant's *belief* in consent (as distinguished from his mere *assertion* of consent), the court need not give the reasonable belief instruction sua sponte.[70]

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66 People v. Burnham, 222 Cal. Rptr. 630 (Cal. Ct. App. 1986).

67 *Id.* at 639. The inference approach is tempting for its apparently successful qualification of a rigid rule, but is less persuasive when examined closely. The *Burnham* court explained that "[t]he inference of belief in consent may not be deserving of consideration by the jury if, for example, the defendant clearly admits that although the victim said she consented he did not believe her, or otherwise concedes the issue." *Id.* at 639 n.11. But this example is incoherent, since such a concession by a defendant would not even amount to evidence of *actual* consent, let alone give rise to the inference described by the court. Indeed, it is not only difficult but impossible to postulate a factual context in which there is evidence of consent, giving rise to an inference that the defendant *believed* the complainant consented, and yet the inference is "not deserving of any consideration whatever." Instead, the inference arises and is deserving of the jury's consideration in every case in which there is evidence of actual consent. Accordingly, the *Burnham* court's approach dovetails with that of the court in *Hampton.*

68 People v. Vasquez, 281 Cal. Rptr. 661 (Cal. Ct. App.), *review granted,* 815 P.2d 303 (Cal. 1991), *review dismissed,* No. S021871, 1993 Cal. LEXIS 736 (Cal. Feb. 11, 1993).

69 *Id.* at 670.

70 *Id.* at 670-71 (quoting People v. Rhoades, 238 Cal. Rptr. 909, 914 (Cal. Ct. App. 1987)).

This rule is even more confused than the absolute approaches of *Hampton* and *Romero.* It recognizes that a defendant's testimony as to consent can support a mistake instruction,

Each of these intermediate courts of appeal sought to integrate the defenses of actual consent and reasonable belief as to consent. Notably, those courts that viewed evidence of actual consent as coextensive with evidence supporting a defense of mistake as to consent tended to use the language of "reasonable belief," placing no special emphasis upon the erroneous nature of the belief, but instead emphasizing its authenticity and reasonableness.[71] Conversely, those courts that described an evidentiary chasm between the defense of actual consent and that of mistake as to consent more often used the language of mistake rather than belief, notwithstanding that neither the *Hernandez* nor the *Mayberry* court itself relied upon the "mistaken" nature of a defendant's belief for their conclusions.[72] The success of a so-called "mistake" defense to criminal culpability follows not from the fact that the defendant was wrong, but that his belief was genuine and reasonable, and thereby precluded his having a punishable state of mind. Yet the stress placed upon the error of a defendant's belief as to consent in rape provided a foundation upon which these courts constructed the further misconception of a need for evidence of "equivocal" conduct. The requirement that a defendant acknowledge the error of his belief—not merely that he honestly believed, but that he understood his belief to be wrong—is tantamount to a denial of the defense where the defendant's testimony is entirely consistent with a defense of actual consent.[73] This disparity between the discourse of belief and mistake reaches its apex in *People v. Williams*,[74] together with the codification of a firm rule of equivocality.[75]

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then denies that instruction as a matter of law in those instances where other evidence conflicts with that of the defendant. But as long as a defendant's testimony supports his belief in consent, no matter what other evidence is in the record, the instruction should be given. It is never the function of the trial court to weigh evidence, or to resolve inconsistencies within a record. As is set out *infra*, this approach leads to a corruption of the respective functions of judge and jury.

[71] *See, e.g.*, People v. Hampton, 173 Cal. Rptr. 268, 272 (Cal. Ct. App. 1981).

[72] *See* People v. Romero, 215 Cal. Rptr. 634, 638 (Cal. Ct. App. 1985); People v. Mayberry, 542 P.2d 1337, 1344-45 (Cal. 1975); People v. Hernandez, 393 P.2d 673, 676 (Cal. 1964).

[73] The error of a defendant's belief is rarely proven through the defendant's own testimony. More often, the error will be demonstrated through other evidence, such as the testimony of the complainant. For this reason as well, this emphasis on defendant's acknowledgement of error is unsound.

[74] 841 P.2d 961 (Cal. 1992).

[75] The emphasis on error furthers the gradual transformation of the "defense" of mistake of fact from a particular method of disproving an element of the prosecution's case, *see supra* notes 13-15 and accompanying text, to a true affirmative defense. *See also* Tyson v. Trigg, 50 F.3d 436, 447 (7th Cir. 1995) (characterizing mistake as "a true defense, unlike the 'defense' of actual consent to intercourse") (citing IND. CODE § 35-41-3-7 and cases), *cert. denied*, 116 S. Ct. 697 (1996). By compelling a defendant to admit the error of his belief, this rule requires a defendant to concede lack of actual consent in order to proffer a

III. *People v. Williams* and the Rule of Equivocality

Resolving the conflicting rules adopted by the various lower appellate courts, the California Supreme Court announced a new rule regarding the availability of the defense of mistake as to consent in *People v. Williams.* It held the defense unavailable as a matter of law unless there is "substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not."[76]

The complainant in this case, Deborah S., had arrived in San Francisco two weeks prior to the events giving rise to the prosecution, and was staying with her sister in a homeless shelter in the city. As Deborah waited outside the shelter on the morning of the incident, the defendant, Wash Williams, an employee, volunteer, and resident at the shelter, asked her if she would like to get some coffee. Both witnesses agree that they then spent the morning walking, conversing, and eating.[77] At some point, Williams asked her if she would like to watch television, and she testified that she "thought they were going to 'his friends or something.'"[78] She accompanied him to a building with a gate across the front, and after Williams rang a buzzer, they were admitted.[79] Inside, "Williams rented a room, and asked the clerk for a sheet." Deborah testified that at this point she realized they were in a hotel.[80]

Deborah further testified that she walked into the room ahead of Williams and noticed that there was no television in the room. Williams lay on the bed and asked her to join him, but she refused, suggesting he get back the money he had paid for the room. Deborah went to the door, was unable to release the lock, and Williams put his hand on the door and hollered at her that he "didn't spend $20.00 for

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mistake defense.

Moreover, those cases in which the courts were most concerned about the lack of "harmony" between a defendant's account of the events and the account given by the complainant are among those in which the defendant's conduct was the most brutal and therefore least likely to be based upon a credible belief that there was actual consent. In *Vasquez,* for example, according to the victim, the defendant crashed through the window of his ex-wife's bedroom in the middle of the night, ripped her clothes off, and forced her, screaming and naked, into his car, and then through a series of ordeals punctuated by repeated rapes and sodomies, including dragging her down a cliff, throwing her over a barbed wire fence, and pulling her into a river. Peole v. Vasquez 281 Cal. Rptr. 661, 664 (Cal. 1991). As is set out *infra* in part VII, there is understandable judicial reluctance to permit a jury to find that a defendant could have been mistaken as to consent on such facts.

[76] 841 P.2d at 966.

[77] *Id.* at 962-63.

[78] *Id.* at 963.

[79] *Id.*

[80] *Id.*

nothing."[81] She testified that Williams punched her in the left eye and ordered her onto the bed. After she said "no," he pushed her down on the bed, got on top of her, and engaged in sexual intercourse. Deborah testified that she screamed and tried to push him off but could not. After ejaculating, Williams then allowed Deborah to get up and dress, and offered her $50, which she refused. She left the room and walked to the San Francisco Hall of Justice, where she reported that she had been raped.[82]

Williams' testimony diverged from that of Deborah S. at the point at which they entered the hotel room.[83] He testified that he did not want or expect to have sex at the hotel, but that once in the room, Deborah began to kiss and hug him, and to remove her clothes. He then removed his clothes. He testified that because of diabetes, he was almost impotent and that Deborah had to fondle his genitals for ten to fifteen minutes before he could engage in intercourse with her. After the intercourse, Deborah told him that she needed $50 because her sister was moving in with her boyfriend. He refused, and testified that her attitude then "changed completely" and that she threatened to create a problem for him by telling the shelter manager and her sister what had happened. He testified that she called him a "welching Nigger," and said that she "knew how to 'fix' him" because she had been raped by her father and either brother or brothers-in-law. Angered, Williams slapped her on the right side of her face. He testified that as Deborah dressed, he asked her why she did not wipe away the sperm, and she replied that she wanted to preserve the evidence.[84]

The trial court refused to give an instruction, requested by both the defense and the prosecution, on the issue of reasonable and good faith but mistaken belief as to consent. The jury convicted Williams on two counts of forcible rape. On appeal, the Court of Appeals re-

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[81] *Id.*

[82] *Id.*

[83] The Supreme Court characterized Williams' account as "dramatically different" from that of Deborah S. *Id.* at 964.

[84] *Id.* In addition to the testimony of these two witnesses, the prosecution offered evidence that Deborah's eye was so swollen she could hardly see out of it and that the injury was more consistent with a punch than a slap. There was testimony from the examining nurse and physician that semen was present on vaginal slides, and that Deborah complained of pain on the right side of her neck and along her right side, and of tenderness along the right side of her uterus. *Id.* at 963-964. The defense offered evidence from the hotel clerk that she did not hear any screams or other sounds indicating physical violence, although she also testified that she might have left the office and even the floor during the time of the incident. *Id.* at 967.

All of this testimony would permit a jury to resolve the question of the reasonableness *vel non* of defendant's belief of consent. *See infra* part VII (discussion of the requirement that belief be reasonable).

versed, holding that substantial evidence existed to support the requested *Mayberry* instruction, including the defendant's testimony that Deborah:

> willingly accompanied him to the hotel after spending several hours in his company, that she did not object when the hotel clerk handed him a bedsheet, that once inside the room she hugged and kissed him and initiated sexual intercourse, and that during the hour they were inside the room the hotel clerk did not hear any screams or other sounds indicating physical violence.[85]

The California Supreme Court reversed again. It held that a *Mayberry* defense has two components, one of which is the defendant's subjective, good faith, "albeit mistaken[ ]" belief that the victim consented.[86] The court held that the defendant's burden may be satisfied only by evidence "of the victim's equivocal conduct on the basis of which [the defendant] erroneously believed there was consent."[87]

Reviewing the sharply conflicting accounts of the two key witnesses, the court concluded that they could not, as a matter of law, support a *Mayberry* instruction. In the court's view, Williams' testimony established only actual consent, and Deborah's testimony, "if believed, would preclude any reasonable belief of consent."[88] The court concluded that "[t]hese two wholly divergent accounts create no middle ground from which Williams could argue he reasonably misinterpreted Deborah's conduct."[89] On this basis, it affirmed the trial court's refusal to give the *Mayberry* instruction.[90]

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85 People v. Williams, 841 P.2d 961, 964-65 (Cal. 1992).

86 *Id.* at 965.

87 Independent of this subjective component is the additional requirement that the defendant's belief be objectively reasonable, that it be formed "under circumstances society will tolerate as reasonable." *Id.* at 965.

88 *Id.* at 966.

89 *Id.*

90 *Id.* Similarly, Judge Posner, writing for the the United States Court of Appeals for the 7th Circuit in Tyson v. Trigg, 50 F.3d 436 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 697 (1996), rejected a rape defendant's *habeas* challenge to the trial court's refusal to instruct on mistake. In that case, the complainant testified that the defendant had invited her to go out with him on the evening of the day they first met, that he had picked her up in a limousine, and that he had asked her to stop briefly at his hotel. She testified that after using the restroom, she returned to his room to find him in his underwear, and that he forced her onto the bed and raped her. The defendant testified that he had invited the complainant to have sex with him, that they kissed and touched in the limousine on the way to his hotel, and that they engaged in consensual sex. In language paralleling the *Williams* court's, Judge Posner held that "[n]either Tyson nor [the complainant] testified to *ambiguous* words or conduct from which consent might reasonably though erroneously have been inferred." *Id.* at 448 (emphasis added). Instead, he explained:

> If Tyson was believed, there was actual consent. If [the complainant] was believed, there had been no manifestation of consent. Of course, the jury might have believed neither completely, and the question is then whether, had they believed [the complainant] to the extent of agreeing that she had not in fact consented to have sex with

The *Williams* court's emphasis on the equivocal nature of the evidence of consent that must be proferred in support of a mistake of fact defense was not without precedent. Several districts of the Court of Appeals had used this language in developing approaches to *Mayberry*.[91] But the *Williams* court went a step further, locating the requirement of equivocality in the *subjective* component of the reasonable belief defense. It determined that the only evidence which a court may consider supportive of a defendant's actual or honest belief in consent—as distinguished from the reasonableness of that belief—is evidence of "equivocal" conduct by the complainant respecting consent. Moreover, it refused to permit evidence that would support a defense of actual consent, evidence of unequivocal conduct such as that described by *Williams*, to support a *Mayberry* instruction.[92] Instead, the court required the defendant to prove that he "misinterpreted" the complaining witness's conduct.

The *Williams* decision is peculiar for a number of reasons, some of which lie in the analysis itself, and others which become apparent only when considered in the context of other areas of criminal law.[93] It is strange to think that the quality of the evidence that might support a defendant's honest, good faith belief in consent should not only be different in kind from that which demonstrates actual consent, but also less certain and more ambiguous than evidence of

> Tyson, they might nevertheless have found that Tyson could reasonably have misunderstood her words or behavior as expressing consent. Given the case as it was presented to the jury, such a finding would have been so speculative as to be unreasonable.

Id.

Similarly, the Indiana Court of Appeals held, on direct appeal of that case, that defendant's testimony of a consensual encounter

> is a plain assertion of actual consent. From this testimony, a reasonable jury could infer only that [the complainant] consented to sexual intercourse. There is no recitation of equivocal conduct by [the complainant] which reasonably could have led Tyson to believe that [she] only appeared to consent to the charged sexual conduct; no gray area exists from which Tyson can logically argue that he misunderstood her actions.

Tyson v. State, 619 N.E.2d 276, 295 (Ind. Ct. App. 1993), *cert. denied*, 116 S. Ct. 697 (1996). The court went so far as to quote the dictionary definition of "equivocal": "'having two or more significations: capable of more than one interpretation: of doubtful meaning: ambiguous.'" *Id.* n.22 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 769 (1976)).

Although the Indiana court neither cited nor referred to *Williams*, it seems clear that the court was aware of that decision, since, unlike California, there is no precedent in Indiana law for the court's emphasis on the term "equivocal.".

91 *See supra* part II(C).

92 The court expressly rejected the rule adopted by at least one intermediate appellate court, that the *Mayberry* instruction should be given in *every* case in which "[actual] consent is offered as a defense to a charge of rape." *Williams*, 841 P.2d at 966 n.7.

93 Examples of the latter category include issues regarding the consequences of applying a rule of equivocality to the defense of mistake of fact when it arises as to offenses other than rape, see *infra*, part IV, and the role of the jury in criminal cases. *See infra*, part V.

actual consent. A defendant's testimony that a complainant participated enthusiastically in sexual conduct would, under *Williams*, be *less* probative of his good faith belief that she consented than would testimony of "equivocal conduct," such as testimony suggesting that the complainant was reluctant, or even that she expressed non-consent.[94] This proposition is certainly counterintuitive, and the court provides no explanation to redress this concern.

Still more peculiar is the idea that the equivocal nature of evidence of consent should be deemed an element of the *subjective* component of the defense, the part which asks, "What did *this* defendant actually believe?" A defendant's description of events contains, of necessity, an implicit statement that he believed the events to be as he described them.[95] Indeed, since a defendant has no insight into the complainant's state of mind except through his own perceptions and beliefs, his testimony regarding her consent can only be testimony as to his perception of her consent, that is, his belief as to consent. A description of unequivocal consent must imply that the defendant honestly believed the person whose conduct he describes actually consented. The equivocal or unequivocal nature of a complainant's conduct can only be probative of the reasonableness of the defendant's belief, not its authenticity or existence.[96]

An additional peculiarity, given the general rule regarding the quantum of evidence necessary for a jury instruction, is the court's assumption that certain evidence, such as the defendant's testimony, might support a *Mayberry* instruction on its own, but, depending upon

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[94] Indeed, "unequivocal" evidence might, under *Williams*, not only be less probative of a good faith belief in consent, but not probative at all.

[95] Testimony of a defendant that the complainant's conduct was consistent with consent, but that he himself did not believe her to be consenting, would support neither an actual consent defense nor a mistake of fact as to consent defense, since such a defendant would be admitting that he did not honestly or actually have such a belief. *See supra* note 65. In the absence of such an express disavowal, however, a description of conduct indicating consent ordinarily contains an implicit declaration of defendant's belief that the complainant in fact consented.

[96] One can imagine a scenario in which the evidence of consent is so minimal as to fall below the established threshhold for an instruction on either actual consent or reasonable belief in consent. If, for example, the defendant offers no evidence of consent, or testifies that the complainant said "no," a trial court might conclude that the evidence of belief of consent was too insubstantial to warrant the jury's consideration of those defenses. The British case of Director of Public Prosecutions v. Morgan might fall into this category. Applying an entirely subjective standard for belief as to consent, the court nevertheless concluded that *no jury* could have found that the defendant actually believed there was consent since the complainant's conduct, as described by the defendant, was entirely inconsistent with consent, and the only source of the defendant's purported belief was a statement by someone without the capacity to consent, the complainant's husband. This is, however, distinguishable from a rule that creates a chasm between the defendant's perception and that which he perceives to be "true."

other evidence offered at trial, might not support that same instruction.[97] Although it might well be that other evidence, available to and credited by a jury, would cause them to conclude that a defendant's belief was not reasonable, such other evidence is ordinarily not to be weighed by the instructing court in deciding whether the defendant's testimony supports an instruction.[98] Either it does or it does not.[99]

The *Williams* court emphasized the erroneous nature of those beliefs that give rise to a *Mayberry* instruction, explaining that "as the language implies, a mistake of fact occurs when one perceives facts differently from how they actually exist."[100] This drift in emphasis

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97 The rule, then, purports to permit the complainant's testimony of non-consent to prove the defendant's state of mind with respect to consent, while at the same time barring the inverse.

98 *See, e.g.*, People v. Flannel, 603 P.2d 1, 10 (Cal. 1979) ("A trial court should not, however, measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, a task exclusively relegated to the jury.").

99 A still more egregious example of the kind of weighing done by the *Williams* court occurred in the *Tyson* case, both on direct appeal and in the federal *habeas* case. Judge Posner rejected defendant's contentions regarding a mistake instruction after finding that there was a "lack of any hint *in [the complainant's] testimony* of words or acts by which she might have manifested consent. . . ." Tyson v. Trigg, 50 F.3d 436, 448-49 (7th Cir. 1995), *cert. denied*, 116 S. Ct. 697 (1996) (emphasis added). He did not explain why support for the requested instruction had to be located in the testimony of a particular witness. Worse, the Indiana Court of Appeals considered testimony by the complainant that she responded affirmatively when asked by the defendant if she wanted "to get on top," and that she asked defendant to use a condom, in addition to the defendant's own testimony of enthusiastic consensual conduct by the complainant. It held that such evidence was inadequate to support an instruction on mistake of fact, reasoning that, "in the context in which these statements occurred, that is, *amidst [the complainant's] unequivocal description of a sexual assault*, they could not, as a matter of law, lead a reasonable person to believe that Tyson was reasonably mistaken as to [the complainant's] consent to sexual intercourse." Tyson v. State, 619 N.E.2d 276, 295-96 (Ind. Ct. App. 1993), *cert. denied*, 116 S. Ct. 697 (1996) (emphasis added). Here the court plainly, if apparently unwittingly, made a determination of credibility, finding that the complainant's testimony was true and therefore a bar to the belief in consent as to which defendant offered testimony.

George Fletcher has observed that, with respect to this aspect of the court's decision in *Tyson*, "the Indiana Court of Appeal developed an odd theory of consent that, in effect, privileges the testimony of the alleged victim in rape cases. If she testifies clearly to conduct of resistance, that she said no instead of maybe, there is no 'equivocal conduct.'" Instead, he suggests, the court's approach amounts to "accord[ing] to a woman complaining of rape a presumption of honesty and objectivity." GEORGE FLETCHER, WITH JUSTICE FOR SOME 131 (1995).

100 People v. Williams, 841 P.2d 961 (Cal. 1992). *See also* Tyson v. Trigg, 50 F.3d at 448 ("Neither Tyson nor [the complainant] testified to ambiguous words or conduct from which consent might *reasonably though erroneously* have been inferred.") (emphasis added); Commonwealth v. Fionda, 599 N.E.2d 635, 641 (Mass. App. Ct. 1992) ("The defendant did not claim to have been confused, misled, or mistaken.").

In this part of its analysis, the *Williams* court described how belief as to the termination of a previous marriage in a bigamy prosecution or as to the age of a sexual partner in a statutory rape prosecution would similarly be valid only if erroneous. *Williams*, 841 P.2d at 966. Yet it failed to pursue its rule of equivocality into these and other areas in which the mistake defense has been applied. As is set out *supra* in part IV, the rule of equivocality is

away from "reasonable belief" and toward "mistake," already evident in many of the post-*Mayberry* cases, infects the court's analysis by assuming that the error must be contained within the defendant's own perception of the events, rather than being demonstrable through the testimony of another.[101] Of course, any defendant whose own testimony acknowledged the possibility of error would have a difficult time persuading a jury of the honesty and good faith of his belief as to consent. At a minimum, such testimony would preclude a jury from acquitting on the theory of actual consent, since it would require the defendant to acknowledge that there was none.[102]

The combined effect of these peculiarities virtually eliminates the defense of mistake of fact in rape. Those defendants who, as a factual matter, would present the strongest mistake case, by testifying to conduct that could be characterized as "unequivocal," are precluded by the rule of *Williams* from presenting that defense to the jury. That is, those who give the most persuasive and consistent account of events will, by virtue of the strength of their testimony, be unable to reach the jury on the issue of mistake as to consent. Conversely, those whose testimony escapes the bar imposed upon "unequivocal" evidence will face a different, equally imposing, obstacle: their testimony will contain its own refutation.[103] A defendant who describes an en-

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not applied to any other offense and, as to offenses like bigamy and statutory rape, cannot coherently be applied.

[101] *Cf. Williams*, 841 P.2d at 970 (Mosk, J., concurring) ("It is not the *mistaken* belief that negates the requisite 'wrongful intent,' but simply the *belief itself*") (emphasis in original).

In State v. Tyson, the Indiana Court of Appeals expanded upon this aspect of the *Williams* court's reasoning:

> Tyson's description is a plain assertion of actual consent. From this testimony, a reasonable jury could infer only that [the complainant] actually consented to sexual intercourse. There is no recitation of equivocal conduct by [the complainant] which reasonably could have led Tyson to *believe that [she] only appeared to consent to the charged sexual conduct; no gray area exists from which Tyson can logically argue that he misunderstood [her] actions.*

State v. Tyson, 619 N.E.2d at 295 (emphasis added) (footnote omitted). Similarly, in Tyson v. Trigg, the court held that "[n]othing in Tyson's testimony gave a hint of possible misunderstanding. According to him, [the complainant] had been not merely a willing but an enthusiastic participant. Obviously the jury disbelieved this. Nothing in [the complainant's] testimony gave a hint of possible misunderstanding either." Tyson v. Trigg, 50 F.3d at 448.

[102] The impact of this aspect of *Williams* is to require a defendant to elect between the defense of actual consent and that of mistake as to consent. Since a criminal defendant is entitled to offer multiple, and even inconsistent, defenses, *see supra* note 61, this rule may be constitutionally flawed. Moreover, as indicated above, the defenses are not only *not* inconsistent (an insufficient basis to force a defendant to elect between two defenses) but are instead necessarily consistent.

[103] *See Williams*, 841 P.2d at 970 (Mosk, J., concurring) ("to offer the defense [a defendant] would have to take the position that he was *mistaken* about the complainant's consent—and thereby admit, at least by implication, that the complainant did not in fact consent. This is illogical") (emphasis in original).

counter in which the complainant's conduct was admittedly equivocal as to consent essentially concedes that point and is doomed to almost certain conviction.[104]

A further surprising aspect of the *Williams* decision is that the undisputed testimony as to the circumstances surrounding the sexual conduct suggests far more "equivocality" than, for example, is found in the *Mayberry* case itself. Where the defendant in *Mayberry* was a stranger who accosted the complainant on the street, grabbing her arm and blocking her path,[105] the defendant in *Williams* was at least a casual acquaintance of the complainant, who voluntarily spent much of the morning with defendant.[106] In *Mayberry*, the defendant threw a bottle at the complainant, knocked her to the sidewalk, and threatened to punch all her teeth out if she did not accompany him to the scene of the sexual conduct.[107] In *Williams*, the complainant willingly accompanied the defendant into the hotel room, even after seeing the clerk hand him a bedsheet in exchange for a $20 payment.[108] Moreover, the *Williams* complainant, according to her testimony, did not encounter any forceful conduct until after entering the hotel room,[109] whereas the complainant in *Mayberry* was assaulted both before and after entering the apartment where the sexual conduct took place.[110] Nevertheless, the facts of *Mayberry* produced the broad rule allowing the mistake defense in rape, and the facts of *Williams* provide the basis for the limiting requirement of equivocality. At a minimum, the *Williams* court's interpretation of *Mayberry* to require equivocal evidence of consent ignores these significant aspects of the case.[111] In fact, under *Williams*, Mayberry would not have been enti-

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Equivocality is, ordinarily, not an asset when determining the probative value of a witness's testimony. *See, e.g.*, People v. Flannel, 603 P.2d 1, 11 (Cal. 1979) (affirming trial court's refusal to instruct on intoxication defense where defendant's testimony as to intoxication was "equivocal").

[104] This rule works to the victim's detriment as well as to the defendant's: if equivocal evidence, such as moderate or intermittent resistance, is deemed to be probative of mistake, then no resistance whatsoever might, by the same reasoning, be permitted to support a finding of actual consent. Once again, the legal rule has the effect of shifting scrutiny away from the defendant's conduct and onto that of the complainant. *See* Berliner, *supra* note 49, at 2699.

[105] People v. Mayberry, 542 P.2d 1337, 1340 (Cal. 1975).

[106] 841 P.2d at 963. This is not to suggest that a mistake defense ought properly to be limited to so-called date rape cases, but instead to highlight that, ordinarily, there is greater difficulty in persuading a jury as to a defendant's good faith and reasonable belief of consent where the complainant is a stranger to the defendant.

[107] 542 P.2d at 1340.

[108] 841 P.2d at 963.

[109] *Id.*

[110] 542 P.2d at 1340-41.

[111] It can hardly be said that Ms. B.'s testimony of "putting on an act" to persuade Mayberry to let her go, or failing to seek help, could eclipse the extreme brutality that she

tled to the mistake of fact instruction.[112]

IV. Equivocality and Mistake of Fact as to Other Offenses

A further flaw in *Williams*' rationale is the absence of any suggestion that equivocality is necessary to the defense of mistake of fact generally, as applied to other offenses to which it has long been regarded as a valid defense. Considering the long list of offenses to which a defense of mistake has been available, and then turning to the crime of statutory rape and the rules regarding imperfect self-defense, it becomes apparent that equivocal evidence has never been necessary for the defense of mistake in these areas.[113] Instead, decisions regarding mistake as to non-sexual offenses make it plain that the *same* unequivocal evidence that gives rise to a defense of actual innocence also supports the defense of mistake.[114]

The defense of mistake of fact has a history far longer than thirty years when offered against charges other than rape. In addition, its scope has been wide: it has been deemed a viable defense to the complete array of theft offenses, including larceny,[115] receipt of stolen

described and permit Mayberry to form an erroneous belief as to her consent when Williams could not, as a matter of law, have formed such a belief with far more basis for doing so. The only way that the jury in *Mayberry* could find that the defendant had a good-faith, reasonable belief as to Ms. S's consent would be if it disbelieved significant portions of her testimony, including her description of force and threats of force, while crediting her as to the ultimate issue of consent. Yet it is this parsing of witness testimony that the *Williams* court neither contemplates nor permits.

112 The notorious incident of the Texas "condom rapist" also illustrates the peculiarity of the rule and the danger in shifting the focus from defendant's to complainant's conduct. In that case, the complainant's request—after the defendant had broken into her apartment in the middle of the night—that defendant wear a condom might easily be characterized as "equivocal" conduct, permitting a mistake instruction on facts far more egregiously nonconsensual than those in *Williams*. *See Second Jury Charges Man in Condom Rape Case*, N.Y. Times, Oct. 28, 1992, at A15 (noting that the first grand jury refused to indict since "some jurors believed that the woman's handing [defendant] a condom, which she described as an act of self-protection against AIDS, might have implied her consent" and quoting the defendant's testimony that "She's the one who gave me the condom .... If she didn't want to, why would she give me the condom?").

113 Nor would a rule of equivocality make any more sense as applied to these other offenses than in does in the context of rape.

As George Fletcher succinctly demonstrates, in the context of offenses other than rape, the rule of equivocality "cannot withstand two minutes of serious analysis." George Fletcher, With Justice for Some 130 (1995). Writing about the rule as it emerged in the *Tyson* decision, Fletcher gives the example of a man who spots what "clearly appears to be a scarecrow," and who then shoots at that apparition. The scarecrow turns out to be a man in a scarecrow disguise, but there is "nothing equivocal about his likeness to an object that may be shot with impunity." *Id.* According to the *Tyson* court, the shooter is guilty of murder, since he cannot assert a defense of reasonable mistake. *Id.*

114 That the one is a justification and the other an excuse does not account for this difference in treatment.

115 *See, e.g.*, People v. Devine, 30 P. 378 (Cal. 1892).

goods,[116] and robbery,[117] as well as burglary,[118] kidnapping,[119] forgery,[120] embezzling,[121] non-support,[122] resisting arrest, and even assault.[123] Indeed, the contemporary formulation of the rule of mistake is not offense-specific, but instead defines mistakes that will operate as defenses to include all mistakes (either of fact or law) which negative the mens rea required to establish a material element of an offense.[124] Moreover, no formulation of the general rule of mistake contains an evidentiary threshhold of any kind, much less a rule of equivocality as to the evidence supporting mistake. Accordingly, there appears to be no contextual justification for modification of the defense in cases of rape.[125]

The offense of bigamy illustrates well the general application of the defense of mistake, as well as the oddity of adopting a rule of equivocality. While the availabilty of a mistake defense to bigamy varies among jurisdictions,[126] *no* jurisdiction makes the defense contingent upon a requirement that evidence of mistake be equivocal, nor would such a contingency make sense. Instead, the division of authority arises from conflicting state court interpretations of the mens rea

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116 *See, e.g.*, People v. Osborne, 77 Cal. App. 3d 472 (Cal. Ct. App. 1978).

117 *See, e.g.*, People v. Butler, 421 P.2d 703 (Cal. 1967).

118 *See, e.g.*, People v. Lohbauer, 627 P.2d 183 (Cal. 1981) (defendant could not be convicted of burglary when he believed he had permission to enter and was honestly and reasonably mistaken about whose home he entered).

119 *See, e.g.*, People v. Howard, 686 P.2d 644 (Cal. 1984) (Bird, J. concurring) (honest and reasonable belief that defendant had reconciled with his wife and therefore had custody would preclude conviction for child stealing).

120 *See, e.g.*, People v. Crowder, 272 P.2d 775 (Cal. 1954).

121 *See, e.g.*, People v. Stewart, 544 P.2d 1317 (Cal. 1976).

122 *See, e.g.*, People v. Clarke, 304 P.2d 271 (Cal. App. Dep't Super. Ct. 1956) (honest and reasonable belief that defendant was not the father precluded conviction for nonsupport of child).

123 *See, e.g.*, People v. Sanchez, 83 Cal. App. 3d Supp. 1 (Cal. App. Dep't Super. Ct. 1978) (mistake as to consent is a defense to charge of assault).

124 MODEL PENAL CODE, § 2.04(1)(a).

125 I do not mean to suggest that the law of mistake occupies an area of monolithic consistency. There has always been variation among jurisdictions as to the availability of mistake for particular crimes, but this variation is consistent with the general contours of the defense, and is therefore different in kind from the radical departure represented by the rule of equivocality. Where the definition of an offense is ambiguous or silent as to what, if any, mens rea is required for its commission, different jurisdictions have construed the definition as either requiring or repudiating proof of intent. The concomitant result is that where no proof of intent is required, a mistake that negatives such intent will be no defense. *See* LAFAVE & SCOTT, *supra* note 12, at § 5.1(b) ("uncertainty in criminal legislation as to what mental state, if any, is required—has also accounted for much of the confusion in this area").

126 *See infra*, note 127. *See also*, MODEL PENAL CODE § 230(1)(d) (defense available if "actor reasonably believes that he is legally eligible to remarry"); M. C. Dransfield, Annotation, *Mistaken Belief in Existence, Validity, or Effect of Divorce or Separation as Defense to Prosecution for Bigamy or Allied Offense*, 56 A.L.R.2d 915 (1957).

requirements of their bigamy statutes.[127] This is consistent with the well settled view of the defense of mistake as no more than a reiteration of the fundamental principle that a failure of proof of mens rea requires an acquittal.[128]

It is difficult to imagine a rule in bigamy cases that would limit the defense of mistake to instances in which evidence of mistake is "equivocal" as that term has been used in *Williams* and elsewhere. Of what would such evidence consist? Most likely, a defendant in a case of bigamy will offer proof of the termination of the prior marriage.[129] If accepted, that proof could result in a judgment that the defendant had not committed the offense of bigamy. Significantly, the *same proof* would also form the basis for a defendant's honest (and perhaps reasonable) belief that the prior marriage had been terminated, although other evidence demonstrated that it had not.[130] Thus, unlike in *Williams*, the unequivocal testimony of a defendant that he or she actually believed that the prior marriage had been terminated

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[127] In those states that have construed their bigamy statutes to contain no mens rea component, the defense is unavailable. *See generally* LAFAVE & SCOTT, *supra* note 12, at § 5.1 (explaining that this construction has usually been based upon one of three principles: a) that in specifying certain defenses to bigamy, a legislature thereby intended to be exhaustive; b) that any legislative requirement of mens rea would have been explicit if intended; and c) that "the statutory language . . . favored the policy that those who remarry do so at their peril."). Each of these theories for refusing a defense of mistake is consistent with the general principle, noted above, that the defense is really no more than a restatement of the broader proposition that a failure to prove the mens rea required for an offense must result in an acquittal. *See, e.g.*, People v. Spoor, 85 N.E. 207 (Ill. 1908); State v. Trainer, 134 S.W. 528 (Mo. 1911); Manahan v. State, 219 S.W.2d 900 (Tenn. 1949); State v. Hendrickson, 245 P. 375 (Utah 1926).

Conversely, in those states that have interpreted their bigamy statutes to require mens rea, the defense is available. *Hendrickson*, 245 P. at 375. (noting that the "more carefully reasoned decisions" hold that legislative silence does not connote an intent to create strict liability for this offense, and that "for an offense as serious as bigamy, it should be presumed that the legislature intended to follow the usual mens rea requirement unless excluded expressly or by necessary implication'"). *See also* People v. Vogel, 299 P.2d 850 (Cal. 1956) (recognizing the defense of mistake to a charge of bigamy) *cited in* People v. Hernandez, 393 P.2d 673 (Cal. 1964) and People v. Mayberry, 542 P.2d 1337 (Cal. 1975); Alexander v. United States, 136 F.2d 783 (D.C. 1943); Robinson v. State, 65 S.E. 792 (Ga. App. 1909); Lesueur v. State, 95 N.E. 239 (Ind. 1911); Regina v. Tolson, 23 Q.B.D. 168 (1889).

[128] *See supra* notes 14-15 and accompanying text.

[129] For example, in the California case of People v. Vogel, 299 P.2d 850 (Cal. 1956), the defendant offered to testify that his wife had told him she was going to divorce him, and offered additional evidence tending to prove that she had married another man during defendant's absence on active duty in the Korean War. *Id.* at 852.

[130] *See, e.g.*, *Vogel*, 299 P.2d at 855 (noting that "[t]he same evidence that would tend to prove an actual marriage, if offered by the People, could reasonably form the basis for an honest belief by a defendant that there was such marriage, that it was legally entered into, and that he was, therefore, free to remarry"). *Vogel* was one of the key cases in the analysis of the California Supreme Court in both *Hernandez* and *Mayberry*. *See Hernandez*, 393 P.2d at 676-77; *Mayberry*, 542 P.2d at 1344-45.

would be adequate to raise the defense of mistake, and to support an instruction to the jury on that issue, regardless of any other evidence in the case.

Prosecution evidence that the marriage had not in fact been terminated is equally unlikely to be "equivocal"; instead, it would probably be objective in nature, consisting of court records of a divorce judgment deemed to be invalid as a matter of law (or otherwise not susceptible to conflicting interpretations), or the appearance in court of a supposedly deceased spouse. The offense would be proven and the sole question for the jury would be the honesty and reasonableness of the defendant's belief that the prior marriage had been terminated. In finding that the defendant did make a reasonable mistake, a jury would have credited some of both the prosecution's and the defense's evidence, but would nevertheless acquit. Nothing in the defense of mistake as applied to bigamy compels a jury to adopt one advocate's evidence to the exclusion of the other's.[131]

Moreover, a defendant who testified that she believed the prior marriage had been terminated because of evidence that she acknowledged to be *equivocal*, whether evidence of the first spouse's death[132] or divorce,[133] would be hard pressed to persuade a jury as to either the genuineness or reasonableness of her belief. Acknowledgement of the equivocal character of circumstances upon which a defendant purports to rely as to a matter of such importance would be the death knell to a good faith mistake defense as well as to a defense of reasonable mistake.

A similar pattern appears when considering mistake as a defense to statutory rape. As with bigamy, a split exists among jurisdictions as to whether to recognize a defense of reasonable mistake as to age at all. It is not, however, contingent upon the equivocal nature of the proof of age, but upon determination of a preceding question,

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131 This is true for all offenses other than rape to which the defense is recognized.

132 An example might be conflicting testimony regarding an accident. *See generally* Annotation, *Validity of Marriage Celebrated While Spouse by Former Marriage of One of the Parties was Living and Undivorced, in Reliance Upon Presumption from Lapse of Time of Death of Such Spouse,* 93 A.L.R. 345 (1934); Annotation, *Validity of Marriage Celebrated While Spouse by Former Marriage of One of the Parties was Living and Undivorced, in Reliance Upon Presumption from Lapse of Time of Death of Such Spouse,* 144 A.L.R. 747 (1943).

133 An example might be conflicting evidence about steps taken by either spouse to secure a divorce. *See, e.g.*, Ellison v State, 129 So. 887, 888 (Fla. 1930) (finding that defendant was told by his wife that she had secured a divorce and remarried); State v. Trainer, 134 S.W. 528 (Mo. 1911) (stating that defendant believed he was divorced based upon publication in newspaper of notice of spouse's action for divorce); State v. Nicholas, 86 S.E.2d 202 (N.C. 1955) (stating that defendant in bigamy prosecution testified that he had hired a lawyer to obtain a divorce and believed the lawyer had done so).

namely the mens rea, if any, required for the offense.[134] As in the case of bigamy, it would be difficult to conceive of equivocal evidence in this context. More often than not, a defendant will offer unequivocal testimony as to circumstances which caused him honestly (and perhaps reasonably) to believe that his sexual partner was above the statutory age of consent. If credited, this evidence could support *either* a defense of actual innocence (i.e., a conclusion that the complainant was in fact over the age of consent), *or* a defense of reasonable belief as to age.

The probability of equivocal evidence being offered by the prosecution is similarly slim. Most often, objective evidence demonstrates the actual age of the complainant, and, if credited, reduces the issue for the jury to that of the honesty and reasonableness of the defendant's mistaken belief that the complainant was older. A defendant need not acknowledge the error of his belief as a precondition of access to the defense of mistake. Indeed, as with bigamy, the prospect of a defendant persuading a jury on this issue would be remote once he testifies that the circumstances were such that he was uncertain as to the complainant's age.[135]

A final example of an area of law in which the defense of mistake has been recognized without the limitations imposed in *Williams* and elsewhere is that of self-defense and imperfect (or incomplete or unreasonable) self-defense. Here again, there is no requirement of equivocality as a prerequisite to a mistake defense. Indeed, there has been explicit recognition of the fact that the *same* evidence that might support a complete justification of the use of force would also support a claim of mitigation based upon an erroneous perception of the need to use such force.[136] Whether the verdict is self-defense or im-

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134 *See supra* note 29-30 and accompanying text.

135 Because of problems of proof unique to the offense, rape is a particularly poor candidate for application of a rule of equivocality. Unlike the crimes of bigamy and statutory rape, where proof of the element as to which a defendant is likely to be mistaken is objectively verifiable, a charge of rape requires examination of the complainant's state of mind in order to resolve the issue as to which defendant claims to be mistaken, namely consent.

136 *See, e.g.*, People v. McKelvy, 239 Cal. Rptr. 782, 788 (Cal. Ct. App. 1987) ("[T]he evidentiary consideration that led the trial court and counsel to agree on the need for instructions regarding self-defense lead with equal force to the need for instructions regarding unreasonable self-defense"); People v. Ceja, 31 Cal. Rptr. 475 (Cal. 1994). *See also* In re Christian S., 7 Cal. 4th 768 (1994).

In the leading California case of People v. Flannel, 603 P.2d 1 (Cal. 1979), the issue presented was whether evidence supporting a requested self-defense instruction also compelled the court to instruct *sua sponte* on imperfect self-defense. The California Supreme Court held that it did, but affirmed the conviction on the separate ground that, at the time of trial, "[g]iven the undeveloped state of the reasonable belief rule," the court had no duty to instruct on it *sua sponte.* The court did, however, announce that "[i]n the light of the instant development of the reasonable belief rule . . . we see no reason why in cases not

perfect self-defense depends not upon the equivocal character of the evidence supporting a defendant's belief, but instead upon the factfinder's resolution of unequivocal, even conflicting, evidence as to the reasonableness of that belief.[137]

Self-defense is available to an actor who is not the aggressor in an encounter and who "reasonably believes (a) that he is in immediate danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger."[138] Imperfect self-defense is available not as a justification of the use of force, but as a circumstance mitigating the use of force and reducing the offense to one of lesser degree, usually manslaughter. It is available where the actor "holds an honest but unreasonable belief in the necessity to de-

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yet tried the court should not be so informed as to give the instruction sua sponte." *Flannel*, 603 P.2d at 9. For a discussion of the distinction between requested and *sua sponte* instructions, *see supra* note 61.

137 People v. Flannel, 603 P.2d at 7 ("It is the honest belief of imminent peril that negates malice in a case of complete self-defense; the reasonableness of the belief simply goes to the justification for the killing.").

Under one view, there is a somewhat imperfect fit when applying principles of mistake to the rule of self-defense. Some courts have held that the mistake does not so much negative defendant's culpability for the offense as it negatives an element of the defense (the necessity of using force/reasonableness of the perception of imminent use of force by another). *See, e.g.*, Hoskins v. State, 563 N.E.2d 571, 576 (Ind. 1990) (holding mistake of fact instruction not available in self-defense case because defendant's mistake as to whether victim was armed "does not satisfy the requirement that the defendant's culpability be negated."). Alternatively, as other courts have held, a belief in the necessity of the use of force, whether reasonable or not, negatives the element of malice. *See Flannel*, 603 P.2d at 6-7 ("Malice aforethought is a specific mental state and . . . a defendant may show that he lacked that mental state when it is an essential element of the offense of which he stands accused . . . . [W]e cannot accept the People's claim that an honest belief, if unreasonably held, can be consistent with malice.") (quoting in part People v. Conley, 49 Cal. Rptr. 815, 819 (Cal. 1966)); *McKelvy*, 239 Cal. Rptr. at 786 ("Although the 'malice' required for the offense of mayhem differs from the 'malice aforethought' with which *Flannel* was concerned, it is equally true in both cases that the requisite state of mind is inconsistent with a genuine belief in the need for self defense.").

I believe the analogy is apt, since the relationship between the defendant's perception of events and the actual events at issue closely parallels that seen in the context of mistake as to consent and actual consent in rape. *See* Beckford v. Regina, App. Cas. 130, 144 (P.C. 1988) (drawing same analogy, although applying a purely subjective standard to both and stating "If then a genuine belief, albeit without reasonable grounds, is a defense to rape because it negatives the necessary intention, so also must a genuine belief in facts which if true would justify self-defence be a defence to a crime of personal violence because the belief negatives the intent to act unlawfully").

138 LAFAVE & SCOTT, *supra* note 12 at § 5.7. *See, e.g.*, *Flannel*, 603 P.2d at 4 ("To be exculpated on a theory of self-defense one must have an honest *and* reasonable belief in the need to defend.").

The Model Penal Code, as well as British law, define self-defense subjectively, without reference to the reasonableness of an actor's belief. MODEL PENAL CODE § 3.04(1) (use of force is justifiable when an actor "believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion"); Beckford v. Regina, App. Cas. at 144.

fend against imminent peril to life or great bodily injury."[139] Accordingly, a defendant's perception of the need to use force can and does support two different defenses to charges arising from that use of force, whether or not the defendant's perception is grounded in equivocal evidence. This is a significant departure from the *Williams* rule, which, again, locates the need for equivocality in the subjective part of the mistake standard, and regards the two defenses as so distinct that they require different evidentiary foundations.

As with the actor who asserts either a consent defense or a mistake as to consent defense in rape, the actor claiming self-defense or imperfect self-defense must actually believe that he or she is in danger and that force is necessary to avoid the danger.[140] But the evidence of this belief need not be equivocal. On the contrary, a defendant's unequivocal evidence of a belief as to the need to repel imminent use of force should and does support instructions on both self-defense and imperfect self-defense. For example, where a defendant testified that the victim "came toward him, grabbed his chest," and then drew his knife, but other testimony shows that the victim never drew a knife and that defendant fired a gun at the victim from a distance of approximately two feet, both a self-defense instruction and an unreasonable self-defense instruction were deemed warranted.[141] And where defendant testified that the victim threatened him with a beer bottle, that defendant held a pool cue in front of him to protect himself, and that the victim fell into the cue, but where other testimony shows that the victim was sitting in a chair sipping a beer when the defendant approached and hit her in the eye with a sudden upward thrust of the pool cue, instructions on both defenses were again deemed warranted.[142] In these cases, no less than in the rape cases described above, the testimony of the defendant and others cannot be "harmonized," but are instead at odds with each other. Indeed, imperfect self-defense is predicated upon an *un*reasonable belief, and is therefore perhaps a better candidate for a rule of equivocality than reasonable mistake as to consent in rape, which is limited to reasonable

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[139] *Flannel*, 603 P.2d at 2.

[140] *See Flannel*, 603 P.2d at 5 (quoting People v. Sedeno, 518 P.2d 913, 923 (Cal. 1974), the court emphasized "the close relationship between a defendant's claim of self-defense and the unreasonable belief doctrine. 'Since there was no evidence that defendant believed he was acting in self defense, there was likewise no basis for an instruction on the effect of an unreasonable belief that deadly force was necessary in defense of self'"). *Cf. supra* note 65, (discussing the requirement that a defendant actually and honestly believe that the complainant consented in order to raise either the defense of actual consent or reasonable belief).

[141] *Flannel*, 603 P.2d at 3.

[142] People v. McKelvy, 239 Cal. Rptr. 782, 783-784 (Cal. Ct. App. 1987).

mistakes. Nevertheless, the jury may consider the credibility of the defendant's testimony to support the conclusion that he actually perceived an imminent threat, even if the jury also concludes that there was no such threat and that the perception was therefore not reasonable. In this area of law, then, equivocality has no place.

When considering the defense of mistake to crimes generally and the plain incongruity of a notion of equivocality as an evidentiary predicate to raising that defense, the limitation imposed upon the use of mistake as a defense in rape emerges as an anomaly. In section VI, *infra*, I consider other rules of law that are applied with similar disparity to rape.

V. The Rule of Equivocality and the Role of the Jury

The impact of the rule of equivocality described above reaches beyond questions of consistency within substantive criminal law, and undermines fundamental assumptions about the trial process. In effect, the rule creates a categorical barrier to jury consideration of a body of highly probative evidence without explicitly identifying any countervailing policy consideration to warrant such a barrier.[143] Examples of such barriers are far from uncommon in the law of evidence, but they are ordinarily the product of a frank election between or among conflicting policy goals.[144] In this area, however, the election is covert, discoverable only after a close analysis of the rhetoric surrounding it.[145] The impact of the rule of equivocality on this aspect of the jury's role sets the offense of rape apart from other crimes, creating a rule of admissibility that has as its threshhold not the weight or quality of the evidence, but the nature of the offense charged.

In addition, the rule imposes a rigid sequencing upon the issues to be considered and resolved by the jury. Again, in no other area is the jury constrained to consider the elements of an offense in a particular order. The rule of equivocality requires that there be a determi-

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[143] To the extent that this categorical bar precludes jury consideration of an issue as to which there is some evidence, it not only thwarts the jury function, but also compromises a defendant's constitutionally protected right to have the jury determine every material issue and every theory supported by some evidence. *See* Rose v. Clark, 478 U.S. 570, 582 (1986). *See also* People v. Modesto, 31 Cal Rptr. 225 (Cal. 1963), *cited in* People v. Mayberry, 542 P.2d 1337, 1343 (Cal. 1975); Cal. Penal Code § 1127 ("jurors are the exclusive judges of all questions of fact submitted to them and of the credibility of witnesses"). These concerns are beyond the scope of this Article.

[144] *See, e.g.*, Fed. R. Evid. 407 (excluding evidence of subsequent remedial measures); Fed. R. Evid. 408 (excluding evidence of offer or acceptance of valuable consideration in compromising or attempting to compromise a claim); Fed. R. Evid. 609 (excluding evidence of some prior convictions).

[145] *See infra*, part VII, for that analysis.

nation by the jury that the complainant did not consent before they will be permitted to consider whether or not the defendant had the mental state necessary to commit the offense.[146] As to all other offenses, a jury is free to acquit upon concluding that the prosecution failed to meet its burden of proof as to any single element, including the defendant's mens rea. If, for example, the jury were divided on the question of the complainant's consent, they should nevertheless be free to acquit if they were united in their conclusion that the defendant reasonably believed she consented.[147] This cannot happen after *Williams.*[148]

Perhaps most significantly, the rule of equivocality precludes the jury from parsing witness testimony and making mixed determinations of credibility. It does not allow for the possibility that a jury may find the "truth" to be somewhere between the narratives of the defendant and the complainant. The *Williams* court speaks of the testimony of the complainant and defendant as two entireties, between which a jury must elect.[149] It does not appear to consider the unsurprising, indeed likely, possibility that a jury might accept portions of each witness's testimony and reject other portions, concluding perhaps that there was no consent but that the defendant honestly and reasonably believed that there was.[150]

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146 *Cf.* People v. Williams, 841 P.2d 961, 970 (Cal. 1992) (Mosk, J., concurring) (the rule of equivocality would "virtually bar the jury from entertaining a reasonable doubt about the intent element until it resolves the no-consent element in the People's favor. . . . It cannot properly be forced to first determine the no-consent element itself beyond a reasonable doubt").

147 *See* People v. Williams, 841 P.2d at 970 (Mosk, J., concurring). *See also infra* p. 851 (diagram).

148 *Williams* contorts the ordinary sequence in which the judge's instructions to the jury *precede* the jury's evaluation of the evidence.

149 841 P.2d at 966. The court quoted from People v. Rhoades, 238 Cal. Rptr. 909, 914 (Cal. Ct. App. 1987), in which the Court of Appeal concluded, on similarly conflicting testimony, that the "sexual act was [either] entirely consensual or the obvious product of force." *See also* Tyson v. State, 619 N.E.2d 276, 297 (Ind. Ct. App. 1993) ("[A]n examination of the testimony of [the complainant] and Tyson, the only testimony available as to the events in the hotel room, reveals evidence of only consent or compulsion; there is no evidence of equivocal conduct that a reasonable person in Tyson's position could have reasonably misinterpreted as [the complainant's] consent to the charged sexual conduct . . . . Their respective testimonies describe two different and irreconcilable events that cannot be harmonized and taken together to provide evidentiary support for the instruction in question."); Commonwealth v. Fionda, 599 N.E.2d 635, 641 (Mass. App. Ct. 1992) ("The victim testified to her words and actions, none of which was ambiguous . . . . The question for the jury was whether they believed the victim or the defendant.").

150 *See* People v. Ceja, 31 Cal. Rptr. 475, 480 (Cal. Ct. App. 1994).

Indeed, the *Mayberry* decision itself noted that "part" of the complainant's testimony supported the mistake instruction, recognizing that the jury could have parsed and weighed the testimony of the witnesses in reaching a conclusion. People v. Mayberry, 542 P.2d 1337, 1346 (Cal. 1975). A jury might, for example, have concluded that the complain-

The function of the jury in a criminal case has traditionally been expansively defined, with courts at both the trial and appellate levels recognizing, as a corollary to the axiom that credibility is in the exclusive province of the jury, that a jury may "pick and choose" aspects of a witness's testimony to credit or reject,[151] and may consider testimony not merely as a historical record of what actually occurred, but also as a lens through which to view other evidence in a case. The rule of equivocality announced in *Williams* precludes such sifting by a jury, instead imposing upon the finders of fact a bipolar model of acceptance or rejection of a witness's entire testimony.[152] This is a radical departure from the norm.

Instead of the bipolar model contemplated by the court, there are more properly three possibilities for a not guilty verdict, illustrated by the figure below:

	CONSENT	NO CONSENT
REASONABLE BELIEF	Not Guilty (1)	Not Guilty (3)
UNREASONABLE BELIEF	Not Guilty (2)	Guilty

The degree of force to which a complainant testifies need not eliminate the third possibility, since a jury might not credit that portion of a complainant's testimony that described the use of force,

ant's testimony as to the degree of force used by defendant was "true" and therefore belied the defendant's testimony on that issue; conversely, it could have found that the complainant was not "truthful" in describing the force used, but could nevertheless have found that she did not consent to the sexual conduct, thus giving rise to a valid defense of reasonable mistake.

151 Judge Posner appears to accept this proposition when he notes in Tyson v. Trigg that "[o]f course the jury might have believed neither [Tyson or the complainant] completely . . . ." 50 F.3d 436, 448 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 697 (1996). He does not, however, implement this observation in his analysis. *See also* United States v. Morissette, 342 U.S. 246, 276 (1952) ("juries are not bound by what seems inescapable logic to judges"); United States v. Brown, 603 F.2d 1022, 1025 (1st Cir. 1979) (jury is free to "pick and choose"); Brooke v. United States, 385 F.2d 279, 282 (D.C. Cir. 1967); State v. Hightower, 312 S.E.2d 610, 614 (Ga. 1984).

152 The *Williams* court seemed to acknowledge, at least theoretically, this aspect of the jury function when it held, at the conclusion of its opinion regarding the requirement that a mistake instruction be given even when the equivocal evidence of consent comes after the defendant has used force against the complainaint, that:

> a trier of fact is permitted to credit some portions of a witness's testimony, and not credit others. Since a trial judge cannot predict which evidence the jury will find credible, he or she must give the *Mayberry* instruction whenever there is substantial evidence of equivocal conduct that could be reasonably and in good faith relied on to form a mistaken belief of consent, despite the alleged temporal context in which that equivocal conduct occurred.

People v. Williams, 841 P.2d 961, 968 (Cal. 1992). It is impossible to determine why the court could be so skeptical as to the temporal, but not as to the substantive, evidence of force and consent.

although crediting her ultimate assertion that she did not consent.[153] Conversely, a jury might reject that portion of a defendant's testimony that suggests positive enthusiasm by the complainant, concluding instead that the complainant exhibited only that amount of passive acquiescence sufficient to permit the defendant to form a good faith and reasonable belief as to consent.[154] The court's unwillingness to recognize this range of jury responses to witness testimony is fundamentally inconsistent with generally applicable principles regarding credibility and the jury's function.[155]

The suggestion that testimony should be accepted or rejected in its entirety also ignores the growing body of contemporary scholarship that denies the singularity of meaning or experience,[156] and that rec-

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[153] This possibility is particularly strong where, for example, the degree of force to which a complainant testifies is extreme, but is not corroborated by medical evidence. *See, e.g.*, State v. Tyson, 619 N.E.2d at 296 (complainant testified that defendant, a heavyweight boxer, "slammed" her down, although the state offered no evidence of any corresponding bruising or laceration).

The *Tyson* case illustrates the possibility of an intermediate "truth" between that described by either the complainant or defendant. There, a jury might well have found (if permitted to consider the question) that the complainant did not consent to engage in sexual intercourse, but instead found herself alone with an extraordinarily powerful man, and that she submitted out of fear without expressing her lack of consent, even if that fear were not the result of any word or deed of the defendant. His mere status as a heavyweight boxer might well have caused the complainant to remain silent about her non-consent.

[154] The New Jersey case of State ex rel. M.T.S., 609 A.2d 1266 (N.J. 1992), might require more than this, but no other state does. *See infra* note 183.

Significantly, Judge Posner implies throughout his analysis of the mistake issue that the relevant standard is one of express consent, rather than non-consent. Tyson v. Trigg, 50 F.3d at 448 ("If [the complainant] was believed, there had been no manifestation of consent"); *id.* ("The question is then whether [the jury could have found that] . . . Tyson could reasonably have misunderstood her words or behavior as expressing consent"); *id.* ("But to take the next step, and believe that she manifested consent to him, would require some testimony concerning events in the suite, testimony on which the jury might have hung its judgmental cap"); *id.* at 448-449 (noting the "lack of any hint in [the complainant's] testimony of words or acts by which she might have manifested consent"). This subtle error shapes the court's analysis of the mistake issue, allowing it to reject as "irrelevant" evidence of conduct preceding the sexual intercourse from which a reasonable person could have formed a belief as to consent. *Id.* at 448. *See infra* notes 179-180 and accompanying text.

[155] Judge Posner goes so far as to characterize as "sheer speculation" the possibility that a jury might "[attempt] a reconstruction of the preliminaries to the rape that would have established the defense of reasonable mistake." *Tyson*, 50 F.3d at 449.

[156] The writings of postmodernist scholars challenge the notion, implicit in *Williams* and similar decisions, that there is a single "true" account of what took place. *See, e.g.*, Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505 (1992), *cited in* Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 602 n.38 (noting that the "two major strains" of postmodernism, "poststructuralists" and "neopragmatists," both express the idea that our perspectives on the world are culturally and linguistically conditioned, that reality is never transparent to us, and that the content of our knowledge depends on our different situations.")

ognizes and even celebrates differences in perception that flow from differences in gender, race, and culture.[157] In a rape trial, these difference arise twice: first, in the perceptions of the participants themselves (complainant and defendant), and, second, in the perceptions of individual jurors.[158] Accordingly, the possibility of fragmentation of a witness's testimony and of rejection or credit of some testimony, but not all, is quite high. The perceptions of the participants may be impossible to "harmonize," although both may be "true" in this more limited sense. In addition, the response of different jurors to that testimony may range along a wide continuum from wholesale adoption or rejection to a more nuanced and selective response inconceivable to the *Williams* court. For these additional reasons, the rule of equivocality is flawed.

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[157] PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 149 (1991) (noting that individuals' "experiences of the same circumstances may be very different"); Daniel Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 810 (1993) (explaining different voice thesis which "postulates that members of different groups have different methods of understanding their experiences and communicating their understandings to others"); *Id.* at 811, n.18 (noting that "one scholar has gone so far as to suggest that women have different perceptions of time, space, and causality"), *citing* Ann C. Scales, *Feminists in the Field of Time*, 42 FLA. L. REV. 95, 122-123 (1990); CAROL GILLIGAN, IN A DIFFERENT VOICE 30 (1982) (contrasting a male model of conflict resolution, defined by individual rights and rules, competition, and struggle, with a femal model defined by context, relationship, communication, and empathy). *See also* Naomi R. Cahn, *Inconsistent Stories*, 81 GEO. L. J. 2475 (1993) ("we cannot overlook the possibility that outsiders' stories may conflict, and that the narratives of excluded groups may be inconsistent,") *citing, inter alia*, Charles R. Lawrence III, *The Word and the River: Pedagogy as Scholarship Struggle*, 65 S. CAL. L. REV. 2231, 2270-77 (1992); Mari J. Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method*, 11 WOMEN'S RTS. L. REP. 7, 8 (1989). Whether such differences are rooted in gender, race, or other variables is not as significant as the simple fact that these differences indeed exist.

One can imagine how these differences might play out in a "date rape" scenario: according to Gilligan's models, the male actor might assume consent in the absence of a clearly expressed "no," while the female actor might assume that the man, as a moral person, "considers, as would she, the consequences to everybody involved" before acting. GILLIGAN, *supra*, at 54. Again according to Gilligan's models, the woman might believe "that her voice will be heard" and that the male actor is as empathetic as she. *Id.* at 29. *See also* Karen M. Kramer, *Rule By Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 118 (1995) (noting that "[g]ender sterotypes exert a powerful effect on the social interpretation of a woman's 'no'"), *citing* Alejandro Martinez, Suzanne O'Brien & David Frazee, Final Report of Rape Education Project Survey: Stanford Survey on Attitudes, Awareness, and Experience of Sexual Violence 14-15 (unpublished study, on file with the Stanford Law Review) (finding that both men and women rated a "no" from others as less meaningful than their own, with women responding that they meant no when they said "no," but that *other* women often do not).

[158] *See* Cahn, *supra* note 15, at 2476-77 ("[A]t least three different stories could be told about the 'facts' at every [civil] trial . . . . The defendant generally tells a different story than the plaintiff, and the judge or jury may find that an entirely different story constitutes the 'truth' in the case.").

VI. Changing The Rules in Rape

The rule of equivocality announced in *Williams* is one of several recent doctrinal developments in the area of rape law that has reconfigured well settled rules of criminal law to have unique application to sexual offenses.[159] Not only are these doctrinal developments departures from generally applicable principles of criminal law, but they exist in neat symmetry with now repudiated rules of rape law that had, prior to the period of legislative and judicial reform, impeded rape prosecutions.[160] In this respect, doctrinal developments have come full circle, reinstating flawed logic and unsound reasoning to facilitate, rather than impede, some prosecutions for sexual offenses.

The rule of equivocality is, in effect, the obverse of the antiquated corroboration requirement. That rule was a judicially created categorical barrier to jury consideration of certain evidence. It operated to the detriment of the prosecution by foreclosing a jury from convicting on the basis of the uncorroborated testimony of a complainant, even where the jury might have credited her.[161] The equivocality rule operates as a similarly categorical obstruction of jury consideration of a body of evidence, this time to the detriment of the defendant, requiring that *his* testimony regarding his belief as to consent be "corroborated" by the character of the consent evidence. Unless a court finds, as a threshhold matter, that the evidence with respect to consent is "equivocal," a jury will be foreclosed from considering evidence that the defendant honestly and reasonably believed that there was consent, even if that jury would have credited such evidence. As with

159 For example, as illustrated above, the notion of equivocality has no application to any other offense to which the defense of mistake of fact has long been available.

160 In her work, *Real Rape*, Susan Estrich identified a set of legal rules that at the time of her writing made prosecuting rape extremely difficult. These rules applied only to rape and included the requirement that a complainant's testimony be corroborated; the requirement that the complainant resist to her utmost; the broad-ranging inquiry into a complainant's sexual past; the substantiality of the force requriement; the requirement that that a complaint be "fresh"; and the cautionary instruction that rape is a charge easy to make and difficult to refute. Susan Estrich, Real Rape 3-5 (1983). *See also* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1, 10 (1977) (identifying a similar list of legal obstacles to rape prosecutions).

161 *See, e.g.*, D.C. Code Ann. § 22.2801 (1981) (requiring corroboration of complainant's testimony) (abolished for adult female complainants in Arnold v. United States, 358 A.2d 335 (D.C. 1976)); State v. Rhodes, 270 N.W.2d 920 (Neb. 1978) (continuing to require corroboration for adult complainaints); People v. Radunovic, 234 N.E.2d 212 (1967) (requiring corroboration of complainant's testimony as to each and every material fact essential to constitute the crime) (repealed by New York Penal Law § 130.16 (McKinney 1975)). *See generally* Vitauts M. Gulbis, *Annotation, Modern Status of Rule Regarding Necessity for Corroboration of Victim's Testimony in Prosecution for Sexual Offense*, 31 A.L.R. 4th 120. *See also* Model Penal Code § 213.6(5) ("No person shall be convicted of any [sexual offense felony] upon the uncorroberated testimony of the alleged victim.").

the corroboration requirement, the rule looks not to the disputed evidence itself but to other evidence in order to determine as a matter of law whether the disputed evidence can reach the jury.

This judicial obstruction is no less improper than was the corroboration requirement and for precisely the same reasons. The corroboration requirement validated the view that a rape victim's testimony was less reliable than other forms of evidence, as well as less reliable than the testimony of victims of all other crimes. The requirement was ultimately rejected by nearly every state that had applied it, once it had been demonstrated that the rule was rooted not in legitimate concerns about protecting defendants from unjust conviction,[162] but instead in "a deep distrust of the female accuser."[163] Similarly, the rule of equivocality, in its creation of a categorical bar to consideration of a defendant's testimony in support of a defense of mistake, validates the view that a rape defendant's testimony is less reliable than that of other witnesses, and, more significantly, "privileges" the testimony of the complainant in rape cases.[164]

This inversion can be seen in at least one other area: the admissibility of evidence of prior sexual conduct. Despite a well established evidentiary taboo against the use of propensity evidence to prove a defendant's character, with certain exceptions[165] in the area of sexual

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162 7 WIGMORE, EVIDENCE § 2061 (Chadbourne rev. 1978) (observing that the corroboration requirement was "based plausibly on the laudable purpose of protecting against false accusations").

163 Berger, *supra*, note 160, at 10. As Judge Skelly Wright noted in United States v. Sheppard, "it was said that because charges of rape may easily be fabricated, and because juries may be enraged by testimony of sexual assaults, and because a defense to a rape charge is difficult to establish, a corroboration rule is necessary in all such cases to protect defendants against unjust convictions. More recent studies, however, suggest that the factors invoked in support of the corroboration requirement do not justify that rule . . . juries generally tend to view rape charges with suspicion; and convictions in the absence of aggravating circumstances are extremely rare." United States v. Sheppard, 569 F.2d 114 (D.C. Cir. 1977) (citations omitted) (repealing the corroboration requirement in the District of Columbia).

For discussion of the corroboration requirement and advocacy of its repeal, see Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1136-1137 nn.150-60 (1986); Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1529-33 (1975); Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L. J. 1365 (1972); Note, *Corroborating Charges of Rape*, 67 COLUM. L. REV. 1137 (1967).

164 FLETCHER, *supra* note 99, at 130-31.

165 *See, e.g.*, FED. R. EVID. 413; CAL. EVID. CODE § 1101. *See also* Edward J. Imwinkelried & Miguel A. Mendez, *Resurrecting California's Old Law on Character Evidence*, 23 PAC. L.J. 1005, 1006, 1041 (1992) (noting that the rule precluding evidence of uncharged conduct to prove character was "part of the early law of England" and is curently in force in "all American jurisdictions, either by statute or case law . . . . "). *But see* CAL. EVID. CODE § 1101(b) (exception permitting such evidence when offered to prove "whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented") (amended by Stats. 1986, ch. 1432,

offenses, many states have created strained justifications for admitting evidence of prior sexual assaults, permitting such evidence to be considered on the issue of mistake as to consent and, in some instances, even actual consent.[166] Most recently, the Federal Rules of Evidence have been amended to permit broad use of evidence of prior sexual assaults and not other offenses "on any matter to which it is relevant."[167]

This recent development has as its obverse the now repudiated practice of permitting evidence of a complainant's prior sexual conduct to prove consent. While that practice has been thoroughly reformed by the enactment of rape-shield laws, which prohibit exploration of a complainant's prior sexual history except in limited circumstances,[168] the exploration of defendants' sexual past is now a viable tactic for proving non-consent.

Again, the rationale for halting the practice of impeaching a complainant's testimony as to consent by use of her prior sexual history is applicable, with nearly equal force, to the admission of prior bad acts against a rape defendant.[169] In either instance, the notion that an

§§ 1,2, pp. 5129-5130).

166 *See, e.g.*, People v. Ewoldt, 7 Cal. 4th 380 (Cal. 1994) (admissible to prove common design or plan) (overruling People v. Tassell, 679 P.2d 1 (Cal. 1984)); People v. Jackson, 110 Cal. App. 3d 560 (Cal. Ct. Appeals 1980) (defendant's assertion of consent "was tantamount to a denial that he intended [to perform the sexual conduct] by force or intimidation. Evidence of prior offenses was thus admissible to establish defendant's intent in the present offense by corroborating the victim's testimony that she had not consented to the sex acts"); State v. Lough, 853 P.2d 920 (Wash. Ct. App. 1993) (admitting evidence to prove common scheme or plan, as well as "knowledge" of victim's lack of capacity to consent by reason of physical helplessness); People v. Oliphant, 250 N.W.2d 443 (Mich. 1976) (admitting evidence to show common scheme or plan and to prove actual consent); Velez v. State, 762 P.2d 1297, 1302 n.8 (Alaska Ct. App. 1988) (collects cases); People v. McKibben, 862 P.2d 991 (Colo. App. 1993) (admitting evidence to prove lack of consent); State v. Lamoureaux, 623 A.2d 9 (R.I. 1993) (admitting evidence as proof of absence of mistake to prove lack of consent).

167 Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322; 108 Stat. 1796 § 320935 (1994) (enacted Sept. 13, 1994) (amending the FEDERAL RULES OF EVIDENCE to add Rules 413, 414, and 415). *See* STEPHEN A. SALTZBURG ET AL., 1 FEDERAL RULES OF EVIDENCE MANUAL 575, 580, 583 (6th ed. 1994).

168 *See, e.g.*, FED. R. EVID. 412.

169 The symmetry between so-called rape-shield laws and prior bad acts evidence is admittedly an imperfect one. *See* Susan Estrich, *Teaching Rape Law*, 102 YALE L. REV. 509, 519 (1992) (characterizing it as a "false symmetry") ("[E]vidence that a man has abused other women is much more probative of rape than evidence that a woman has had consensual sex with other men is probative of consent."). Professor Estrich's explanation, however, does not demonstrate that a defendant's uncharged misconduct is in fact more probative than the prior sexual conduct of a complainant on the consent issue, so much as it suggests that such evidence poses a graver risk of being perceived as probative by a finder of fact:

> Most women have had sexual experiences, and unless those experiences fall into some kind of unusual pattern, the mere fact that a woman has had lovers tells us almost nothing about whether she consented on the particular occasion that she is charging

individual's conduct respecting consent on a prior occasion provides a valid indicator of that person's consent on a subsequent occasion—and with a different partner—is simply wrong.[170]

> as rape. But won't we all look at a defendant differently if three other women have also come forward to say they were abused? The danger with such evidence is not that it proves so little, but that it may prove too much.

Id.

Another commentator has argued against this purported symmetry, contending, *inter alia*, that rape shield laws encourage reporting of rapes, whereas "revealing . . . evidence [of a defendant's uncharged conduct] would not suppress conduct that society wants to promote." Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORD. URB. L. J. 271, 277 (1995). Profesor Park contends that evidence of a complainant's prior sexual history is less probative than that of a defendant, arguing that prior consent "tends . . . to show that [the complainant] does not readily make accusations of rape. Otherwise, why didn't she accuse one of her many partners of rape?" *Id.* at 278. This analysis purports to link an individual's propensity to fabricate a charge of rape to her prior sexual history, with no support for so doing. Professor Park goes on to argue that "[t]he defendant's history of other rapes does not cut both ways. It simply tends to show that the defendant is a rapist who is more likely to be guilty in this case without the evidence." *Id.* This argument ignores the now widely accepted view that rape is a crime of violence rather than a purely sexual crime. Even a defendant convicted of sexual assault is likely nevertheless to subsequently engage in consensual sex. Moreoever, the analysis presumes that consent was at issue in the prior uncharged assault, when in may instances the issue for trial is one, like identity, that has no probative value on the matter of consent.

At least two courts to date have noted this symmetry between rape shield evidence and evidence of uncharged misconduct. *See* People v. Oliphant, 250 N.W.2d 443, 459-464 (Mich. 1976) (Levin, J. dissenting); State v. Christensen, 414 N.W.2d 843 (Iowa Ct. App. 1987). In *Christensen*, the intermediate appellate court observed that "in an analagous situation," the Iowa Supreme Court held that "we have never adopted the principle that a victim's consent to intercourse with one man implies her consent in the case of another . . . . Neither, we think, does one woman's lack of consent to intercourse with a man imply a different woman's lack of consent to intercourse with the same man." *Christensen*, 414 N.W.2d at 846-47 (citing *Oliphant*, 250 N.W. 2d at 450). It further held that admissibility of such evidence on the question of mistake would require an "additional necessary logical thread connecting [the first victim's] alleged lack of consent, [defendant's] awareness of that lack of consent—an issue about which [the first victim's testimony] has nothing to say—and [the defendant's] awareness, mistaken or otherwise, of [the second victim's] lack of consent." *Id.* at 847. *See also* Statement of Myrna Raeder, On Behalf of the American Bar Association, Before the Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Comments on Rules 413, 414, and 415, Federal Rules of Evidence 4-5 (Oct. 10, 1994) (noting a risk that, if propensity evidence is made admissible in sexual assault cases, it "may ultimately produce a backlash against the strict intepretation of the federal Rape Shield Rule 412 . . . . judges may claim that due process requires investigation of the complainant's sexual history when the defendant's sexual history is being offered for propensity and credibility is the key.").

[170] *See, e.g.*, Velez v. State, 762 P.2d 1297, 1301 n.6 (Alaska Ct. App. 1988) ("[e]vidence regarding a motive to have intercourse with one woman does not legitimately support an inference that the defendant was motivated to have intercourse with a second woman") (citing Pletnikoff v. State, 719 P. 2d 1039, 1043 (Alaska Ct. App. 1986)); State v. Saltarelli, 655 P.2d 697, 699-701 (Wash. 1982); State v. Christensen, 414 N.W.2d 843, 847 (Iowa Ct. App. 1987); People v. Oliphant, 250 N.W.2d 443, 450 (Mich. 1976) ("[c]ertainly, the fact that an individual commits a rape at one time has no bearing on whether another woman consented to intercourse at a later time") (admitting evidence of uncharged conduct on

Significantly, those courts that have adopted a rule permitting the admission of uncharged misconduct on the issue of mistake only, refusing such evidence when offered to prove actual non-consent, have imputed a mistake defense to the defendant even when it had not been offered by the defense, in order to apply the evidentiary rule and admit the uncharged misconduct. In these instances, courts have construed evidence of actual consent offered by a defendant as evidence of mistake, ignoring any concern about the unequivocal nature of that evidence.[171] This inconsistency further exposes the analytical weakness of the proposition that mistake and consent are inconsistent defenses, supported by evidence different in kind.

The symmetry between the emerging legal rules governing rape prosecutions and those rules that were the subject of hard-fought struggles for legal reform underscores the breadth of the change in the legal landscape of this offense. In section VII below, I examine some possible explanations for this change.

VII. Conclusion: Rhetoric and Reasonableness

It is difficult to explain the transformation of the rules of rape described above. What animates courts to impose barriers to consideration of certain evidence, defense evidence this time, when they are now constrained from imposing symmetrical barriers on prosecution evidence? The answer, in part, can be found in the rhetoric of some recent rape decisions. The discourse of these decisions evinces profound judicial concern that jury consideration of certain kinds of evidence in cases of sexual assault may produce troubling results. In this respect, the rhetoric as well as the rules have come full circle from the infamous Stanford Law Review article of 1966 which held that

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other grounds); Jones v. State, 580 So.2d 97, 101 (Ala. Crim. App. 1991) ("unless there is some logical and reasonable connection or relation between the forcible rape of two different women, 'the fact that one woman was [forcibly] raped has no tendency to prove that another woman did not consent to intercourse'"), *quoting* 2 A.L.R.4th §6(b) at 378; State v. Keys, 852 P.2d 621, 625 (Mont. 1993) (even if defendant intended to engage in sex forcibly and without consent, "this criminal intent would be irrelevant if [the complainant] consented," and evidence of defendant's intent is therefore inadmissible).

[171] *See, e.g.*, People v. Tassell, 679 P.2d 1, 10-12 (Cal. 1984) (Reynoso, J., concurring and dissenting) (although defendant asserted consent, and did not assert a *Mayberry* defense, defendant placed his intent with respect to consent at issue, and the same evidence supported both actual consent and reasonable belief as to consent); State v. Lough, 853 P.2d 920, 935 (Wash. Ct. App. 1993) ("even where a defendant does not specifically raise the issue of intent or good faith, evidence of other offenses may be admissible as showing a common scheme or plan"); State v. Lamoreaux, 623 A.2d 9, 13 (R.I. 1993) ("[i]mplicit in a defendant's claim that a victim of sexual assault consented to his advances is the claim that at least he was led to believe that there was consent. Thus the issue of consent in this case is closely related to the issue of mistake").

"although a woman may desire sexual intercourse, it is customary for her to say 'no, no, no' (although meaning 'yes, yes, yes') and to expect the man to be the aggressor," or the 1952 Yale Law Journal article which reported that "[m]any women . . . require as a part of preliminary 'love play' aggressive overtures by the man" and that "[o]ften their erotic pleasure may be enhanced by, or even depend upon, an accompanying physical struggle."[172]

In *Williams*, for example, the court was plainly concerned that an instruction on the defense of mistake of fact might have produced an acquittal. The court commented that the defense evidence could not be deemed proof of reasonable belief of consent without "reviv[ing] the obsolete and repugnant idea that a woman loses her right to refuse sexual consent if she accompanies a man alone to a private place."[173] In its zeal to distance itself from the assumptions of earlier courts, and to demonstrate its contemporaneity in sexual matters, the court characterizes as irrelevant evidence that might well have been considered by some jurors on the issues of both consent and mistake, such as the complainant's accompanying the defendant to a place where he asked for and received a bedsheet in exchange for a payment of $20. The obvious absence of a television set inside the rented room did not preclude the court from going on to comment that the assumption about consent "is an especially cruel [one] here, where the victim, a homeless woman, may well have wanted nothing more than the relative quiet and comfort of a private room in which to relax and watch television."[174]

Similarly, in *Tyson v. Trigg*, Judge Posner ridicules defense evidence of conduct by the complainant in the hours and minutes before the sexual encounter, from which a reasonable person might have formed a belief as to consent, holding that, "[t]hough it should be obvious, we add that possible manifestations of consent before [the complainant] entered the bedroom would not be enough evidence to require that an instruction on reasonable mistake be given."[175] He

172 ESTRICH, *supra* note 160, at 38-39 (*quoting* Roger B. Dworkin, *The Resistance Standard in Rape Legislation*, 18 STAN. L. REV. 680 (1966) *and* Note, *Forcible and Satutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L. J. 62 (1952). *See also* Larry W. Myers, *Reasonable Mistake of Age: A Needed Defense to Statutory Rape*, 64 MICH. L. REV. 105, 125 (1965) (contending that defendants charged with statutory rape are often "innocent boys who may in fact have been enticed by the most seductive of young women"), *quoting State v. Snow*, 252 S.W. 629, 632 (Mo. 1923) ("[a] lecherous woman is a social menace; she is more dangerous than T.N.T.; more deadly than the 'pestilence that walketh in darkness or the destruction that wasteth at noonday'" (citation omitted)).

173 People v. Williams, 841 P.2d 961, 967 (Cal. 1992) (quoting the dissenting opinion below, in the Court of Appeals).

174 *Id.* at 967.

175 Tyson v. Trigg, 50 F.3d 436, 448 (7th Cir. 1995), *cert. denied* 116 S. Ct. 697 (1996).

draws an inapt analogy to a commercial contract:

> The law of rape is not a part of the law of contracts. If on Friday you manifest consent to have sex on Saturday, and on Saturday you change your mind but the man forces you to have sex with him anyway, he cannot use your Friday expression to interpose, to a charge of rape, a defense of consent or of reasonable mistake as to consent. You are privileged to change your mind at the last moment.[176]

In this dismissive analogy, Posner assumes the answers to two critical questions. First, he assumes that the complainant "made her change of mind clear to Tyson."[177] Of course, if she did not, then her conduct manifesting consent prior to the rape would be relevant to, and would support, a defense of mistake as to consent.[178] Second, Judge Posner recites that "[o]bviously the jury disbelieved [Tyson] when he testified that the complainant had been not merely a willing but an enthusiastic participant."[179] Notwithstanding this rhetorical emphasis, there is no way of knowing what the jury believed about Tyson's *perception* of the complainant as an enthusiastic participant, since the mistake instruction was not given. All that can be determined with certainty is that the jury found that she did not actually consent; but this conclusion does not necessarily imply that she *appeared* not to consent, which is the relevant issue for mistake of fact.[180] As in *Williams*, fearing that the jury might view the evidence just as the defendant would wish, the court forces jurors to don a set of blinders. The depth of these courts' apprehension provides powerful proof that the evidence is susceptible to the very construction they eschew.

This rhetoric parallels the shift in the doctrinal landscape de-

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This included evidence that the complainant "met Tyson later, under circumstances which suggested an interest in sex — she accepted an invitation at 1:40 a.m., voluntarily accompanied Tyson to his hotel room, and willingly sat on his bed with him." Tyson v. State, 619 N.E.2d 276, 297 (Ind. Ct. App. 1993).

176 Tyson v. Trigg, 50 F.3d at 448. Posner inserts an additional day into the analogy in order to bolster his point, although the facts of the *Tyson* case are that the conduct alleged to have permitted Tyson to form a belief as to consent *immediately* preceded *and accompanied* the sexual conduct.

177 *Id.* at 448.

178 *Id.* at 448.

179 Moreover, conduct during sexual intercourse that was consistent with the prior conduct indicating consent—such as her request that Tyson use a condom, and her affirmative response when Tyson asked her if she would like to be "on top"—is also relevant to Tyson's reasonable belief about consent, since it demonstrates that the prior consent had not been withdrawn. *Id.*

180 Additional instances of appellate courts' grappling with the possibility that a jury's view of the evidence might endorse sterotypes that the court disdains can be found in a number of decisions on the matter of mistake. *See, e.g.*, Commonwealth v. Simcock, 575 N.E.2d 1137, 1142 (Mass. App. Ct. 1992) ("It is most unlikely, therefore, that the jury found lack of consent based upon the unexpressed misgivings in the mind of the victim that were inconsistent with her words and actions.").

scribed above, a boomerang back from misgivings about juries who might too easily convict to juries who might too readily acquit. The test for an instruction is not, however, the possibility that the jury may disappoint the court. Judges may not impose an obstacle between the jury and the facts, even with the high-minded purpose of establishing a standard below which a jury may not sink.

The limitation already embedded in the mistake defense—that any mistake must not only be genuine but also reasonable—adequately protects the legitimate interest in educating sexual actors about acceptable norms of behavior without subverting fundamental principles of criminal law and procedure in the ways described above. Under this existing limitation, a jury would be free to convict or acquit either Mayberry or Williams, by determining the fact question within their province: the reasonableness of the defendant's belief in consent.[181] In resolving this issue, juries would consider such factors as the degree of force involved and, most importantly, the credibility of the witnesses, and would not be bound by a court's characterization of the sum of the evidence as "equivocal" or otherwise.

Courts and legislatures may indeed have the effect of prodding juries in a particular direction, not by taking fact issues away from them, but by giving content to the notion of reasonableness. A rule stating that it is never reasonable to believe there was consent if the complainant says "no,"[182] or, more expansively, a rule that denies the reasonableness of a belief if the complainant does not give her consent expressly[183] are two examples of such possibilities.

181 *See* People v. Williams, 841 P.2d 961, 965 (Cal. 1992) (defendant's belief must not only be held in good faith, but must also be formed "under circumstances that society will tolerate as reasonable").

182 Commonwealth v. Lefkowitz, 481 N.E.2d 227, 232 (Mass. App. Ct. 1985) (Brown, J., concurring) (rejecting purely subjective standard for mistake as to consent in rape) ("It is time to put to rest the societal myth that when a man is about to engage in sexual intercourse with a 'nice' woman 'a little force is always necessary' . . . I am prepared to say that when a woman says 'no' to someone any implication other than a manifestation of non-consent that might arise in that person's psyche is legally irrelevant, and thus no defense."). Professor Estrich has, for example, argued that while unreasonable mistakes should never exculpate, reasonable mistakes should. In giving content to the term "reasonable," she adopts a standard of express non-consent, which might perhaps be viewed as a midpoint on the continuum of possible standards. ESTRICH *supra* note 160, at 97-98 ("give [a woman] credit for knowing [her mind] herself when she speaks it, regardless of their relationship") and 102 ("unreasonableness" as to consent is "understood to mean ignoring a woman's words").

183 At least one state has adopted this more expansive definition: In the case of State ex. rel. M.T.S., the New Jersey Supreme Court held that the physical force element of the offense of rape could be satisfied "if the defendant applies any amount of force against another person in the *absence of what a reasonable person would believe to be affirmative and freely—given permission to the act of sexual penetration.*" State ex. rel. M.T.S., 609 A.2d 1266, 1277 (N.J. 1992) (emphasis added). *See also* The Antioch College Sexual Offense Policy

The requirement of a minimal threshold of evidence as a prerequisite for an instruction[184] and the ample room for legislative and judicial rulemaking under the rubric of reasonableness adequately protect against a mistake defense run rampant without the unworkable and illogical requirement of equivocality that has been grafted on to the rule. In addition, of course, there is the not insubstantial hurdle of the jury. An instruction on mistake of fact is far from a required finding of not guilty; instead, the jury must credit at least some aspects of a defendant's evidence in order to conclude that there was indeed a reasonable and actual mistake as to consent. If the jury shares the court's vision of what a man may reasonably believe when a woman "accompanies [him] alone to a private place,"[185] or when she accepts an invitation after midnight,[186] they can and should be trusted to convict, even if offered the possibility to acquit based upon reasonable belief in consent.

(requiring consent "for each new level of physical and/or sexual contact/conduct in any given interaction," and defining "consent" as "the act of willingly and verbally agreeing to engage in spcific sexual contact or conduct"). *See also* Ellen Goodman, *The Struggle on College Campuses to Create a New Standard of Sexual Equality*, BOSTON GLOBE, Sept. 19, 1993, at 75; June Gross, *Combating Rape on Campus in a Class on Sexual Consent*, N.Y. TIMES, Sept. 25, 1993, at 1.

Such rules would nevertheless require a judge to instruct the jury on both actual and reasonable belief in consent whenever there is a conflict in testimony, leaving the jury free to find as fact that consent was or was not expressly given.

184 *See supra* note 61, 94 and accompanying text.

185 People v. Williams, 841 P.2d 961, 967 (Cal. 1992).

186 Tyson v. State, 619 N.E.2d 276, 297 (Ind. Ct. App. 1993).