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The Mistake of Fact Defense and the Reasonableness Requirement

MARGARET FRIEDLANDER BRINIG*

INTRODUCTION

A study of the contrast in the American and British approaches to the resolution of problems in substantive criminal law provides one method for judging the quality of justice inherent in the application of a given law. This article examines specifically the mistake of fact defense 1 and its disparate treatment under these two systems of justice. The British approach is to retain a subjective element in the mistake of fact defense, while American courts impose an objective "reasonableness" requirement.

The British method amounts to a logical clarification of the mistake of fact defense. In contrast, the American method constitutes judicial intervention into substantive criminal law.

It might be expected that American courts would favor the defendant by allowing him, for constitutional reasons, the benefit of the doubt. However, it is the British House of Lords that seems to have resolved the particular problem of mistake of fact without the advantage of the due process clause. An examination of the two different types of analysis will lead the reader to the same conclusion—that the reasonableness requirement has no place in the mistake of fact defense in criminal law. The substantive criminal law approach, utilizing the concept of mens rea, will be discussed first, and will be followed by a treatment of recent American constitutional developments in the area of burden of proof standards in their criminal context.

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1. The author's research was guided by the organization and thoughtfulness of the authors of S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES (3d ed. 1975), and by the vital work of Glanville Williams, principally in G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART (2d ed. 1961).
Finally, two factually similar rape cases, one British and one American, will be analyzed to show the present contrasting results when the same problem is presented. Some suggestions for legislative or judicial reform will follow.

I. THE SUBJECTIVE ELEMENT IN CRIMINAL LAW—Mens Rea

Criminal law as a whole can easily be grasped once the concept of mens rea, the mental element of a crime, is mastered. The unifying principle is that no person should be subjected to the unique sanctions of criminal punishment unless found to be morally blameworthy or culpable—that is, unless he (or she) has performed a voluntary act while possessing a guilty mind or mens rea.

2. Williams explains the necessity for the requirement of mens rea in terms of the various common rationales for the imposition of punishment when he writes:

   It may be said that any theory of criminal punishment leads to a requirement of some kind of mens rea. The deterrent theory is workable only if the culprit has knowledge of the legal sanction; and if a man does not foresee the consequence of his act he cannot appreciate that punishment lies in store for him if he does it. The retributive theory presupposes moral guilt; incapacitation suggests social danger; and the reformative aim is out of place if the offender's sense of values is not warped.

G. Williams, supra note 1, at 30. See also Morissette v. United States, 342 U.S. 246, 252 (1952).

3. It is this element of blameworthiness that separates the criminal from the mere tortfeasor or contract breaker. Although the same amount of harm might be forthcoming in a given situation, the so-called vicious mind distinguishes the criminal offender. As Sir Patrick Devlin explains it:

   The notion of mens rea meant that in considering the gravity of the crime, it became necessary to take into account not only the act and its consequences but also the degree of blameworthiness with which the offender acted, that is, the intent to which he denied or apprehended the consequences of the act.


There has for some time been an exception from this requirement of evil intent for so-called "public welfare offenses." Sayre, Public Welfare Offenses, 33 COLUM. L. REV. 55, 73, 84 (1933), originated the phrase:

   We do not go with Blackstone in saying that "a vicious will" is necessary to constitute a crime, 4 Bl. Comm. *21, for conduct alone without regard to the intent of the doer is often sufficient. There is wide latitude in the lawmakers to declare an offense and to exclude elements of knowledge and diligence from its definition. But we deal here with conduct that is wholly passive — mere failure
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." 4

Because of this culpability requirement, two questions posed in every criminal case must be answered affirmatively before a guilty verdict can be reached: did defendant break a law because he performed a voluntary act 5 (whether or not harmful consequences were to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed. Cf. Shevlin-Carpenter Co. v. Minnesota, 218 U.S. 57; United States v. Balint, 258 U.S. 250; United States v. Dotterweich, 320 U.S. 277, 284. Lambert v. California, 355 U.S. 225, 228 (1957).

4. Morissette v. United States, 342 U.S. 246, 251-52 (1952). In Morissette, defendant's conviction for stealing government property, spent bomb casings, which he thought had been abandoned by the Air Force, was reversed despite the fact that the federal theft statute did not mention an intent requirement. The Court found that when a statute was merely a codification of the common law, the traditional intent requirement would be read into it absent a contrary legislative intent.

5. Cases in which a conviction was reversed because the appellate court could find no voluntary act include People v. Newton, 8 Cal. App. 3d 359, 87 Cal. Rptr. 394 (1970) (automatism, murder conviction reversed because of defendant's prior gunshot wound); People v. Grant, 4 Ill. App. 3d 125, 360 N.E.2d 809 (1977) (automatism due to defendant's psychomotor epilepsy); Bratty v. Attorney-General, [1962] A.C. 386, 409-10 (defendant sought defense to traffic violation based on automatism caused by psychomotor epilepsy); Kilbride v. Lake, [1962] N.Z.L.R. 590 (wind blew inspection sticker from windshield of car; defendant ticketed before he knew of its absence or had a chance to replace it). The Model Penal Code carries a requirement of a voluntary act in § 2.01 (proposed official draft) which it explains in terms of the futility of punishing an involuntary act.

That penal sanctions can not be employed with justice unless requirements are satisfied seems wholly clear. The law can not hope to deter involuntary movement or to stimulate action that can not physically be performed; the sense of personal security would be short lived in a society where such movement or inactivity could lead to formal social condemnation of the sort that a conviction necessarily entails. People whose involuntary movements threaten harm to others may present a public health or safety problem, calling for therapy or even for custodial commitment; they do not present a problem of correction.

These are axioms under the present law, though dealt with only indirectly by our penal legislation in the states where legislation touches the subject at all.

Comments (Tent. Draft No. 4, 1955) at 119.
caused thereby),\(^6\) and, did he possess the state of mind expressed or implied by the statute that would indicate culpability?\(^7\)

A principle to which we will return later in this article is that generally, the most serious offenses require a greater degree of blameworthiness, manifesting a greater depth of intent or purpose on the part of the actor.\(^8\) The major exception is felony murder, first degree in many states, where the intent is implied from the intentional participation in the very serious underlying felony.\(^9\) This greater degree of intent, confusingly described as specific intent,\(^10\) requires that the actor not only intend an action criminal in itself, (e.g., breaking into a building), but also that he have a further or

\(^6\) It seems that in some cases, "harm" may often be merely an affront to an overly scrupulous morality. This is the category of offenses sometimes referred to as "victimless crimes."


\(^7\) In Morissette v. United States, 342 U.S. 246, 251-52 (1952), the Court suggests that the mens rea concept was so fundamental to American's "intense individualism," that eventually it became an unstated requirement of every criminal statute. "Courts with little hesitation or division, found an implication of the requirement as to offenses that were taken over from the common law."

8. For example, in Morissette, where defendant's conviction for stealing empty bomb casings was reversed by the Supreme Court, the Court distinguished between the so called public welfare offenses, see note 3 supra, and the more serious common law crime of larceny. 342 U.S. at 260.

Stealing, larceny, and its variants and equivalents were among the earliest offenses known to the law that existed before legislation; they are invasions of rights of property which stir a sense of insecurity in the whole community and arouse public demand for retribution, the penalty is high and, when a sufficient amount is involved, the infamy is that of a felony, which, says Maitand, is "... as bad a word as you can give to man or thing," quoting from 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW 465 (1899).


10. Morissette v. United States, 342 U.S. 246, 252 (1952) ("the variety, disparity, and confusion" of the "requisite but elusive mental element"). See generally J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 142 (2d ed. 1960); SMITH & HOGAN, CRIMINAL LAW 47 (3d ed. 1973); G. WILLIAMS, CRIMINAL LAW, supra note 1, § 21 at 49.
specific criminal purpose (e.g., to commit a felony inside the building, or burglary).¹¹

Because it serves to negate the mens rea required by nearly every criminal offense,¹² mistake of fact is an important defense to a criminal charge. The Model Penal Code defines the mistake of fact defense as follows:

(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; or
   (b) the law provides that the state of mind established by such ignorance or mistake constitutes a defense.¹³

Once again, the reason for the defense is explained in terms of the more general requirements of the mens rea doctrine of establishing blameworthiness:

To understand the rationale of ignorantia facti excusat, it is necessary to recognize and take account of the relevant ethical principle, namely, moral obligation is determined not by the actual facts but by the actor's opinion regarding them.¹⁴

Mistake of fact situations include those where, for example, defendant did not know what he was doing was wrong, because he thought the property he took was abandoned¹⁵ or his own, or because he thought the house he was entering was his (identical house). Even when defendant's mistake was caused by his intoxication by drugs or


¹² The only exceptions would be the public welfare offenses, see note 3 supra, and cases of criminal negligence. The Model Penal Code describes cases where mens rea may be negated in § 2.02(2)(b):

A person acts knowingly with respect to a material element of an offense when:
   (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of the nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result. This is also called a "general intent" crime. MODEL PENAL CODE § 204(1).

¹³ See also CAL. PENAL CODE § 26 (West 1973); Hall, Ignorance and Mistake in Criminal Law, 33 IND. L.J. 1, 2 (1957).

¹⁴Hall, Ignorance and Mistake in Criminal Law, supra note 13, at 3. Aristotle, according to Hall, thought of behavior in ignorance of the facts as involuntary. Id. at 4. See also 1 HALE, PLEAS OF THE CROWN 42 (1736).

¹⁵This was apparently the situation in Morissette v. United States, 342 U.S. 246 (1952), where defendant picked up spent bomb casings thinking the Air Force had abandoned them. For a general discussion of examples of mistake of fact, see G. WILLIAMS, supra note 1, at ch. 5, pp. 140 ff.; § 70 at 199.
alcohol, his actions will be excused in crimes where specific intent, or the further criminal purpose is required.

II. EXTERNAL STANDARDS IN CRIMINAL LAW—THE "REASONABLENESS" REQUIREMENT

The approach outlined above is described as a subjective approach, i.e., defendant's guilt or innocence is determined by what he actually thought or perceived. Subjectivism is a pervasive element in criminal, as opposed to civil law. An anomaly has crept into this picture, stemming, as so many common law traditions do, from the influence of the legal realists, among them Justice Holmes. Holmes wrote in his chapter on the criminal law in The Common Law that external standards "independent of the degree of evil in the particular person's motives or intentions," were to be expected where the law was responsible for establishing guidelines for conduct which would give rise to liability. Holmes went on to distinguish criminal liability from liability in tort. He acknowledged the fact that external standards of conduct are more easily imposed in the field of torts than in criminal law, where intent plays a far more important role. Nevertheless, his drive to establish external standards of conduct in criminal law, in the interests of community safety, evolved into the objective standard of "reasonableness" manifested in his opinion in Commonwealth v. Pierce. In that case, defendant, a physician who


19. Holmes notes that criminal liability is founded on blameworthiness, and that "a law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear." Id. (emphasis added). Holmes' objective, or reasonable man approach can clearly be contrasted with more recent opinions, such as that of a student author writing in 1972, which distinguishes between the fault required in civil cases, where the issue is compensation, and the standard in criminal cases, where punishment is possible and "a conscious choice by the defendant" should be required. Comment, Negligence and the General Problem of Criminal Responsibility, 81 Yale L.J. 949, 977 (1972). See generally, Hall, The Interrelationship of Criminal Law and Torts, 43 Colum. L. Rev. 967 (1943).

had wrapped a female patient in kerosene-soaked clothes in an attempt to cure her, was convicted of involuntary manslaughter when she died. The Court upheld the conviction although the defendant had acted without knowledge of a risk, and with his patient’s consent. The Pierce opinion established the precedent that mistakes of fact need not only be real, but also “reasonable” in order to excuse liability. This appears to run counter to the general, and growing, notion that guilt ought to be determined subjectively, that is, based upon what the defendant actually thought when he committed the

21. *Id.* at 178. Since a reasonable person would not have acted as defendant did, he was liable for involuntary manslaughter, although usually a state of mind more akin to recklessness, or disregard of a known risk is required.


If the jury believe, from the evidence, that the conduct of the prosecutrix was such towards the defendant, at the time of the alleged rape, as to create in the mind of the defendant the honest and reasonable belief that she had consented, or was willing for the defendant to have connection with her, they must acquit the defendant.

There are other manifestations of the objective standard including the partial defense of provocation, which must be of such a nature as to provoke the “reasonable” man. See Maher v. People, 10 Mich. 212 (1862); Bedder v. D.P.P. [1854] All E.R. 801; Mancini’s Case, [1944] A.C. 1; ILL. ANN. STAT. ch. 38 § 9-2 (Smith-Hurd Cum. Supp. 1978); MINN. STAT. ANN. § 609.20 (West 1963); Homicide Act, 1957, 5 & 6 ELIZ. 2, c. 11, pts. 1, 3; Michaels & Wechsler, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 1241, 1281-82 (1937). Cf. Williams, *Provocation and the Reasonable Man*, 1954 CRIM. L. REV. 740; N.Y. PENAL LAW § 125.25(1)(a) (McKinney 1975); MODEL PENAL CODE § 210.2(1)(b). If the defendant makes a mistake as to the provoking person, the objective test does not hold, for his mistake need not be reasonable. State v. Yanz, 74 Conn. 177, 50 A. 37 (1901); Williams, *supra* note 1, at 752.


A person may ... use physical force upon another person when and to the extent he reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by such other person.

A British article suggests that this reasonableness requirement be justified as a “special excuse” that is not an element the state is required to prove. Sellers, *Mens Rea and the Judicial Approach to “Bad Excuses in Criminal Law,”* 41 MOD. L. REV. 245 (1978).
crime. To defeat a mistake of fact defense in American law, it is only necessary for the state to prove that a reasonable man would not have made (or should not have made) the mistake, obviously a much easier task for the state than having to prove beyond a reasonable doubt that the defendant did not in fact make the mistake.

It might be argued that the "reasonableness" requirement is an attempt to circumscribe the degree of deviation from the norm that the society will tolerate. As such the requirement is appropriate,


Legal theory which makes guilt or innocence of criminal homicide depend upon such accidental and fortuitous circumstances as are now embraced by modern tort law's encompassing concept of proximate cause is too harsh to be just.

Pennsylvania simultaneously has been faced with the problem of meeting the constitutional standards enunciated in Mullaney v. Wilbur, see notes 58-61 infra, and accompanying text. The developments have gone on independently, resulting in the anomaly that in a state where objectivity is apparently becoming less and less prevalent, defendant must raise insanity as an affirmative defense. Commonwealth v. Ernst, 476 Pa. 102, 381 A.2d 1245 (1977). The burden of disproving self-defense remains on the prosecution once the issue has been duly raised. Self-defense "negates specific elements of the crime of murder as it existed in this state at common law, i.e., unlawfulness and malice, and it is in contravention of the United States Constitution, . . . to require a criminal defendant to carry a burden of proof by a preponderance of the evidence concerning this defense." Commonwealth v. Hilbert, 476 Pa. 288, 301, 382 A.2d 724, 731 (1978).


Jerome Hall writes in Ignorance and Mistake in Criminal Law, supra note 13, at 7-8, that absent any showing of insanity, feeblemindedness, etc., a defendant's normality is assumed. Since the jury cannot see into his mind, what a reasonable person would have thought obviously has some bearing on what defendant probably thought. Hall goes on to say, however, that the use of the reasonableness standard as an external (objective) standard of liability is objectionable because "some defendants are inexperienced or awkward or, for other causes, are not reasonable ('normal') persons," although they do not fall within the legal definition of incompetence.


since criminal law is at least partially an instrument of social control for the common benefit.\textsuperscript{26} But the approach fails to note the difference between the morally deviant and the person who is merely less intelligent or perceptive than the norm. No one would argue successfully that the morally deviant ought to be tolerated.\textsuperscript{27} However, it is difficult to fit the blissfully and unreasonably ignorant into the same category. It is punishment for a status, and even the Supreme Court has written that it is wrong to punish anyone for "being a leper" or "having a common cold."\textsuperscript{28} In such cases it seems inappropriate to use criminal punishment as opposed to treatment in some institution where the defendant could be educated, or treated for his deficiencies.\textsuperscript{29}

It is arguably wrong for a society to use a conviction, with its attendant social stigma, to gain control over an offender whose fault lies not in his judgment as to whether an act was wrong, but in his mistake concerning the nature of the act itself.\textsuperscript{30} The American national philosophy is hinged on the widest possible tolerance of deviation from the norm, hence the emphasis on freedom of speech to encourage a "marketplace of ideas," and the use of federalism to allow greater latitude in self-government.\textsuperscript{31} American law should not abridge the individual's "right to be different"\textsuperscript{32} when he is not morally at fault.

The problems with the American approach to mistake of fact can perhaps best be explained through a series of pictorial representations.

In an idealized criminal trial situation involving mistake of fact, all those who were in fact guilty would be found guilty, while no one innocent would be convicted. This state of affairs is represented by Diagram A. In a real world situation, things are not so perfect, which is the reason for the "beyond a reasonable doubt" test. The situation would approach Diagram B where a few of those who are innocent


\textsuperscript{27} See, e.g., the limitation on the sociopathic or psychopathic offender who might otherwise meet the Model Penal Code insanity defense. \textit{Model Penal Code} § 4.01(2). \textit{But see} the opinion of Judge Bazelon, dissenting in United States v. Moore, 486 F.2d 1139 (D.C. Cir. 1973).

\textsuperscript{28} Robinson v. California, 370 U.S. 660, 666 (1962). See notes 80-81 \textit{infra}.

\textsuperscript{29} For a similar suggestion, see Hall, \textit{Ignorance and Mistake in Criminal Law}, supra note 13, at 11.


\textsuperscript{32} W. Kittie, \textit{The Right to be Different} (1972).
would be convicted while others, who are guilty, would go free. With the present view of mistake of fact, there are far more findings of guilt, but more innocent people are convicted in the process (Diagram C). Obviously other considerations leading to acquittals are not considered in any of the illustrations that follow.

**TRIALS INVOLVING MISTAKE OF FACT CLAIMS**

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Cross-hatched area indicates persons found guilty.
In American jurisdictions, where the "reasonable" mistake standard prevails, the State is in effect required only to prove, beyond a reasonable doubt, that (1) the harm done was caused by the defendant's voluntary act, and (2) a reasonable man would not have thought things were as defendant alleges he thought them to be. All these "reasonable" requirements seem to fly in the face of a system that purports to punish on the basis of guilt or individual culpability alone. Thus, the reasonableness requirement of mistake of fact serves to undermine the function of the requirements that mens rea be proved and that the ultimate issue of guilt or innocence be established beyond a reasonable doubt. That function is simply to reduce the probability that an individual who is not guilty will be convicted. The Supreme Court, in a case to be discussed at length in the pages that follow, appears to be unwilling to accept such an increase in the chances of an error to defendant's detriment.

There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account. Where one party has a stake in an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt.

This additional burden upon the defendant, which seems unsupportable either in terms of logic or justice, is made still less defensible in the American system by a series of Constitutional decisions made by the Supreme Court.

III. THE CONSTITUTIONAL STATUS OF THE REASONABLENESS REQUIREMENT IN CRIMINAL LAW

The Court has made very few forays into the field of substantive criminal law, perhaps because this area has been relegated to the

33. Professor Jerome Hall calls this "a complete repudiation of the underlying policy." Hall, Ignorance and Mistake in Criminal Law, supra note 13, at 5-6.

34. In re Winship, 397 U.S. 358, 364 (1970) (quoting from Speiser v. Randall, 357 U.S. 513, 525-26 (1958)) (emphasis added). The Court in Winship further noted, "To this end, the reasonable-doubt standard is indispensable, for it 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the fact in issue.' " 397 U.S. at 364 (quoting in part Dorsen & Rezneck, In Re Gault and the Future of Juvenile Law, 1 FAM. L.Q. No. 4, 1, 26 (1967)). Winship and its progeny are discussed at notes 52-58, infra, and accompanying text.

35. For a lucid description of most of them, see Packer, Mens Rea and the Supreme Court, 1962 Sup. Ct. Rev. 107.
political branches under the doctrine of separation of powers,\textsuperscript{36} or to the states under the tenth amendment.\textsuperscript{37}

Justice Marshall wrote:

We cannot cast aside the centuries-long evolution of the collection of interlocking and overlapping concepts which the common law has utilized to assess the moral accountability of an individual for his antisocial deeds. The doctrines of actus reus, mens rea, insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical and medical views of the nature of the man. This process of adjustment has always been thought to be the province of the States.\textsuperscript{38}

The exceptions to this rule, understandably, have come at points where the substantive criminal law has inexorably conflicted with the Constitution.\textsuperscript{39} Thus, during an era of judicial activism, when the Supreme Court engaged more freely in what is called substantive due process, it also elected to rule on the propriety of convictions obtained under statutes, primarily in the economic arena, which dispensed in whole or in part with mens rea.\textsuperscript{40} These statutes were

\begin{enumerate}
\item See, e.g., Griswold v. Connecticut, 381 U.S. 479, 513 (1965) (Black, J., dissenting):
\begin{quote}
Such an appraisal of the wisdom of legislation is an attribute of the power to make laws, not of the power to interpret them. The use by federal courts of such a formula or doctrine or whatnot to veto federal or state laws simply takes away from Congress and States the power to make laws based on their own judgment of fairness and wisdom and transfers that power to this Court for ultimate determination—a power which was specifically denied to federal courts by the convention that framed the Constitution.
\end{quote}
\item Powell v. Texas, 392 U.S. 514, 531 (1968).
\item Id. at 535-36. Cf. Fisher v. United States, 328 U.S. 463, 476 (1946) (District of Columbia Court of Appeals permitted to disallow “diminished capacity” defense as a matter of local law); and the most recent decision of Patterson v. New York, 432 U.S. 197, 201 (1977).
\item The Court has had the power of judicial review since the decision of Chief Justice Marshall in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
\end{enumerate}
challenged as violative of due process, but were upheld where they involved the "public welfare" because the fact of doing business put the defendants on notice that if harm occurred, they might be held responsible.41

Recently, members of the Court42 as well as commentators43 have criticized what they believe to be a return to substantive due process. The Supreme Court, however, has again examined and upheld a statute alleged to create culpability on the part of the defendant who did not possess intent. In United States v. Feola,44 the Court faced a challenge to 18 U.S.C. § 111,45 which eliminated a requirement that the defendant have knowledge of surrounding circumstances. Its reasoning, strikingly similar to that of the substantive due process era justices discussed above, was that once the defendants embarked on a


44. 420 U.S. 671 (1975).

45. 18 U.S.C. § 111 (1976) provides in part that,

Whoever forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of his official duties, shall be fined not more than $5,000 or imprisoned not more than three years, or both.

Feola was convicted of violating § 111 and 18 U.S.C. § 371 (1976) (conspiracy). He argued that he should not have been convicted under either statute since he did not know that the victims of the assault in question were federal officers. 420 U.S. at 675. If his view had been accepted, he would simply have been guilty of a state offense of simple assault, rather than the violation of § 111, which carries heavy penalties. Id. at 683.
criminal enterprise, in this case assaults on what they thought were prospective drug purchasers, they might be found guilty of assault on the federal officers who were posing as purchasers.\textsuperscript{46}

In addition to the direct attack on the mens rea requirements, the Court has considered the propriety of punishment for persons who arguably could not entertain the intent required for conviction.\textsuperscript{47} The Supreme Court, in Robinson v. California,\textsuperscript{48} found that the eighth amendment's cruel and unusual punishment clause, as applied to the states through the due process clause of the fourteenth amendment, prohibited punishment of a drug addict for the status, or illness, of being an addict.\textsuperscript{49} The Court, however, rejected a claim in a later case that actions resulting from alcoholism or its symptoms, as opposed to the status of having the illness itself, were also protected from punishment.\textsuperscript{50}

The most recent constitutional challenges to criminal statutes have been based upon the burden of proof required by the due process clause of the fourteenth amendment.\textsuperscript{51} In In re Winship\textsuperscript{52} the Court found that due process required proof beyond a reasonable doubt of every element of an offense.\textsuperscript{53} Winship was extended in Mullaney v.

\begin{itemize}
\item \textsuperscript{46} Id. at 684. The Court went on to consider the intent required for conviction of conspiracy to violate § 111. Obviously in this case the enterprise was criminal rather than commercial, as in the cases noted previously, note 40 supra.
\item \textsuperscript{47} These people would therefore lack the volitional (will) element of mens rea, as opposed to the cognitive (knowledge) element that was involved in Feola.
\item \textsuperscript{48} 370 U.S. 660 (1962).
\item \textsuperscript{49} Id. at 666. The Court distinguishes a status and its proper mode of treatment from a criminal offense in the famous passage that follows:

\begin{quote}
It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.
\end{quote}

We cannot but consider the statute before us as of the same category. Id. at 666-67 (citations omitted).
\item \textsuperscript{50} Powell v. Texas, 392 U.S. 514 (1968). The conviction was for being intoxicated in a public place, which Powell claimed was either symptomatic of or compelled by his alcoholism.
\item \textsuperscript{51} U.S. CONST. amend. XIV § 1 provides in part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law. . . ."
\item \textsuperscript{52} 397 U.S. 358 (1970) (burden of proof in juvenile proceeding).
\item \textsuperscript{53} Id. at 364. This holding was foreshadowed by the opinion of the first Justice Harlan in Davis v. United States, 160 U.S. 469 (1895) (jury instructed to convict
Wilbur to void Maine's statutory requirement that the defendant prove that he acted "in the heat of passion" once the State proved an unlawful, intentional killing, in order to preclude a conviction for murder rather than voluntary manslaughter. In essence, the trial judge instructed the jury that if it were satisfied beyond a reasonable doubt that defendant Wilbur had committed a voluntary and intentional killing, malice aforethought was presumed. Therefore, the defendant would be guilty of murder unless he established by a preponderance of the evidence that he had killed in the heat of passion upon a sudden provocation. In such a case, the jury could find him guilty of manslaughter.

Since the Mullaney decision various states have experimented with the presumptions and burdens of proof required under their criminal codes. Recently, the Court decided that the Winship-Mullaney concept did not invalidate a New York murder conviction obtained under the presumption that where the state proved an intentional defendant in murder case when evidence was equally balanced regarding the sanity of the accused). Morano, writing in 1975, suggested that before the development of the reasonable doubt rule jurors were expected to acquit if they had any doubts, reasonable or unreasonable, of the accused's guilt. Morano, A Reexamination of the Development of the Reasonable Doubt Rule, 55 B.U.L. REV. 507, 519 (1975). He notes, as I have suggested earlier (see note 19 supra, and accompanying text), that the standard evidently developed from the reasonable man doctrine which appeared in eighteenth century tort cases in response to the need for a rational system of proof in which only relevant and probative information could be the basis for the jury's determinations. Morano, supra, at 514. Winship and subsequent cases seem to have enshrined this minimal evidentiary requirement into a constitutional rule.


55. ME. REV. STAT. tit. 17, § 2651 (1964).


killing (with death, causation, and intention)\textsuperscript{58} it could sustain a charge of first degree murder unless the defendant could show that he suffered “extreme emotional disturbance.”\textsuperscript{59} This case may indicate the continued vitality of \textit{Leland v. Oregon},\textsuperscript{60} decided in 1952, in which the Court upheld a conviction based upon a statute requiring defendant to prove his insanity beyond a reasonable doubt.\textsuperscript{61} Many states now require defendant merely to produce evidence of his insanity, which must then be disproved beyond a reasonable doubt by the prosecution.\textsuperscript{62}

In a recent antitrust case,\textsuperscript{63} the Court declined to hold that the prosecution’s burden of proof could be relieved by a presumption

\textsuperscript{58. Patterson v. New York, 432 U.S. 197 (1977).}
\textsuperscript{59. Id. at 222 n.5.}
\textsuperscript{60. 343 U.S. 790 (1952).}
\textsuperscript{61. Id. at 799.}

In his concurring opinion in \textit{Powell v. Texas}, 392 U.S. 514, 545 (1968), Justice Black wrote that for the Court to require a defense of compulsive behavior caused by disease would be to make a form of the insanity defense a constitutional requirement throughout the nation, and overrule \textit{Leland}, where both the majority and dissenting opinions stressed the indefensibility of imposing a particular test of criminal responsibility on the States.

In \textit{Mullaney}, the Chief Justice and Mr. Justice Rehnquist, concurring, expressed their understanding that the decision did not call into question the ruling in \textit{Leland} with respect to the proof of insanity. Subsequently, the court confirmed that it remained constitutional to require the defendant to prove his insanity defense, dismissing as not raising a substantial federal question a case in which appellant specifically challenged the continuing validity of \textit{Leland}. \textit{Rivera v. Delaware}, 429 U.S. 877 (1976), \textit{dismissing for want of substantial federal question}, 351 A.2d 561 (Del. 1976).

The claim in this Court was that \textit{Leland} had been overruled by \textit{Winship} and \textit{Mullaney}. We dismissed the appeal as not presenting a substantial federal question. \textit{Cf.} \textit{Hicks v. Miranda}, 422 U.S. 332, 344 (1975).

\dots

We are unwilling to reconsider \textit{Leland} and \texti{Rivera}.

\dots


\begin{enumerate}
\item Subsection (1) of this Section does not:
\begin{enumerate}
\item require the disproof of an affirmative defense unless and until there is evidence supporting such defense; or
\item apply to any defense which the Code or another statute plainly requires the defendant to prove by a preponderance of evidence.
\end{enumerate}
\end{enumerate}

\textsuperscript{63. United States v. United States Gypsum Co., 98 Sup. Ct. 2864 (1978).}
that, once unlawful price-fixing\textsuperscript{64} effects were shown,\textsuperscript{65} probable anti-competitive consequences followed. Evidentiary inferences are permissible,\textsuperscript{66} but not departures from the \textit{Mullaney} proof requirements of elements of the offense charged.

\textbf{IV. BRITISH AND AMERICAN APPROACHES COMPARED—\textit{Regina v. Morgan} AND \textit{United States v. Short}}

Great Britain has avoided the apparent contradiction posed by the imposition of an objective standard on the normally subjective criminal law. Furthermore, it has done so without the aid of a constitutional requirement for proof beyond a reasonable doubt. This has occurred in spite of a strong tradition, again originating with America’s Justice Holmes, of objectivity in other areas of criminal law, as illustrated by the well-known cases of \textit{Bedder v. Director of Public Prosecutions}\textsuperscript{67} and \textit{Director of Prosecutions v. Smith}.\textsuperscript{68}

In \textit{Regina v. Morgan},\textsuperscript{69} a group of R.A.F. men went drinking with Morgan, their superior officer. They then endeavored to find prostitutes, and were unsuccessful. Morgan finally suggested that they all adjourn to his home to have sexual intercourse with his wife. The defendants’ story was that on the way home he informed the young men that his wife was “kinky,” enjoying perverse pleasures including

\textsuperscript{65} 98 Sup. Ct. at 2872.
\textsuperscript{67} [1854] All E.R. 801, where defendant, an impotent man, killed a prostitute who jeered at him, and was denied the partial defense of provocation. The provocation must be such as would arouse a reasonable ordinary man, as opposed to a reasonable impotent man, to violence. “If the reasonable man is then deprived in whole or in part of his reason or the normal man endowed with abnormal characteristics, the test ceases to have any value.” The decision is criticized in Williams, \textit{Provocation and the Reasonable Man}, \textit{Crim. L. Rev.} 740, 741-42 (1954).
\textsuperscript{68} [1960] 3 All E.R. 161, 167, [1961] A.C. 290 where defendant accelerated his car, causing a policeman to fall into the path of an oncoming car, and was convicted of first degree murder, although he had no intent to kill:

\begin{quote}
On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what \textit{the ordinary responsible man} would, in all the circumstances of the case, have contemplated as the natural and probable result. (emphasis added).
\end{quote}

\textsuperscript{69} 2 W.L.R. 913 (H.L. 1975).
the thought that she was being raped. She would therefore struggle and scream, but the men should take this apparent resistance as a sign that she was enjoying herself. When the men reached the Morgan home, they dragged Mrs. Morgan, who for some time had slept apart from her husband, into another room, and forced her to have intercourse with each one of them in turn, including her husband, while the others held her down, over her violent screams and struggles.\textsuperscript{70}

At the trial the charge required that defendants' mistake of fact be both real and reasonable. The court held that it is not enough that a defendant relied upon a belief, even though honestly held, if it was completely fanciful and contrary to every indication which would carry some weight with a reasonable man.\textsuperscript{71} All except Morgan were convicted of rape. Morgan, who by law could not be guilty of rape of his wife,\textsuperscript{72} was convicted of aiding and abetting.\textsuperscript{73}

On appeal the House of Lords upheld the convictions, but not on the basis of the defendants' lack of reasonableness.\textsuperscript{74} The English jurists did not believe, and felt that jury properly instructed could not believe, that the defendants had really entertained such a mistake.\textsuperscript{75} Mistake of fact, genuine but unreasonable, would have negated the intent required for the crime of rape.\textsuperscript{76} "If the defendant believed (even on unreasonable grounds) that the woman was consenting to

\begin{itemize}
\item \textsuperscript{70} Id. at 956.
\item \textsuperscript{71} Id. at 940 (Opinion of L. Edmund-Davis).
\item \textsuperscript{72} Sexual Offenses Act of 1956, 4 & 5 Eliz. 2, c. 69, § 1.
\item \textsuperscript{73} 2 W.L.R. at 915.
\item \textsuperscript{74} Id. at 926, 937, 938, 959.
\item \textsuperscript{75} The court below (Bridge, J.) wrote that the jury obviously considered the men's story "a pack of lies and one must assume that any other jury would have taken the same view of the relative credibility of the parties." Id. at 926.
\item \textsuperscript{76} See, e.g., opinion of Lord Hailsham of St. Maryllbone, id. at 931. See G. Williams, supra note 1, at 184. Lord Hailsham criticized the use by some of the minority Lords of definitions and explanations of mens rea found in offenses other than rape. 2 W.L.R. at 915 See G. Williams, supra note 1, at 173. Lord Hailsham wrote that it was wrong to utilize the reasoning found in "strict liability" offenses of bigamy and statutory rape to arrive at a conclusion that defendants might be found guilty of forcible rape without an intent requirement as to the circumstances of the offense. Even though the offense of rape might require purpose (or knowledge) as to its actus reus, or conduct, and its result, again the act of sexual intercourse, the intent requirement for the material element might well be quite different (i.e., recklessness). See also Wechsler, On Culpability and Crime: The Treatment of Mens Rea in the Model Penal Code, 339 ANNALS 24, 28 (1963). "The Model Penal Code thus recognizes that the kind of culpability required by the law may not only vary from crime to crime within these limits but also from one to another material element of the offense . . . ." 
\end{itemize}
intercourse then he could not have been carrying out an intention to have intercourse without her consent." 77

One of the opinions discussed the "probative" burden defined in Woolmington v. Director of Public Prosecutions, 78 noting that the trend towards objectivity was a course which he was extremely reluctant to adopt. To allow the prosecution to prove the ultimate question of the presence of any element of a crime by less than "beyond a reasonable doubt" was undesirable.

The dissenting judges in Morgan wrote that the new rule went too far, allowing victims of "general intent" crimes to suffer at the expense of allowing "unreasonable" defendants to remain unpunished for their actions. Lord Simon of Glaisdale succinctly expressed this public policy: "A respectable woman who has been ravished would hardly feel that she was vindicated by being told that her assailant

77. 2 W.L.R. at 958 (L. Fraser of Tullybelton) following the decision in Morgan, Parliament enacted the Sexual Offenses Act of 1976, effective December 22, 1976, which defined the offense of rape as "having unlawful sexual intercourse with a woman without her consent, or reckless as to whether she consents to it." Subsection (2) is a declaratory provision applying whenever the jury at a trial for rape has to consider whether the defendant made a mistake of fact concerning the woman's consent at the time of the alleged offense. It emphasizes that the presence or absence of reasonable grounds for an alleged belief in the woman's consent is merely a factor which the jury is to take into account with other relevant evidence in considering whether the accused in fact had such a belief. See generally 126 NEW L.J. 1186 (1976). Weschler, the Reporter for the American Model Penal Code, notes that recklessness may be sufficient (as may be negligence in some cases) on questions of consent, as opposed to the purpose to effect the sexual relation, in rape cases. Wechsler, supra note 76, at 28. Recklessness involves conscious risk creation on the part of the actor. Id. at 29.

78. [1935] A.C. 462. This is the basis of the modern English view concerning burden of proof. Here the court allowed the appeal of a murder case where the charge had been that once the fact of killing was proved by the Crown, all circumstances of accident, necessity or infirmity were to be proved by the prisoner unless they arose out of the evidence produced by the State. Id. at 472. The court noted that:

Throughout the web of the English criminal law one golden thread is always to be see, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defense of insanity and subject also to any statutory exception.

Id. at 481. The Butler Commission on Mentally Abnormal Offenders has recommended replacing the burden of proof in such cases as Woolmington, and calls exceptions to the general rule with an evidential burden, or burden of production. See generally Williams, Intoxication and Specific Intent, 126 NEW L.J. 658 (1976); Williams, Murder—Drunkenness—Insane and Non-Insane Automatism, CAMB. L.J. 3, 5-6 (1962). Compare the Woolmington view with that of the American judiciary:

This presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary.

must go unpunished because he believed, quite unreasonably, that she was consenting to sexual intercourse.”

The Morgan dissenters, in addition to policy-based reasoning, continued to distinguish between crimes of specific, or ulterior intent, and those of general intent, or intention merely to do the actus reas. The majority in Morgan appeared willing to abandon the distinction entirely and to require actual knowledge or at least recklessness as elements of all crimes.

However, the recent case of Director of Public Prosecutions v. Majewski suggests that the distinction has not been lost to the British criminal law. Majewski was convicted of assault occasioning actual bodily harm and assault on police constables in the exercise of their duty; both are general intent crimes. The evidence indicated that, though under the influence of drink and drugs, he knew what he was doing. The trial judge instructed the jury that the fact that defendant was under the influence of drugs was no defense to charges not involving specific intent.

Majewski was convicted and his appeal was dismissed. Lord Chancellor Elwyn-Jones wrote the opinion:

In the case of these offences (not requiring specific intent) it is no excuse in the law that, because of drink or drugs which the accused himself had taken knowingly and willingly, he had deprived himself of the ability to exercise self-control, to realize the possible consequences of what he was doing, or even to be conscious that he was doing it.

The Lord Chancellor in Majewski quoted with approval Lord Simon’s statement in Morgan that “crimes of basic intent are those whose

79. 2 W.L.R. at 940 (L. Simon, dissenting).
80. Id. at 935 (L. Simon, dissenting). These concepts are discussed in connection with the American development of mens rea. See notes 2-7 infra, and accompanying text.
81. Id. at 925 (Opinion of L. Cross); id. at 933 (Opinion of L. Hailsham); id. at 949-50 (Opinion of L. Fraser). Compare MODEL PENAL CODE § 2.02(3). In the case of rape, since the mental element is not specified in MODEL PENAL CODE § 213, a mistake of fact would excuse if not made recklessly, MODEL PENAL CODE § 2.04(1)(a).

A similar approach was used by the court in D.P.P. v. Flannery and Prendergast [1969] V.R. 31 where a rape conviction was quashed since:

[one of the elements to be established on a charge of rape is an intention on the part of the accused to have carnal knowledge without the consent of the woman concerned, and that this involves proof by the crown either that the accused was aware that the woman was not consenting, or else realized that she might not be and determined to have intercourse with her whether she was consenting or not. Id. at 32. See Elliott, Australian Letter, 1969 CRIM. L. REV. 511, 515. Defendant still bears the evidential burden, or burden of production, however.

82. [1976] 2 All E.R. 142.
83. Id. at 172.
definition expresses (or more often implies) a *mens rea* which does not go beyond the *actus reus.*” He failed, however, to note that Lord Simon’s view was rejected by a majority of the House of Lords. 84

The *Majewski* decision is based on sound reasoning and its results well serve the ends of justice. 85 In contrast, American case law does not provide such excellent precedent. The leading American case, in which both the facts and the results were strikingly similar to those in *Majewski*, was unfortunately decided on the basis of the indefensible doctrine requiring a showing of reasonableness in mistake of fact defenses.

*United States v. Short,* 86 took place during the Korean War in the city of Tokyo. Private Short and a companion, both of whom had apparently been drinking, approached two Japanese women from behind. When one woman attempted to run, frightened by the English-speaking men, the other tripped and was caught by Short. He spoke to her in English; but, although she had learned some English in school, she was so afraid that she did not understand what was said, except that there was some mention of yen. Short then pulled her into a public latrine, closed the door, and fondled her while she protested loudly in Japanese. Short later claimed that he thought that the victim was a prostitute and was disagreeing only about the price offered for her services. In the meantime, her companion returned to the latrine with the victims employer, who opened the door, heard the victim saying “no” in Japanese, and saw Short holding her. The employer then summoned the police who, upon arriving on the scene, called out in Japanese for Short to stop. Short replied in the same language that everything was all right. He

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84. *See Williams, Intoxication and Specific Intent*, 126 *New L.J.* 658, 659-70 (1976), for a discussion of the case. Williams would no doubt approve of the majority decision in *Morgan*, at least for offenses not deemed “strict liability” like bigamy, which purport to do away with all but the voluntary act requirement. Williams notes that this might make intoxication a defense in all crimes where defendant did not know what he was doing; and therefore suggested a separate offense of dangerous intoxication. Williams, *The Mental Element in Crime*, 125 *New L.J.* 968, 969-70 (1975). Such an act seems to have been codified as part of the proposed Mentally Abnormal Offenders Act, Cmd. 6244 of 1975. There it would be a strict liability offense.

85. The logic of the British position does not in any way reflect upon my own or the modern judicial or legislative position regarding the offense of rape. Anyone who forces a woman against her will to submit to other men can go to prison, even if those other men get the benefit of the *Morgan* rule. *Regina v. Cogan and Leak*, [1975] 2 All E.R. 1059.

86. 4 C.M.A. 437, 16 C.M.R. 11 (1954).
was thereupon arrested, and ultimately convicted of assault with intent to commit rape by a general court martial in Japan.

When the case reached the Court of Military Appeals, review was granted to consider the denial of defense requests for several specific instructions. The one of concern here is proffered instruction number two:

In order to constitute an offense, the accused must think the victim is not consenting because he must intend not only to have carnal knowledge of the woman but to do so by force.

Short maintained that he sought to present a defense of mistake of fact. He cited an Alabama case where a rape conviction was reversed because the trial judge failed to give what Short felt was a similar instruction. The requested instruction in the Alabama case focused on the "honest and reasonable belief" that the prosecutrix, who in that case was weakminded, had consented.

Short's conviction was affirmed, the court noting that the omission of "reasonable" in the charge he requested was substantial but

87. Id. at 441, 16 C.M.R. at 15. Rape is generally considered a "general intent" crime—the actor must intend merely to have intercourse with a woman by force and against her will. See, e.g., Henry v. United States, 432 F.2d 114, 119 (9th Cir. 1970), modified, 434 F.2d 1283 (9th Cir. 1971), cert. denied, 404 U.S. 1001 (1971); Comment, Rape—Specific or General Intent Crime?, 15 WASH. & LEE L. REV. 128 (1958). Interestingly enough it is the only such crime that supports a conviction for felony murder, where theoretically the specific intent necessary to raise the degree of the homicide to first degree murder is derived from the specific intent proved for the underlying offense. See note 9 supra.

88. 4 C.M.A. at 439, 16 C.M.R. at 13.

89. Id. at 440, 16 C.M.R. at 14.

90. Id. at 441, 16 C.M.R. at 15.

91. Id. at 444-45, 16 C.M.R. at 18-19, citing McQuirk v. State, 84 Ala. 435, 4 So. 775 (1888). See also State v. Dizon, 47 Hawaii 444, 390 P.2d 759 (1964). The McQuirk charge, 84 Ala. at 437, 4 So. at 776, was reported by the appeals court as follows:

The fourth charge requested by the defendant should also have been given. The consent given by the prosecutrix may have been implied as well as express, and the defendant would be justified in assuming the existence of such consent if the conduct of the prosecutrix towards him... was of such a nature as to create in his mind the honest and reasonable belief that she had consented by yielding her will freely to the commission of the act.

An example of a recent similar case is People v. Maybury, 15 Cal. 3d 449, 125 Cal. Rptr. 745, 542 P.2d 1337 (1975). At trial the "reasonable mistake of fact" charge was omitted, resulting in defendant's conviction of rape where his victim's conduct had been truly equivocal. The California Supreme Court reversed, holding that it was necessary to give the requested charge.

92. 4 C.M.A. at 445, 16 C.M.R. at 19. One gets the feeling that the same result might have been reached under the doctrine in Morgan, see note 76 supra, either by
that the trial judge was correct in refusing it, because “[t]he accused’s personal evaluation of the circumstances is but one factor to be considered by the court; it is not conclusive.” 93

The dissent in Short focused on the difference between the general intent crime of rape, where reasonableness might be needed for a valid defense of mistake of fact; and the specific intent crime of assault with intent to commit rape, where defendant should be entitled to an instruction on mistake of fact regardless of reasonableness.94 Hypothetically at least, had the court accepted the defense argument the results might have been different, since Short maintained that his mistake, although possibly unreasonable, was an honest one. He might on the other hand, still have been convicted if the trier of fact found that he was criminally reckless when he made the mistake.95 Short was intoxicated. Therefore, even if he believed the woman was consenting (a doubtful fact, since from the testimony he evidently spoke some Japanese), his belief in her consent would have been deemed reckless. He would still have been found guilty.

V. CONCLUSION

The contrast between the approaches taken in Morgan and Short thus illustrate a failure in America’s otherwise enlightened criminal justice formulations. American courts could remedy the situation by eliminating the “reasonableness” requirement in mistake of fact cases, either for reasons of logic or because the due process requirements of the Constitution require them to do so. American legislatures (or applying a recklessness standard, as was impliedly done in Morgan, see note 81 supra, or by considering Short guilty because his act was malum in se. See, e.g., United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976), cert. denied, 429 U.S. 1120 (1977) (mistake of law); Regina v. Prince, 2 Crim. Cas. Res. 154 (1875). Cf. United States v. Feola, 420 U.S. 671, 684 (1975).

93. 4 C.M.A. at 445, 16 C.M.R. at 19.

94. Id. at 446-47, 16 C.M.R. at 21. In making this distinction, Judge Brosman comes very near to the opinion of Lord Simon of Glaisdale, dissenting in Morgan, 2 W.L.R. at 937, see note 79 supra.

95. See Wechsler, On Culpability and Crime: The Treatment of Mens Rea in the Model Penal Code, 339 ANNALS 24, 34 (1963); MODEL PENAL CODE § 2.08(2): “When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such awareness is immaterial.” Wechsler notes that the policy of the provision is that “awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is so dispersed in our culture that it is fair to postulate a general equivalence—in respect to culpability—between the risks created by the conduct of the drunken actor and his conduct in becoming drunk.” See, e.g., Springfield v. State 96 Ala. 81, 85-86, 11 So. 250, 252 (1892).
courts construing the mens rea requirements of particular statutes) could alternatively resolve the problem by enacting general intent crimes requiring *recklessness*, instead of *unreasonableness*, as a minimum standard for conviction.

The Supreme Court has recently stated that its concern is with what the defendant actually thought and did, rather than the question of whether a procedural mistake was made at his arrest or trial. The Court continues to find that "it is far worse to convict an innocent man than to let a guilty man go free." Due process only requires that the balance be struck in favor of the defendant. It does not require that "every conceivable step be taken, at whatever cost" to limit the chances that the innocent might be convicted. Therefore, it cannot be said that the Court is placing an impossible burden on the State.

It seems just as unconstitutional to relax the prosecution's burden of proof in mistake of fact cases as it is in the "heat of passion" situation considered in *Mullaney*. It is indeed ironic that American courts appear more willing to punish rather than to acquit a person who is unfortunate, but guilty of no crime, than they are to *mitigate* the penalty for one who is conceivably guilty of some offense. Excuses developed in the law of homicide prior to mitigating factors, an

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96. Compare Stone v. Powell, 428 U.S. 465 (1976) (fourth amendment exclusionary rule is only a prophylactic tool and should not apply to federal habeas corpus once reviewed in state court of alleged search and seizure); with United States v. Feola, 420 U.S. 671, 686 (1975):

[T]here may well be circumstances in which ignorance of the official status of the person assaulted or resisted negates the very existence of mens rea. For example, where an officer fails to identify himself or his purpose, his conduct in certain circumstances might reasonably be interpreted as the unlawful use of force directed either at the defendant or his property. In a situation of that kind, one might be justified in exerting an element of resistance, and an honest mistake of fact would not be consistent with criminal intent.

and Hampton v. United States, 425 U.S. 484 (1976) (the issue of entrapment can only be raised when defendant has no predisposition to commit the crime in question); United States v. Freed, 401 U.S. 601, 607-09 (1971) (affirming conviction for possession of unregistered hand grenade; conduct of accused not likely to be innocent).


100. Perhaps the earliest discussions of excuse are found in the Bible: "Whoever strikes a man so that he dies shall be put to death. But if he did not lie in wait for him, but God let him fall into his hand, then I will appoint for you a place to which he may flee." *Exodus* 21:12-13.

This is the provision for the manslayer, who by fleeing there may save his life. If any one kills his neighbor unintentionally without having been at enmity
indication, perhaps, of the court's traditional unwillingness to punish an accused in the absence of moral culpability. At any rate, there can hardly be a finding of guilt "beyond a reasonable doubt" where in fact defendant did not know that he was doing harm.

with him in time past—as when a man goes into the forest with his neighbor to cut wood, and his hand swings the axe to cut down a tree, and the head slips from the handle and strikes his neighbor so that he dies—he may flee to one of these cities and save his life; lest the avenger of blood in hot anger pursue the manslayer and overtake him, because the way is long, and wound him mortally, though the man did not deserve to die, since he was not at enmity with his neighbor in time past. Therefore I command you, You shall set apart three cities.
