Soundoff continued
Pappajohn rape trial letter erroneous

Dear Sir:

I am not sure that Mr. Pappajohn would think that the letter that appeared in your March 6, 1981"Soundoff" column, entitled "'Honest belief' no defense for rapists" was very funny. Contrary to Ms. Good's claim that the "assailant was freed," Mr. Pappajohn was convicted and is currently serving time in the B.C. Penitentiary. I feel compelled to reply, at some length, to Ms. Good's letter because it contains a number of serious errors with respect to the law of rape. In addition, an appreciation of the legal principles with respect to the issue of rape should help your readers decide whether or not they would like to support Mr. Robinson's bill to amend the Criminal Code.

It is a fundamental precept of our system of criminal justice that a person cannot be adjudged guilty and subjected to punishment unless the Prosecution can prove, beyond a reasonable doubt, that the accused committed the offensive acts (the actus reus) with guilty mind (the mens rea). This mens rea, which consists of some positive state of mind, such as evil intention, or knowledge of the wrongfulness of the act, or reckless disregard of consequences, is an essential and constitutent step in establishing criminal responsibility.

The nature and extent of the actus reus and the mens rea to be proven by the Prosecution will vary according to the particular crime at issue; that is, they can only be determined by a detailed examination of the charging section in the Criminal Code. What then, are the physical and mental elements required under sec. 143 of our Criminal Code on a charge of rape?

Section 143 defines rape as an act of sexual intercourse with a female person without her consent. The actus reus of rape is therefore complete upon (a) an act of sexual intercourse; (b) without consent. However, an affirmative finding as to each of these elements does not finish the inquiry, for, the requirement that there be a guilty intention with respect to each element of the actus reus must also be satisfied. A very long line of English and Canadian legal decisions lends support to the proposition that a guilty mind must be proven in relation to *all* elements of the offence of rape, including absence of consent. This principle simply extends to rape the same general order of intention as in other serious crimes.

The next issue is, therefore, to determine whether a mistake of fact can be used by an accused in a rape case to negative mens reas - guilty intention. It will be helpful to turn briefly to the argument in the *Pappajohn* case to answer that question. At trial, the jury found that, as a matter of fact, the victim did not consent to sexual intercourse (as we have seen above, an element of the actus reus). However, Pappajohn argued that even assuming that the victim did not consent, *he believed she did consent*. As an accepted long standing principle of our criminal law, a mistake of fact is a defence where it prevents an accused from having the mens reas which the law requires for the very crime with which the accused is charged. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nontheless commits the actus reus of the offence. Again, the principle of mistake of fact affords the accused no more, but no less, of a defence on a charge of rape than he would have for any other serious crime. For example, in *R v Beaver*, the accused testified that he believed that a package, found in his possession, only contained milk sugar; in fact, it contained heroin and the accused was charged with possession of heroin. Although the Prosecution had no difficulty in proving, beyond a reasonable doubt, the actus reus of the offence (possession of the drug), the Supreme Court of Canada allowed the defence of mistake of fact because mens rea formed an essential ingredient of the possession charge. The Court stated:

Has X possession of heroin when he has in his hand or in his pocket a package which in fact contains heroin but which he honestly believes contains only baking soda? In my opinion, that question must be answered in the negative.

The next, and perhaps the most important question which must now be broached is whether a defence of honest, tho mistaken, belief in consent must be based on reasonable grounds. An act is reasonable in law when it is such as a person of ordinary care would do under similar circumstances: to require that the mistake be reasonable means that, if the accused is to have a defence, he must have acted up to the standard of an average person, *whether the accused is himself such a person or not;* this is the application of an outer, objective standard to the individual. If the accused is to be punished because his mistake is one which an average person would not make, punishment will sometimes be inflicted when the criminal mind does not exist.

It seems clear that both legal scholars and the courts in Canada and England have rejected the contention that a defence of mistake of fact must be based on reasonable grounds. Thus, in the *Beaver* case the Supreme Court of Canada held:

The essential question is whether the belief entertained by the accused is an honest one and that the existence or non-existence of reasonable grounds for such belief is merely relevant evidence to be weighed by the tryer of fact in determining such essential questions.

Therefore, if a jury finds evidence of a mistake of fact, whether reasonable or unreasonable, upon the existence of a guilty intention (mens rea) then the Prosecution has failed to make its case and there is no conviction.

I hope that the outline of the above principles illustrates some of the glaring errors contained in Ms. Good's letter concerning the *Pappajohn* case. First, Mr. Pappajohn did not honestly believe that the vitim wanted to be raped: he argued that he honestly believed that she consented to sexual intercourse. Second, Mr. Pappajohn did not argue that because he was emotionally sick he should be acquited and the Court would, in any case, not have entertained such an argument. Third, the *Pappajohn* case does not set a precedent in Canadian law; it merely follows a long line of authority which has established the principles I have outlined above. Finally, the contention that the *Pappajohn decision now "means that women could face either additional brutality or death, by submitting, the criminal can be freed on precedent of this decision on 'honest belief" is simply wrong and a dangerous statement to make. Section 143 (b) (i) states that a male person commits rape when he has sexual intercourse with a female person who is not his wife with her consent* if the consent is extorted by threats of fear or bodily harm.

I sincerely hope that the above comment will allow your readers to make a reasoned decision on whether or not they would like to support Mr. Robinson's private members bill amending the Criminal Code so that an accused will only have available to him the defence of mistake of act if, contrary to accepted principles of our criminal law, the mistake is based upon reasonable grounds. The accused in a rape case is then judged not by what he believes, but by what a reasonable person would believe.

Yours sincerely,
Hajo Versteeg,
Professor in Criminal Law
Assistant Professor of Law
University of New Brunswick

Teachers needed

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John P. McAndrew, President
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Coups a problem in Africa

Dear Sir:

One of the most persistent and most difficult problems in Africa is the presence and proliferation of coups. In some cases the coups may be justified. A typical example of this type may be the coup that ousted the "Unique Miracle," "the Grand Master of Education, Science and Culture", and President-for-Life, Macias Nguema of Equatorial Guinea. But in most cases African coups are not only unjustified but also unnecessary. In this category are the coups that are planned and executed by a few selfish hot heads with the aim of discrediting a capable and successful leader of a nation or organization.

Unfortunately, this is a common feature in African political life where the illiterate majority (89 out of every 100 persons on average) cannot usually question the motives of the plotters for obvious reasons. But what is bad about this type of coups is that a few African students have managed to slip through the vigilant Canadian immigration with the coup mentality into Fredericton. The abortive coup within the African Student Union recently was a case in point.

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