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Review of Selected 1994 California Legislation

Crimes

**\*419 CRIMES; RAPE--LACK OF CONSENT**

[Penal Code § 261.7](#) (New). SB 1351 (Marks); 1994 Stat. Ch. 907

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In prosecutions for specified sexual offenses, [\[FN1\]](#) existing law defines consent as an act or attitude that signifies the victim's free will. [\[FN2\]](#) Existing law further provides that a defendant's honest and reasonable belief that a victim consented to sexual intercourse may negate criminal intent and as such, may serve as a defense to rape. [\[FN3\]](#) Chapter 907 requires that in prosecutions for certain sexual **\*420** offenses, the victim's request or suggestion to the defendant that a condom or other form of birth control be used, in absence of other evidence, will not be sufficient to constitute her consent to his actions. [\[FN4\]](#)

INTERPRETIVE COMMENT

Chapter 907 was initiated in part as a response to a nationally publicized rape case in Texas in which the defendant claimed his victim consented to intercourse because she requested that he wear a condom. [\[FN5\]](#) Although the defendant was **\*421** ultimately convicted, the case drew attention to the law's inadequacy in addressing a victim's attempt to protect her future health after being raped. [\[FN6\]](#) Thus, Chapter 907 seeks to ensure that rape victims feel secure in their attempt to protect themselves from sexually transmitted diseases, if not from the actual rape itself, without having the accused misrepresent the communication before the jury. [\[FN7\]](#)

Opponents of Chapter 907, however, suggest that while no jury would believe such a defense, a victim's plea to the defendant that he wear a condom before raping her is a factual circumstance that the jury is entitled to consider in some situations. [\[FN8\]](#) Furthermore, by withholding certain facts from the jury as insufficient to establish consent, opponents assert that the jury may ultimately be confused as to what facts are relevant in determining if consent was obtained prior to the act of intercourse. [\[FN9\]](#)

[\[FN1\]](#). See [CAL. PENAL CODE § 261\(a\) \(West Supp.1994\)](#) (defining rape as an act of sexual intercourse with an individual other than the spouse of the actor under specified circumstances demonstrating the victim's lack of consent); [id.](#) § 286(d) (West Supp.1994) (listing the elements which comprise the crime of sodomy against another's will); [id.](#) § 288a(d) (West Supp.1994) (providing criminal response for one who accomplishes oral copulation against another's will); [id.](#) § 289(a) (West Supp.1994) (describing the crime of penetration by a foreign object of someone

else's anal or genital openings against his or her will).

[FN2]. *Id.* § 261.6 (West Supp.1994); see *id.* (stating that in order to constitute consent, the victim must be aware of the nature of the accused's act and must indicate consent freely and voluntarily and noting that the victim's past or present dating relationship with the defendant will not be sufficient to constitute consent); see also [People v. Nash](#), 261 Cal. App. 2d 216, 223, 67 Cal. Rptr. 621, 625 (1968) (explaining that manifestation of the victim's nonconsent would satisfy the minimal degree of resistance necessary to defend against a rapist), cert. denied, 393 U.S. 944 (1968); [People v. Lay](#), 66 Cal. App. 2d 889, 893, 153 P.2d 379, 381 (1944) (asserting that there can be no consent when the victim is threatened with great bodily harm); cf. [People v. Stengel](#), 570 N.E.2d 391, 396 (Ill. 1991) (holding that the victim's failure to cry out or resist could not constitute consent in such sexual crimes where the woman is in fear of harm), appeal denied, 580 N.E.2d 130 (Ill. 1991); [Hernandez v. State](#), 804 S.W.2d 168, 170 (Tex. App. 1991) (concluding that victims of sexual assault did not have to resist and that the analysis in deciding defendant's guilt should focus on his compulsion, as opposed to the resistance by the victim); [State v. Woodfork](#), 454 N.W.2d 332, 334 (S.D. 1990) (discussing a rape case in which the defendant asserted that the victim's theft of condoms should be admissible as to the issue of consent).

[FN3]. [People v. Mayberry](#), 15 Cal. 3d 143, 157, 542 P.2d 1337, 1346, 125 Cal. Rptr. 745, 754 (1975); see *id.* (finding that the defendant only had to raise a reasonable doubt as to his reasonable and good faith belief in the victim's consent); *id.* at 154, 542 P.2d at 1344, 125 Cal. Rptr. at 752 (noting that one who acts under mistake of fact is generally not criminally liable due to a lack of criminal intent); see also [People v. Williams](#), 4 Cal. 4th 354, 362, 841 P.2d 961, 966, 14 Cal. Rptr. 2d 441, 446 (1992) (concluding that since the Mayberry instruction was based on the defendant's mistake of fact, such an instruction will only be granted if the defendant has demonstrated the victim's equivocal conduct through substantial evidence and noting that instructions as to mistake of fact should not be given in cases where the defendant is relying on actual consent as a defense); [People v. May](#), 213 Cal. App. 3d 118, 127, 261 Cal. Rptr. 502, 507 (1989) (deciding that when the jury concludes that neither party to a rape trial is being truthful, and the defendant is only asserting a defense of actual consent, the court has a sua sponte obligation to instruct the jury about the defendant's reasonable and good faith belief as to consent), review denied, 1989 Cal. LEXIS 4812 (1989); [People v. Bruce](#), 208 Cal. App. 3d 1099, 1104, 256 Cal. Rptr. 647, 649 (1989) (contrasting the defense of consent against the Mayberry defense as to mistake of fact, and noting that while the defense of consent allows the jury to choose between the victim's and defendant's version of the incident, the reasonable and good faith belief as to the consent defense permits the jury to accept both the defendant's and victim's versions as true); cf. [Merced Mut. Ins. Co. v. Mendez](#), 213 Cal. App. 3d 41, 51, 261 Cal. Rptr. 273, 280 (1989) (determining that an unreasonable belief as to a victim's consent, despite being honest, would still violate the criminal provision against forcible oral copulation); [People v. Bolton](#), 566 N.E.2d 348, 352 (Ill. 1990) (ruling that a victim's choosing to be sexually assaulted by one individual rather than repeated sexual assaults by others does not establish her consent to the sexual crime); [People v. Leonhardt](#), 527 N.E.2d 562, 567 (Ill. 1988) (holding that the mere provocation of a rapist who used force or the threat of force to obtain sexual intercourse would not establish implied consent). See generally [CALJIC § 10.65 \(5th ed. West Supp.1994\)](#) (providing that a reasonable and good faith belief as to voluntary consent is a defense to the charges of forcible rape, oral copulation by force or threat, forcible sodomy, and penetration of the anal or genital opening by a foreign object and stating, however, that if the victim's equivocal conduct is based upon force, violence, duress, or fear of immediate physical harm, the defendant's belief that the victim consented will not be considered reasonable and in good faith); John C. Meyer, Review of Selected 1990 Legislation, Criminal Procedure; Sex Offenses-Consent, 22 PAC. L.J. 323, 525-26 (1991) (examining the treatment of consent as applied to sexual relations under California law).

[FN4]. [CAL. PENAL CODE § 261.7](#) (enacted by Chapter 907); see Interview with Joshua M. Dressler, Professor of Law, McGeorge School of Law, in Sacramento, California (Oct. 4, 1994) (notes on file with Pacific Law Journal) (suggesting that the clause "without other evidence of consent" within Chapter 907 invites a judge to instruct a jury in such a manner that may preclude any finding of consent and asserting that Chapter 907 does not speak to the issue of mistake of fact; thus, even though a jury may not construe a victim's request for a condom as an indicator of consent, an acquittal may still be possible based upon the defendant's reasonable and good-faith belief); Interview with Michael M. Vittielo, Professor of Law, McGeorge School of Law, in Sacramento, CA. (Sept. 16, 1994) (notes on file with

Pacific Law Journal) (noting that in the absence of the clause specifying that additional evidence of consent was necessary for raising the condom issue as to consent, the law might have conflicted with the defendant's constitutional right to raise a defense, but suggesting that per Mayberry, a question of reasonable belief as to consent might be raised because of the defendant's inference that the victim consented by her request that he wear a condom); cf. [Mayberry at 157, 542 P.2d at 1346, 125 Cal. Rptr. at 754](#) (holding that the defendant could raise a defense of mistake of fact as to his belief that the victim consented to having sexual intercourse with him). But see Interview with Joshua M. Dressler, *supra* (noting further that pursuant to Chapter 907, a victim's asking of her attacker to use a condom is not necessarily equivocal conduct; therefore, per the Williams decision, a mistake of fact instruction will not necessarily have to be given); see also [Williams, at 362, 841 P.2d at 966, 14 Cal. Rptr. 2d at 446](#) (holding that it is incumbent upon the defendant to prove the victim's equivocal conduct through substantial evidence).

[\[FN5\]](#). SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1351, at 2 (Aug. 17, 1994); see Ron Arias, Threatened With Rape, Elizabeth Wilson Begged Her Attacker to Wear a Condom. He Did-And a Grand Jury at First Let Him Go, PEOPLE, May 31, 1993, at 87 (detailing both the rape and the surrounding aftermath of an attack where victim Elizabeth Wilson requested that her attacker Joel Valdez wear a condom and explaining that although she asked him to wear a condom, he initially refused before ultimately complying only after she suggested to him that she might have AIDS); Man Who Was Asked to Use Condom Guilty of Rape, L.A. TIMES, May 14, 1993, at A34 (discussing the Texas case where victim Elizabeth Wilson plead with her rapist, Joel Valdez, to wear a condom due to her fear of contracting AIDS); Judy Mann, Beyond the Risk of Rape, WASH. POST, Oct. 16, 1992, at E3 (describing community outrage at the Austin, Texas grand jury's refusal to indict accused rapist Joel Valdez due to his victim providing a condom and noting that the grand jury had failed to indict him despite evidence that demonstrated the victim was held at knife-point and had run naked to a neighbor's house for assistance after the ordeal).

[\[FN6\]](#). ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1351, at 1 (Aug. 15, 1994); see *id.* (citing the State Bar Conference of Delegates' assertion that prior to the enactment of SB 1351, California law compelled a woman to choose between protecting herself or risk being found by a jury to have consented to rape); see also Arias, *supra* note 5 (reporting that after significant public outcry, a subsequent grand jury indicted the accused rapist who was ultimately found guilty and sentenced to 40 years in prison).

[\[FN7\]](#). SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1351, at 2 (Aug. 17, 1994); see also ASSEMBLY FLOOR, COMMITTEE ANALYSIS OF SB 1351, at 1 (Aug. 15, 1994) (explaining that SB 1351 is necessary because a victim's attempt at keeping herself free from further harm from a rapist may be construed as consensual behavior); Mann, *supra* note 5 (warning that rape today involves not only the loss of self-worth and the risk of immediate physical injury to the victim, but also includes the possibility of contracting AIDS). But see Interview with Joshua M. Dressler, *supra* note 4 (noting that instances of date-rape will presumably not be affected by Chapter 907 due to the "without other evidence" clause).

[\[FN8\]](#). SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1351, at 2 (Aug. 17, 1994); see *id.* (citing opposition from the California Attorneys for Criminal Justice); see also Interview with Michael M. Vittielo, *supra* note 4 (suggesting concern that the defendant may not be able to present evidence as to mistake of fact without additional evidence of consent).

[\[FN9\]](#). SENATE FLOOR, COMMITTEE ANALYSIS OF SB 1351, at 2 (Aug. 17, 1994).

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