

The Gap Between Canada's Common Law and Constitutional Standards of Fault

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Introduction

At first glance, Canada's experience with the constitutionalization of fault principles seems robust and promising. Unlike in the United States, the Supreme Court of Canada has struck down felony murder and statutory rape provisions as inconsistent with constitutional requirements of fault. In addition, the Court has also articulated a range of constitutional principles relating to absolute liability, the need for proportionality between moral blameworthiness and punishment and the need to distinguish negligence as a form of criminal liability from its use for purposes of civil liability as well as from subjective fault.¹ Those who examine Canada's experience, especially in a comparative light, may be tempted to conclude that it provides a good example of how criminal law fault principles can be constitutionalized.

A closer examination of the Canadian experience, however, suggests that not all is well with the constitutionalization of fault.² There has been significant slippage between common law standards of fault articulated in a series of cases before the Charter and the actual standards of fault that have been enforced by Canadian courts under the Charter. For example, common law presumptions against absolute liability and in favour of subjective fault in relation to all aspects of the actus reus have been narrowed into Charter standards that cheerfully allow absolute liability in cases where the accused's rights under s.7 of the Charter to life, liberty and security of the person are not infringed and accepts negligence liability except for a list of stigma offences that so far only includes murder, attempted murder and war crimes. In addition, the Canadian court has disparaged the idea that fault should generally be proven in relation to all aspects of the prohibited act as a matter of "theory" that is not worthy of recognition as a principle of fundamental justice under s.7 of the Charter.

¹ *R. v. Creighton* [1993] 3 S.C.R. 3; *R. v. Beatty* [2008] 1 S.C.R. 49; *Re B.C. Motor Vehicles* [1985] 2 S.C.R. 486.

² The "slippage" or gap between the two was recognized over a decade ago in Alan Brudner "Guilt Under the Charter: The Lure of Parliamentary Supremacy" (1998) 40 C.L.Q. 287 at 308ff

The first part of this paper will document the gap that has emerged between Canada's common law standards and its constitutional standards of fault. This empirical point has been made before, but needs to be made with care and comprehension to show how wide spread and systemic that slippage has been. The gap can no longer be seen as a product of isolated cases that can eventually be marginalized or dismissed as wrongly decided. After over a quarter of a century's experience with the Charter, it has emerged as an entrenched and systemic phenomenon. Rightly or wrongly, there is no going back to a world where common law fault principles are constitutionally protected.

The second part of the paper will attempt to provide some explanations for the gap between common law and constitutional standards of fault and to provide some strategies for what, if anything, should be done about the divergent approaches to fault under common and constitutional law. One option is simply to accept the gap and conceive of common law and constitutional standards as two separate lines of defence against incursions on fault principles. Such an approach can be defended on legal process grounds as recognizing the institutional differences between common law and constitutional law. At the same time, such an approach may be unstable especially if common law and constitutional standards are based on different understandings of fault and if constitutional law is treated as the younger more glamorous sibling who overshadows the older and more staid common law. As will be seen, there is some basis for concluding that Canada's common law standards of fault that were developed largely in the 1960's and 1970's reflect the orthodoxy of subjectivism while Canada's constitutional standards of fault developed in the 1980's and 1990's reflect increased acceptance of negligence as a legitimate basis for criminal liability. There is some evidence that the newer and firmer constitutional standards are eclipsing the older and less absolute common law standards.

An alternative strategy, also rooted in the legal process approach, would be to understand the gap between common law and constitutional standards as largely a product of the Supreme Court's unique treatment of s.7 of the Charter. Unlike any other right in the Charter, the Supreme Court has held that s.7 rights are close to absolute and should generally only be subject to reasonable limitation under s.1 of the Charter in

extraordinary or emergency situations.³ It will be suggested that this unique treatment of s.7 may help explain why the Court has been so reluctant to constitutionalize earlier common law standards. This argument is based on an assumption that the court does not object to the subjective and harm based standards of the common law in principle, but rather is concerned that they may prove inflexible and inconvenient if constitutionalized under s.7 of the Charter. A more flexible approach to s.7 which recognizes the legitimacy of justified departures from s.7 standards then could open the way to the constitutionalization of common law standards. Such an approach, however, depends on both the court's acceptance of the premises of the common law standards and the ability of s.1 and perhaps s.33 of the Charter to provide appropriate vehicles to allow justified and legitimate departures from subjective standards of fault.

A final explanation for the divergence between common law and constitutional standards of fault is more speculative and more corrosive of principles of fault. This explanation is based on the idea that Canadian courts are actually ambivalent to principles of subjective fault and that this ambivalence has been manifested through the hesitant and half-hearted approach to constitutionalizing fault principles. In this vein, the Court's refusal to constitutionalize the principle that fault should be proven for all aspects of the prohibited act may be a sign that the court is not fully committed to the idea that people should be punished on the basis of their responsibility for harm as opposed to the harm that they have committed. Similarly the Court's hesitant constitutionalization of subjective fault principles may be an indication that it is ambivalent about principles which focus on inferences about the accused's mental states as opposed to objective and overtly moral judgments about their culpability.⁴ In this vein, the Court's acceptance of negligence liability and its attempts to ensure that negligence liability is adopted to the criminal context and adequately distinguished from civil negligence provides some evidence of the Court's attraction to alternatives to subjective fault. This explanation for the gap between common and constitutional

³ *Re B.C. Motor Vehicles* [1985] 2 S.C.R. 486; *R. v. Ruzic* [2001] 1 S.C.R. 687.

⁴ For criticisms of subjective standards see James Stribopolous "The Constitutionalization of 'Fault' in Canada: A Normative Critique" (1999) 42 *Crim.L.Q.* 227; George Fletcher "The Meaning of Innocence" (1998) 48 *U.T.L.J.*

standards of fault is the most corrosive of the explanations offered in this paper because it produces no obvious quick fix. In other words, ambivalence about fault cannot be cured by a better understanding of the respective roles of common law and constitutional protections or of the dialogic nature of the Canadian Charter of Rights. They can only be cured by a fuller commitment to such principles and one that is strong enough to reject or depart from the Court's established jurisprudence. Viewed in this light, the partial constitutionalization of fault principles in Canada can be seen as a fragile remnant of principles that were more fully accepted at an earlier time and are likely to enjoy less support in the future.

I. The Gap Between Common Law and Constitutional Standards of Fault

Some historical analysis is necessary to understand the gap that has been created between Canada's common law and constitutional standards of fault. There has been a tendency for Canadian commentators and courts to be present-minded in the era of the Charter. As this part of the paper will demonstrate, this approach is a mistake because there were significant protections for fault in Canadian law long before the enactment of the Charter.

Common Law Protections of Subjective Fault

In the 1957 case of *Beaver*⁵, a majority of the Supreme Court applied various common law presumptions of the fault to hold that proof of subjective knowledge of the nature of the prohibited drug was required to convict a person of possession of prohibited drugs under the then *Opium and Drug Act*. In reaching this conclusion, Cartwright J. invoked 19th century British precedents that no innocent person should be punished by a literal construction of an offence and the idea that it "is contrary to the whole established law of England (unless the legislation on the subject has clearly enacted it) to say that a person can be guilty of a crime in England without a wrongful intent".⁶ He also corrected the reference in the 1889 case of *Tolson* to honest and reasonable mistake of fact being a defence to only require a honest mistake.⁷ These

⁵ [1957] S.C.R. 531

⁶ Ibid at 537 quoting *Attorney General v. Bradlaugh* (1885), 14 Q.B.D. 667 at 689-90

⁷ Ibid at 539

statements were made in the face of dissents that the drug offence should be treated as a regulatory crime. Although *Beaver* constitutes a strong statement in favour of subjective fault principles⁸, the commitment was not absolute. The Court recognized that Parliament could clearly displace such principle and upheld the conviction of the accused for selling drugs that he mistakenly thought were a harmless substance because the trafficking offence as opposed to the possession offence was constructed to apply to goods that were represented to be prohibited drugs.

The presumption of subjective fault in *Beaver* was subsequently affirmed in two landmark decisions by Justice Dickson rendered in the late 1970's and early 1980's. Although the case dealt with presumptions against absolute liability to be discussed below, Justice Dickson's decision in *Sault Ste Marie* ⁹ also affirmed a sweeping and general presumption of subjective fault for all criminal offences.¹⁰ Two years later in *Pappajohn*, Dickson J. re-affirmed this presumption of subjective fault by stating that "there rests now, at the foundation of our system of criminal justice, the precept that a man cannot be adjudged guilty and subjected to punishment, unless the commission of the crime was voluntarily directed by a willing mind."¹¹ and by defining mens rea as including "some positive states of mind, such as evil intention, or knowledge of the wrongfulness of the act, or reckless disregard of consequences"¹² but not including negligence. This followed from the statements in *Sault Ste Marie* that "mere negligence is excluded from the concept of the mental element required for conviction" of a criminal offence and that "within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or fails to know facts he should have known, is innocent in the eyes of the law."¹³

⁸ For earlier statements in favour of subjective see *Watts v. The Queen* [1953] 1 S.C.R. 505 per Estey J. reading in mens rea to Criminal Code offence of refusing to give up drift timber.

⁹ [1978] 2 S.C.R. 1299

¹⁰ Ibid at 1326

¹¹ Ibid at 138

¹² Ibid at 139

¹³ *Sault Ste Marie* supra at 1309-1310.

In addition, the *Pappajohn*¹⁴ common law presumption of subjective fault was with reference to the text writer Glanville Williams, extended to include "all circumstances and consequences that form part of the *actus reus*."¹⁵ Although Dickson J. dissented on the merits of the case, all members of the Court agreed with his doctrinal comments which were made only two years before the enactment of the Charter. At the same time, it should be noted that Dickson's defence of subjective principles was subject to extensive criticism by some feminist scholars who argued that it disregarded the sexual assault context.¹⁶ As will be seen, the general *Pappajohn* principles of subjective fault in relation to all aspects of the *actus reus* have not been constitutionalized and the specific *Pappajohn* mistaken belief in consent defence has in the sexual assault context been modified by Parliament to require the accused to take reasonable steps in the circumstances known to him to ascertain whether the complainant has consented to sexual activity.

Common Law Presumptions about the Correspondence of Mens Rea and Actus Reus

In the 1956 case of *Rees*¹⁷, the Court held that the mens rea requirement of knowingly or willfully contributing to a child's delinquency should be applied to all the elements of the offence including the fact that the person was a child. The result was to allow a defence of honest but not necessarily reasonable mistake of fact with respect to the accused's belief that the child in question was an adult. Cartwright J. quoted Glanville Williams in support and stressed that "It would indeed be a startling result if it should be held that in a case in which Parliament has seen fit to use the word "knowingly" in describing an offence honest ignorance on the part of the accused of the one fact which alone renders the action criminal affords no answer to the charge."¹⁸ As discussed above, the common law presumption that subjective mens rea would apply to all aspects of the *actus reus* was affirmed in Justice Dickson's decision in *Pappajohn*. All of these common law presumptions of fault were, of course, subject to clear statutory abrogation.

¹⁴ [1980] 2 S.C.R. 120.

¹⁵ *Ibid* at 139

¹⁶ See for example Toni Pickard "Culpable Mistakes and Rape" (1980) 30 U.T.L.J. 75.

¹⁷ [1956] S.C.R. 640

¹⁸ *Ibid* at 651-653

Common Law Presumptions Against Absolute Liability

The common law presumption against absolute liability in which guilt follows from proof of the criminal act was not recognized until the late 1970's. Until that time, Canadian courts would either interpret statutory offences as requiring full subjective mens rea as in the *Beaver* case discussed above, or as allowing absolute liability without any inquiry into the accused's fault.¹⁹ In the 1978 case of *Sault Ste Marie* ²⁰, the Supreme Court unanimously articulated a strong common law presumption against all absolute liability offences. The presumption applied even to regulatory offences such as the pollution offence in question that did not provide for imprisonment for a first offence and could be regarded as of "civil nature" or as "a branch of administrative law."²¹ Dickson J. reasoned that absolute liability in all its guises violated "fundamental principles of penal liability" and he specifically dismissed arguments that regulatory offences did not have a sufficient stigma to require proof of fault on the basis that the accused will "have suffered loss of time, legal costs, exposure to the processes of the criminal law, and, however one may downplay it, the opprobrium of conviction."²² The presumption against absolute liability for any statutory offence was, of course, not absolute. It could be displaced if the legislature "made it clear that guilt would follow proof merely of the proscribed act. The overall regulatory pattern adopted by the Legislature, the subject matter of the legislation, the importance of the penalty, and the precision of the language used will be primary considerations in determining whether the offence"²³ was one of absolute liability.

Constitutional Protections of Subjective Fault

In its initial forays into constitutionalizing mens rea principles, the Supreme Court of Canada showed some attraction to the idea that the subjective fault principles that were articulated in cases such as *Beaver*, *Sault Ste Marie* and *Pappajohn* should receive protection under s.7 of the Charter. In *R. v. Vaillancourt* ²⁴, Lamer J. stated that

¹⁹ *R. v. Pierce Fisheries* [1971] S.C.R. 5

²⁰ [1978] 2 S.C.R. 1299.

²¹ *Ibid* at paras 1302-3

²² *Ibid* at 1311-1312.

²³ *Ibid* at 1326

²⁴ [1987] 2 S.C.R. 636

"It may well be that, as a general rule, the principles of fundamental justice require proof of a subjective *mens rea* with respect to the prohibited act, in order to avoid punishing the "morally innocent".²⁵ Nevertheless, he limited himself to striking down an offence that deemed any killing with a firearm during the commission of a serious crime to be murder on the basis that it did not even ensure objective foresight of death. Three years later in *Martineau*²⁶, however, the majority made clear that the relevant constitutional principle required subjective foresight and knowledge of the likelihood of death. The Court did not apply the common law presumptions of subjective fault that would have included lower forms of subjective fault such as a reckless awareness of the possibility of death and it did not base its conclusions on general principles of criminal liability. Rather the Court based its constitutional decision on the particular stigma and punishment (mandatory life imprisonment) that followed from a murder conviction. In this case, the Court demanded a slightly higher level of fault- knowledge of the likelihood of the prohibited act occurring- than required under common law presumptions of fault, but it limited its holding to the murder context.

In a case decided with *Martineau*, the Court in *R. v. Logan*²⁷ expanded its stigma holding to rule that attempted murder, like murder, required subjective knowledge of the likelihood of death. The Court based this holding on the idea that a person who was guilty of attempted murder would be branded with the same "killer instinct" as a murderer and would be recognized as someone who simply was lucky in the sense that his or her intended victim did not die. On one level, this decision expanded the ambit of the constitutional principle that requires subjective knowledge of the prohibited consequences from murder to attempted murder. In this vein, the Court also held that a person could not be convicted as a party to attempted murder under s.21(2) on the basis that an attempted murder was objectively foreseeable from the commission of a common unlawful purpose such as robbery. That said, *Logan* fits in with the thesis of a gap between constitutional and common law standards of fault because the constitutionally mandated fault of subjective knowledge was actually a lower form of fault than a standard of an intent to commit the completed offence that the Court had previously

²⁵ *Ibid* at para 27

²⁶ [1990] 2 S.C.R.

²⁷ [1990] 2 S.C.R. 731

applied without reference to the Charter to attempted murder.²⁸ The intent to commit the completed offence applied to all attempts and arguably to other inchoate offences because of a recognition of the particular importance of intent with respect to crimes that did not involve the commission of the completed offence. In this sense, the majority of the Court seemed to decide that the constitutional minimum of fault in the form of subjective foresight would allow Parliament to lower the standards of fault that the court had without reference to the Charter imposed on attempted offences. In a concurrence, Justice L'Heureux-Dube who had dissented in *Martineau* on the basis that objective foresight of death should be a constitutionally sufficient form of fault for murder made the cogent argument that the majority was aiming its constitutional sights too low because "logic as well as principles of fundamental justice enshrined in the *Canadian Charter of Rights and Freedoms*, dictate that the specific intent to commit the attempted murder crime must be conclusively proven."²⁹ *Logan* remains an unsatisfying decision because it constitutionalizes a lower form of fault for the specific crime of attempted murder than the Court had previously imposed as a matter of principle on all inchoate offences and because it does not discuss the proper fault principles that should govern attempts in general.

Logan also provides further evidence of the Court's caution under the Charter. The Ontario Court of Appeal in that case had invalidated the objective arm of s.21(2) of the Code on the basis of a general principle that it would be unfair to convict a person of an offence as a matter of party liability on the basis of objective foresight when the principal offender could only be convicted of the same offence, in this case attempted murder, on the basis of subjective fault. This was a more general principle of fault that would have invalidated s.21(2) not just for murder or attempted murder but for all crimes that would require proof of subjective fault for the principal offender. Lamer J. dismissed the idea of a general principle that would require parties and principal offenders to have the same type of criminal fault concluding that while such a principle "as a matter of policy...seems more equitable than not, I am not ready to characterize it as a principle of fundamental justice."³⁰ Instead, he noted that judges would maintain sentencing discretion adequately to differentiate between different levels of fault and culpability that might be possessed by principal offenders. The argument that the use of sentencing discretion can mitigate potential overbreadth and injustice in the criminal law is not a strong one, but as will be seen, it is one that will re-appear in Canada's Charter jurisprudence on fault. In any event, *Logan* demonstrates the Court's reluctant to constitutionalize

²⁸ *R. v. Ancio* [1984] 1 S.C.R. 225.

²⁹ *R. v. Logan* at

³⁰ *Ibid* at

broad principles of fault as well as the possibility that constitutional standards of fault would be less protective of the accused than common law standards of fault.

In the wake of *Martineau* and *Logan*, the case for constitutional protection of subjective fault was litigated on an offence by offence basis and not on the basis of overarching principles. The relevant question in this litigation was not whether principles of fair labeling and punishment requires proof of subjective fault in relation to the elements of the actus reus, but whether the particular stigma and penalty of particular offences were severe enough to require a minimum constitutional mens rea. In almost every case in which this question was asked, the answer given by the Supreme Court was that the stigma and penalty of the particular offence were not severe enough constitutionally to require subjective mens rea. At various times, the Court rejected arguments that constitution required subjective fault for unlawfully causing bodily harm³¹, dangerous driving³², manslaughter³³, failing to provide the necessities of life³⁴, careless use of a firearm³⁵ and misleading advertising.³⁶ The Court's reasoning in these cases has been oft-criticized for its shallow and conclusory nature. The relevant point for this paper is that the Court has severely limited the ambit of required subjective fault under the Charter whereas it had previously applied broad common law presumptions of subjective fault that applied to all criminal offences.

The only crimes that the Court has added to the short list of stigma crimes that require proof of subjective fault were war crimes and crimes against. A 4 judge majority of the Court in *R. v. Finta*³⁷ held that the stigma and the penalty of the crimes was sufficient to require prove of subjective knowledge or willful blindness in relation to the constituent elements of the offence. Justice Cory reasoned that “the degree of moral turpitude that attaches to crimes against humanity and war crimes must exceed that of the domestic offences of manslaughter or robbery. It follows that the accused must be aware of the conditions which render his or her actions more blameworthy than the domestic offence.”³⁸ Three judges, however, dissented from this ruling and relied on a recent case,

³¹ *R. v. DeSousa* [1992] 2 S.C.R. 944

³² *R. v. Hundal* [1993] 1 S.C.R. 867. The Court reached this decision despite in earlier decisions endorsing the idea that dangerous driving under the Criminal Code in contrast to careless driving under provincial highway traffic acts would require advertent negligence. See *Mann v. The Queen* [1966] S.C.R. 238; *Binus v. The Queen* [1967] S.C.R. 594. But see also *Peda v. The Queen* [1969] S.C.R. 905 holding that it was not necessary to instruct the jury about the differences between advertent and inadvertent negligence albeit over the strong dissent of Cartwright C.J.

³³ *R. v. Creighton* [1993] 3 S.C.R. 3.

³⁴ *R. v. Naglik* [1993] 3 S.C.R. 122

³⁵ *R. v. Finlay* [1993] 3 S.C.R. 103.

³⁶ *R. v. Wholesale Travel* [1991] 3 S.C.R. 154

³⁷ [1994] 1 S.C.R. 701.

³⁸ *Ibid* at

to be discussed below, which held that there was no constitutional principle that fault be proven in relation to all aspects of the prohibited act. In their view, it was sufficient that the prosecutor establish the mens rea for the underlying offences, robbery and manslaughter, and establish that the crimes committed against Jews in Hungary during World War II in fact constituted war crimes and crimes against humanity. In a subsequent case, the Court has described the relevant mens rea for war crimes to also include recklessness.³⁹ Given the Court's track record on stigma crimes, it is doubtful that many, if any, crimes will be held to have sufficient stigma to require subjective fault in relation to the elements of the actus reus. One possible exception are new crimes of terrorism that were added to the Criminal Code after 9/11, but lower courts have not clearly held that terrorism offences to be stigma crimes in the first few prosecutions under the new provisions.⁴⁰

Constitutional Protections of the Correspondence of Mens Rea and Actus Reus

As discussed above, common law presumptions in a range of cases from *Rees* to *Pappajohn* had articulated a general principle that fault should be established in relation to all aspects of the actus reus. In 1990, the Court acted in accordance with this principle when it invalidated under s.7 of the Charter a provision that made the accused's belief about the age of a girl under 14 years of age irrelevant in a charge of statutory rape.⁴¹ Two years later, however, in *R. v. DeSousa*⁴² dealing with the offence of unlawfully causing bodily harm, the unanimous Court concluded that there was no principle of fundamental justice that required proof of fault for all elements of the offence. The Court was influenced by that fact that "to require intention in relation to each and every consequence would bring a large number of offences into question" including manslaughter, dangerous and impaired driving causing bodily harm or death, assault and sexual assault causing bodily harm, and arson causing bodily harm. The Court stressed that a person found guilty of such consequence based offences was not

³⁹ *Mugesera v. Canada* [2005] 2 S.C.R. 100 at para 173.

⁴⁰ One court seems to have accepted the importance of presumptions of subjective fault, but held that they were not offended by provisions such as 83.19 (2) of the Code that provide that it is not necessary to establish that any particular terrorist activity was contemplated at the time of the crime. *R. v. Khawaja* (2006) 214 C.C.C.(3d) 399 at paras 37-42 (Ont Ct. S.C.J.)

⁴¹ *R. v. Hess* [1990] 2 S.C.R. 906. The majority judgment of Wilson J. was predicated more on the fact that the crime required no proof of fault once Parliament had removed a defence of mistake of fact and even due diligence with respect to the girl's age. It did, however, make reference to the common law presumptions of fault in *Sault Ste Marie* and *Pappajohn*. In other cases, Wilson J. also referred to the presumption that mens rea would extend to all elements of the prohibited act. *R. v. Docherty* [1989] 2 S.C.R. 941. See also *R. v. Théroux*, [1993] 2 S.C.R. 5, at p. 17

⁴² [1992] S.C.R. 944

morally innocent, even though this begged the question of the fairness of labeling them as responsible for unintended and perhaps unforeseeable harm. Although he had cited some of the common law cases discussed above, Sopinka J. seemed to go beyond the constitutional ruling and re-write the common law when he asserted "there appears to be a general principle in Canada and elsewhere that, in the absence of an express legislative direction, the mental element of an offence attaches only to the underlying offence and not to the aggravating circumstances."⁴³ *De Sousa* is a frequently and justly criticized decision. It demonstrates the Court's reluctance to constitutionalize broad fault principles that could have an impact on many offences. In addition, it demonstrates the potential for narrow constitutional standards to eclipse long standing and generous common law presumptions.

The Court re-visited the issue of whether fault should extend to all aspects of the prohibited act with similar results a year later in the manslaughter case of *R. v. Creighton*.⁴⁴ McLachlin J. in her majority judgment at least recognized that the common law, now re-named "criminal law theory", required a "symmetry" between the fault element and the prohibited act. Nevertheless she concluded that it was "important to distinguish between criminal law theory, which seeks the ideal of absolute symmetry between *actus reus* and *mens rea*, and the constitutional requirements of the *Charter*. As the Chief Justice has stated several times, "the Constitution does not always guarantee the 'ideal'" So long as the accused has some element of fault and the moral culpability was proportionate to the seriousness and consequences of the offence charged, the Constitution would be satisfied. Again, the Court refused to constitutionalize well established common law principles because of concerns that principles of fundamental justice must "have universal application" and admit of no exceptions. The Court also suggested that sentencing discretion could mitigate any overbreadth or harshness that would apply to the broad fault element that could apply to unforeseen and even accidental deaths if there was objective foresight of non-trivial bodily harm. At the time of the decision, judges had complete sentencing discretion, but now manslaughters committed with a firearm are subject to a mandatory minimum of four

⁴³ *Ibid* at

⁴⁴ [1993] 3 S.C.R. 3.

years imprisonment. Reliance on the vagaries of sentencing discretion is no answer to concerns about fault elements.

Chief Justice Lamer with three other judges dissented but they laboured to formulate a principle of fundamental justice that would also admit of no exceptions. The result was a complex rule that would have required proof of fault in relation to the prohibited consequences for crimes such as manslaughter but would have built in exceptions to this requirement for other crimes where the underlying offence was “inherently risky to life and limb” and would have not risked invalidation of offences such as dangerous or impaired driving causing death. Even if this principle had been accepted by the majority of the Court, it would have represented a significant reduction of the relevant common law principle. Even among judges who were prepared to give s.7 a broader reading, its constitutional status affected and shrank its content compared to sweeping common law presumptions that could be displaced by clear legislative statements.

Constitutional Protections Against Absolute Liability

In the *B.C. Motor Vehicle Reference*⁴⁵, the Supreme Court held that an absolute liability offence for driving with a suspended licence that was punishable by a mandatory minimum of seven days imprisonment violated s.7 of the Charter. This case was the first case to address the constitutionalization of common law presumptions of fault and in retrospect it seemed to establish a more promising and robust tone than many of the subsequent cases discussed above. Lamer J. rejected the idea that the principles of fundamental justice were limited to procedural fairness and adopted the Court’s reasoning in *Sault Ste Marie* that absolute liability offended basic principles of penal liability by punishing a person in the absence of fault. Thus, the Court recognized that the common law presumption against absolute liability as a principle of fundamental justice under s.7 of the Charter. Nevertheless, the Court qualified its holding by stressing that there would be no s.7 violation unless there was also a violation of the rights to life, liberty and security of the person. It indicated that imprisonment need not be mandatory and even the threat of imprisonment and probation orders

⁴⁵ [1985] 2 S.C.R. 486

would deprive a person of liberty.⁴⁶ In addition, it specifically left open the possibility that the security of the person might encompass other penalties. The Court stressed that considerations of the public interest could not justify exceptions to the s.7 right, but should rather be justified by the government under s.1. Even then, the Court took a restrictive approach and stated that s.7 violations could only be justified under s.1 for reasons of “administrative expediency” in “exceptional conditions, such as natural disasters, the outbreak of war, epidemics, and the like.”⁴⁷ As will be discussed below, this restriction on possible justifications for exceptions to s.7 rights has helped restrict the ambit of the rights accepted under s.7.

British Columbia responded to this ruling by removing the explicit legislative displacement of a due diligence test that would have been read in by the courts under the *Sault Ste Marie* presumptions against absolute liability. Many would have thought that this would have been sufficient to re-activate the presumption that the offence would not be absolute liability, but a majority of the Supreme Court held in a subsequent case that the offence remained one of absolute liability because any possible defence that an accused might have to driving with a suspended license was precluded by the principle that mistakes of law would not be an excuse. Leaving aside the merits of this decision⁴⁸ or the Court’s subsequent decision to return to the more straightforward *Sault Ste Marie* presumptions⁴⁹, the relevant point here is that the Court did not strike down the absolute liability offence but rather held that it was constitutional because British Columbia had enacted general legislation providing that no one could be imprisoned for an absolute liability offence. The result was to provide constitutional legitimacy for absolute liability offences that were given under the common law. Lower courts have held that absolute liability offences accompanied even by very high fines do not offend the Charter.⁵⁰

⁴⁶ Ibid at para 76.

⁴⁷ Ibid at para 85

⁴⁸ See Hamish Stewart “Mistake of Law under the Charter” (1998) 40 C.L.Q. 279.

⁴⁹ *Levis (City) v. Tetreault* [2006] 1 S.C.R. 420 at para 17-19

⁵⁰ *R. v. 1260448 Ontario Inc.* (2003) 68 O.R.(3d) 51 (C.A.); *R v. Polewsky* (2005) 202 C.C.C.(3d) 257 (Ont.C.A.) But for a recent application of the common law presumption against absolute liability see *R. v. Kanda* (2008) 227 C.C.C.(3d) 417 (Ont.C.A.)

II. Possible Explanations of the Gap Between Constitutional and Common Law Protections of Fault

The last section has established a significant gap between common law standards of fault and those that have been constitutionalized under s.7 of the Charter. The remaining task is to offer some possible explanations for this divergence. This section will also address the question of whether the divergence can be justified and assuming that it cannot, some possible strategies for closing the gap between common law and constitutional protections of fault.

The Respective Nature and Role of Common Law and Constitutional Principles

One possible explanation for the divergence between common law and constitutional protections of fault is that the courts are reluctant to offer the most robust protections for fault under the constitution. The common law presumptions can all be displaced by clear legislation to the contrary and there are many examples of courts recognizing the ability of legislatures to displace the common law protections. For example, the British Columbia offence that was invalidated in the *B.C. Motor Vehicle Reference* clearly provided that a defence of due diligence was not available and the courts accepted that this made the offence one of absolute liability. After some initial hesitation about whether criminal negligence, defined as conduct that shows wanton or reckless for life or safety, had displaced the presumption of subjective fault⁵¹, courts now accept that that any presumption of subjective fault has been displaced by this provision.⁵² In addition, courts have not applied the common law presumption that fault should be proven in relation to all aspects of the prohibited act when interpreting offences such as dangerous or impaired driving causing injury or death. In general, there is less evidence that common law presumptions have been used to thwart clear expressions of the legislative will in criminal law than in administrative law where common law presumptions about judicial review have been applied in the face of seemingly clear privative clauses.

⁵¹ A depleted Court divided 3:3 over this issue in *R. v. Tutton* [1989] 1 S.C.R. 1392.

⁵² *R. v. Creighton* [1993] 3 S.C.R. 3.

Constitutional protections of fault will be less easily displaced than common law presumptions. Even if the court had interpreted s.7 of the Charter like other Charter rights, the government would have to justify every departure from constitutional fault standards under s.1 of the Charter. This would require the government not only to provide an important objective to justify the limitation on the right, but also to demonstrate that the limit was rationally connected to the objective, restricted the right as little as possible and had an appropriate overall balance considering the effects of the limit on the right infringed and the objective advanced. The test for justification under s.1 of the Charter is flexible and many violations of the presumption of innocence have been held to be reasonable limits on the rights. Nevertheless, some incursions on fault principles might be more difficult to justify than others. For example, deterrence of harmful behavior might be the justification for many possible uses of absolute and constructive liability. If common law presumptions against absolute liability and requiring fault for all elements of the actus reus were constitutionalized, the government would have to establish that such measures were rationally connected and proportionate means to achieving its deterrence goals. The deterrent effect of penal sanctions are notoriously difficult to demonstrate⁵³ and often require complex empirical studies of the harm before and after the relevant intervention as well as consideration of possible confounding variables. Courts may be concerned that governments would have difficulties in producing evidence of deterrent effectiveness under s.1. At the same time, however, the courts have readily accepted that legislatures can limit rights on the basis of reasoned apprehension of harm in a variety of areas and such reasoning might be available to justify departures from constitutional standards of fault.⁵⁴

The present state of law on fault could possibly be justified on the basis that divergent common law and constitutional standards of fault provide the court with two distinct barriers to incursions on fault principle. The first barrier would be the common law. Courts could effectively insist that legislatures make clear statements to displace

⁵³ See H.L. Ross *Deterring the Drinking Driver* (Chicago: University of Chicago Press, 1989).

⁵⁴ See for example *R. v. Whyte* [1988] 2 S.C.R. 3 and *R. v. Orbanski* [2005] 2 S.C.R. 3 accepting s.1 justifications on the presumption of innocence under s.11(d) and the right to counsel under s.10(b) as necessary to deter and detect drunk driving.

common law presumptions of fault. Alexander Bickel was perhaps the first constitutional theorist to recognize the value of clear statement rules in requiring the legislature to address an issue and provide some direct democratic desire to limit rights.⁵⁵ In subsequent years, many scholars have followed Bickel and comment favourably on the utility of clear statement rules.⁵⁶ Much of the interest in clear statement rules by American scholars starting with Bickel has been in its potential to produce a dialogic form of sub-constitutional law that allows the courts to protect rights while allowing the legislature an opportunity to devise an effective legislative reply to the decision. Such an approach might be less necessary in the Canadian context where Parliaments generally have the ability and the opportunity to justify limits or even override constitutional rights as interpreted by the courts. At the same time, however, it could be argued that using common law presumptions as a preliminary site for judicial-legislative dialogue about fault could promote deliberation about rights in the criminal process. For example, the frequent failure of the legislature to specify a fault element would trigger robust common law presumptions of subjective fault for all elements of the prohibited act. The legislature would have to provide some clear statement to displace such presumptions. One feature of much penal legislation is that it is frequently enacted in response to highly publicized crimes and as a means to denounce such crimes. In such circumstances, there may be a value in allowing the court to first counter populist measures under the common law while giving the legislature an opportunity to have sober second thoughts and either affirm its commitments to limit rights or to accept the court's actions in reading in fault requirements under the common law.

One possible shortcoming of a dualist common law and constitutional protections to fault principles is that an awareness that the constitution allows robust departures from common law standards may undermine the legitimacy and vigour of the common law protections. There may be a tendency to think that if the constitution allows departures from common law standards that the common law standards are not

⁵⁵ Alexander Bickel *The Least Dangerous Branch* (New Haven: Yale University Press, 1986)

⁵⁶ Guido Calabresi *The Common Law in the Age of Statutes* (Cambridge: Harvard University Press, 1981); William Eskridge *Dynamic Statutory Interpretation* (Cambridge: Harvard University Press, 1997); Einer Elhauge *Statutory Default Rules* (Cambridge: Harvard University Press, 2008).

intrinsically valuable in themselves. This tendency is especially evident with respect to the decisions in *De Sousa* and *Creighton* to hold that the common law presumption of fault with respect to the actus reus is not a principle of fundamental justice. In *De Sousa*, the Court comes close to re-writing history and denying that the common law presumption even existed in the first place. The majority's approach in *Creighton* more accurately concedes the existence of the common law presumption, but then labels it a matter of "criminal law theory" that is not a fundamental principle of criminal justice. Moreover, the majority judgment suggests that the common law principle is at odds with a "common sense of justice."⁵⁷ Fault requirements are particularly vulnerable to denigration precisely because they are not intuitive to most people. They are particularly not intuitive in the face of a horrific act where people have died or been seriously injured. There are reasons to be concerned that Canada's dualist common law and constitutional protections of fault may have the effect of undermining the legitimacy of the common law protections.

The Unique Position of Section 7 of the Charter within the Charter

Another factor that may explain why Canadian constitutional protections of fault are much less robust than common law protections is the court's decision to hold that violations of s.7 will rarely if ever be justified under s.1 of the Charter. As seen above, this process started with the Court's statement in the *British Columbia Motor Vehicle Reference* that violations of s.7 in the name of "administrative expediency" could only be justified under s.1 of the Charter in "exceptional circumstances" such as wars and epidemics. Even though the Court in that case and others including the constructive murder cases of *Vaillancourt* and *Martineau* and the absolute liability case of *Pontes* went through a full s.1 analysis, the fact remains that the Supreme Court has never held that a limitation on a s.7 right has been justified under s.1 of the Charter. Given this, it is likely that judges think twice before recognizing new principles of fundamental justice. This conclusion can be supported without legal realism or psycho analysis of the judges. In *Vaillancourt* and *Martineau*, the Court made reference to the many offences that would be found in violation of a rule that required subjective fault. Similarly in *De Sousa* and *Creighton*, the Court cited the many offences that would run afoul of a rule that

⁵⁷ *R. v. Creighton*[2003] 3 S.C.R. 3.

required fault in respect of all aspects of the prohibited act. These references demonstrate that Supreme Court judges quite appropriately are concerned with the broader implications of their rulings. In assessing these implications, the judges must be aware of the Court's statements about the difficulty of justifying limits on s.7 rights and of the courts record in this regard. Thus it is probable that the Court's unique approach to s.1 in the context of s.7 rights has been an important factor in its refusal to constitutionalize common law fault principles.

Would the protection of fault be better if the court treated s.7 rights like other Charter rights and imposed no advance restrictions or exceptional circumstances requirement for reasonable limits on s.7 rights? Such an approach would open the possibility that the court could have constitutionalized common law presumptions of fault while giving the state an opportunity to justify departures from such rights. In a sense the Court seemed headed in this direction in the *British Columbia Motor Vehicle* which endorsed the *Sault Ste Marie* presumptions as principles of fundamental justice. The only qualification in this regard was tied to the structure of s.7 of the Charter which does not guarantee respect for the principles of fundamental justice at large, but only when the state deprives a person of life, liberty or security of the person. Although this latter requirement has been relevant in the absolute liability context and opens up the prospect that absolute liability can be constitutional when applied to corporations or applied to people whose liberty and security of the person is not violated, it would have little if any relevance with respect to constitutionalized principles of subjective fault and fault in relation to all aspects of the prohibited act.

If the common law standards were constitutionalized, any departure from them would have to be justified under s.1. Section 1 more than s.33 operates as a means for legislatures and courts to engage in dialogue about justified limits on rights. Section 1 provides a fertile middle ground between legislative and judicial supremacy.⁵⁸ Under such a scenario, it is possible to imagine that the government could justify the use of negligence in connection with manslaughter and the use of constructive liability for aggravated forms of impaired and dangerous driving. The government would have

⁵⁸ For my defence of this middle ground see *The Supreme Court on Trial* (Toronto: Irwin Law, 2001) and "Constitutional and Common Law Dialogues About Rights" (2001) 80 Can.Bar Rev. 481.

the opportunity to demonstrate the importance of departing from standards of subjective fault in particular legal and social contexts. Although the bottom line might frequently be the same as under the current law, the gap between common law and constitutional standards of fault would be filled. The common law standards would be strengthened by being recognized as constitutional principles of fundamental justice and this could help ensure that subjective standards of fault did not wither away like other relics of the 1960's. Moreover, departures from subjective standards of fault would be restrained and disciplined by having to engage in s.1 justifications. As constitutional standards exist today, Parliament need not worry about subjective fault so long as it is confident that the courts will not find that the offence has a stigma and penalty akin to murder, attempted murder and war crimes.

Possible Misgivings about the Principles of Subjective Fault

The above scenario of constitutionalized subjective fault is, however, perhaps overly optimistic. It suggests that while exceptions to principles of fault can be justified in some limited contexts that they are basically sound. It suggests that they satisfy what the court has identified as the criteria for recognition as principles of fundamental justice: namely, that the principles be recognized as long standing and manageable legal principles that command a consensus as opposed to more controversial issues of public policy.⁵⁹ But there is another possibility. The other possibility is that the Court's reluctance to constitutionalize fault principles is related to misgivings about the soundness of those principles as opposed to either a strategy to provide dual layers of protection for them or the implications of the decision to disapprove of s.1 limitations on s.7 rights. In this scenario the failure to constitutionalize subjective fault can be explained not so much by institutional concerns but by genuine doubts about the soundness of the substance of subjective fault.

Is there any evidence to support the idea that the Court may have misgivings about the common law principles of fault discussed in this paper? To be sure, the Court has not explicitly disapproved the common law presumptions and they are all still valid as common law presumptions. Nevertheless, some uneasiness with these principles are

⁵⁹ See for example *R. v. D.B.* 2008 SCC 25.

visible with a bit of reading between the lines. For example, Justice McLachlin's decision in *Creighton* to reject a principle of fundamental justice that would require fault to extend to all aspects of the actus reus was justified in large part on "policy considerations" revolving around harm. She seemed to assume an equivalence between principles of fundamental justice and "common notions of justice" when she stated "Just as it would offend fundamental justice to punish a person who did not intend to kill for murder, so it would equally offend common notions of justice to acquit a person who has killed another of manslaughter and find him guilty instead of aggravated assault on the ground that death, as opposed to harm, was not foreseeable." The idea that the court should give weight to "common notions of justice" when defining the principles of fundamental justice is disturbing when it is considered that many common notions of justice would embrace absolute liability for all crimes and tie criminal liability simply to the infliction of harm by the accused. Although the public might not understand or readily accept an aggravated assault conviction when the victim subsequently died, this may be the result that is justified by an application of fundamental principles of penal liability that are within the inherent domain of the judiciary even if it is narrowly defined. Those accused of crimes are probably the most unpopular group that seeks protection from the court. As Justice Iacobucci has recognized in an admittedly different consequence, the role of the courts in upholding constitutional standards "is of particular importance when the public mood is one which encourages increased punishment of those accused of criminal acts and where mounting pressure is placed on the liberty interest of these individuals. Courts must be bulwarks against the tides of public opinion that threaten to invade these cherished values."⁶⁰ That said, the Court must be aware of the populist surge in the criminal law. Although the federal Parliament has never used the s.33 override, the closest it has come to the use of the override has been in response to the Court's decisions in *Seaboyer* or *Daviault* when the Court has been severely criticized for defending the rights of rapists. If Parliament is ever to override rights, it is likely to be done through an override of the rights of unpopular and poorly organized crimes as

⁶⁰ *R. v. Hall* [2002] 3 S.C.R. 309 at para 128.

opposed to the rights of unpopular but often well organized minorities.⁶¹ Although there are arguments that judges should not worry whether their decisions are subject to legislative overrides, there are some signs that courts may be sensitive to not provoking the legislature to use the override.⁶²

A significant part of the justification for not recognizing a constitutional principle that fault should be extended to all parts of the actus reus in *Creighton* revolved around what the Court labeled “policy considerations”. The majority’s judgment was predicated on an assumption that a fault requirement of objective foresight of bodily harm would deter people from undertaking dangerous activity that would result in death. This assumption was made without adverting to Justice Dickson’s earlier arguments in *Sault Ste Marie* that deterrence might not work with respect to risks that are not objectively foreseeable. From a Charter perspective, Justice McLachlin’s invocation of policy justifications for rejecting a s.7 requirement that mens rea reflect aspects of the actus reus imposed a definitional limit on the right and did not require the government to adduce evidence under s.1 of the Charter that the limit on the right was a reasonable and proportionate limit on the right. From an institutional perspective, this approach to accepting definitional limit on (common law) rights departed from Justice Dickson’s belief that legislatures and not the courts should be responsible for making controversial policy decisions that limit rights.⁶³

The court’s reluctance in *De Sousa* and *Creighton* to constitutionalize a principle that fault should extend to all aspects of the actus reus was related in part to the court’s understanding that the “consequences” of acts can be important even if they are not

⁶¹ Bruce Ackerman “Beyond Carolene Products” (1985) Harv.L.Rev. For example, there was little serious discussion at the federal law of using the override to prevent the recognition of gay marriage.

⁶² For example, the Supreme Court accepted reply legislation in *R. v. Mills* [1999] 3 S.C.R. 668 when Parliament had the option of re-enacting the popular criminal law legislation with the override but invalidated reply legislation in *Sauve v. Canada* [2002] 2 S.C.R. 519 when the use of the override was precluded because the relevant right, the right to vote, was not subject to the override.

⁶³ Justice Dickson’s approach to this institutional division of labour ran through his decisions rejecting the extending common law police powers in cases such as *Moore v. The Queen* [1979] 1 S.C.R. 195; requiring clear statements to displace common law presumptions of fault in *Sault Ste Marie* and rejecting reading in remedies to save legislation under the Charter in *Hunter v. Southam* [1984] 2 S.C.R. 145.

intended and perhaps not even foreseeable. The idea that it is wrong to focus on the accused's fault and ignore the harm that was caused to the victim is perhaps most fully defended in Justice L'Heureux-Dube's dissent in *Martineau*. It explains why she was prepared to accept a standard of objective foresight of death in cases where the victim died while insisting in the companion attempted murder case of *Logan* on proof of a specific intent to kill. The same sense of balance between fault and harm also underlines the majority's decision in *Creighton*, both with respect to its rejection of the principle that fault should extend to all aspects of the actus reus and its belief that the thin skull principle should inform the fault requirement for manslaughter. In both cases, there is a danger that a focus on the harm caused to the victim will dominate considerations of the accused's fault.

The Court's reluctance to constitutionalize principles of subjective fault is also likely related to sustained criticism of such principles when applied in cases such as *Pappajohn*. The concern expressed by many feminists was that the defence of honest but not necessarily reasonable mistake of fact ignored the context of sexual violence and preferred what Catherine Mackinnon referred to as the "rapist's perspective" over that of the victim.⁶⁴ Even if the Court is not prepared to abandon subjective fault in its entirety, it has surely been aware of the criticisms of its arguable excesses as well as Parliament's attempts in both the sexual assault⁶⁵ and corporate crime⁶⁶ contexts to blend subjective and objective fault together in innovative ways. The populist impulse in criminal law has been so powerful that Parliament has gone out of its way to deem that voluntary intoxication should be substituted for the voluntariness and the mens rea for general intent crimes of violence.⁶⁷ The Court must be well aware of Parliament's impatience with subjective fault provisions.

⁶⁴ Catherine Mackinnon *Feminism Unmodified* (Cambridge: Harvard University Press)

⁶⁵ Criminal Code s.273.2 (b) providing that the mistaken belief in consent will not be a defence if the "accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain whether the complainant was consenting."

⁶⁶ Criminal Code s.22.2 (c) providing organizational liability when a senior officer knows that a representative is about to be a party to the offence but does not take all reasonable steps to stop the representative from being a party to the offence.

⁶⁷ Criminal Code s.33.1-3.

The Court's treatment of subjective fault in the Charter era also suggests a concern that they not be extended too far. For example, the Court has overruled earlier precedent that had allowed common intent and the intent for aiding and abetting to be negated in circumstances where the accused acted in circumstances of duress.⁶⁸ Although the Court in 1984 had stressed the need for proof of an intent to complete the crime for attempted crimes⁶⁹, in 2005, the Court required less than a full intent to commit the crime to be guilty of the inchoate crime of incitement or counseling a crime that has not been committed.⁷⁰ In recent years, courts are even reviving murder under s.229 (c) in a way that blurs distinctions between objective and subjective fault and allows murder convictions to be imposed for accidental deaths committed during the performance of unlawful objects even in cases where the accused does not intend to kill or even harm any particular person.⁷¹

More work in the last two decades has been done by the Court in refining and debating objective standards of liability than subjective standards of liability. In *Creighton*, there was a sophisticated debate between the majority and the minority about whether the reasonable person should be individuated to reflect characteristics of the accused. The majority's conclusion that such concerns should be irrelevant in almost every case seemed also to be driven by the same policy concerns about deterring dangerous conduct that influenced its other decision in the case. The Court's decision in *Beatty*⁷² to require a marked departure whenever negligence liability is used in the criminal code is a welcome restraint on negligence liability, but it can also be seen as a means of legitimating negligence liability. The Court's subsequent decision to affirm a slightly higher standard or marked and substantial departure for criminal negligence offences⁷³ suggests that attention is now being paid to different levels of objective fault even while the degrees of subjective fault are arguably being collapsed

⁶⁸ *R. v. Hibbert* [1995] 2 S.C.R. 973 overruling *Pacquette v. The Queen* [1977] 2 S.C.R. 189

⁶⁹ *R. v. Ancio* [1984] 1 S.C.R. 226.

⁷⁰ *R. v. Hamilton* [2005] 2 S.C.R. 432.

⁷¹ *R. v. S.R.(J.)* (2008) 237 C.C.C.(3d) 305 (Ont.C.A.); *R. v. Magno* (2006) 210 C.C.C.(3d) 500 (Ont.C.A.) leave to appeal dismissed [2006] SCCA no. 407. See Kent Roach "The Problematic Revival of Murder under Section 229 (c) of the Criminal Code" (2009) *Alberta L.Rev.* (forthcoming)

⁷² [2008] 1 S.C.R. 49.

⁷³ *R. v. J.F.* 2008 SCC 60.

and rationalized. Objective fault may be on the rise while subjective standards of fault may be on the decline. Such a decline will be facilitated by the Court's refusal to constitutionalize subjective fault standards.

What is to be Done about the Gap Between Common Law and Constitutional Standards of Fault?

The pessimistic tone of this paper raises the question of what, if anything, is to be done about the gap between constitutional and common law standards of fault. Given the Court's clear refusal to constitutionalize subjective fault standards and the extension of fault to all elements of the prohibited act, it is unlikely that courts will take this path in the foreseeable future. The Court is more likely to re-evaluate the anomalous status of s.7 rights in the context of s.1, but this change alone may not lead to constitutional recognition of subjective fault standards if, as suggested above, they are under siege in a modern age. Given this, it is important to pay more attention to common law protections for such standards. They should be applied and defended whenever possible and in this sense the best standard is a dualist approach which insists on defending common law standards even if they have not been constitutionalized. Cases like *De Sousa* which attempt to re-define and reduce common law standards of fault should be resisted as should attempts to conflate common law and constitutional protections,

Common law standards will thrive in an environment where Parliament is content to enact bare bones legislation that does not bother to address fault elements. Unfortunately, there is some evidence that Parliament is becoming more interested in specifying fault elements. This tendency can be seen in the new terrorism offences which on the one hand recognize subjective fault, but on the other hand provide interpretative provisions which are designed to minimize the requirements on prosecutors to establish subjective fault.

Although old common law standards should be retained and protected, complacency about the value of subjective fault should be resisted. Courts and commentators should defend the ability of subjective fault standards to protect individual accused in all their idiosyncracies and without risking the possible

stereotyping and inevitable under and over inclusiveness that comes with the use of modified objective standards which, in any event, are only permitted at the stage of defences. Subjective fault standards should also be connected to the legitimacy of punishment. More work needs to be done to establish the relevance of subjective fault standards to the many mentally disordered and intellectually impaired individuals who are imprisoned. The possible relevance of brain imaging to the discovery of subjective fault should also be explored. Without constitutional support, subjective fault cannot rely on its prior support and it must be made relevant to the conditions of criminal law in the new century.

Conclusion

The significant gap between common law and constitutional standards of fault, as well as the increased attention to objective fault principles, is consistent with a story that suggests that subjective fault principles are on a gentle decline while competing concerns about harm and objective fault are on the ascendency. If this is true, then in some respects the Court may have been prescient in its decisions not to constitutionalize subjective fault principles. Such an approach would, however, suggest that the Court has abandoned subjective fault principles that it had articulated and defended most notably in the 1950's by Justice Cartwright and in the 1970's by Justice Dickson. Subjective fault principles can provide a bulwark against populist impulses that at best view the accused as objects of deterrence and denunciation and at worst demonize the accused. These populist impulses would cheerfully hold accused persons responsible for harms that have been caused regardless of fault, especially if the accused was engaged in illegal or blameworthy behavior at the time that the harm was caused.

It may turn out the gap between common law and constitutional standards of fault in Canada was inevitable. Nevertheless, it would have been interesting to see what would have happened if the court had constitutionalized the broad principles of subjective fault that it had recognized before the Charter. Such a move would likely have required the Court to be more willing to entertain the government's case for limiting s.7 rights under s.1 of the Charter. The government likely would have been able

to justify some departures from subjective fault standards under the Charter particularly with respect to sexual assault, corporate crime and impaired driving causing death. If the courts had not been willing to accept such limitations on subjective fault principles, Parliament might have considered using the override. Nevertheless in both the limitation and override contexts, subjective fault would have been recognized as the principled foundation of the criminal law even while Parliament crafted and defended departures from these principles. As matters stand now, subjective fault is based only on the more shaky foundations of the common law. Indeed, the place of subjective fault is so fragile in Canadian criminal law that it is possible to imagine a future where it is reserved only for a few especially serious crimes.