

This paper critically assesses the gap between Canada's criminal law standards of fault articulated in the 1950s and 1970s and its constitutional standards of criminal fault articulated in the 1980s and 1990s. This gap is explained in terms of the Court's ambivalence about subjective fault principles as manifested by its acceptance of criminal negligence. It is also explained by the Court's unique treatment of section 7 of the Canadian Charter of Rights and Freedoms as a right that, unlike any other right in the Charter, is only subject to reasonable limitation under section 1 of the Charter in extraordinary emergency situations. The paper then suggests that the gap between criminal and constitutional fault standards is not sustainable and can only be closed if the Court rethinks its approach to the limitation of section 7 rights. Maintenance of the gap may erode respect for common-law presumptions of subjective fault. If this occurs, Canada's apparently robust approach to the constitutionalization of fault will have actually diminished respect for and protection of subjective fault principles.

Keywords: criminal law/Canada/fault/common law/constitutional/fundamental justice

1 Introduction

The Canadian experience with constitutionalization of criminal law fault principles seems at first glance to be positive and robust. Unlike in the United States, the Canadian courts have struck down felony murder and various absolute-liability provisions as inconsistent with constitutional requirements of fault.¹ The Court has also gone farther than courts in Israel and Germany in constitutionalizing fault requirements,² as well as principles that would prohibit convictions for physically³ or morally

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1 *R v Martineau*, [1990] 2 SCR 633 [*Martineau*]; *R v Hess*, [1990] 2 SCR 906 [*Hess*]; *Re BC Motor Vehicles*, [1985] 2 SCR 486 [*Re BC Motor Vehicles*].

2 Miriam Gur-Arye & Thomas Weigend, 'Constitutional Control of Criminal Prohibitions Affecting Human Dignity and Liberty: German and Israeli Perspectives,' Israel LR [forthcoming in 2011].

3 *R v Daviault*, [1994] 3 SCR 63, holding that a common-law rule that prevented even extreme intoxication being raised as a defence to general intent offences violated

involuntary⁴ conduct. From a comparative perspective, Canada appears to be at the vanguard in constitutionalizing fault principles.

A closer examination of the Canadian experience, however, reveals that there has been significant slippage between criminal law⁵ standards of fault articulated in a series of cases before the Charter and the actual standards of fault that have been enforced by courts under the Charter. For example, common-law presumptions against absolute liability have been narrowed into Charter standards that allow absolute liability in cases where the accused's rights to life, liberty and security of the person under section 7 of the Charter are not infringed. Similarly, common-law presumptions of subjective fault have been eclipsed by an acceptance under the Charter of negligence liability for all but a few crimes thought to carry such a special stigma that they require proof of subjective fault in relation to all aspects of the prohibited act. In addition, a majority of the Supreme Court of Canada has disparaged the idea that fault should generally be proven in relation to all aspects of the prohibited act as a matter of 'criminal law theory'⁶ that is not worthy of recognition as a principle of fundamental justice under section 7 of the Charter.

The gap that has emerged between Canadian criminal- and constitutional law standards of fault is a fertile area for exploring the proper

the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 s 7 and could not be justified as a reasonable limit under s 1 of the Charter. This article will focus on principles of fault and not principles relating to defences. Nevertheless, it should be noted that the effect of this decision has been blunted by Parliament's decision to deny the defence of extreme intoxication to all general intent offences involving violence; see *Criminal Code*, RSC 1985, c C-34 ss 33.1-3.

- 4 *R v Ruzic*, [2001] 1 SCR 687 [*Ruzic*], holding that requirements that threats be imminent and be made by a person physically present with the accused violated s 7 of the Charter, *ibid*, because they could result in a conviction of a person who acted in a morally involuntary manner.
- 5 In an original draft of this article, I referred to common-law standards of fault because, as will be seen, the relevant standards of fault in Canada are found in common-law decisions of the Supreme Court that create common-law presumptions of statutory interpretation. In other countries, however, similar standards might be found in principled criminal codes. Although Canada has a Criminal Code, it is not a principled one in the sense that it does not systematically address fault elements. Therefore, I will refer to the standards as criminal law standards of fault, even though, in Canada, such criminal law standards are found in the common law. In some instances, I will refer to the common-law nature of criminal law standards of fault when their common-law status is particularly relevant to the ability of the legislature to displace or abrogate the standards. Even if fault standards are articulated in legislated criminal codes, however, they will be subject to amendment by ordinary legislation and as such can be distinguished from constitutional standards that are less easily amended.
- 6 *R v Creighton*, [1993] 3 SCR 3 at 53 [*Creighton*].

relationship between criminal and constitutional law. The gap can be defended from a constitutional law perspective on the basis that the courts have rightly been cautious and minimalistic when constitutionalizing fault principles as part of the supreme law. The Supreme Court's approach is consistent with a case-by-case approach to constitutionalization defended by scholars such as Cass Sunstein who worry about judicial capacities to formulate broad and deep theories of justice when enforcing the supreme law of the Constitution.⁷ The Court's caution in this area may be related to doubts about the project of interpreting the guarantees of the principles of fundamental justice in section 7 of the Charter to include more than procedural fairness.⁸

From a criminal law perspective, the Court's refusal to constitutionalize subjective-fault principles may reflect recent theoretical interest in the use of objective theories of liability as a form of criminal law fault.⁹ In addition, there is a general uneasiness with individualistic demands for subjective fault in modern societies where there is increased knowledge about and regulation of risk and an increased willingness to use the criminal sanction to demand that all individuals regulate their own risky behaviour.¹⁰ The Court's refusal to constitutionalize subjective-fault principles recognizes that such principles no longer command the consensual support that they did in the 1950s and 1960s.¹¹ The Court's approach has left plenty of room for courts and legislatures to develop negligence as a form of criminal fault and to experiment with blended forms of subjective and objective fault.

In this article, I will not attempt to argue that subjective-fault principles should be the only constitutionally acceptable form of criminal liability. My position is more nuanced. I will assume that, in some contexts, the use of objective forms of criminal liability and blended forms

7 Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge: Harvard University Press, 1999) [Sunstein].

8 Jamie Cameron, 'Fault and Punishment under Sections 7 and 12 of the Charter' in Jamie Cameron & James Stribopoulos, eds, *The Charter and Criminal Justice Twenty Five Years Later* (Toronto: Lexis Nexus, 2008).

9 Much of this thinking can be traced to George Fletcher, *Rethinking Criminal Law* (Oxford: Oxford University Press, 2000) at 6.8. [Fletcher, *Rethinking*], who argued that a consideration of the objective nature of excuses revealed the true 'normative' nature of criminal liability and underlined the poverty of the subjective approach as one based on a 'purely descriptive theory of liability'; see also Victor Tadros, *Criminal Responsibility* (Oxford: Oxford University Press, 2005) [Tadros].

10 Ulrich Beck, *Risk Society: Toward a New Modernity* (London: Sage, 1992); David Garland, *The Culture of Control* (Chicago: University of Chicago Press, 2001) [Garland].

11 For criticisms of subjective standards, see James Stribopoulos, 'The Constitutionalization of 'Fault' in Canada: A Normative Critique' (1999) 42 *Crim LQ* 227; George Fletcher, 'The Meaning of Innocence' (1998) 49 *UTLJ* 157; Rosemary Cairns-Way, 'Constitutionalizing Subjectivism: Another View' (1990) 79 *CR* (3d) 260.

of subjective and objective fault could be justified. Nevertheless, I will argue that subjective fault is a sufficiently compelling and traditional standard of culpability that it should have been constitutionalized as a principle of fundamental justice under section 7 while accepting that departures from subjective fault could be justified in non-emergency situations under section 1 as a proportionate restriction on the accused's rights to be judged on the basis of his or her subjective fault. The idea that subjective fault could be constitutionalized under section 7 but subject to justified and contextual limitations under section 1, however, is inconsistent with the Supreme Court's continued unwillingness to allow section 7 rights to be limited under section 1 in non-emergency situations.¹² I will thus suggest that the Court has committed both criminal law and constitutional errors when creating the gap that exists between Canada's criminal and constitutional standards of fault. The criminal law error was to ignore the case for individualistic and traditional subjective-fault standards. The constitutional law error was not to subject section 7 rights to the same standard of reasonable limits imposed on other Charter rights, including other traditional legal rights such as the presumption of innocence.

The second part of this article 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 before¹³ but needs to be made again and updated to demonstrate how systemic that slippage has been. After over a quarter of century's experience with the Charter, the gap can no longer be seen as a product of isolated cases that can be dismissed as wrongly decided.

The third part of the article will provide a defence of subjective-fault principles as the appropriate starting point for determining criminal liability. Traditional subjective understandings of fault, defended by writers such as Glanville Williams, Jerome Hall, and Herbert Packer,¹⁴ are uniquely tied to the diverse conditions and abilities of all those subject to the criminal law. They do not have the inevitable over- and under-inclusiveness of objective standards, which can only be individuated to reflect certain but not all personal characteristics. Subjective fault principles also best accord with principles of fair labelling and retributive, deterrent, and restorative theories of punishment that all conceive of crime as based on

12 *Re BC Motor Vehicles*, supra note 1; *Ruzic*, supra note 4.

13 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 *Constitutional Law Quarterly* 287 at 308ff.

14 Glanville Williams, *The Criminal Law*, 2d ed (London: Stevens, 1961) [Williams]; Herbert Packer, 'The Supreme Court and *Mens Rea*' (1962) *Sup Ct L Rev* 107; Jerome Hall, 'Why Negligence Should Not Be Included in the Penal Code' (1963) 63 *Colum L Rev* 632.

deliberate choices made by accused rather than on the failure of the accused to conform to social standards. The constitutionalization of subjective-fault principles would also encourage restraint in applying the criminal law standard by requiring the state to justify under section 1 the use of objective or constructive liability as necessary to deal with particular crimes.

Accepting that the normative argument for constitutionalizing subjective fault has yet to persuade the Court, I will then attempt to explain the reasons for the Court's refusal. Such explanations are part of a 'history of the present'¹⁵ that places judicial decisions into their larger political, social, and legal contexts. The first explanation is that the Court's approach is a manifestation of ambivalence about principles which focus on inferences about the accused's mental state as opposed to objective and overtly moral judgments about the accused's culpability. The Court's acceptance of negligence liability and its attempts to ensure that negligence liability is adapted to the criminal context and adequately distinguished from civil negligence¹⁶ provide some evidence of its attraction to alternatives to subjective fault. Serious concerns have been raised that principles of subjective fault are inappropriate means to deal with pressing problems and Parliament has experimented with mixed subjective and objective forms of fault, most notably in the contexts of sexual assault¹⁷ and corporate crime.¹⁸ In addition, many theorists have defended objective fault as more compelling than what has often been described and implicitly dismissed as the orthodoxy of subjectivism.¹⁹ Viewed in this light, the Court's refusal to constitutionalize pre-Charter presumptions of subjective fault may represent a lack of confidence in the wisdom of the universal application of subjective fault in favour of a more contextual and selective approach. The Court's approach also creates room for much current criminal law theory that has explored how negligence can be used as an appropriate standard of criminal liability.

Another possible explanation for the gap that has emerged between criminal and constitutional standards of fault can be found in the

15 Garland, *supra* note 10 at 1.

16 *R v Beatty*, [2008] 1 SCR 49 [*Beatty*].

17 *Criminal Code*, s 273.2(b), providing that an accused will not have a 'mistake of fact' defence to sexual assault if 'the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.'

18 *Criminal Code*, s 22.2(c) providing that a corporation or other organization may be guilty of a 'subjective fault' offence if one of its senior officers, 'knowing that a representative is or is about to be a party to the offence, does not take all reasonable measures to stop them from being a party to the offence.'

19 Fletcher, *Rethinking*, *supra* note 9 at 6.8; see also Tadros, *supra* note 9.

Court's unique treatment of section 7 of the Charter under section 1 of the Charter. Unlike any other right in the Charter, the Supreme Court has held that section 7 rights should generally only be subject to reasonable limitation under section 1 of the Charter in extraordinary emergency situations. This unique treatment of section 7 helps explain why the Court has been so reluctant to constitutionalize criminal law subjective fault standards. The recognition of subjective-fault principles under section 7 of the Charter might have resulted in invalidation of many criminal offences that only require criminal negligence or do not require proof of fault in relation to all aspects of the prohibited act. This would have happened more because of the Court's inflexible approach to section 1 with respect to section 7 than because of any failure by the government to justify departures from subjective-fault standards as necessary to respond to the challenges of harms caused by sexual violence or corporate crime or the harms caused by dangerous, unlawful, or licensed activities. If the Court had accepted subjective-fault principles under section 7 but subjected them to an ordinary section 1 justification process, the Court's treatment of subjective fault might have been similar to its treatment of the presumption of innocence where the right has been defined broadly but contextual limits on the right have been accepted as necessary to respond to the harms and challenges of crimes such as drunk driving and prostitution.²⁰

The fourth part of this article will outline different possible futures for the gap that has emerged between criminal and constitutional standards of fault in Canada. One possible future is the maintenance of the dualist status quo, which accepts the legitimacy of the gap between criminal-law and constitutional standards of fault. On this view, criminal law standards can be more robust, demanding, and controversial precisely because they can be displaced by ordinary legislation. In contrast, constitutional standards should be more modest because they define bare minimum standards that, as constitutional standards, can only be displaced by the justification of reasonable limits on constitutional rights or the difficult processes of overriding or amending the constitution. This dualist approach is defensible especially by those who focus on the status of the constitution as a higher law and are sceptical about the viability of dialogic or common-law constitutionalism that allows robust rights enforced by the courts to be subject to statutory limitations justified by the elected government.²¹ At the same time, however, the dualism of the status quo may not be desirable or sustainable. The refusal of Canadian courts fully to constitutionalize subjective-fault standards have left such

20 *R v Whyte*, [1988] 2 SCR 3 [*Whyte*]; *R v Downey*, [1992] 2 SCR 10 [*Downey*].

21 For a symposium on the viability of dialogic or common-law constitutionalism see 'Charter Dialogue: Ten Years Later' (2007) 45 Osgoode Hall LJ.

standards vulnerable to both legislative displacement and scepticism about whether they are sound and just starting points for the criminal justice system.

A case can be made for closing the gap that has developed between criminal and constitutional standards of fault. A unitary approach could be achieved either by raising constitutional standards to match the more robust criminal law standards or by having the minimum standards of the constitution eclipse the more robust, controversial, and older criminal law standards. My preference is for a unitary approach in which constitutional standards are raised to reflect older criminal law standards of subjective fault. This preference is supported by the intuitive idea that the Charter should improve rather than detract from protections for the accused and by the case made in the third part of this article and by others for subjective-fault principles as most consistent with punishing and labelling people for the bad choices they have made and not for their failure to live up to social standards. Such a unitary approach would not mean that proof of subjective fault would be required for all criminal laws. Rather, it would mean that Parliament would have to justify under section 1 departures from subjective fault in particular contexts.

The second way that the gap can be closed is through a race to the bottom in which Canada's newer constitutional standards of fault would eclipse older common-law standards of fault so that the minimum standards of fairness required under the Charter become the new maximum of what can be expected from the state.²² There are already some signs in both the jurisprudence²³ and the commentary²⁴ that less attention is being applied to older criminal law standards of subjective fault that have not been constitutionalized. The gap between criminal and constitutional standards may eventually be closed but in favour of the minimum and piecemeal standards that are reflected in Charter jurisprudence and not the more robust and sweeping standards that

22 For criticisms of a somewhat similar focus in the enactment of terrorism law, see Kent Roach, 'The Dangers of a Charter-Proof and Crime-Based Approach to Terrorism' in Daniels et al, eds, *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001) 131.

23 For a denial that there was even a criminal law principle that fault should be proven in relation to all aspects of the *actus reus*, see *R v DeSousa*, [1992] 2 SCR 944 (available on SCC Lexum) [*DeSousa*]. But for a recent case that applies the common-law presumption in *Sault Ste Marie*, [1978] 2 SCR 1299 [*Sault Ste Marie*], against absolute liability, see *Levis (City) v Tetreault*, [2006] 1 SCR 420 [*Levis*].

24 One leading Canadian criminal law text devotes just over two pages to the 'common law tradition of subjective approach to *mens rea*' and asserts that the presumption of subjective fault in *Sault Ste Marie* 'no longer reflects the Canadian position'; Don Stuart, *Canadian Criminal Law: A Treatise*, 5th ed (Toronto: Thomson, 2007) at 170 [Stuart, *Treatise*].

are found in the Court's common-law precedents from the 1950s and 1970s. This will mean that subjective fault will no longer be either the common-law or constitutional starting point for thinking about criminal fault in Canada. It may be seen only as an extraordinary constitutional principle reserved for the most serious crimes. Fault principles that were the norm under the common law will be a constitutional oddity, reserved only for the most serious crimes. Such an approach would suggest that Canada's apparently robust approach to the constitutionalization of fault has actually diminished respect for and protection of subjective-fault principles.

II *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 were significant protections for fault in Canadian law long before the enactment of the Charter.²⁵ These common-law precedents have not been overruled, and they need to be better understood by those who apply the criminal law. Although the Charter has undoubtedly had a huge impact on criminal law, the vast majority of the substantive criminal law remains unaffected by the Charter.

A COMMON-LAW PROTECTIONS OF SUBJECTIVE FAULT

In the 1957 case of *Beaver*,²⁶ a majority of the Supreme Court applied various common-law presumptions of 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 nineteenth-century British precedents that no innocent person should be punished 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.'²⁷ He also corrected the reference in the 1889 case of *Tolson* to honest and reasonable mistake of fact being a defence to rape to only requiring an honest

25 Many of these precedents have been criticized for not overtly dealing with the underlying policies, for adopting a formalistic approach, and for not citing Canadian academic authority; see Paul Weiler, 'The Supreme Court and the Doctrines of *Mens Rea*' (1971) 49 Can Bar Rev 281; Paul Weiler, *In the Last Resort* (Toronto: Carswell, 1974) at ch 4. Although he criticizes the crafting of many of the judgments, even Professor Weiler recognizes that 'our judges are legally bound by the principle or presumption of *mens rea* which cements a concern about "blameworthiness" into the criminal law'; *ibid* at 104.

26 [1957] SCR 531 [*Beaver*].

27 *Ibid* at 537, quoting *Attorney General v Bradlaugh* (1885), 14 QBD 667 at 689–90.

mistake about the existence of consent.²⁸ Although *Beaver* constitutes a strong statement in favour of subjective-fault principles,²⁹ the commitment was not absolute. The Court recognized that Parliament could clearly displace such principles. Cases such as *Beaver* allowed the courts to be strong proponents of a general principle of subjective fault but also to accept clear legislative displacement of such principles.

The presumption of subjective fault in *Beaver*³⁰ was subsequently affirmed in two landmark decisions by Justice Dickson rendered in the late 1970s and early 1980s. Although the case dealt with presumptions against absolute liability to be discussed below, Justice Dickson's decision in *Sault Ste Marie*³¹ also affirmed a sweeping and general presumption of subjective fault for all criminal offences.³² 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.'³³ Dickson J defined *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,'³⁴ 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.'³⁵ As will be seen, a sticking point in the decision not to constitutionalize these principles may have been their categorical exclusion of negligence as a form of fault that was acceptable under the criminal law.

B COMMON-LAW PRESUMPTIONS ABOUT THE CORRESPONDENCE OF *mens rea* AND *actus reus*

In the 1956 case of *Rees*,³⁶ the Court held that the *mens rea* requirement of knowingly or wilfully contributing to a child's delinquency should be

28 Ibid at 539.

29 Supra note 26; for earlier statements in favour of subjective fault, see *Watts v The Queen*, [1953] 1 SCR 505, Estey J, reading in *mens rea* to a *Criminal Code* offence of refusing to give up drift timber.

30 Supra note 26.

31 Supra note 23.

32 Ibid at 1326.

33 [1980] 2 SCR 120 at 138 [*Pappajohn*].

34 Ibid at 139.

35 Supra at note 23 at 1309–10.

36 *The Queen v Rees*, [1956] SCR 640 [*Rees*].

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.³⁷ This and other common-law presumptions of fault were, of course, subject to clear statutory abrogation. For example, Parliament clearly provided that the accused's belief about a child's age was not relevant for the purposes of determining whether the accused was guilty of statutory rape.³⁸ Common-law presumptions of fault were dialogic in the sense that they allowed Parliament to enact clear legislation that displaced them.³⁹

In *Pappajohn*,⁴⁰ the Court extended the presumption of subjective fault with reference to the text writer Glanville Williams to include 'all circumstances and consequences that form part of the *actus reus*.'⁴¹ Although Dickson J dissented on the merits of the case, all members of the Court agreed with his doctrinal comments that subjective fault extended to all aspects of the *actus reus*. *Pappajohn* was decided only two years before the enactment of the Charter. Once the Court decided that the principles of fundamental justice protected under section 7 of the Charter were not limited to procedural guarantees of natural justice but included other basic tenets of the legal system, it would not have been unreasonable to think that presumptions of subjective fault would be constitutionalized. As will be seen, however, this has not been the case. The Court has clearly refused under the Charter to constitutionalize the *Pappajohn* presumptions (1) that all criminal offences require proof of subjective fault and (2) that subjective fault (or indeed objective fault) should be proven in relation to all the aspects of the *actus reus*.⁴² To be sure, *Pappajohn* was a controversial judgment that was criticized for disregarding the context of sexual violence. Nevertheless, it is surprising that fault principles affirmed by the unanimous Supreme Court in 1980 gained no foothold under the Charter.

C 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 1970s. Until that time, Canadian courts would interpret statutory offences as requiring full subjective *mens rea* as in the *Beaver* case discussed

37 Ibid at 651–3.

38 A statutory rape offence, *Hess*, supra note 1, that clearly made the accused's belief as to the age of the girl irrelevant was, however, eventually held to violate s 7 of the Charter.

39 See generally Kent Roach, 'Common Law and Constitutional Dialogues about Rights' (2001) 80 Can Bar Rev 481.

40 Supra note 33.

41 Ibid at 139.

42 Supra note 33.

above,⁴³ or as allowing absolute liability without any inquiry into the accused's subjective or objective fault.⁴⁴ In the 1978 case of *Sault Ste Marie*,⁴⁵ the Supreme Court unanimously articulated a strong common-law presumption against all absolute-liability offences. The presumption applied even to regulatory offences that did not provide for imprisonment. Indeed, the offence in question in *Sault Ste Marie* was a pollution offence that did not provide for imprisonment for a first offence and the Court characterized regulatory offences in general as being of 'a civil nature' and 'a branch of administrative law.'⁴⁶ Nevertheless, Dickson J reasoned that absolute liability in all its guises violated 'fundamental principles of penal liability.'⁴⁷ Moreover, 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.'⁴⁸

The *Sault Ste Marie* 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'⁴⁹ was one of absolute liability. As will be seen, however, the presumption that all absolute liability violated 'fundamental principles of penal liability' recognized by an unanimous Supreme Court in 1978 would receive only partial constitutionalization in 1985.⁵⁰

D CONSTITUTIONAL PROTECTIONS OF SUBJECTIVE FAULT

In its initial foray into constitutionalizing *mens rea* principles, the Supreme Court of Canada seemed to be attracted to the idea that the subjective-fault principles should receive protection under section 7 of the Charter. In *R v Vaillancourt*, Lamer J stated that '[i]t 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."⁵¹ Nevertheless, he limited

43 Supra note 26.

44 *R v Pierce Fisheries*, [1971] SCR 5.

45 Supra note 23.

46 Ibid at 1302–3.

47 Ibid at 1311.

48 Ibid at 1311–2.

49 Ibid at 1326.

50 *Re BC Motor Vehicles*, supra note 1.

51 [1987] 2 SCR 636 at para 27 [*Vaillancourt*].

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. This minimalist decision was justified in part on the basis that the Attorney General of Canada had not intervened to defend other murder provisions that might be invalidated should the Court accept a constitutional requirement of subjective fault in relation to the victim's death.⁵² In addition, two judges wrote a separate concurrence to stress that it was not necessary to decide whether there was a constitutional requirement for subjective foresight of death.⁵³ The Court's limited decision in *Vaillancourt* is consistent with constitutional minimalism. Cass Sunstein has argued that a minimalist approach to constitutional decision making is an apt vehicle to accommodate disagreement within a Court as well as the risk of error or unintended consequences when making decisions about the meaning of the supreme law.⁵⁴ This suggests that the process of constitutionalizing the criminal law might also result in the dilution or hedging of traditional criminal law principles.

Three years later in *Martineau*,⁵⁵ the majority of the Court made clear that the relevant constitutional principle for murder required subjective foresight and knowledge of the likelihood of death. In reaching this decision, however, the Court did not apply the general common-law presumptions of subjective fault that Lamer J alluded to in *Vaillancourt*.⁵⁶ Rather the Court based its constitutional decision in *Martineau* 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's occurring – than required under common-law presumptions of fault which, following *Pappajohn*,⁵⁷ also included recklessness or subjective advertence to the possibility of the prohibited act. At the same time, the constitutional requirement was much less sweeping than the common-law presumption and only applied to the offence of murder and attempted murder.

In *R v Logan*,⁵⁸ the Court 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

52 Ibid at para 3.

53 Ibid at para 45.

54 Sunstein, *supra* note 7 at chs 3 and 4.

55 *Supra* note 1.

56 See text accompanying note 51 *supra*.

57 *Supra* note 33.

58 [1990] 2 SCR 731 [*Logan*].

same 'killer instinct' as a murderer. Nevertheless, *Logan* is consistent with the thesis of a gap between constitutional and criminal 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 applied to attempted murder without reference to the Charter.⁵⁹ In other words, Parliament could, consistent with the constitutional minimum, lower the *mens rea* for attempted murder from an intent to kill to knowledge of the probability of death. Justice L'Heureux-Dubé 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.'⁶⁰ *Logan* remains an unsatisfying decision because it constitutionalizes a lower form of fault for attempted murder than the Court had previously imposed on the basis of sound criminal law principles about the nature of inchoate offences requiring that the accused have the intent to commit the completed offence. To be sure, the differences between the common-law intent to kill standard in *Ancio*⁶¹ and the *Logan*⁶² standard of knowledge of the likelihood of death is not huge, but it underlines how the courts were reluctant to constitutionalize sweeping criminal law principles about the nature of inchoate liability under the Charter.

Logan also provides further evidence of the Court's caution under the Charter. The Ontario Court of Appeal in that case invalidated the objective arm of section 21(2) of the *Criminal Code* on the basis of a general principle that it would be unfair to convict a person of an offence as a party on the basis of objective foresight when the principal offender could only be convicted of the same offence on the basis of subjective fault.⁶³ This was a more general principle of fault that would have invalidated the objective arm of section 21(2) not just for murder or attempted murder but for all crimes that required 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.'⁶⁴ Justice Lamer's

59 See *R v Ancio*, [1984] 1 SCR 225 [*Ancio*].

60 *Logan*, supra note 58 at 750.

61 Supra note 59.

62 Supra note 58.

63 *R v Logan* (1988), 46 CCC (3d) 354 at para 140 (Ont CA) aff'd on different grounds [1990] 2 SCR. 731 [*Logan* 1988].

64 *Logan*, supra note 58 at 741.

concerns about not deciding matters of ‘policy’ suggests that concerns about the separation of powers and judicial overreaching would influence judicial decisions to constitutionalize fault principles. Justice Lamer also stressed that trial judges could in their exercise of sentencing discretion differentiate between different levels of fault and culpability between principal and secondary offenders. Reliance on sentencing discretion to mitigate potential over-breadth and injustice in the criminal law is not particularly principled or satisfying, but as will be seen, it has emerged as a common feature in Canada’s constitutional fault jurisprudence.

In both *Martineau*⁶⁵ and *Logan*,⁶⁶ the Court proceeded in a constitutionally minimalist fashion because it only addressed the narrow issue of the constitutionally required fault element for murder and attempted murder. Gone were the sweeping pronouncements and presumptions about fault seen in pre-Charter cases such as *Sault Ste Marie* and *Pappajohn*. The relevant question under the Charter was not whether principles of fair labelling and punishment required proof of subjective fault in relation to the elements of the *actus reus* or the relation of fault to the nature of inchoate offences, 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 was that the stigma and penalty of the particular offence were not severe enough constitutionally to require subjective *mens rea* in relation to all aspects of the prohibited act. The Court rejected arguments that the constitution required subjective fault for unlawfully causing bodily harm,⁶⁷ dangerous driving,⁶⁸ manslaughter,⁶⁹ failing to provide the necessities of life⁷⁰, careless use of a firearm⁷¹ and misleading advertising.⁷² The Court’s reasoning in these cases has been oft-criticized for its shallow and conclusory nature.⁷³ The relevant point for this article

65 *Supra* note 1.

66 *Supra* note 58.

67 *DeSousa*, *supra* note 23.

68 *R v Hundal*, [1993] 1 SCR 867. The Court reached this decision despite 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] SCR 238; *Binus v The Queen*, [1967] SCR 594. But see also *Peda v The Queen*, [1969] SCR 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 CJ.

69 *Creighton*, *supra* note 6.

70 *R v Naglik*, [1993] 3 SCR 122.

71 *R v Finlay*, [1993] 3 SCR 103.

72 *R v Wholesale Travel*, [1991] 3 SCR 154.

73 Don Stuart, *Charter Justice in Canadian Criminal Law*, 4th ed (Toronto: Carswell, 2005) at 80.

is that the Court severely limited the ambit of subjective-fault principles under the Charter that it had previously applied in a broad fashion under the common law. The gap between constitutional and ordinary criminal law standards became entrenched and systemic.

The only crimes that the Court added to the short list of stigma crimes that require prove of subjective fault in relation to all aspects of the prohibited were war crimes and crimes against humanity. A four-judge majority of the Court in *R v Finta*⁷⁴ held that the stigma and the penalty of war crimes was sufficient to require proof of subjective knowledge or wilful 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.’⁷⁵ Three judges, however, dissented and relied on cases 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, namely 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.⁷⁶ The Court’s decision and its order of a retrial for an accused war criminal in *Finta* was controversial.⁷⁷ Nevertheless, the majority’s *mens rea* requirement is consistent with evolving international jurisprudence⁷⁸ and has been applied in subsequent successful war crimes prosecutions in Canada.⁷⁹ 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 courts have not held terrorism offences to be stigma crimes in the first few prosecutions under the new provisions.⁸⁰

74 [1994] 1 SCR 701.

75 Ibid at 818.

76 In a subsequent case, the Court has curiously described the relevant *mens rea* for war crimes to also include recklessness; *Mugesera v Canada*, [2005] 2 SCR 100 at para 173 [*Mugesera*].

77 Irwin Cotler, ‘War Crimes and the Finta Case’ (1995) 6 Sup Ct L Rev (2d) 577.

78 Kriangsak Kittichaisaree, *International Criminal Law* (Oxford: Oxford University Press, 2001) at 91–3.

79 *R v Munyaneza*, 2009 QCCS 2201 at para 126.

80 *R v Khawaja* (2006), 213 CCC (3d) 399 (Ont Sup Ct), aff’d 2010 ONCA 862, leave granted 2011 CanLII 38816 (SCC). See generally Kent Roach, ‘Terrorism Offences and the Charter: A Comment on *R v Khawaja*’ (2007) 11 Can Crim L Rev 271.

E CONSTITUTIONAL PROTECTIONS OF THE CORRESPONDENCE OF *mens rea* AND *actus reus*

As discussed above, common-law presumptions in a range of cases from *Rees*⁸¹ to *Pappajohn*⁸² 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 section 7 of the Charter, a provision that made the accused's belief about the age of a girl under fourteen years of age irrelevant in a charge of statutory rape.⁸³ Two years later, however, in *R v DeSousa*⁸⁴ 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 the fact that 'to require intention in relation to each and every consequence would bring a large number of offences into question'⁸⁵ 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 morally innocent, even though this begged the question of the fairness of labelling 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 re-write the common law when he asserted that '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.'⁸⁶ *De Sousa* 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 erode long-standing and generous common-law presumptions.

The Court revisited whether fault should extend to all aspects of the prohibited act with similar results a year later in the manslaughter case

81 *Supra* note 36.

82 *Supra* note 33.

83 *Hess*, *supra* note 1. 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*, *supra* note 23, and *Pappajohn*, *supra* note 33. 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 SCR 941; see also *R v Théroux*, [1993] 2 SCR 5 at 17.

84 *Supra* note 23.

85 *Ibid* at 966.

86 *Ibid* at 967.

of *R v Creighton*.⁸⁷ McLachlin J, in her majority judgment, 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.’”⁸⁸ So long as the accused had some element of fault and had moral culpability that was proportionate to the seriousness 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.

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 labelled ‘policy considerations.’⁸⁹ The Court’s reference to policy was again a sign that concerns about the separation of powers and judicial role was influencing the Court on the constitutionalization of fault principles. The majority’s judgment in *Creighton* 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 arguments in *Sault Ste Marie*⁹⁰ that deterrence might not work with respect to risks that are not objectively foreseeable. It is not intuitively obvious which of these competing assertions about deterrence are empirically correct. Nevertheless, from a Charter perspective, Justice McLachlin’s invocation of policy justifications for rejecting a section 7 requirement that *mens rea* reflect aspects of the *actus reus*⁹¹ imposed a robust and consequentialist definitional limit on the right, without requiring the government to adduce evidence under section 1 of the Charter that the limit on the right was reasonable and proportionate.

Finally, the majority in *Creighton*⁹² also relied on the idea that trial judges would be able to use sentencing discretion when sentencing people for manslaughter for deaths that were not foreseeable. As discussed above, reliance on sentencing discretion is not a particularly principled or reliable means to ensure proportionality between a

87 *Supra* note 6.

88 *Ibid* at 53.

89 *Supra* note 6.

90 *Supra* note 23 at 1311–3.

91 See text accompanying note 88 *supra*.

92 *Supra* note 6.

crime and the offender's culpability. In any event, sentencing discretion in relation to manslaughter and many other crimes in Canada has subsequently been fettered by the rise of new mandatory minimum penalties. A person who commits manslaughter with a firearm is now subject to a mandatory minimum sentence of four years imprisonment even though the victim's death may not have been reasonably foreseeable.⁹³

Chief Justice Lamer dissented in *Creighton*,⁹⁴ but he 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 manslaughter, but would have made exceptions for other inherently risky crimes such as impaired or dangerous driving. 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. It would have meant that popular offences such as impaired driving causing death would not violate section 7 even though the offence did not require proof of fault in relation to the causing of death. This may be a desirable conclusion, but Justice Lamer's approach imposed internal limits on the section 7 right and did not require the government to justify the use of constructive liability under section 1 of the Charter. In other words, the common-law principle that fault should be established with respect to all aspects of the *actus reus* was diluted even under Justice Lamer's more robust and dissenting approach to defining the principles of fundamental justice. Even judges as committed to subjective fault as Chief Justice Lamer accepted the need to define fault principles more narrowly under section 7 of the Charter than under common law which could easily be displaced by ordinary legislation.

F CONSTITUTIONAL PROTECTIONS AGAINST ABSOLUTE LIABILITY

In the *BC Motor Vehicle Reference*,⁹⁵ 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 section 7 of the Charter. This was the first case to address the constitutionalization of common-law presumptions of fault. 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

93 This new mandatory penalty has been upheld under the Charter as not constituting cruel and unusual punishment; see *R v Morrissey*, [2000] 2 SCR 90; *R v Ferguson*, [2008] 1 SCR 96.

94 *Supra* note 6.

95 *Supra* note 1.

in the absence of fault.⁹⁶ Thus, the Court recognized that the common-law presumption against absolute liability as a principle of fundamental justice under section 7 of the Charter. Nevertheless, the Court qualified its holding by stressing that there would be no section 7 violation unless there was also a violation of the rights to life, liberty, and security of the person.⁹⁷ As will be seen, this qualification laid the basis for the acceptance of absolute liability in subsequent cases.

British Columbia responded to this ruling by removing the explicit legislative displacement of a due diligence defence. Many would have thought that this would have been sufficient to reactivate the criminal law presumption in *Sault Ste Marie* that the offence would now be presumed to be a strict liability offence that allowed the accused a defence of due diligence or reasonable mistake of fact.⁹⁸ Nevertheless, a majority of the Supreme Court held in *R v Pontes*⁹⁹ that the offence remained one of absolute liability because any possible defence that an accused might have to driving with a suspended licence was precluded by the principle that mistakes of law would not be an excuse. Leaving aside the merits of this decision or the Court's subsequent decision to return to the more straightforward *Sault Ste Marie* presumptions,¹⁰⁰ the relevant point here is that the Court held that an absolute-liability offence was constitutional because British Columbia had enacted general legislation providing that no one could be imprisoned for an absolute-liability offence. In the wake of this constitutional ruling, lower courts have held that absolute-liability offences accompanied even by very high fines do not offend the Charter.¹⁰¹

The more limited rules against absolute liability in constitutional as opposed to criminal law can be defended on the textual basis that section 7 of the Charter 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. Nevertheless, the

96 Ibid at para 26.

97 *BC Motor Vehicle Reference*, supra note 1 at para 76.

98 See text accompanying notes 47–8.

99 [1995] 3 SCR 44.

100 For arguments that this decision effectively made inroads on the traditional principle that ignorance of the law is not an excuse, see Hamish Stewart, 'Mistake of Law under the Charter' (1998) 40 Crim LQ 476. For the Court's subsequent affirmation that it would continue to apply the presumption in *Sault Ste Marie*, supra note 23, that all regulatory offences would allow a due diligence defence without inquiry into whether the legislature intended for such a defence to apply, see *Levis*, supra note 23 at paras 17–9.

101 *R v 1260448 Ontario Inc* (2003), 68 OR (3d) 51 (CA); *R v Polewsky* (2005), 202 CCC (3d) 257 (Ont CA). But for recent applications of the common-law presumption against absolute liability, see *R v Kanda* (2008), 227 CCC (3d) 417 (Ont CA); *R v Raham*, (2010) 99 OR(3d) 241.

example of absolute liability falls into the same pattern as seen above with respect to subjective fault and the extension of fault to all elements of the *actus reus*. In all three areas, constitutional standards of fault are significantly less protective of the accused than criminal law standards articulated as a series of common-law presumptions by the Supreme Court in the 1950s and 1970s. The gap between Canada's criminal and constitutional standards of fault is significant and striking. It cannot be dismissed as a result of a few wrongly or closely decided cases.

III *What has been left behind and reasons that may explain the gap between criminal and constitutional protections of fault*

In this part of the article, I will provide a defence of subjective fault as the appropriate starting point for thinking about criminal liability. I will then suggest that the Court's reluctance to constitutionalize criminal law principles of subjective fault may be a sign of misgivings about the soundness of subjective-fault principles as universal principles of fault. Another explanation for the gap relates to the Court's unique treatment of section 7 of the Charter in relation to section 1 of the Charter. The Court may have been reluctant to constitutionalize subjective-fault principles under section 7 of the Charter because of the difficulty of accepting any limitation on these principles under section 1 of the Charter.

A WHAT HAS BEEN LEFT BEHIND: THE CASE FOR SUBJECTIVE FAULT

Why should subjective fault and related common-law principles requiring proof of fault for all aspects of the prohibited act be the constitutional starting point? Although a full defence of subjective-fault principles is not possible here, there is much to commend subjective standards as principles of fundamental justice. First, subjective fault makes the fullest allowance for diversities in the mental capacities and functioning of accused. Even objective standards that are individuated to reflect factors such as the age and gender of the accused risk a degree of over- and under-inclusiveness in determining individual fault that is not present with respect to subjective fault.¹⁰² In any event, the Court has refused individuated objective standards, and it has struggled with the difficulties of ensuring that negligence standards are applied fairly to the

102 This point was made by Justice Wilson in *R v Tutton*, [1989] 1 SCR 1392 at 1418–9 [*Tutton*] when, after surveying attempts by HLA Hart, George Fletcher, and Toni Pickard to individuate the objective standard in an attempt to ensure that it could fairly be applied to all persons, she concluded that such approaches suffer 'from the various degrees of over and under inclusiveness that would be expected from a test which is only a rough substitute for a finding of a blameworthy state of mind in each case.'

broad range of people who may commit criminal acts.¹⁰³ Its approach to objective fault is quite unforgiving to those who, through no fault of their own, cannot be expected to live up to the standard of the reasonable person. As Glanville Williams argued half a century ago,

[S]ome people are born feckless, clumsy, thoughtless, inattentive, irresponsible, with a bad memory and a slow 'reaction time.' With the best will in the world, we all of us at some time in our lives make negligent mistakes. It is hard to see how justice (as distinct from some utilitarian reason) requires mistakes to be punished.¹⁰⁴

If anything, our awareness of the diverse abilities of individuals to conform to objective social standards has only increased since Williams made this argument and the Canadian courts embraced subjective-fault standards in the 1950s and 1970s.¹⁰⁵ Subjective-fault requirements force judges and juries to keep as open a mind as possible and consider what was in the accused's mind before imposing society's greatest censure on those people. Thus, subjective fault imposes an important restraint on the use of the criminal sanction and an important reminder about the need to attempt to understand each accused as an individual.

Although much recent criminal law theory has been preoccupied with making the case for objective fault as a sufficient form of fault, there is still much to be said intuitively for subjective-fault principles. For example, most of us would find it to be unjust to be convicted of possessing illegal drugs if we had not been aware that drugs had been placed in our luggage. The possibility that we might have taken better care guarding our luggage would not justify the imposition of either the stigma or the punishment for possessing illegal drugs. Support for the idea that there is intuitive and common-sense support for subjective fault is also found in the fact that Parliament has not yet rushed to impose objective fault despite the lack of constitutional barriers to such laws. New laws targeting terrorism¹⁰⁶ and luring children on computers¹⁰⁷ employ subjective

103 *Creighton*, supra note 6.

104 Williams, supra note 14 at 122. Alexander & Ferzan recently made a similar point in arguing that '[a]t any point in time we are failing to notice a great many things, we have forgotten a great many things, and we are misinformed or uninformed about many things . . . Even those most concerned with the well-being of others will violate this injunction constantly'; Larry Alexander & Kimberly Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge: Cambridge University Press, 2009) at 71.

105 For examples of accused who have mental disorders or disabilities who do not qualify for the restrictive mental disorder defence see Kent Roach & Andrea Bailey 'The Relevance of Fetal Alcohol Spectrum Disorder and the Criminal Law from Investigation to Sentencing' (2009) 42 UBC L Rev 1.

106 *Criminal Code*, ss 83.03–83.2.

107 *Ibid*, s 172.1.

fault, and even with respect to arson, Parliament distinguishes ‘arson by negligence’¹⁰⁸ from traditional intentional arson.¹⁰⁹ Even George Fletcher’s own work found that, despite clear instructions on the need for reasonable standards when acting in self-defence, a New York jury applied a subjective theory of self-defence when it acquitted Bernard Goetz.¹¹⁰

Subjective fault fits better than objective fault with most theories of punishment which respond to intentional or at least conscious decisions of offenders to break laws. Theories of retributive justice correspond well with the idea that the accused had subjective fault¹¹¹ as do theories of punishment based on specific deterrence¹¹² or restorative justice.¹¹³ A person who was not aware of the harm that he or she caused or the risk that he or she ran cannot easily be blamed or deterred by the use of the criminal sanction. Such persons also cannot meaningfully acknowledge personal responsibility for the harm that they inadvertently caused.

The case from tradition for subjective fault should not be ignored. Subjective-fault principles were the traditional starting point for much of the last half of the twentieth century. The principles of fundamental justice in section 7 of the Charter are in large part derived from traditional legal principles. Although increasing concerns about risks and particular crimes may justify some departures from subjective fault, they cannot explain why subjective fault should be abandoned as the constitutional starting point. The constitutional abandonment of subjective fault represents a break with tradition and one that will make it easier to apply criminal sanctions. It will also mean that governments will not have to justify under section 1 of the Charter the use of objective fault or constructive liability even though such standards place less of a burden on the state and run the risk of unfairness towards those accused who have not lived up to and may be incapable of living up to the standards of the reasonable person. The Supreme Court has not provided a sufficient explanation for why subjective fault should be abandoned as a constitutional starting point.

The case for requiring proof of fault in relation to all aspects of the prohibited act is related to the above defence of subjective-fault principles, but may be a bit less strong. Intuitively, a person held responsible for causing death or bodily injury should have some responsibility for such harms. The felony murder cases recognize the injustice of

108 Ibid, s 436.

109 Ibid, s 433.

110 George Fletcher, *A Crime of Self Defence* (New York: Wiley, 1995).

111 *R v M (CA)*, [1996] 1 SCR 500 at para 79.

112 *Sault Ste Marie*, supra note 23.

113 *R v Gladue*, [1999] 1 SCR 688; *R v Proulx*, [2000] 1 SCR 61.

convicting people of murder for accidental deaths.¹¹⁴ It is not clear that this injustice is completely eliminated with respect to less serious offences such as manslaughter or impaired or dangerous driving causing death. Labels matter and play into the stigmatization of the accused. At the same time, departures from the rule that fault should be proven in relation to all aspects of the prohibited act may be justified in certain contexts where unlawful or licensed activities create a widely accepted and acknowledged risk of certain harms. Such a non-absolutist approach to the protection of traditional fault principles is consistent with the approach used by the rebuttable presumptions of the common law. Like the common-law principles themselves, constitutionalized subjective-fault principles should allow for exceptions where both objective and constructive liability may be appropriate and necessary. In a constitutionalized environment, however, such exceptions should be justified as proportionate restrictions on the right of the accused to be held criminally liable only for subjectively known or risked harms.

B THE RISE OF CONCERNS ABOUT HARMS, RISKS, AND VICTIMS AS ALTERNATIVES TO SUBJECTIVE FAULT

The high point of the Court's commitment to principles of subjective fault came in *Pappajohn*¹¹⁵ where the entire Court agreed with Justice Dickson's articulation of a defence that the accused could honestly but not necessarily reasonably have a mistaken belief that a complainant had consented to sexual activity. The court was divided, with Justice Dickson in a minority, on whether the jury should have been instructed about the mistake of fact defence in the particular case, but they were unanimous as to the subjective nature of the defence and of criminal fault in general. The Court's defence of subjective fault in *Pappajohn* was subject to extensive criticism by feminist scholars who argued that it disregarded the sexual-assault context¹¹⁶ and the perspective of women as victims and potential victims of sexual assault.¹¹⁷ Although it is difficult to demonstrate that this critique had direct influence on the Court's subsequent decisions, it is noteworthy that the general *Pappajohn* principle of subjective fault in relation to all aspects of the

114 For arguments for recognizing a principle of fundamental justice that a person should not be convicted of murder for an accidental death, see Kent Roach, 'The Problematic Revival of Murder under Section 229(c)' (2010) 47 *Alta L Rev* 675 at 699 [Roach, 'Problematic'].

115 *Supra* note 33.

116 See e.g. Toni Pickard, 'Culpable Mistakes and Rape' (1980) 30 *UTLJ* 75.

117 Catharine Mackinnon, *Toward a Feminist Theory of the State* (Cambridge, MA: Harvard University Press, 1989) at 180, criticizing both subjective- and objective-fault standards for not considering the 'women's point of view.'

*actus reus*¹¹⁸ has not been constitutionalized, even while the doctrinally similar decision of *Sault Ste Marie*¹¹⁹ has been partially constitutionalized. In addition, the specific *Pappajohn* mistaken belief in consent defence has 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.¹²⁰ This provision represents a Parliamentary attempt to combine subjective and objective forms of liability in order to deal with the particular context of sexual violence. This provision has been upheld under the Charter.¹²¹ All of these developments suggest less support for the *Pappajohn* principles of requiring proof of subjective fault for all parts of an offence.

It is also significant that the Court has, over the last twenty years, gone to great pains to recognize, develop, and refine negligence as a legitimate form of fault in the criminal law. In *Creighton*,¹²² 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 Court's 2008 decision in *Beatty*¹²³ to require a marked departure whenever negligence liability is used also attempted to legitimate negligence as a form of criminal fault. The Court's subsequent decision to affirm a slightly higher standard of marked and substantial departure for criminal negligence offences¹²⁴ suggests that attention is now being paid to different levels of objective fault. These developments reflect much contemporary interest in theorizing about objective fault¹²⁵ but also the paucity of theoretical defences of subjective fault over the last thirty years.

The Supreme Court's recent performance on subjective fault has been lacklustre. The Court has blurred different degrees of subjective fault and contributed to a process of thinning out subjective-fault requirements. It has rejected the idea that purpose can be negated by duress;¹²⁶ it has held that wilful blindness is an equivalent to knowledge;¹²⁷ it has hinted that recklessness may be a sufficient form of fault with respect to the constitutionally required *mens rea* for war crimes;¹²⁸ and it has equated recklessness

118 See text accompanying notes 40–2 supra.

119 Supra note 23.

120 *Criminal Code*, s 273.2(b).

121 *R v Darach*, (1998) 122 CCC (3d) 225 (Ont CA) aff'd on other grounds, [2000] 2 SCR 443.

122 Supra note 6.

123 Supra note 16.

124 *R v JF*, 2008 SCC 60.

125 See Fletcher, *Rethinking*, supra note 9 at 6.8; see also Tadros, supra note 9.

126 *R v Hibbert*, [1995] 2 SCR 973.

127 *R v Sansregret*, [1985] 1 SCR 606; *R v Briscoe*, 2010 SCC 13.

128 *Mugesera*, supra note 76 at para 176.

with an explicit statutory purpose requirement¹²⁹ and perhaps even as an acceptable form of fault for the offence of incitement.¹³⁰ Some courts have also revived murder under section 229(c) of the *Criminal Code* in a way that arguably blurs distinction between objective and subjective fault and can impose murder convictions for accidental deaths resulting from the pursuit of unlawful objects when the accused does not intend to kill or even harm any particular person.¹³¹ In comparison to negligence, subjective-fault principles have not thrived in the Charter era.

Why might the Court have misgivings about subjective fault? Increased judicial and scholarly interest in negligence as an acceptable form of criminal fault is undoubtedly a factor. Feminist critiques of subjective fault as ignoring the perspective of the victim and allowing harmful attitudes to exonerate the accused has also likely played some role. Another factor has probably also been increased awareness of the risk of harms and a willingness to use the criminal law to prevent sometimes catastrophic risks from being realized. All of these factors have contributed to making the criminal law more concerned with the harm that is caused to victims and society than with the fault or reasons why the accused acted in a harmful manner. For example in *DeSousa*, the Court concluded that

it is acceptable to distinguish between criminal responsibility for equally reprehensible acts on the basis of the harm that is actually caused. This is reflected in the creation of higher maximum penalties for offences with more serious consequences. Courts and legislators acknowledge the harm actually caused by concluding that in otherwise equal cases a more serious consequence will dictate a more serious response.¹³²

A similar concern about harm informs the majority's decision in *Creighton*,¹³³ with respect to both 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. The increased emphasis on harm in Canadian criminal law reflects the emergence of victims and potential victims of crime as well as the calculated risk of harms as more important concerns in criminal

129 *R v Kerr*, [2004] 2 SCR 371 at para 26, Bastarache J; *ibid* at para 88, LeBel J, Arbour J, concurring.

130 *R v Hamilton*, [2005] 2 SCR 432 at para 29. See Stuart, *Treatise*, *supra* note 24 at 712; Eric Colvin & Sanjeev Anand, *Principles of Criminal Law*, 3d ed (Toronto: Carswell, 2007) at 570, suggesting acceptance of a recklessness standard for incitement.

131 *R v Shand* (2011) ONCA 5; *R v SR (J)* (2008), 237 CCC (3d) 305 (Ont CA); *R v Magno* (2006), 210 CCC (3d) 500 (Ont CA) leave to appeal to SCC refused, [2006] SCCA No 407; see also Roach, 'Problematic,' *supra* note 114.

132 *DeSousa*, *supra* note 23.

133 *Supra* note 6.

law.¹³⁴ To be sure, these concerns have not displaced subjective-fault requirements for the most serious cases, but they have likely played a role in diminishing enthusiasm for the constitutionalization of subjective-fault principles as universal standards of fault.

C THE COURT'S UNIQUE TREATMENT OF SECTION 7 IN RELATION TO THE SECTION 1 OF THE CHARTER

Starting with its earliest decision constitutionalizing fault requirements,¹³⁵ the Supreme Court has more or less consistently held that violations of section 7 of the Charter could only be upheld as reasonable limits on rights in extraordinary circumstances such as states of emergency.¹³⁶ The Court has never upheld a section 7 violation under section 1 of the Charter.¹³⁷ The Court's restrictive approach to accepting reasonable limits on section 7 is unique under the Charter. No similar restrictions have been imposed with respect to any other Charter right. For example, the Court has frequently held that limitations on the presumption of innocence which requires the prosecutor to prove guilt beyond a reasonable doubt were reasonable, even though the presumption of innocence is a fundamental feature of the criminal justice system. Interestingly, the Court has also interpreted the presumption of innocence in section 11(d) of the Charter in a broad and generous manner so that the right is violated when the accused is required to establish a defence or when the accused only bears the evidential burden of adducing evidence that is capable of raising a reasonable doubt about a mandatory presumption.¹³⁸ As was seen in the second part of this article, however, the Court's approach to the interpretation of section 7

134 See generally Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999); Garland, *supra* note 10.

135 *Re BC Motor Vehicles*, *supra* note 1.

136 *Ruzic*, *supra* note 4; *R v DB*, [2008] 2 SCR 3. See generally Peter Hogg, *Constitutional Law of Canada*, 4th ed (Toronto: Carswell, as updated) at 35.14; Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 4th ed (Toronto: Irwin Law, 2009) at 84, 221–2.

137 Justice McLachlin, in dissent in *Hess*, *supra* note 1, was prepared to uphold an offence of statutory rape as a reasonable response to the dangers of premature sexual intercourse by girls, even though the offence violated the Charter, s 7, by denying the accused any defence with respect to his belief about the girl's age. The majority of the Court, however, found that the violation of Charter, *ibid*, s 7, could not be justified under s 1 because of the existence of more proportionate alternatives, such as the present law, *Criminal Code*, s 150.1, which restricts recognizing the accused's mistaken belief about a child's age as a defence to cases where he or she has taken all reasonable steps to ascertain the child's age. See also Chief Justice Lamer in *R v Penno*, [1990] 2 SCR 865, who, in a sole concurrence, was also prepared to accept a section 1 limitation on section 7 rights in order to uphold the exclusion of intoxication as a defence to intoxicated driving.

138 *Whyte*, *supra* note 20; *Downey*, *supra* note 20.

of the Charter cannot be characterized as broad and generous, at least with respect to its refusal to constitutionalize common-law standards of fault.

It does not require wild speculation or hyper-legal realism to conclude that the Supreme Court has been concerned about the broader implications of its Charter rulings on fault. In *Vaillancourt*, Lamer J explicitly recognized that the constitutionalization of subjective fault would place many criminal offences in jeopardy.¹³⁹ In both *DeSousa*¹⁴⁰ and *Creighton*,¹⁴¹ the Court examined a range of offences that were not before it such as the offences of impaired driving causing death before concluding that it should not constitutionalize a principle that would require the proof of fault in relation to all aspects of the prohibited act. These decisions demonstrate that the Court was concerned about the impact of its decisions on other offences. If the Court had been more willing to entertain possible section 1 justifications for departing from section 7, it could have constitutionalized traditional fault standards under section 7 while recognizing that the government might be able to justify departures from such standards in some contexts such as impaired driving causing death or sexual assault or corporate crime.

The Court's effective reading out of section 1 from section 7 brings section 7 much closer to traditional models of constitutional and judicial supremacy, where constitutional rights are not subject to a formal limitation process and departures from constitutional rights require approval from the Court or the amendment of the Constitution.¹⁴² Under such models of judicial review, courts are rightly more cautious when interpreting the constitution than the common law because the constitution constitutes the supreme law that cannot easily be changed. Proponents of common-law,¹⁴³ 'Commonwealth',¹⁴⁴ or dialogic¹⁴⁵ constitutionalism, however, argue that much of the distance between common-law and constitutional protections of rights can be diminished when constitutional

139 *Supra* note 51 at para 27.

140 *Supra* note 23.

141 *Supra* note 6.

142 Judicial supremacy is based on the idea that 'the very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials'; *West Virginia Board of Education v Barnette*, 319 US 624 at 638 (1943).

143 WJ Waluchow, *A Common Law Theory of Judicial Review* (Cambridge, UK: Cambridge University Press, 2007).

144 Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *Am J Comp L* 707.

145 Kent Roach, *The Supreme Court on Trial: Democratic Dialogue or Judicial Activism* (Toronto: Irwin Law, 2001). A large literature has emerged about both whether dialogic constitutionalism is possible and whether it is desirable. See 'Charter Dialogue: Ten Years Later' (2007) 45 *Osgoode Hall LJ* 1ff.

rights are subject to limitation and derogation as is the case under the Canadian Charter and many other modern bills of rights. Even without reference to such theories, one needs only look to the Court's frequent acceptance of section 1 limits on the presumption of innocence to see that subjective-fault principles could have been constitutionalized and that exceptions to such principles could have frequently been justified had the Court simply treated violations of section 7 under section 1 as they treated other Charter rights.

IV *The future of the gap between criminal and constitutional law standards*

There are three possible scenarios with respect the future of the gap that now exists between criminal and constitutional law standards of fault. The first scenario is that the status quo will continue and the common law and the Charter will provide dual but different standards of protection from legislative incursion of fault principles. The second and preferable scenario is that courts will move toward a unitary approach, where constitutional law standards expand to incorporate traditional criminal law standards. The third scenario is also a unitary one, but one in which the minimum standards of the Charter become maximum standards and the principles of subjective fault that were articulated so forcefully by the Supreme Court in the 1950s and the 1970s fade into history.

A IS THE DUALIST STATUS QUO DESIRABLE AND SUSTAINABLE?

The present state of the law provides judges with two distinct instruments for resisting legislative incursions on fault principles. The first is the use of the various common-law presumptions examined in the first part of this article. Courts can use these protections to insist that legislatures make clear statements to displace presumptions of subjective fault. Once legislatures make clear statements to displace subjective-fault principles, courts can then review the legislative product under section 7 of the Charter. The Court is not powerless at this stage, but it will be cautious in recognition of the fact that absent an override under section 33, its rulings will likely be the last word. It will be constrained by its prior failure to recognize principles of subjective fault as principles of fundamental justice at least outside the context of murder, attempted murder, and war crimes.

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 support for the limitation of rights.¹⁴⁶ In subsequent years, many scholars have followed

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

Bickel and commented favourably on the utility of clear-statement rules.¹⁴⁷ Much of the interest in clear-statement rules has been in their 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 judicial decisions. Such an approach may 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 can promote deliberation about rights in the legislative process. One unfortunate feature of much penal legislation is that it is frequently enacted in response to highly publicized crimes. In such circumstances, there may be a value in allowing the court to counter populist measures under the common law while giving Parliament an opportunity to have sober second thoughts. Parliament can then decide whether to accept the Court’s common-law decision or enact legislation that explicitly displaces subjective-fault principles.

Although the dualist status quo has the virtue of promoting deliberation, there are reasons to question whether it is desirable. For those influenced by Bickel, the use of statutory presumptions is a second-best strategy that is designed to mitigate judicial supremacy. In the Canadian context, judicial supremacy can be avoided and a full constitutional dialogue between courts and legislatures can be maintained provided that the possibility of legislative limits and override on all rights is maintained.¹⁴⁸ In any event, it is not clear that dualism is sustainable. Common-law presumptions of fault were generated and thrived in a pre-Charter environment when legislatures were often content to enact offences without addressing what, if any, fault element was required. In a sense, legislatures delegated the fault issue to judicial determination. In the Charter era, however, proposed legislation is now frequently given pre-enactment scrutiny to determine its consistency with the Charter.¹⁴⁹ Lawyers advise governments about the limits of their powers, and this may result in legislation that more frequently uses the full extent of the government’s power under the Charter. Charter-proofed legislation may more frequently make use of Charter precedents that

147 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).

148 Guido Calabresi, ‘Forward: Anti-Discrimination and Accountability (What the Bork-Brennan Debate Avoids)’ (1991) 105 Harv L Rev 80 at 124–5.

149 See generally James Kelly, *Governing with the Charter* (Vancouver, BC: University of British Columbia Press, 2005).

allow for the use of negligence liability for most crimes, that allow absolute liability so long as the threat of imprisonment is eliminated, and that allow people to be punished for the unintended and unforeseen harms that they caused. If this occurs, the minimum standards of the Charter could become *de facto* maximum standards.

In addition, courts and commentators may become less committed to common-law standards over time. There may be a tendency to think that, if the constitution allows departures from common-law standards, then the standards are not intrinsically valuable in themselves. This tendency is especially evident in *DeSousa*,¹⁵⁰ where the Court essentially rewrote history by denying that the common-law presumption that fault should be proven with respect to all elements of the prohibited act ever existed. The majority's approach in *Creighton*¹⁵¹ more accurately conceded the existence of the common-law presumption, but then labelled it a matter of 'criminal law theory' that was not a fundamental principle of criminal justice. Moreover, the Court suggested that this particular form of 'criminal law theory' was at odds with a 'common sense of justice,' something that suggests that the theory itself is not sound.¹⁵² Fault requirements are particularly vulnerable to denigration precisely because they are not intuitive or popular. They are particularly not intuitive in the face of a horrific act where people have died or been seriously injured. There is a danger that less attention will be paid to the common-law presumptions in scholarship and teaching about the criminal law. If the common-law presumptions are not known, they will atrophy like an unused muscle. They may weaken and eventually fade away.

B TOWARD A UNITARY FUTURE WHERE CONSTITUTIONAL STANDARDS CATCH UP TO CRIMINAL STANDARDS

In the early years of the Charter, it was possible to imagine a future where traditional criminal law presumptions of subjective fault would be fully constitutionalized under section 7 of the Charter. In 1985, the Court firmly rejected the idea that section 7 was limited to the protection of procedural fairness. Rather, the principles of fundamental justice were to be found in the basic tenets of the justice system and these basic tenets seem to include the common-law presumptions of fault. In 1987, Lamer J even speculated that "[i]t 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.""¹⁵³ In my view, it would have been best for the Court to have

150 *Supra* note 23.

151 *Supra* note 6.

152 *Ibid.*

153 *Vaillancourt*, *supra* note 51 at para 27.

constitutionalized common-law presumptions of fault under section 7 but to have allowed the government the same opportunity to justify limits on those rights under section 1 as under other Charter rights. As suggested in the third part of this article, the constitutionalization of subjective-fault principles would have embraced individualistic theories of criminal liability which are perfectly tailored to the capacity of each accused and which are most congruent with theories of punishment and fair labelling that see criminal acts as a choice made by the accused. The constitutionalization of such standards would have been a strong signal about the need for restraint in the use of the criminal sanction and the criminal law's commitment of fairness to all individuals.

The constitutionalization of subjective fault would have meant that all absolute-liability offences, all constructive-liability offences that did not require proof of fault in relation to all aspects of the prohibited act, and all criminal offences that required negligence liability would have violated section 7 of the Charter. Nevertheless, the government would have been allowed to justify departures from these standards under section 1 without any need for showing the existence of an emergency. If this had occurred, the government would likely have been able to justify the use of negligence in connection with manslaughter and the use of constructive liability for aggravated forms of impaired and dangerous driving. It might also have been able to justify blended forms of subjective and objective fault with respect to sexual assault and corporate crime. In other words, the bottom line might frequently have been the same as under the current law. Nevertheless, the gap between criminal-law and constitutional standards of fault would have been closed. Traditional criminal law standards of fault would have been strengthened by being recognized as constitutional principles of fundamental justice. At the same time, governments would have had to take care to justify departures from such standards as reasonable limits on Charter rights.

Unfortunately, the time for such a unitary approach may have passed. Although much could be gained by constitutionalizing traditional fault principles under section 7, future attempts to do so will face challenges found in both the Court's jurisprudence of fault and its section 1 jurisprudence. Courts would have to overrule precedents such as *Creighton*¹⁵⁴ that reject traditional fault principles as principles of fundamental justice and would have to retreat from *dicta* that tie constitutional requirements for subjective fault to the special stigma of crimes such as murder. Such a reinvigorated approach to section 7 would not be enough. The Courts would also have to revisit section 1 jurisprudence that suggests that limits on section 7 rights cannot be justified except in emergencies.

154 *Supra* note 6.

This may be too much change to expect, and the existing fault protections under section 7 could become less secure if the Court only changed the section 1 jurisprudence.

C THE DANGERS OF A UNITARY FUTURE WHERE CRIMINAL LAW STANDARDS DECREASE TO MATCH MINIMAL CONSTITUTIONAL STANDARDS

As suggested above,¹⁵⁵ my preference would be for a unitary approach where traditional criminal fault principles were constitutionalized but subject to ordinary section 1 limits. The second best option would be the maintenance of the status quo. But there is also a risk of a third type of future. This third possible future is based on a race to the bottom where traditional criminal law standards will be abandoned to reflect only the minimum fault standards that the Court has recognized under section 7. In such a scenario, precedents such *Sault Ste Marie* and *Pappajohn* would increasingly be viewed by commentators and courts as relics of an age that was insensitive to the importance and challenges of prosecuting corporate crime and sexual violence. Courts and legislatures would increasingly focus on the minimum standards of the Constitution and pay less attention to older common-law standards that have suffered for not being constitutionalized.

Legislatures have incentives to create crimes that are as broad as constitutionally possible.¹⁵⁶ If Parliament continues to be attracted to adopting the toughest policy on crime that is constitutionally permissible or defensible, then we may already be moving into a *de facto* unitary approach where the more robust criminal law protections of fault become irrelevant. The federal minister of justice has a duty to report on proposed legislation that is inconsistent only with the minimum standards of the Charter and not with the more robust standards of the common law. Legislatures could enact more harm-based constructive-liability offences that displace the common-law presumption that fault should be proven in relation to all aspects of the *actus reus*. Legislatures could freely employ absolute liability so long as they punish only with high fines. They may also more frequently employ objective and constructive forms of liability so long as the crime does not have a special stigma. All of these actions would be perfectly consistent with the Charter. Nevertheless, they would represent an unrestrained approach to the use of the criminal law that was not sensitive to the need for subjective

155 See Part III-A, above.

156 William Stuntz, 'The Pathological Politics of Criminal Law' (2001) 100 Mich L Rev 505, noting the incentives of legislatures to create broad crimes and arguing that greater constitutionalization of the criminal law is necessary; Markus Dubber, 'Policing Possession: The War on Crime and the End of Criminal Law' (2002) 91 J Crim L & Criminology 829; broad criminal offences provide little if any restraint on the police.

fault before the strong sanction of the criminal law is employed against a particular individual or of older traditions as represented by criminal law standards of subjective fault.

The prospect of a unitary race to the bottom approach in which the criminal law standards of the 1950s and the 1970s fade away is not appealing. As discussed above, there remains much to be said for principles of subjective fault even if the courts are unwilling to protect them under the Charter. For example, subjective principles of fault provide a better base for tailoring criminal law standards to the realities of the many accused who, because of various personal characteristics, including addictions, genetics, mental health, and disability issues, are not easily measured by the standards of the reasonable person. They avoid the inevitable stereotyping that may accompany the use of modified objective standards that attempt to factor in some personal characteristics of the accused into objective reasonable-person standards, but not others.¹⁵⁷ The feminist critique of subjective-fault standards in the 1980s and early 1990s that may have influenced the Court not to constitutionalize subjective-fault principles across the board has itself changed, as some feminist commentators have paid more attention to the diversity of women and have expressed concerns that attempts to incorporate ‘female’ experiences into the law may only reflect hierarchies and stereotypes.¹⁵⁸ There is much to be said for the old subjective principles of fault, but they will not survive without contemporary defenders.

v *Conclusion*

The significant gap that now exists between Canada’s criminal-law and constitutional standards of fault, as well as the Court’s 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, risk, and objective fault are on the ascendency.

157 Justice Wilson argued that, rather than adopt a modified objective approach to fault, ‘it seems preferable to me to continue to address the question of whether a subjective standard (a standard, I might add, that in its form is applied equally to all and consistent with individual responsibility) has been breached in each case than to introduce varying standards of conduct which will be only roughly related to the presence or absence of culpability in the individual case’; *Tutton*, supra note 102 at 1418–9. See also Kent Roach, ‘Justice Bertha Wilson: A Classically Liberal Judge’ in Jamie Cameron, ed, *Justice Bertha Wilson* (Toronto: LexisNexis, 2008) at 206–9.

158 See e.g. some feminist critiques of the Court’s attempt to incorporate feminist critiques of pornography and the uneasiness expressed by many feminist commentators about the incorporation of battered woman’s syndrome into the law; Brenda Cossman, ‘Disciplining the Unruly’ (2003) 36 UBC L Rev 77; Isabel Grant, ‘The ‘Syndromization’ of Women’s Experience’ (1991) 25 UBC L Rev 23.

If this is true, then in some respects the Court may have been prescient and prudent not to constitutionalize subjective-fault principles at a time when they were on the retreat. Nevertheless, the abandonment or slow death of subjective-fault principles would be an unfortunate development because they provide a bulwark against populist impulses that would punish on the basis of harm inflicted with little regard to culpability and individual differences between the accused. Subjective-fault principles determine the culpability of accused in all their individuality and resist the urge to see accused as undifferentiated objects of deterrence and denunciation. They also relate best to retributive, deterrent, and restorative theories of punishment, which all see wrongdoing as a choice that the accused can control.

If present constitutional minimums become maximum standards, legislatures will be able to use objective and harm-based constructive liability for most criminal offences and impose no-fault absolute liability so long as imprisonment is not possible. They will also be able to hold accused to blame for unintended and unforeseen harms, especially if the accused was engaged in illegal, blameworthy, or risky behaviour at the time that the harm was caused. This article has assumed that at times such an approach could be justified, but maintains that departures from traditional subjective-fault principles should be demonstrated by the government to be a proportionate and necessary response in a particular context. The failure to constitutionalize subjective-fault principles creates the danger that the use of objective fault, absolute liability, and constructively liability, once seen as exceptional and suspect under the common law, will be normalized and legitimized under the Charter.

Criminal law presumptions of subjective fault that were robust and strong at the time that the Charter was enacted in 1982 have become much weaker since that time. No doubt there are historical forces including increased concerns about risks and harms to victims that can explain such trends. On a normative level, however, the constitutional abandonment of subjective-fault principles is regrettable because subjective-fault principles can ensure that the criminal law is administered in a manner that is sensitive to the individual capacities of the many different people who stand accused of crimes. Moreover, the Court could have constitutionalized and protected subjective-fault principles under section 7 and allowed the government to justify perhaps frequent departures from them had it not effectively made it impossible to justify section 1 limits on section 7 rights. The result of these multiple doctrinal and intellectual forces is that subjective-fault principles are now much less well protected in Canada than before the enactment of the Charter. Canada may appear in a comparative sense to have robust constitutional protections for criminal fault. Nevertheless, a deeper historical look suggests that subjective fault actually had a much greater hold on Canadian law before the enactment of the Charter.