# Objective *Mens Rea* Revisited

*Terry Skolnik*[*]

*Since the enactment of the Canadian Charter, the criminal law concept of mens rea has evolved significantly. The objective standard of fault or objective mens rea — has been the subject of much doctrinal and theoretical examination. Where proof of objective mens rea is required, an accused can be convicted because their dangerous conduct constituted a marked departure from the norm and a reasonable person would have foreseen and avoided the risk. In this article, it is argued that there are two groups of concerns related to the concept of objective mens rea in Canadian law.*

*On the one hand, there are culpability-related concerns. Culpability for objective mens rea can be difficult to justify in a system of criminal law premised on rationality, choice, and fair stigmatization. On the other hand, there are constitutional concerns. Subjective awareness of a risk of harm to others should be constitutionally required in certain contexts. This is most notably the case where the accused can be stigmatized for having killed another person and is liable to life imprisonment.*

*Due to these two groups of concerns, objective mens rea should be revisited accordingly.*

---

*Depuis la promulgation de la Charte canadienne, le concept de droit criminel de mens rea a considérablement évolué. Le critère objectif de la faute ou mens rea objective a fait l'objet de nombreuses études doctrinales et théoriques. Lorsque la preuve d'une mens rea objective est requise, un accusé peut être déclaré coupable parce que sa conduite dangereuse constituait un écart marqué par rapport à la norme, et qu'une personne raisonnable aurait prévu et évité le risque. Dans cet article, l'auteur prétend qu'il y a deux groupes de préoccupations liées à la notion de mens rea objective du droit canadien.*

*D'une part, il y a des problèmes liés à la culpabilité. La culpabilité à l'égard d'une mens rea objective peut être difficile à justifier dans un système de droit criminel fondé sur la rationalité, le choix et la juste dénonciation. D'autre part, il existe des préoccupations constitutionnelles. La prise de conscience subjective d'un risque de préjudice pour les autres devrait être nécessaire dans certains contextes. C'est notamment le cas où l'accusé peut être stigmatisé pour avoir tué une autre personne et est passible d'emprisonnement à perpétuité.*

*En raison de ces deux groupes de préoccupations, la mens rea objective devrait être revue en conséquence.*

---

[*] I would like to thank Michelle Biddulph and the peer-reviewer for their helpful feedback and comments. I would also like to thank the SSHRC for their generous support.

## I. INTRODUCTION

Within the past thirty years, Canadian criminal law has undergone a series of drastic changes. Many developments are attributable to the enactment of the *Canadian Charter of Rights and Freedoms*,[1] and how it radically transformed fundamental substantive and procedural aspects of criminal law.[2] One of the most significant changes catalyzed by the *Charter* was the evolution of *mens rea* — the morally blameworthy mental element or fault required to prove the accused's guilt for a given offence.[3] Since the *Charter* was enacted, Canadian law has increasingly distinguished between two principal standards of fault required to convict persons accused of criminal offences: subjective and objective *mens rea*. In this article, it will be argued that the current conception of objective *mens rea* must be revisited due to two sets of concerns.

The first relates to culpability and the potential for unfair conviction of individuals who commit certain offences requiring proof of objective fault. The contention is that this can occur in three contexts. First, for some skills-based activities like driving, the standard of care is based on a certain level of experience. But to meet that standard, individuals must be able to acquire that experience. In these types of activities, the risk that an individual creates is often at its highest when the individual's experience is at its lowest. The risk that an individual poses to others decreases as the individual's experience increases. The initial creation of higher risks is therefore both a necessary aspect of acquiring experience and attributable to their inexperience. Yet the law denies these individuals the possibility to invoke their inexperience as a reason for failing to advert to a given risk. This is objectionable insofar as the reasonable person may be imbued with far more experience than the novice, and there is often no other way to acquire experience other than engaging in the risk-creating activity in question.

Second, some individuals' makeup constitute marked departures from the norm. They may therefore only rarely attain the requisite standard of care even though they are presumed to have the capacity to constantly reach that threshold

---

1 *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. [Hereafter: *Canadian Charter*].

2 *See generally:* Jamie Cameron (ed.), *The Charter's Impact on the Criminal Justice System* (Toronto: Carswell, 1996); Jamie Cameron and James Stribopoulous (eds.), *The Charter and Criminal Justice: 25 Years Later* (Toronto: LexisNexis, 2008); Don Stuart, *Charter Justice and Canadian Criminal Law*, 6th ed. (Toronto: Carswell, 2014); M.L. Friedland, "Reforming Police Powers: Who's in Charge?" in R.C. Macleod and David Schneiderman (eds.), *Police Powers in Canada: The Evolution and Practice of Authority* (Toronto: University of Toronto Press, 1994), at p. 101; Kent Roach, "The Effects of the Canadian Charter of Rights on Criminal Justice" (1999) 33 Israel Law Review 607; *R. c. Demers*, 2004 SCC 46, 2004 CarswellQue 1547, 2004 CarswellQue 1548, [2004] 2 S.C.R. 489, (*sub nom.* R. v. Demers) 185 C.C.C. (3d) 257, 20 C.R. (6th) 241, at para. 90.

3 *R. v. H. (A.D.)*, 2013 SCC 28, 2013 CarswellSask 304, 2013 CarswellSask 305, [2013] 2 S.C.R. 269, 295 C.C.C. (3d) 376, 2 C.R. (7th) 1, at paras. 86-87; Rupert Cross, "The Mental Element in Crime" (1967) 83 L.Q.R. 215.

and meet the law's requirements. Third, certain disorders such as Fetal Alcohol Spectrum Disorder may increase the likelihood of inadvertently creating certain risks and grounding objective *mens rea,* yet the condition may go unnoticed by courts.[4] In this latter context, courts ought to be particularly careful in convicting for crimes requiring proof of objective fault.

The second set of concerns are constitutional in nature. It will be argued that in a criminal law system premised on rationality, choice, and fair stigmatization, objective fault seems to fit uneasily into a choice-based conception of culpability.[5] Given these concerns, the article concludes by revisiting the constitutionalization of fair or appropriate stigmatization for certain crimes, including murder, attempted murder, theft, and crimes against humanity.[6] It will be advanced that the current list of offences that constitutionally require subjective fault is neither principled nor justifiable. Lastly, and along the lines of what Arvay and Latimer have recently contended, the article concludes by arguing that objective *mens rea* offences are particularly objectionable insofar as they require nothing more than objective foresight of bodily harm yet are punishable by life imprisonment.[7] The article is divided into the following sections.

In section (a), the differences between subjective and objective *mens rea* are discussed. Section (b) then explores the relationship between choice and culpability, in addition to the justifications for morally blaming those who inadvertently create risks or harm others. In section (c), the principal culpability-related concerns surrounding the objective standard of fault are set out. Section (d) concludes the article by exploring the constitutional problems inherent to the objective standard of fault for certain offences, notably manslaughter and criminal negligence causing death.

---

4 *See generally*: Kent Roach and Andrea Bailey, "The Relevance of Fetal Alcohol Spectrum Disorder in Canadian Criminal Cases from Investigation to Sentencing" (2009-2010) 42 U.B.C. L. Rev. 1

5 Antony Duff, "Choice, Character, and Criminal Liability" (1993) 12 Law and Philosophy 345, pp. 348 and f.

6 *R. v. Finta*, 1994 CarswellOnt 61, 1994 CarswellOnt 1154, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417, 28 C.R. (4th) 265, reconsideration / rehearing refused (June 23, 1994), Doc. 23023, 23097 (S.C.C.) (crimes against humanity) *R. c. Vaillancourt*, 1987 CarswellQue 18, 1987 CarswellQue 98, [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118, 60 C.R. (3d) 289 and *R. v. Martineau*, 1990 CarswellAlta 143, 1990 CarswellAlta 657, [1990] 2 S.C.R. 633, 58 C.C.C. (3d) 353, 79 C.R. (3d) 129 (murder and theft requiring subjective *mens rea*); *R. v. Logan*, 1990 CarswellOnt 1002, 1990 CarswellOnt 110, [1990] 2 S.C.R. 731, 58 C.C.C. (3d) 391, 79 C.R. (3d) 169 (attempted murder).

7 Joseph Arvay and Alison Latimer, "The Constitutional Infirmity of the Laws Prohibiting Criminal Negligence" (2016) 63 C.L.Q. 325.

## II. SUBJECTIVE AND OBJECTIVE *MENS REA*

### (a) Subjective *Mens Rea*

Subjective *mens rea* evaluates the positive state of mind of the accused — what the accused actually knew, intended, or adverted to — rather than what the accused should have known or adverted to in the circumstances.[8] Within the classification of subjective *mens rea*, are four subjective states of mind which must be proven by the Crown beyond a reasonable doubt, depending upon the wording and constitutional requirements mandated for the conviction of a particular offence.[9] The four types of subjective *mens rea* are intention, recklessness, knowledge, and wilful blindness.[10]

Intention is the most blameworthy form of subjective *mens rea* and connotes an intention to bring about certain culpable consequences.[11] Recklessness implies that the accused engaged in some risk-creating conduct and was aware of that risk.[12] Knowledge implies that the accused knew about a morally reprehensible state of affairs or consequence, the paradigm offences of which are crimes of possession.[13] Lastly, wilful blindness means that the accused deliberately omitted to make certain inquiries into blameworthy states of affairs despite the fact that they were curious as to their illegality.[14] Wilful blindness replaces the subjective *mens rea* of knowledge.[15]

---

8 *R. v. H. (A.D.)*, 2013 SCC 28, 2013 CarswellSask 304, 2013 CarswellSask 305, [2013] 2 S.C.R. 269, 295 C.C.C. (3d) 376, 2 C.R. (7th) 1, at para. 3.

9 *R. v. H. (A.D.)*, *ibid.*, at para. 16. For the minimal constitutional requirements, see: *See: R. c. Vaillancourt*, 1987 CarswellQue 18, 1987 CarswellQue 98, [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118, 60 C.R. (3d) 289; *R. v. Martineau*, 1990 CarswellAlta 143, 1990 CarswellAlta 657, [1990] 2 S.C.R. 633, 58 C.C.C. (3d) 353, 79 C.R. (3d) 129.

10 *R. v. H. (A.D.)*, *ibid.*, at para. 16

11 *Id. See notably:* Karl Laird and David Ormerod, *Smith and Hogan's Criminal Law*, 14th ed. (Oxford: OUP, 2015), pp. 116-7, citing professor Duff at footnote 18; Antony Duff, *Intention, Agency, and Criminal Responsibility* (Oxford: B. Blackwell, 1990).

12 *Ibid.* See also: *R. v. Sansregret*, 1985 CarswellMan 176, 1985 CarswellMan 380, [1985] 1 S.C.R. 570, 18 C.C.C. (3d) 223, 45 C.R. (3d) 193, at para. 16. *Smith and Hogan's Criminal Law*, *ibid.*, at pp. 129 and 145; Gerald H. Gordon, "Subjective and Objective Mens Rea (1974-1975) 17 Crim. L.Q. 355, at p. 378.

13 *Smith and Hogan's Criminal Law*, *ibid*, p. 142; *United States v. Dynar*, 1997 CarswellOnt 1981, 1997 CarswellOnt 1982, (*sub nom.* United States of America v. Dynar) [1997] 2 S.C.R. 462, 115 C.C.C. (3d) 481, 8 C.R. (5th) 79. Cited in Smith and Hogan, *ibid.*

14 *Smith and Hogans Criminal Law*, *ibid.*, pp. 143 and f.; *R. v. Briscoe*, 2010 SCC 13, 2010 CarswellAlta 589, 2010 CarswellAlta 588, [2010] 1 S.C.R. 411, 253 C.C.C. (3d) 140, 73 C.R. (6th) 224 at paras 20-21.

15 *R. v. Briscoe*, *ibid.*

### (b) Objective *Mens Rea*

Certain offences require proof of objective *mens rea*,[16] which is synonymous with the standard of penal negligence.[17] Where the offence can be proven by this objective standard, culpability is not grounded in what the accused actually knew, intended, or foresaw.[18] Rather, it is grounded on what the accused should have foreseen or known by comparing their conduct to the standard of the ordinary reasonable person and verifying whether their conduct constituted a marked departure from that standard.[19] Thus, culpability for objective *mens rea* is grounded in the "absence of the requisite mental state of care".[20]

To be clear, this does not mean that the state of mind of the accused is irrelevant — it may be examined in order to exculpate the accused by demonstrating that they took certain precautions to avoid or minimize the creation of risks.[21] An accused's explanation is therefore relevant in assessing whether a reasonable person in similar circumstances would have been advertent to the risk in question.[22] Examining the accused's state of mind aims to ensure that they possessed the requisite degree of moral fault to merit the stigma of the criminal law.[23] Culpability for objective *mens rea,* however, cannot be absolved by the fact that the accused was simply not thinking or were not subjectively aware of the risk.[24] This grounds objective *mens rea* as opposed to negating it.[25]

The Supreme Court of Canada has suggested a two-step inquiry in assessing whether or not objective *mens rea* was proven beyond a reasonable doubt.[26] First, the trier of fact should analyze whether "in light of all the relevant

---

16 *See for instance*, the offence of dangerous driving in *Criminal Code*, s. 249. *See also: R. v. Roy*, 2012 SCC 26, 2012 CarswellBC 1573, 2012 CarswellBC 1574, [2012] 2 S.C.R. 60, 281 C.C.C. (3d) 433, 93 C.R. (6th) 1.

17 *R. v. Beatty*, 2008 SCC 5, 2008 CarswellBC 307, 2008 CarswellBC 308, [2008] 1 S.C.R. 49, 228 C.C.C. (3d) 225, 54 C.R. (6th) 1, at paras. 4-7.

18 *R. v. H. (A.D.)*, 2013 SCC 28, 2013 CarswellSask 304, 2013 CarswellSask 305, [2013] 2 S.C.R. 269, 295 C.C.C. (3d) 376, 2 C.R. (7th) 1, at para. 3; *R. v. Creighton*, 1993 CarswellOnt 115, 1993 CarswellOnt 989, [1993] 3 S.C.R. 3, [1993] 3 S.C.R. 346, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189, at p. 58; *R. v. Beatty*, 2008 SCC 5, 2008 CarswellBC 307, 2008 CarswellBC 308, [2008] 1 S.C.R. 49, 228 C.C.C. (3d) 225, 54 C.R. (6th) 1, at para. 8.

19 *R. v. Roy*, 2012 SCC 26, 2012 CarswellBC 1573, 2012 CarswellBC 1574, [2012] 2 S.C.R. 60, 281 C.C.C. (3d) 433, 93 C.R. (6th) 1, at para. 36.

20 *R. v. Beatty*, 2008 SCC 5, 2008 CarswellBC 307, 2008 CarswellBC 308, [2008] 1 S.C.R. 49, 228 C.C.C. (3d) 225, 54 C.R. (6th) 1, at para. 8.

21 *R. v. Tayfel*, 2009 MBCA 124, 2009 CarswellMan 563, 250 C.C.C. (3d) 219, 72 C.R. (6th) 45, at para. 54, leave to appeal refused 2010 CarswellMan 684, 2010 CarswellMan 685 (S.C.C.).

22 *R. v. Beatty*, 2008 SCC 5, 2008 CarswellBC 307, 2008 CarswellBC 308, [2008] 1 S.C.R. 49, 228 C.C.C. (3d) 225, 54 C.R. (6th) 1, at paras. 43-44.

23 *Ibid.*

24 *Ibid.*, at para. 8.

25 *Ibid.*, at para. 48.

evidence, a reasonable person would have foreseen the risk and taken steps to avoid it if possible".[27] If the first question is answered affirmatively, the second step examines whether the accused's conduct constituted "a marked departure from the standard of care expected of a reasonable person in the accused's circumstances".[28] A marked departure from the norm is required to ensure that the accused is sufficiently morally blameworthy to merit the reprobation associated with a criminal conviction, and to ensure that the civil standard of negligence is not conflated with the more demanding standard in criminal law.[29] In evaluating whether there was a marked departure, personal characteristics of the accused, such as their age, experience, and education, "[are] irrelevant unless [they] go to the accused's incapacity to appreciate or avoid the risk".[30] This was decided in the companion cases *R. v. Creighton*[31], *R. c. Gosset*,[32] and *R. v. Naglik*.[33]

These cases require some elaboration. Creighton was an experienced drug-user convicted of manslaughter for having injected cocaine into the arm of another experienced drug-user, killing her.[34] Gosset was a police officer who accidentally pulled the trigger at a fleeing suspect, was acquitted for manslaughter, but ordered to stand a new trial.[35] Naglik was the mother of an eleven week-old newborn child.[36] When she brought the child to the hospital, doctors remarked that the newborn had sustained serious injuries which occurred over a period of several weeks.[37] She was accused of both aggravated assault and failing to provide the necessities of life.[38]

---

[26] *Ibid.* The term "suggested" is used because Cromwell J. noted that "It is helpful to approach the issue [of objective *mens rea*] by asking two questions".

[27] *Ibid.*

[28] *Ibid.*

[29] *Ibid.*, at paras. 4-7. See also: Glanville Williams, "Convictions and Fair Labeling" [1983] C.L.J. 85, at p. 85.

[30] *R. v. Beatty*, *ibid.*, at para. 38.

[31] *R. v. Creighton*, 1993 CarswellOnt 115, 1993 CarswellOnt 989, [1993] 3 S.C.R. 3, [1993] 3 S.C.R. 346, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189

[32] *R. c. Gosset*, 1993 CarswellQue 16, 1993 CarswellQue 2047, [1993] 3 S.C.R. 76, 83 C.C.C. (3d) 494, 23 C.R. (4th) 280.

[33] *R. v. Naglik*, 1993 CarswellOnt 990, 1993 CarswellOnt 116, [1993] 3 S.C.R. 122, 83 C.C.C. (3d) 526, 23 C.R. (4th) 335.

[34] *R. v. Creighton*, 1993 CarswellOnt 115, 1993 CarswellOnt 989, [1993] 3 S.C.R. 3, [1993] 3 S.C.R. 346, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189, at p. 12.

[35] *R. c. Gosset*, 1993 CarswellQue 16, 1993 CarswellQue 2047, [1993] 3 S.C.R. 76, 83 C.C.C. (3d) 494, 23 C.R. (4th) 280, at p. 80].

[36] *R. v. Naglik*, 1993 CarswellOnt 990, 1993 CarswellOnt 116, [1993] 3 S.C.R. 122, 83 C.C.C. (3d) 526, 23 C.R. (4th) 335, at pp. 128-129.

[37] *Ibid.*

[38] *Ibid.*

In these three cases, the majority of the Court concluded that objective *mens rea* did not permit the standard of fault to fluctuate according to the personal characteristics of the accused.[39] In other words, people with lesser education or experience should not be held to a standard of fault lower than that of the reasonable person, whereas individuals with more experience or education should not be held to a higher standard than what the reasonable person would have done.[40] As the majority of the Court explained in *Creighton*:

> I can find no support in criminal theory for the conclusion that protection of the morally innocent requires a general consideration of individual excusing conditions. The principle comes into play only at the point where the person is shown to lack the capacity to appreciate the nature and quality or the consequences of his or her acts [. . .]
>
> What then is the situation for crimes of inadvertence? Here actual intention or knowledge is not a factor; hence personal characteristics are not admissible on that ground. Nor, in my view, can a case be made for considering them on any other basis, except in so far as they may show that the accused lacked the capacity to appreciate the risk. This appears to be the settled policy of the law, applied for centuries to offences involving manslaughter or penal negligence based on objectively assessed fault. Here, as in crimes of subjective intent, the courts have rejected the contention that the standard prescribed by the law should take into account the individual peculiarities of the accused, short of incapacity.[41]

Similarly, in *Naglik,* the majority of the Court explained that the offence of failing to provide the necessities of life imposed a societal duty on parents to conform to a basic standard of care.[42] They remarked that this notion of societal duty would be useless if the standard of care fluctuated according to the accused's subjective beliefs, values, or priorities.[43] They explained:

> With respect to the wording of s. 215 , while there is no language in s. 215 such as "ought to have known" indicating that Parliament intended an objective standard of fault, the language of s. 215 referring to the failure to perform a "duty" suggests that the accused's conduct in a particular circumstance is to be determined on an objective, or community, standard. The concept of a duty indicates a societal minimum which has been established for conduct: as in the law of civil negligence, a duty would be meaningless if every individual defined its

---

39 *R. v. Creighton*, 1993 CarswellOnt 115, 1993 CarswellOnt 989, [1993] 3 S.C.R. 3, [1993] 3 S.C.R. 346, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189, at p. 61.

40 *Ibid.*

41 *Ibid.*, at pp. 63-64.

42 *R. v. Naglik*, 1993 CarswellOnt 990, 1993 CarswellOnt 116, [1993] 3 S.C.R. 122, 83 C.C.C. (3d) 526, 23 C.R. (4th) 335, at pp. 141-142.

43 *Ibid.*

> content for him or herself according to his or her subjective beliefs and priorities. Therefore, the conduct of the accused should be measured against an objective, societal standard to give effect to the concept of "duty" employed by Parliament.
>
> The policy goals of the provision support this interpretation. Section 215 is aimed at establishing a uniform minimum level of care to be provided for those to whom it applies, and this can only be achieved if those under the duty are held to a societal, rather than a personal, standard of conduct. While the section does not purport to prescribe parenting or care-giving techniques, it does serve to set the floor for the provision of necessaries, at the level indicated by, for example, the circumstances described in subs. (2)(a)(ii). The effects of a negligent failure to perform the duty will be as serious as an intentional refusal to perform the duty.[44]

The majority of the Court therefore concluded that the personal characteristics of the accused, such as their age, intelligence, and experience were irrelevant unless they deprived the accused of the capacity to appreciate the risks created by their conduct.[45]

Professor David Paciocco adequately summarized why the majority of the Supreme Court of Canada adopted such an approach, as opposed to one that more broadly considers the individual personal characteristics of the accused and do not amount to incapacity:

> [The dissenting judges] would have allowed a generous consideration in making objective assessments of the personal characteristics of the accused, even if they do not deprive the accused of the capacity to act reasonably. Indeed, [they] would have allowed relevant personal characteristics of the accused to increase or decrease the level of responsibility. For example, Creighton was an experienced drug user and would know, perhaps unlike the rest of us, how dangerous injecting 3.5 grams of cocaine into someone can be, especially without knowing its purity. Gosset, as a police officer, would better understand the risks of pointing a cocked pistol at a suspect. These men could therefore be held to higher standards of care than the mythical reasonable person.
>
> The majority rejected this approach for a variety of reasons. First, requiring capacity sufficiently answers the injustice of holding people to standards they cannot keep. Second, Lamer C.J.C. proposed a variable standard of criminal liability inconsistent with the equal application of the law. Third, this variable standard would inject uncertainty into the law. Fourth, it would have the effect of lowering minimum standards of behaviour adopted for the protection of society.[46]

---

[44] *Ibid.*

[45] *Ibid.*, at p. 148.

There are, however, certain problems with this position. Professor Paciocco is correct that relying heavily on the notion of capacity may indeed minimize the potential for individual injustices in certain cases. But as will be explained further on, in the narrow contexts where the makeup of the accused suggests that they may consistently fail to meet the basic standard of care, reliance on capacity may actually generate individual injustices as opposed to preventing them. Furthermore, in these cases, it may not be true that considering the morally relevant individual characteristics of such individuals will actually lower the threshold for certain societal duties more generally. As discussed in the final parts of this article, it is unclear whether attempting to ensure fair ascription of moral blame for certain crimes requiring proof of objective *mens rea* will produce such consequences.

## III. *MENS REA* AND NOTIONS OF CHOICE

When the subjective *mens rea* of the accused is established — in that they intend certain morally blameworthy consequences, are reckless as to their occurrence, or at least know of some culpable state of affairs — their moral blameworthiness is often attributable to their culpable choice to engage in the conduct.[47] This is referred to as a choice-based conception of culpability that is often attributed to Kant.[48] As discussed next, it can be difficult to justify the objective standard of fault on the basis of a choice-based conception of culpability.

Hart famously analogized the law to a choosing system that aims to maximize individual freedom.[49] In such a system, individuals are given advanced warning of legal rules and the penalties for their breach.[50] People are therefore treated as rational agents who weigh the benefits and burdens of breaking a rule in light of the possible sanction.[51] This allows individuals to plan their lives according to the existing system of rules and punishments.[52] Hart did, however,

---

[46] David Paciocco, "Objective and Subjective Standards of Fault for Offences and Defences" (1995) 59 Sask. L.R. 27, at pp. 283-5.

[47] *See for example:* Duff, "Choice, Character, and Criminal Liability", *supra* note 5, p. 348; Michael Moore, "Choice, Character, and Excuse" (1990) 7 Social Philosophy & Policy 29, pp. 30-1; Pete Arenella, "Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability" (1991-1992) 39 UCLA L. Rev. 1511, pp. 1517-8; Peter Aranella, "Character, Choice, and Moral Agency: The Relevance of Character to our Moral Culpability Judgments" (1990) 7 Social Philosophy & Policy 59, pp. 63-4.

[48] Antony Duff, "Virtue, Vice, and Criminal Liability: Do We Want an Aristotelian Criminal Law?" (2002) 6 Buff. Crim. L. Rev. 147, pp. 149 and f.

[49] H.L.A. Hart and John Gardner, *Punishment and Responsibility* (Oxford: OUP, 2008), pp. 23-4.

[50] *Ibid.*

[51] *Ibid.*

[52] *Ibid.*

advance a capacity-related theory instead of a choice-based account in justifying the objective standard of fault, which is logical because individuals who are inadvertent to certain risks do not consciously choose to undertake them.[53]

As Duff remarks, the notion of choice at the very least connotes knowledge or awareness of the very risks that one creates.[54] The accused believes they are putting sugar in the victim's cup of coffee. Unbeknownst to them, someone had switched the sugar with cyanide. The victim drinks the beverage and dies. It cannot be said that the accused made any type of meaningful choice if they were not aware of the fact that their conduct could create certain risks or was even potentially wrongful — there is no fault on the part of the accused.[55] The mistake of fact, lack of awareness of risk, and lack of fault make it objectionable to blame the accused.

Excusatory defences also illustrate the importance of a choice-based conception of moral blame.[56] An accused can be excused for crimes they commit when it was the result of a lack of fair choice to do otherwise.[57] The Supreme Court of Canada has expressly adopted this approach in accepting "moral involuntariness" as a principle of fundamental justice underlying excuses.[58]

In cases where fault can be established objectively, the accused does not have to have some positive culpable state of mind or even be aware of a certain risk.[59] When objective *mens rea* must be proven, the accused can be convicted even when they they did not make a conscious choice to create a certain risk or even realize that they were creating a risk to the safety of others. As will be discussed

---

[53] Hart, *ibid*., at p. 150 and f; Duff, "Choice, Character, and Criminal Liability" *supra* note 5, at pp. 348-9.

[54] *Ibid*. As Duff notes, knowledge is a necessary but not sufficient condition of choice. *See also:* Hart, *supra* note 40, at pp. 44-9; Samuel Pillsbury, "The Meaning of Deserved Punishment: An Essay on Choice, Character, and Responsibility" (1991-1992) 67 Ind. L.J. 719, p. 727.

[55] Duff, *ibid*.

[56] Moore, "Choice, Character, and Excuse" *supra* note 47, at pp. 31-3.

[57] *Ibid*. See: *R. v. Ruzic*, 2001 SCC 24, 2001 CarswellOnt 1238, 2001 CarswellOnt 1239, [2001] 1 S.C.R. 687, 153 C.C.C. (3d) 1, 41 C.R. (5th) 1, at para. 39; *R. v. Ryan*, 2013 SCC 3, 2013 CarswellNS 31, 2013 CarswellNS 7, [2013] 1 S.C.R. 14, 290 C.C.C. (3d) 477, 98 C.R. (6th) 223, at para. 23; *Perka v. R*., 1984 CarswellBC 823, 1984 CarswellBC 2518, [1984] 2 S.C.R. 232, 14 C.C.C. (3d) 385, 42 C.R. (3d) 113, at p. 249; George Fletcher. *See: Rethinking Criminal Law* (OUP: Oxford, 2000), at §10.3 and f.

[58] *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. See also Ruzic, (*ibid*.).

[59] See: *R. v. Hundal*, 1993 CarswellBC 489, 1993 CarswellBC 1255, [1993] 1 S.C.R. 867, 79 C.C.C. (3d) 97, 19 C.R. (4th) 169, at p. 882; *R. v. Beatty*, 2008 SCC 5, 2008 CarswellBC 307, 2008 CarswellBC 308, [2008] 1 S.C.R. 49, 228 C.C.C. (3d) 225, 54 C.R. (6th) 1, at para. 37; *R. v. Roy*, 2012 SCC 26, 2012 CarswellBC 1573, 2012 CarswellBC 1574, [2012] 2 S.C.R. 60, 281 C.C.C. (3d) 433, 93 C.R. (6th) 1, at paras. 40-41. Hart, *supra* note 49, at p. 147.

further on, this has led some authors to note that objective *mens rea* appears to be an "inferior, almost aberrant ground for criminal liability" that is "relegated to the fringes of criminal responsibility".[60]

Penal negligence, therefore, operates according to different conceptions which underlie moral blame. Negligence generally concerns inadvertence to unjustified and unreasonable risks that a reasonable person would have been aware of.[61] Inadvertence is not chosen.[62] If a person perceived an unreasonable or unjustified risk but simply chose to ignore it, they are by definition reckless rather than negligent.[63] The justification which is often invoked for blaming individuals for objective *mens rea* offences is not the making of some morally blameworthy choice, but rather, in their capacity to have avoided creating the relevant risk.[64] This capacity-based culpability theory is the standard used in Canadian criminal law for justifying objective *mens rea* as a standard of fault.

## IV. CURRENT PROBLEMS WITH OBJECTIVE MENS REA: CULPABILITY-RELATED CONCERNS

### (a) Preliminary Considerations: Setting Aside Mistakes of Fact

As will be explained next, there are some substantial concerns regarding the objective *mens rea* standard. First, the way in which the standard operates gives rise to the possibility of convicting individuals despite a lack of sufficient moral fault in the circumstances.[65] More specifically and to echo professor Simester, a predominant concern is that the objective standard of fault risks punishing people "for failing to be" reasonably intelligent, educated, or experienced, rather

---

60 George Fletcher, "A Theory of Criminal Negligence: A Comparative Analysis" (1971) 119 U. Penn. L. Rev. 401, p. 402.

61 *R. v. H. (A.D.)*, 2013 SCC 28, 2013 CarswellSask 304, 2013 CarswellSask 305, [2013] 2 S.C.R. 269, 295 C.C.C. (3d) 376, 2 C.R. (7th) 1 at para 3.

62 See: Andrew Simester, "A Disintegrated Theory of Culpability" in Dennis J. Baker and Jeremy Horder (eds.) *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams* (Oxford: OUP, 2013). pp. 190-1; Kenneth Simons, "Culpability and Retributive Theory: The Problem of Criminal Negligence" (1994) 5 J. Contemp. Legal Issues 365, at pp. 365-6; Larry Alexander, "Reconsidering the Relationship Among Voluntary Acts, Strict Liability, and Negligence in Criminal Law" (1990) 7 Social Philosophy & Policy 84, at p. 89.

63 Alexander, *ibid*., at p. 99.

64 *R. v. H. (A.D.)*, 2013 SCC 28, 2013 CarswellSask 304, 2013 CarswellSask 305, [2013] 2 S.C.R. 269, 295 C.C.C. (3d) 376, 2 C.R. (7th) 1, at para. 3; Larry Alexander, "Insufficient Concern:A Unified Conception of Criminal Culpability" (2000) 88 Cal. Law. Rev. 931, p. 952. Cited in Stephen P. Garvey, "What's Wrong with Involuntary Manslaughter?" (2006-2007) 85 Tex. L. Rev. 333, footnote 68.

65 See for instance: *Reference re s. 94(2) of Motor Vehicle Act (British Columbia)*, 1985 CarswellBC 398, 1985 CarswellBC 816, [1985] 2 S.C.R. 486, 23 C.C.C. (3d) 289, 48 C.R. (3d) 289, at para. 76; *R. v. Sault Ste. Marie (City)*, 1978 CarswellOnt 24, 1978 CarswellOnt 594, [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353, 3 C.R. (3d) 30, at p. 1310.

than "for unreasonably deploying" their intelligence, education, or experience.[66] As will be explained, this can occur where the accused's inexperience or lack of intelligence results in them not being aware of a risk or even thinking about their conduct, yet they cannot invoke the defence of mistake of fact. Before exploring the problems related to culpability and the capacity to appreciate risks, it is important to first examine why the defence of mistake of fact decreases the risk of convicting those who are not in fact culpable for an offence requiring proof of the objective *mens rea*. By setting aside cases where mistake of fact is available, it will help narrow down the contexts where objective fault is most problematic.

The Supreme Court of Canada has made clear that even where the two criteria for objective *mens rea* are satisfied, the accused can still be acquitted where their conduct was the product of a reasonably held mistake of fact.[67] A mistake of fact results in the acquittal of the accused where they "honestly believed a state of facts, which, if true, would have rendered [their] conduct lawful".[68] When mistake of fact can be proffered as a defence, the objective and subjective fault distinction loses some importance. *R. v. H. (A.D.)*[69] is illustrative of this concept. In that case, a young woman in her early twenties was accused of child abandonment pursuant to s. 218 of the *Criminal Code*. The offence is consummated when a person unlawfully abandons a child under the age of ten "so that its life is or is likely to be endangered or its health is or is likely to be permanently injured".[70] The accused gave birth to a baby in a stall of a department store's bathroom.[71] When she first saw her baby, its skin was blue.[72] Believing the baby was dead, she left it in the toilet.[73] It was soon found by other people and when the baby's leg moved, emergency services were called and the baby was resuscitated at the hospital.[74] At trial, the accused argued that the pregnancy was a complete surprise. She explained that she had been gaining

---

66 Simester, *supra* note 53, at p. 184. The original quote from professor Simester is: "We ought to blame people for unreasonably deploying the intelligence they have, not for failing to be reasonably intelligent."

67 *R. v. Beatty*, 2008 SCC 5, 2008 CarswellBC 307, 2008 CarswellBC 308, [2008] 1 S.C.R. 49, 228 C.C.C. (3d) 225, 54 C.R. (6th) 1, at para. 38.

68 *R. v. Pappajohn*, 1980 CarswellBC 446, 1980 CarswellBC 546, [1980] 2 S.C.R. 120, 52 C.C.C. (2d) 481, 14 C.R. (3d) 243 (Eng.), 19 C.R. (3d) 97 (Fr.), at pp. 134 and 139. Cited in: *R. v. A. (J.)*, 2011 SCC 28, 2011 CarswellOnt 3515, 2011 CarswellOnt 3516, [2011] 2 S.C.R. 440, 271 C.C.C. (3d) 1, (*sub nom.* R. v. J.A.) 84 C.R. (6th) 1 at para 48; Gideon Rosen, "Kleinbart the Oblivious and Other Tales of Ignorance and Responsibility" (2008) 105 Journal of Philosophy 591, at p. 594.

69 *R. v. H. (A.D.)*, 2013 SCC 28, 2013 CarswellSask 304, 2013 CarswellSask 305, [2013] 2 S.C.R. 269, 295 C.C.C. (3d) 376, 2 C.R. (7th) 1.

70 *Criminal Code*, s. 218.

71 *R. v. H. (A.D.)*, 2013 SCC 28, 2013 CarswellSask 304, 2013 CarswellSask 305, [2013] 2 S.C.R. 269, 295 C.C.C. (3d) 376, 2 C.R. (7th) 1, at para. 7.

72 *Ibid.*

73 *Ibid.*

74 *Ibid.*

weight and took three pregnancy tests, all of which produced negative results.[75] She had been having her period every month.[76] When she found out the baby was alive, she wanted to see the child.[77]

The Supreme Court of Canada ultimately acquitted the accused by determining that the offence of abandoning a child required proof of subjective *mens rea*. Because the accused believed the child to be dead, she did not believe she was exposing it to a risk when she left it in the toilet. However, even if the Court had determined that the offence merely required proof of objective *mens rea,* the accused could still probably have been acquitted had she invoked the defence of mistake of fact — that she honestly believed the baby to be dead in the circumstances and that her conduct was therefore not dangerous or wrongful.[78] In circumstances where the defence of mistake of fact can be invoked, it therefore provides additional protection against convicting the morally innocent and it matters less whether the offence requires proof of objective or subjective *mens rea*. As will be explained next, the major concerns surrounding objective *mens rea* therefore exist in at least three contexts where mistake of fact cannot be raised.

### (b) Concern #1: Creating Unreasonable Risks While Acquiring Necessary Experience

The first problem relates to contexts where the accused is in the learning stages of an activity that generally creates a risk for others. In such circumstances, the only way to concretely minimize the risks associated with the activity in question is to gain relevant experience by repeatedly engaging in it. This is how certain aspects of judgment and experience are acquired. During this process, the novice generally creates more risks than the person with a modicum of experience engaging in the same activity. Furthermore, a beginner may very well know the abstract consequences of their actions, but not understand the concrete consequences of their bodily movements on a state of affairs. Lack of experience or judgment is therefore morally relevant for several reasons.

First, engaging in the activity and creating certain risks is somewhat expected and necessary in order to ultimately improve one's ability and minimize certain risks over the long term. Second, inexperience can be the principal reason — or at least a significant factor — why a person generates the risks in question. It may not be that a person creates risk because they are culpably careless or imprudent. Rather, the risks they generate may be the product of their inexperience — *but for* their inexperience they would not have created the risks. For these reasons, it is counterintuitive to ignore the moral relevance of

---

[75] *Ibid.*

[76] *R. v. H. (A.D.)*, 2013 SCC 28, 2013 CarswellSask 304, 2013 CarswellSask 305, [2013] 2 S.C.R. 269, 295 C.C.C. (3d) 376, 2 C.R. (7th) 1, at para. 9.

[77] *Ibid.*

[78] *Ibid.*, at para. 154 (per Moldaver and Rothstein JJ., concurring).

inexperience in actors who create unreasonable risks, even if they were not thinking and fall short of establishing incapacity. Inexperienced actors may not even know what risks to think about or advert to. As Don Stuart's remarks with respect to a hypothetical example involving a novice and inexperienced young driver: "Is the majority [in Creighton] really serious that a jury must be instructed to ignore the age of the accused and to apply the standard of the average, experienced driver? This would defy common sense and the jury would likely ignore it".[79]

Professor Michael Dummett famously inquired as to whether someone who died can be said to have been courageous if they have never been faced with a situation requiring courage.[80] He points out that there must be some facts upon which to demonstrate some tendency or characteristic of courage in order to ground the truthfulness of the statement that a person is courageous.[81] A similar analogy can be made with respect to one's capacity to be a reasonably safe driver. It may generate moral problems for the law to treat someone as if they were a reasonable driver if there are no facts or prior experiences upon which to validate judgments regarding their driving ability. The concern in such cases is that the law pretends that people possess characteristics or experience that they may not in fact possess. The lack of requisite experience or judgment should not ground moral blame when the person is engaging in the initial stage of an activity, notably where engaging in the activity is necessary to acquire experience and undertake it reasonably safely.

### (c) Concern #2: Failures to Consistently Meet the Requisite Standard

The second problem with the objective *mens rea* standard exists where a person's abilities to consistently meet that standard of care is the exception as opposed to the rule. In other words, the agent is held to a standard that they are bound to fail to meet over a sufficiently protracted period of time.[82] To illustrate this point, consider first one of the justifications for imposing the objective standard in driving cases. In *R. v. Hundal*, the majority pointed out that requiring those who drive to possess a license demonstrates that they "are mentally and physically capable of doing so".[83] But the licensing requirement actually tells us little about one's capacity to consistently attain the requisite standard of care and illustrates some theoretical problems regarding culpability for objective *mens rea*.

For instance, suppose that a hypothetical young driver undertakes some type of negligent or dangerous manoeuvre in 90% of the cases when they choose to

---

79 Don Stuart, *Canadian Criminal Law*, 7th ed. (Toronto: Carswell, 2014), p. 291.

80 Michael Dummett, *Truth and Other Enigmas* (Cambridge: HUP, 1978), pp. 14-6. Cited in: Moore, "Choice, Character, and Excuse" *supra* note 47, at p. 41.

81 *Ibid.*

82 See generally.: Christopher Bennett, "The Limits of Mercy" (2004) 17 Ratio 1, p. 6.

83 *R. v. Hundal*, 1993 CarswellBC 489, 1993 CarswellBC 1255, [1993] 1 S.C.R. 867, 79 C.C.C. (3d) 97, 19 C.R. (4th) 169, at p. 884.

drive and that would be sufficient to substantiate the criteria for objective fault. When they take their driver's license road test, they happen to fall within the 10% of cases where they drive safely and without incident. They receive their license and drive to see a friend shortly after. During the drive, they clumsily undertake some type of manoeuvre that a reasonable person would have avoided and that constituted a marked departure from the norm, resulting in the death of another motorist. Let us further suppose that they were trying their best to drive safely and that no mistake of fact can be raised. As Professor Quigley points out, "All of us, no matter our abilities or characteristics, may on occasion be forgetful, inattentive, or careless".[84] The objective standard of fault, however, is generally forgiving of these types of instances to the extent that they constitute momentary lapses in care or attention.[85]

But the problem with the objective standard of fault is that it presupposes that people who can only rarely attain the objective standard of care can in fact consistently meet it. Capacity is more concerned with what people are capable of doing as opposed to what they routinely do or how they routinely act. Under this "casual sense of capacity" —to use Professor Moore's terminology— one lacks capacity only where it was not possible for them to have avoided the risk.[86] Hart uses similar wording in his famous chapter on negligence, noting that a crucial prong of substantiating fault for negligence is to ask: "Could the accused, given [their] mental and physical capacities, have taken [precautions which any reasonable person with normal capacities would have taken in the circumstances]?"[87] A common objection in such contexts is that we are in fact blaming a person's flawed character as opposed to some distinctly culpable choice that they made.[88] Yet even if an individual can only rarely reach a certain standard, the following arguments can be advanced to demonstrate why maintaining the objective standard of *mens rea* is nonetheless justifiable in these cases.

First, one may argue that people who lack sufficient experience, intelligence, or care ought to be aware of their shortcomings and simply avoid engaging in certain activities or do something to improve their abilities.[89] This view is particularly compelling for several reasons. Notably, it avoids the pitfalls of

---

[84] Tim Quigley, "Constitutional Fault During the Lamer Years" (2000) 5 Canadian Criminal Law Review 99, at p. 102.

[85] *R. v. Beatty*, 2008 SCC 5, 2008 CarswellBC 307, 2008 CarswellBC 308, [2008] 1 S.C.R. 49, 228 C.C.C. (3d) 225, 54 C.R. (6th) 1, at para. 34.

[86] Heidi Hurd and Michael Moore, "Punishing the Awkward, the Stupid, the Weak, and the Selfish: The Culpability of Negligence" (2011) 5 Crim. L. and Phil. 147, p. 157. See also: Oliver Wendell Holmes, *The Common Law* (Boston: Little Brown and Co., 1881), at pp. 107-9.

[87] Hart and Gardner, *supra* note 49, at p. 154.

[88] Aranella, "Convicting the Morally Blameless", *supra* note 47, at pp. 1570-1.

[89] See e.g.: Tony Honore, "Responsibility and Luck: the Moral Basis of Strict Liability" (1988) 104 Law Quarterly Review 530, pp. 536-7.

determinism and recognizes individual agency — people are capable of shaping the course of their lives and their characters through their choices.[90] It suggests that we are in fact blaming individuals based on their culpable prior choices as opposed to culpable character traits such as clumsiness or carelessness that they are hopeless to improve.[91]

But this justification creates its own set of problems. Notably, one must question to what degree people who lack certain attributes —for instance, intelligence, ability, judgment, or experience— are consciously aware of them and can do something to improve them.[92] Some psychologists have demonstrated that people who have lower intellect or lack certain skills tend to actually overestimate their intelligence or abilities — a form of cognitive-bias referred to as the "Dunning-Kruger Effect".[93] As they famously argued:

> In essence, we argue that the skills that engender competence in a particular domain are often the very same skills necessary to evaluate competence in that domain—one's own or anyone else's. Because of this, the incompetent individuals lack what cognitive psychologists variously term metacognition, metamemory, metacomprehension, or self-monitoring skills. These terms refer to the ability to know how well one is performing, when one is likely to be accurate in judgment, and when one is likely to be in error.[94]

One domain where individuals fail to realize the extent of their incompetence is automobile driving.[95] As Myntinnen and colleagues summarize this phenomenon:

> A common result from studies on subjective driving skill is that young novice drivers, especially males, are overconfident with respect to their own driver competence. In addition, young novice drivers tend to underestimate risks in traffic. This overconfidence has been presented as one of the reasons for young novice drivers' overrepresentation in traffic accidents.[96]

---

90 Moore, "Choice, Character, and Excuse" *supra* note 47, at p. 33.

91 Duff, "Choice, Character, and Criminal Liability" *supra* note 5, at pp. 361 and f.

92 Aranella, "Convicting the Morally Blameless", *supra* note 47, at p. 1519.

93 Justin Kruger and David Dunning, "Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments" (1999) 77 Journal of Personality and Social Psychology 1121, at p. 1121.

94 *Ibid*. Internal citations of the paragraph are omitted.

95 See e.g.: E. Kunkel,"On the Relationship between Estimate of Ability and Driver Qualification" (1971) 15 Psychologie und Praxis 73. Cited in Kruger and Dunning, *ibid*., at p. 1122. For more recent examples, see: Sami Mynttinsen et al., "Self-assessed Driver Competence among Novice Drivers: A Comparison of Driving Test Candidate Assessments and Examiner Assessments in a Dutch and Finnish Sample" (2009) 40 Journal of Safety Research 301; Frank McKenna, Robert Stainer, and Clive Lewis, "Factors Underlying Illusory Self-Assessment of Driving Skill in Males and Females" (1991) 23 Accid. Anal. & Prev. 45.

This does not imply that people's abilities are static and that the law operates in a deterministic way. Rather, it suggests that at least in some cases, a person who lacks certain attributes or experience may not be aware of them and the fact that this is common is morally relevant. Not only may an individual be negligent — but to complicate matters even further — they may be negligent in even *realizing* that they are negligent.

But what if an individual was actually aware of the fact that they tend to generally be clumsy, careless, or of low intelligence? What if they did all they could to rectify these deficiencies — that is, they did their best to mitigate the future risks that they would create and be as careful as possible in the future.[97] Yet one day and despite the actor's best efforts, they inadvertently create some risk because they simply were not thinking, it tragically leads to another's death, and the objective *mens rea* standard is satisfied. As Rosen points out, we may quite legitimately argue that the actor is negligent, but it seems problematic to conceive of their negligence as something culpable if they had done their best to ensure they are careful individuals.[98]

### (d) Concern #3: Non-Chosen and Relevant Personal Characteristics

Another objection to the objective standard of fault relates to contexts where the makeup of the accused negatively affects their ability to consistently deploy their judgment, intelligence, or reaction-time but not to the point of establishing incapacity in the sense of s. 16 of the *Criminal Code*.[99] The objection can be articulated in the following way. At least in some cases, individuals unwillingly possess some types of morally relevant disadvantageous characteristics such as poor motor coordination, low intelligence, or so on. Perhaps they were born with these traits or acquired them through no choice of their own, either due to a medical condition or some type of accident. This is one way of articulating what Nagel refers to as "constitutive moral luck", whereby certain factors inherent to a person's internal makeup or constitution are beyond their control, yet they are still deemed to be agents who are proper objects of moral assessment.[100] The brunt of the objection is that objective *mens rea* risks blaming inept or clumsy individuals who are unwillingly endowed with an increased propensity to create the very risks that the standard condemns. Moore and Hurd raise the objection by making the following observation: "If the possession of character traits is not itself punishably blameworthy, it is difficult to see how inadvertence caused by

---

[96] Mynttinsen et al, *ibid.*, at p. 301. Citations omitted.

[97] Rosen, *supra* note 68, at pp. 604-5.

[98] *Ibid.*

[99] Meaning that they do not appreciate the nature or quality of the act or its consequences, or know the difference between what is morally right or wrong. See: *R. v. Chaulk*, 1990 CarswellMan 385, 1990 CarswellMan 239, [1990] 3 S.C.R. 1303, 62 C.C.C. (3d) 193, 2 C.R. (4th) 1, at p. 1397; *R. v. Creighton*, 1993 CarswellOnt 115, 1993 CarswellOnt 989, [1993] 3 S.C.R. 3, [1993] 3 S.C.R. 346, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189, at p. 63.

[100] Thomas Nagel, *Mortal Questions* (Cambridge: CUP, 2012), at pp. 26 and 28.

the possession of such traits could be punishably blameworthy".[101] It is therefore problematic to blame people whose makeup constitutes a marked departure from the norm, for acts that are consistent with their makeup.[102]

One response to these concerns is the following. If one were to attribute too much importance to the notion of constitutive moral luck, it risks demeaning individual agency by asserting that to a significant extent, people are simply not responsible for the tragic consequences they cause because they did not choose to be how they are.[103] All the responsibility is attributed to their original constitution or some prior event leading to their current makeup — which raises its own determinism-related objections.[104]

Thus, for constitutive moral luck to be relevant without becoming a vacuous concept, it is helpful to consider cases where agents possess certain morally relevant characteristics that may affect their inability to appreciate risks. To paraphrase Baron, these can be said to be cases where relevant moral characteristics both (i) meaningfully and sufficiently differentiate them from others and (ii) make compliance with the law more difficult.[105] To illustrate this, consider the moral relevance of Fetal Alcohol Spectrum Disorder or FASD — a condition that affects individuals whose mother ingested alcohol during pregnancy.[106]

The incidence of FASD in Canada is estimated to be somewhere between 3-9 in every 1000 births.[107] The condition causes brain dysfunction, with symptoms including "inconsistent memory and recall, slower and inconsistent cognitive and auditory processing, difficulty in managing/filtering sensory stimuli from the environment, poor motor coordination, [and] inability to read social cues or predict outcomes".[108] Some have also noted that "FASD predisposes and increases criminal behaviour in affected individuals".[109] Another characteristic

---

[101] Moore and Hurd, *supra* note 86, at p. 176.

[102] Rosen, *supra* note 68, at p. 607.

[103] Nagel, *supra* note 100, at p. 35.

[104] *Ibid.*

[105] This idea is taken directly from Maria Baron. *See*: Maria Baron, "Justification, Excuse, and the Exculpatory Power of Ignorance" in Rik Peels (ed.) *Perspectives on Ignorance from Moral and Social Philosophy* (New York: Routledge, 2016), at p. 62.

[106] Roach and Bailey, *supra* note 4, at p. 42; Katherine Wyper and Jacqueline Pei, "Neurocognitive Difficulties Underlying High Risk and Criminal Behaviours in FASD: Clinical Implications" in Monty Nelson and Marguerite Trussler (eds.), *Fetal Alcohol Spectrum Disorders in Adults: Ethical and Legal Perspectives* (New York: Springer, 2015), p. 101.

[107] *Ibid.*; Suzanne Tough and Monica Jack, "Frequency of FASD in Canada, and What This Means for Prevention Efforts in Riley et. al (eds.), *Fetal Alcohol Spectrum Disorder: Management and Policy Perspectives of FASD* (Weinheim: Wiley-Blackwell, 2011), p. 29;

[108] Maria Catterick and Liam Curran, *Understanding Fetal Alcohol Spectrum Disorder: A Guide for Parents, Carers, and Professionals*, at pp. 19-20.

[109] Mela Mansfield and Glen Luther, "Fetal Alcohol Spectrum Disorder: Can Diminished

inherent to the disorder is the "inability to learn from previous experience,"[110] which, as has been argued, is particularly problematic during the learning period of activities that require practice to minimize risks, in addition to being able to advert to one's own incompetence or inability to engage in certain tasks safely. These are the very characteristics that may make an individual more likely to create certain risks and fail to advert to them. Yet Canadian courts have also held that FASD is not sufficient to establish incapacity pursuant to s. 16 of the *Criminal Code,* even if it may constitute a mental disorder.[111] These initial difficulties may be compounded by two pragmatic realities.

The first relates to the relationship between the secondary symptoms of FASD and establishing objective *mens rea*. As Professor Roach points out, individuals with FASD often develop secondary problems such as addiction or alcohol dependency, which may be compounded onto the above-mentioned characteristics affecting reaction time and judgment.[112] The problem is that consumption of alcohol prior to undertaking a risk-generating activity can assist in grounding objective *mens rea*.[113] Thus, the accused's judgment, reaction time, or abilities may further be impaired by alcohol consumption stemming from a dependency even though this may effectively assist in substantiating culpability.[114] It may be that their dispositions — including poor motor skills/ reaction time, inability to learn from prior mistakes, and prior alcohol consumption — may be serious contributing factors that account for why they simply were not thinking when they committed an offence grounded in objective fault. The fact that the accused was not thinking, however, does not have any exculpatory force.[115]

The second relates to the pragmatic realities of the trial process itself. As some scholars have noted, individuals with FASD may more easily be led during

---

Responsibility Diminish Criminal Behaviour?" (2013) 36 International Journal of Law and Psychiatry 46, at p. 48.

[110] Gideon Koren at al., "Fetal Alcohol Spectrum Disorder" (2003) 169 CMAJ 1181, at p. 1181.

[111] Mansfield and Luther, *supra* note 100, at p. 50.

[112] Roach and Bailey, *supra* note 4, at p. 62. See: Riley et. al. (eds.), *Fetal Alcohol Spectrum Disorder: Management and Policy Perspectives of FASD* (Weinheim: Wiley, 2011), at p. 91 [noting that the incidence of alcohol dependency is higher amongst those affected by FASD compared to the general population].

[113] *R. v. Settle*, 2010 BCCA 426, 2010 CarswellBC 2580, 261 C.C.C. (3d) 45 at para 55; *R. v. McLennan*, 2016 ONCA 732, 2016 CarswellOnt 15237, 343 C.C.C. (3d) 39 at para 23, leave to appeal refused 2017 CarswellOnt 4220, 2017 CarswellOnt 4221 (S.C.C.). As both cases note, alcohol consumption is not in itself determinative in establish objective *mens rea*, although it is a relevant factor. See also: *R. v. Anderson*, 1990 CarswellMan 190, 1990 CarswellMan 375, [1990] 1 S.C.R. 265, 53 C.C.C. (3d) 481, 75 C.R. (3d) 50, at p. 2672.

[114] *Ibid.*; *R. v. Creighton*, 1993 CarswellOnt 115, 1993 CarswellOnt 989, [1993] 3 S.C.R. 3, [1993] 3 S.C.R. 346, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189.

[115] *R. v. Beatty*, 2008 SCC 5, 2008 CarswellBC 307, 2008 CarswellBC 308, [2008] 1 S.C.R. 49, 228 C.C.C. (3d) 225, 54 C.R. (6th) 1, at para. 8.

cross-examination, which may generate concerns related to their ability to mount a truly meaningful full answer and defence.[116] The combination of these pre-trial and at-trial factors increases the possibility of convicting people with FASD of objective *mens rea* offences, even if they are not sufficiently blameworthy in the circumstances.

## V: OBJECTIVE MENS REA AND CONSTITUTIONAL CONSIDERATIONS

### (a) Objective Fault, Stigma, and Choice

The second set of concerns surrounding objective *mens rea* are constitutional in nature. As will be explained, the interaction between two principles of fundamental justice highlights problems with objective *mens rea*. The first is fair stigmatization for certain offences. The second is moral voluntariness.

Beginning with the notion of stigma, the Supreme Court of Canada has held that some crimes — notably theft, murder, attempted murder, and crimes against humanity — all constitutionally require proof of a subjective form of *mens rea* due to the stigma attached to these particular offences.[117] With respect to theft, proof of subjective intent is required.[118] With respect to murder and attempted murder, subjective foresight of the *consequence* of the offence (e.g. death) is required.[119]

As for offences requiring proof of objective *mens rea*, the Supreme Court of Canada has held that they do not carry the level of stigma that requires proof of subjective *mens rea* for either the underlying offence or the consequence (e.g. bodily harm or death).[120] Thus, the objective standard of fault can ground both the underlying offence as well as the consequence.[121] This is notably the case with the criminal offence of dangerous driving causing death, where objective *mens*

---

[116] *R. v. Anderson*, 2010 YKSC 32, 2010 CarswellYukon 87, at para. 122; Roach and Bailey, *supra* note 4, at p. 4.

[117] *R. c. Vaillancourt*, 1987 CarswellQue 18, 1987 CarswellQue 98, [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118, 60 C.R. (3d) 289; *R. v. Martineau*, 1990 CarswellAlta 143, 1990 CarswellAlta 657, [1990] 2 S.C.R. 633, 58 C.C.C. (3d) 353, 79 C.R. (3d) 129; *R. v. Logan*, 1990 CarswellOnt 1002, 1990 CarswellOnt 110, [1990] 2 S.C.R. 731, 58 C.C.C. (3d) 391, 79 C.R. (3d) 169; *R. v. Finta*, 1994 CarswellOnt 61, 1994 CarswellOnt 1154, [1994] 1 S.C.R. 701, 88 C.C.C. (3d) 417, 28 C.R. (4th) 265, reconsideration / rehearing refused (June 23, 1994), Doc. 23023, 23097 (S.C.C.).

[118] *Ibid.*

[119] *Ibid.*

[120] *R. v. DeSousa*, 1992 CarswellOnt 1006F, 1992 CarswellOnt 100, [1992] 2 S.C.R. 944, 76 C.C.C. (3d) 124, 15 C.R. (4th) 66; *R. v. Creighton*, 1993 CarswellOnt 115, 1993 CarswellOnt 989, [1993] 3 S.C.R. 3, [1993] 3 S.C.R. 346, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189.

[121] *See:* Arvay and Latimer, *supra* note 7.

*rea* is required to prove both the underlying offence of dangerous driving as well as the consequence.[122]

The second constitutional consideration is found in the notion of moral involuntariness inherent to excusatory defences. Professor Moore famously characterized excusatory defences as "the royal road to theories of responsibility generally".[123] As he explained: "The thought is that if we understand why we excuse in certain situations but not others, we will have also gained a much more general insight into the nature of responsibility itself".[124] In other words, if we understand why we excuse individuals for doing something that is morally blameworthy, we understand why it is justifiable to morally blame individuals in the first place. Examining the normative basis of excusatory defences is important because it suggests that there is a choice-based constitutional conception of culpability in Canadian criminal law.[125] Notably, as the Supreme Court of Canada explained in *Ruzic*, excusatory defences such as duress concede that a particular act was wrong and blameworthy, yet punishment is withheld because the actor lacked a fair or realistic choice in committing the offence due to a threat or extreme circumstance.[126] At the heart of culpability are notions of rationality and choice. As will be discussed next, there are three principal constitutional problems with objective *mens rea* that stem from the interaction between these two aforementioned principles of fundamental justice.

### (b) Concern #1: Lack of Moral/Pragmatic Justifications

The first set of constitutional concerns related to objective *mens rea* have recently been discussed by Arvay and Latimer.[127] The concerns are grounded in how stigma for certain serious criminal offences requiring objective fault may lack appropriate justification. This subsection builds on their arguments, which are summarized as follows. For some crimes, such as dangerous driving causing death, objective *mens rea* is the required standard of fault for both the underlying offence and its consequence.[128] Even if that offence does not require some

---

[122] *R. v. Roy*, 2012 SCC 26, 2012 CarswellBC 1573, 2012 CarswellBC 1574, [2012] 2 S.C.R. 60, 281 C.C.C. (3d) 433, 93 C.R. (6th) 1

[123] Moore, "Choice, Character, and Excuse" *supra* note 47, at p. 29.

[124] *Ibid.*

[125] *R. v. Ruzic*, 2001 SCC 24, 2001 CarswellOnt 1238, 2001 CarswellOnt 1239, [2001] 1 S.C.R. 687, 153 C.C.C. (3d) 1, 41 C.R. (5th) 1, at para. 34. See also at para. 36: "It is clear from Dickson J.'s reasons in *Sault Ste. Marie (City)* that such a regime of absolute penal responsibility was deemed to breach the most basic principle of criminal liability and criminal law, and that criminal responsibility should be attributed only to an act that is the result of the deliberation of a free and conscious mind".

[126] George Fletcher, *Rethinking Criminal Law* (Oxford: OUP, 2000), at §10.3 and f; *Perka v. R.*, 1984 CarswellBC 823, 1984 CarswellBC 2518, [1984] 2 S.C.R. 232, 14 C.C.C. (3d) 385, 42 C.R. (3d) 113, at pp. 248 and 256.

[127] Arvay and Latimer, *supra* note 7, at pp. 325 and f.

culpable choice, the objective standard is defended on the following moral/pragmatic grounds: (i) driving is a reflexive activity as opposed to one that involves conscientious choices or deliberative decisions, (ii) there is a licensing requirement meaning that individuals choose to drive and therefore place themselves in a position of responsibility with regards to others, and (iii) the pragmatic need to reduce road accidents and harm.[129] Dangerous driving causing death is punishable by up to 14 years of imprisonment.[130]

Other criminal offences requiring proof of objective *mens rea* carry more serious penalties. Criminal negligence causing death requires proof of the slightly more demanding threshold of a marked and *substantial* departure from the conduct expected of a reasonable person in the circumstances.[131] Criminal negligence causing death is punishable by up to life imprisonment.[132] Criminal negligence causing death can therefore be punished more harshly than dangerous driving causing death. As Arvay and Latimer point out, the problem is that criminal negligence causing death can be committed outside of driving contexts — and thus in contexts where no similar moral/pragmatic considerations exist to justify imposing an objective standard of fault.[133]

The first major constitutional concern is therefore the following. Certain serious criminal offences grounded in objective *mens rea* lack moral/pragmatic justifications to legitimize the stigma attached to their commission, including for the offence of criminal negligence causing death.[134] These pragmatic justifications exist for offences that are *less* morally blameworthy and stigmatizing in nature, such as dangerous driving causing death.[135] If anything, there ought to be even more compelling moral/pragmatic considerations to justify imposing an objective standard of fault for crimes such as criminal negligence causing death that are more morally blameworthy in nature and where the creation of the risk was not chosen by the actor.

---

[128] See e.g.: *R. v. Roy*, 2012 SCC 26, 2012 CarswellBC 1573, 2012 CarswellBC 1574, [2012] 2 S.C.R. 60, 281 C.C.C. (3d) 433, 93 C.R. (6th) 1

[129] Arvay and Latimer, *supra* note 7, at p. 325. Citing the justifications for objective *mens rea* in: *R. v. Hundal*, 1993 CarswellBC 489, 1993 CarswellBC 1255, [1993] 1 S.C.R. 867, 79 C.C.C. (3d) 97, 19 C.R. (4th) 169

[130] *Criminal Code*, R.S.C. 1985, c. C-46, s. 249(4).

[131] *R. v. F. (J.)*, 2008 SCC 60, 2008 CarswellOnt 6339, 2008 CarswellOnt 6340, [2008] 3 S.C.R. 215, 236 C.C.C. (3d) 421, 60 C.R. (6th) 205 at para 10.

[132] *Criminal Code*, s. 220(b).

[133] Arvay and Latimer, *supra* note 7, at p. 325

[134] *Ibid.*

[135] *Ibid.*

### (c) Concern #2: Inability to Fit Negligence Within a Choice-Based Conception of Culpability

The second problem is the following. If one adheres to a choice-based conception of culpability, it must be that giving individuals fair warning of sanctions generally has some bearing on how they make choices or attempt to conform to the law's standards.[136] This is why Hart analogized the law to a choosing system that maximizes individual freedom, by making individuals aware of legal rules and the consequence of breaking them, yet leaving the choice of compliance in their hands.[137] Similarly, the Supreme Court of Canada noted in *Ruzic* that: "The treatment of criminal offenders as rational, autonomous and choosing agents is a fundamental organizing principle of our criminal law".[138] Yet because those who are negligent are not even adverting themselves to the risk posed by some activity, then they presumably are also not adverting themselves to the existence of the underlying criminal offence or its consequences as a means of guiding their behaviour and adhering to the law's requirements.[139]

Some argue that the criminal law aims to shape preferences by incentivizing individuals to reject socially deviant behaviour.[140] Those who recklessly or intentionally commit illegal acts can be said to reject these incentives by placing their own preferences above those which aim to minimize social deviance and harm to others, which is morally unacceptable except in extreme one-off cases that satisfy proportionality concerns.[141] Thus, in cases of reckless and intentional fault, social deviance is more clearly expressed by acting in way that accepts an unreasonable risk, thereby rejecting the very incentives that aim to secure social order and refusal to have one' preferences shaped.[142] In cases of objective fault, it is not clear that people put their own preferences above society's need to secure social order. Nor is it clear that they reject incentives that try to prevent social wrongs.[143] Rather, fault is established on a less clear and inferential basis, irrespective of whether the failure to appeal to these incentives or have one's preferences guided is actually culpable.

---

[136] See: Heidi Hurd, "The Innocence of Negligence", SSRN draft paper presented at: 2012 Rutgers Tort Theory Conference. Available at: < https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2612084_code2405800.pdf?abstractid = 2612084&mirid = 1&type = 2 > .

[137] Hart, *supra* note 49, at pp. 23-4. See also: Lon Fuller, *The Morality of Law*, revised ed. (New Haven: Yale University Press, 1969), pp. 53 and f.

[138] *R. v. Ruzic*, 2001 SCC 24, 2001 CarswellOnt 1238, 2001 CarswellOnt 1239, [2001] 1 S.C.R. 687, 153 C.C.C. (3d) 1, 41 C.R. (5th) 1, at para. 45.

[139] Hurd, "The Innocence of Negligence", *supra* note 136, at p. 8.

[140] Kenneth Dau-Schmidt, "An Economic Analysis of the Criminal Law as a Preference-Shaping Policy" (1990) Duke L.J. 1, at p. 26.

[141] See e.g.: *Perka v. R.*, 1984 CarswellBC 823, 1984 CarswellBC 2518, [1984] 2 S.C.R. 232, 14 C.C.C. (3d) 385, 42 C.R. (3d) 113, at pp. 247-248.

[142] Dau-Schmidt, *supra* note 140, at p. 26.

[143] *Ibid.*, at pp. 26-7.

Objective standards of fault are therefore paradoxical in how they defy choice-based conceptions of culpability premised on actors' rationality and awareness of legal rules to guide conduct. As Hurd explains:

> After all, the law cannot affect those who are oblivious to its sanctions and rewards. It cannot get people's attention; it can only affect their decisions once it has their attention. It can thus operate only on informed choosers who are cognizant of its possible effects. Inasmuch as those who fail to advert to risks also inevitably fail to advert to the legal consequences that will attach if those risks materialize, the law seemingly cannot affect the incentives of those who cause harm accidentally.[144]

Thus, attributing moral blame for certain criminal offences that require proof of objective fault and carry serious punishment are inherently problematic where the actor is non-culpably inadvertent to: (i) the risk of the underlying offence (ii) the offence itself as a means of guiding their conduct (iii) the consequences of the offence (e.g.: bodily harm or death), and (iv) the offence punishing those consequences as a means of guiding conduct. This is even more problematic where there is a lack of the moral/pragmatic considerations that ground objective *mens rea* for driving-related offences.[145]

### (d) Concern #3: Claiming Crimes Requiring Objective Fault Are Not Sufficiently Stigmatizing

#### *(i) Overview of the Argument*

The final problem relates to the notion of stigma. Theft, murder, attempted murder, and war crimes constitutionally require proof of subjective *mens rea* because of the stigma attached to conviction for these offences. This subsection argues that the list of crimes that constitutionally require proof of subjective *mens rea* is neither principled nor justifiable. This is an important concern for two reasons. On the one hand, it puts into question whether the stigma or punishment attached to those few crimes are truly so particular that they justify the constitutional requirement of subjective *mens rea*.[146] Second, it raises the question as to whether other crimes may carry similar levels of stigmatization

---

[144] Hurd, *supra* note 136, at p. 8.

[145] Arvay and Latimer, *supra* note 7, at p. 325

[146] See e.g.: Peter Lindsay, "The Implications of *R. c. Vaillancourt*. Much Ado About Nothing?" (1989) 47 U. Toronto Fac. L. Rev. 465, at p. 472. Cited in: *R. v. Martineau*, 1990 CarswellAlta 143, 1990 CarswellAlta 657, [1990] 2 S.C.R. 633, 58 C.C.C. (3d) 353, 79 C.R. (3d) 129; James Stribopoulos. "The Constitutionalization of 'Fault' in Canada: A Normative Critique" (1999) 42 Crim. L.Q. 227, p. 250; Rosemary Cairns-Way, "Constitutionalizing Subjectivism: Another View" (1990), 79 C.R. (3d) 260; Alan Brudner, "Proportionality, Stigma, and Discretion" 1995-1996 38 Crim. L.Q. 302, at pp. 306 and f. [arguing that "stigma-as-opprobrium" would be a normatively vacuous concept applicable to a wide array of offences].

and punishment to justify a subjective standard of fault for either the underlying offence or its result.[147] It will be argued that the failure to include certain crimes that are punishable by life imprisonment is particularly objectionable in a constitutional order emphasizing a choice-based conception of culpability and fair stigmatization. The argument takes place in two steps.

First, it was neither principled nor justifiable to include theft as a crime requiring proof of subjective fault as a crime that is so stigmatizing so as to constitutionally require subjective fault is neither principled nor justifiable. As such, the Court's justification for *including* some crimes is not defensible on the basis of meaningful normative considerations. Second, there are compelling reasons that certain offences should constitutionally require proof of subjective *mens rea*.

*(ii) The Importance of Stigma to Constitutional Law*

The *Vaillancourt*, *Martineau*, and *Creighton* decisions hold that the stigma or punishments for some crimes requires proof of subjective *mens rea*. In both *Vaillancourt* and *Martineau,* the accused set out to commit a criminal offence with accomplices. During the commission of the crime, the accomplices unexpectedly murdered the victim, even though the accused did not know or expect the accomplice to do so. At their respective trials, they were both convicted of constructive second degree murder. In both cases, the Supreme Court of Canada struck down parts of the constructive murder provisions because the accused can be convicted as a murderer, even though they did not know that death was a likely result of their act. In *Vaillancourt,* the majority of the Court explained:

> But, whatever the minimum *mens rea* for the act or the result may be, there are, though very few in number, certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime. Such is theft, where, in my view, a conviction requires proof of some dishonesty. Murder is another such offence. The punishment for murder is the most severe in our society and the stigma that attaches to a conviction for murder is similarly extreme. In addition, murder is distinguished from manslaughter only by the mental element with respect to the death. It is thus clear that there must be some special mental element with respect to the death before a culpable homicide can be treated as a murder. That special mental element gives rise to the moral blameworthiness which justifies the stigma and sentence attached to a murder conviction.[148]

A similar justification for constitutionally requiring subjective fault for these same offences was given in *Martineau*. In essence, there must be proportionality

---

[147] Arvay and Latimer, *supra* note 7, at p. 325

[148] *R. c. Vaillancourt*, 1987 CarswellQue 18, 1987 CarswellQue 98, [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118, 60 C.R. (3d) 289, at para. 28.

between the particular stigma or punishment inherent to certain offences on the one hand, and the moral blameworthiness of the offender on the other.[149] The majority of the Court remarked:

> A conviction for murder carries with it the most severe stigma and punishment of any crime in our society. The principles of fundamental justice require, because of the special nature of the stigma attached to a conviction for murder, and the available penalties, a *mens rea* reflecting the particular nature of that crime. The effect of s. 213 is to violate the principle that punishment must be proportionate to the moral blameworthiness of the offender, or as Professor Hart puts it in *Punishment and Responsibility* (1968), at p. 162, the fundamental principle of a morally based system of law that those causing harm intentionally be punished more severely than those causing harm unintentionally.
>
> The rationale underlying the principle that subjective foresight of death is required before a person is labelled and punished as a murderer is linked to the more general principle that criminal liability for a particular result is not justified except where the actor possesses a culpable mental state in respect of that result: see *R. v. Bernard*, [1988] 2 S.C.R. 833, *per* McIntyre J., and *R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.), *per* Martin J.A. In my view, in a free and democratic society that values the autonomy and free will of the individual, the stigma and punishment attaching to the most serious of crimes, murder, should be reserved for those who choose to intentionally cause death or who choose to inflict bodily harm that they know is likely to cause death.[150]

*R. v. Desousa*[151] and *R. v. Creighton*[152] held that crimes such as manslaughter and criminal negligence causing death merely require objective foreseeability of bodily harm. The *Creighton* decision is particularly important, as it provides a detailed justification for why objective foresight of bodily harm is constitutionally acceptable. Creighton was an experienced drug user who injected cocaine into another experienced drug user's arm, resulting in the latter's drug overdose and death.[153] At issue was the constitutionally required standard of fault for manslaughter. The majority of the Court ruled that proof of objective foresight of bodily harm was constitutionally sufficient to ground a manslaughter conviction.[154] Much of the justification was rooted in a comparison between murder and manslaughter. Notably, the Court compared

---

[149] *R. v. Martineau*, 1990 CarswellAlta 143, 1990 CarswellAlta 657, [1990] 2 S.C.R. 633, 58 C.C.C. (3d) 353, 79 C.R. (3d) 129, at pp. 645-646 [S.C.R.].

[150] *Ibid.*

[151] *R. v. DeSousa*, 1992 CarswellOnt 1006F, 1992 CarswellOnt 100, [1992] 2 S.C.R. 944, 76 C.C.C. (3d) 124, 15 C.R. (4th) 66

[152] *R. v. Creighton*, 1993 CarswellOnt 115, 1993 CarswellOnt 989, [1993] 3 S.C.R. 3, [1993] 3 S.C.R. 346, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189.

[153] *Ibid.*, at pp. 11-12.

the stigma, punishment, and moral blameworthiness inherent to both offences. The justification was as follows.

First, with respect to the culpable mental state, those who murder foresee death as a possible consequence but engage in the conduct anyways.[155] They are at least reckless that death can ensue, and are therefore more blameworthy than those who kill another but do not foresee such a consequence.[156] Second, this in turn justifies the stigma that reflects such a blameworthy mental state. It follows that those who kill accidentally are not labelled as murderers and are therefore stigmatized to a lesser degree.[157] Third, murder carries with it the mandatory minimum punishment of life imprisonment whereas manslaughter has no minimum punishment, meaning that the circumstances of the killing can be taken into account to mitigate the severity of the penalty.[158]

*(iii) Objections to Stigma as Opprobrium*

There are three principal concerns related to the current stigma-based justification for constitutionally mandating subjective *mens rea* for a limited number of crimes. These concerns help illustrate some of the problems with merely maintaining an objective standard of fault for certain serious crimes like manslaughter and criminal negligence causing death.[159] The first concern relates to conceptualizing stigma as having objective normative value when it is grounded in social or moral opprobrium.[160] In *Vaillancourt, Martineau,* and *Creighton,* the Supreme Court of Canada remarked that either the social stigma or punishment reflecting the blameworthiness of certain offences justified imposing a subjective standard of fault.

With respect to the particular social stigma association with certain crimes, Lamer C.J — who also wrote the majority judgments in *Vaillancourt* and *Martineau* — explained in *Creighton* that one important aspect of the stigma analysis was to examine whether the offence carried "sufficient gravity to import significant moral opprobrium on the individual found guilty of engaging in such conduct".[161] The Supreme Court of Canada has also observed that the notion of social stigma was more important than the potential punishment in justifying a constitutionally required *mens rea* for a given offence.[162] In the words of the

---

[154] *Ibid*., at pp. 46 and f.

[155] *Ibid.*

[156] *Ibid.*

[157] *Ibid.*

[158] *Ibid.*

[159] Arvay and Latimer, *supra* note 7, at p. 325

[160] Brudner, *supra* note 146, at pp. 306 and f.

[161] *R. v. Creighton*, 1993 CarswellOnt 115, 1993 CarswellOnt 989, [1993] 3 S.C.R. 3, [1993] 3 S.C.R. 346, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189 at p. 19 [S.C.R. 3]. Although Lamer C.J.'s opinion was the dissent in *Creighton*, it still provided clarification regarding the meaning of stigma.

majority of the Court in *Logan*: "It should be noted that, as a basis for a constitutionally required minimum degree of *mens rea*, the social stigma associated with a conviction is the most important consideration, not the sentence".[163] There are several problems with an opprobrium-based conception of stigma.

First, there seem to be certain crimes that objectively carry more moral opprobrium and societal revulsion than theft.[164] One may plausibly argue that sexual offences — especially those committed against children— generate a greater or at least equal level of moral opprobrium and revulsion than theft.[165] Second, if one accepts that the highest levels of opprobrium are reserved for crimes that threaten subsistence as opposed to merely lowering one's standard of living, it also puts into question the extent to which there is something so particularly stigmatizing about theft, notably in how it may fail to impact another's dignity, autonomy, or bodily integrity.[166]

Third, and in response to the previous argument, the rejoinder may be that theft can nonetheless be conceived as stigmatizing in its potential to be labelled as a thief and dishonest person. This seems to be the justification adopted by the Supreme Court of Canada in *Logan*.[167] In that case, the majority of the Court noted:

> [. . .] the offence of theft in the most serious circumstances is punishable by a maximum of ten years or, in less serious circumstances, a maximum of two years if the Crown proceeds by indictment; if the Crown proceeds summarily, the maximum is six months. The constitutional *mens rea* requirement would not, under s. 7, be triggered by any punishment within these ranges which the sentencing judge decided to impose.
>
> Whether the actual or available punishment is severe or not, the social stigma associated with being labelled dishonest will be automatically and unavoidably imposed upon conviction. It is because of this stigma that the principles of fundamental justice will require a minimum degree of *mens rea*, that is, as I said in *Vaillancourt*, at p. 653, "proof of some dishonesty".[168]

---

[162] *R. v. Logan*, 1990 CarswellOnt 1002, 1990 CarswellOnt 110, [1990] 2 S.C.R. 731, 58 C.C.C. (3d) 391, 79 C.R. (3d) 169, at pp. 743-744.

[163] *Ibid.*

[164] Lindsay, *supra* note 146, at p. 472. Paciocco, *supra* note 46, at p. 277.

[165] Cairns-Way, *supra* note 146.

[166] Andrew von Hirsch and Nils Jareborg, "Gauging Criminal Harm: A Living-Standard Analysis" (1991) 11 Oxford J. Legal Stud. 1, pp. 18 and f; Christopher McCrudden, "In Pursuit of Human Dignity: An Introduction to Current Debates", in Christopher McCrudden (ed.), *Understanding Human Dignity* (Oxford: OUP. 2014), p. 46.

[167] *R. v. Logan*, 1990 CarswellOnt 1002, 1990 CarswellOnt 110, [1990] 2 S.C.R. 731, 58 C.C.C. (3d) 391, 79 C.R. (3d) 169, at p. 744.

Another factor in support of this argument is that prior theft convictions are relevant and probative forms of bad character evidence that are suggestive of dishonesty.[169]

But this position has two inherent flaws. On the one hand, it is unclear why a crime such as fraud is not as stigmatizing, especially insofar as it is grounded in dishonesty or the intention to mislead, and is equally probative with respect to one's bad character.[170] On the other hand, the social stigma or label of dishonesty will not necessarily or unavoidably be imposed for a theft conviction. Notably, in the case of theft under $5,000, the accused can be granted an absolute or conditional discharge and is deemed never to have committed the offence.[171] Furthermore, an accused granted an absolute or conditional discharge for theft cannot subsequently be cross-examined on their criminal record related to the commission of that offence.[172] Thus, they are in no sense automatically or unavoidably stigmatized for having committed a theft. This suggests that social opprobrium does not act as an objective normative principle.[173]

*(iv) Objections to Stigma as Proportional to Moral Blame and Punishment*

The other way in which a stigma can be conceptualized relates to the blameworthiness of the conduct and ensuring punishment reflects the appropriate level of blameworthiness.[174] This justification for the stigma requirement also creates certain problems. First, stigma-as-blame is an inherently relational as opposed to absolutist concept.[175] The claim is that crimes and their consequences that are intentionally engaged in are more blameworthy than the same conduct or consequence that stem from inadvertence.[176] This is justified by the claim that harm or certain consequences are more attributable to the actor's agency where it is the product of intention or advertence, whereas it is perhaps more attributable to chance in cases of inadvertence and thus comparatively less blameworthy.[177]

---

[168] *Ibid.*

[169] See e.g.: *R. v. Corbett*, 1988 CarswellBC 756, 1988 CarswellBC 252, [1988] 1 S.C.R. 670, 41 C.C.C. (3d) 385, 64 C.R. (3d) 1, at para. 155; *R. v. Brown*, 1978 CarswellOnt 1184, 38 C.C.C. (2d) 339 (C.A.), at p. 342.

[170] Lindsay, *supra* note 146, at pp. 492-3; *R. v. Moffat* (1988), 42 C.C.C. (3d) 378 (Man. C.A.). Cited in Lindsay, *ibid.* The case concluded that fraud is not an offence that constitutionally requires subjective and specific intent to defraud.

[171] *Ibid.*; *Criminal Code*, s. 553(a)(ii), 730(1), and 730(3) respectively.

[172] *R. v. Danson*, 1982 CarswellOnt 1345, 66 C.C.C. (2d) 369 (C.A.); *R. v. Sark*, 2004 NBCA 2, 2004 CarswellNB 2, 2004 CarswellNB 3, 182 C.C.C. (3d) 530

[173] Brudner, *supra* note 146, at pp. 306 and f.

[174] *Ibid.*, at pp. 308 and f.

[175] *Ibid.* The term "stigma-as-blame" is Brudner's term.

[176] *Ibid.*

[177] *Ibid.*; Nagel, *supra* note 100, at p. 31.

This may justify why murder is more stigmatizing than manslaughter, but raises the question of what the appropriate comparator exists for the crime of theft. If an individual inadvertently takes another's possession without fraudulent intention to deprive the owner of their property, they are not committing some other less blameworthy crime.[178] Rather, they are not fulfilling the substantive *mens rea* requirements for theft.[179] Thus, in light of the moral blameworthiness and ensuing punishment, it is doubtful that there is something so stigmatizing about theft as it comparatively relates to some other offence. It is not clear which crime, if any, is a comparator to theft.

The other potential justification for requiring subjective *mens rea* is rooted in the stigma associated with the severe punishment for a certain crime and how it must be proportional to the degree of moral blame.[180] Yet the Supreme Court seems to have rejected this punishment-centric view with respect to the offence of theft. In *Logan*, the majority of the Court noted that theft is punishable by up to a maximum of ten years imprisonment, which in itself is insufficient to constitutionally require proof of subjective *mens rea*.[181] As the Court explained in that case:

> For example, the offence of theft in the most serious circumstances is punishable by a maximum of ten years or, in less serious circumstances, a maximum of two years if the Crown proceeds by indictment; if the Crown proceeds summarily, the maximum is six months. The constitutional *mens rea* requirement would not, under s. 7, be triggered by any punishment within these ranges which the sentencing judge decided to impose.[182]

Furthermore, the Supreme Court expressly endorsed the opprobrium-based conception of stigma with respect to theft, when they stated:

> Whether the actual or available punishment is severe or not, the social stigma associated with being labelled dishonest will be automatically and unavoidably imposed upon conviction. It is because of this stigma that the principles of fundamental justice will require a minimum degree of *mens rea*, that is, as I said in *Vaillancourt*, at p. 653, "proof of some dishonesty".[183]

---

[178] See: *R. v. Milne*, 1992 CarswellAlta 464, 1992 CarswellAlta 225, [1992] 1 S.C.R. 697, 70 C.C.C. (3d) 481, 12 C.R. (4th) 175; *Criminal Code*, s. 322(1).

[179] *Ibid.*

[180] *R. v. Creighton*, 1993 CarswellOnt 115, 1993 CarswellOnt 989, [1993] 3 S.C.R. 3, [1993] 3 S.C.R. 346, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189, at p. 19.

[181] *R. v. Logan*, 1990 CarswellOnt 1002, 1990 CarswellOnt 110, [1990] 2 S.C.R. 731, 58 C.C.C. (3d) 391, 79 C.R. (3d) 169, at p. 744.

[182] *Ibid.*

[183] *Ibid.*

*(v) Manslaughter, Criminal Negligence Causing Death, and Stigma*

The previous subsections argued that having included theft as a sufficiently stigmatizing crime that constitutionally requires proof of subjective fault is not normatively justifiable on either conception of stigma. That is to say, theft is not sufficiently stigmatizing under an opprobrium or blame-based conception.[184] If it is true that theft cannot be so stigmatizing as to constitutionally require subjective fault under either normative conception, then it would seem that the list of crimes that constitutionally require subjective fault is necessarily questionable. This in turn raises the question as to whether other crimes might also require proof of subjective *mens rea,* notably due to the stigma and punishment inherent to a given offence and that must be reflective of its level of moral blameworthiness. This final subsection argues that both manslaughter and criminal negligence causing death should at least require proof of subjective foreseeability of bodily harm that is neither trivial nor transitory.[185]

Those who commit murder, manslaughter, and criminal negligence causing death can be punished up to life imprisonment.[186] Murder, depending on whether it is committed in the first or second degree, carries with it a minimum sentence expressed by a period of ineligibility for parole, whereas the latter two crimes do not.[187] At the very least, however, an individual found guilty of any one of these three offences risks being stigmatized for having killed another and is liable to life imprisonment.[188] For manslaughter and criminal negligence causing death, an accused found guilty of either crime can be imprisoned for the remainder of their lives, even if they did not foresee that their conduct could cause bodily harm, and even if their conduct cannot be said to have been chosen in that they did not advert to the risks in question.[189] There are several problems with the argument that murder is so stigmatizing that is justifies an objective standard of fault for these two other offences.

The first and perhaps strongest objection is that being stigmatized as a killer and sentenced to life imprisonment is inherently serious in its own right, as opposed to merely being less serious than the stigma and punishment for murder.[190] As Narayan explains, this is a punishment related fallacy — that the

---

[184] With respect to "stigma-as-blame" and "stigma-as-opprobrium", *see*: Brudner, *supra* note 146, at pp. 306 and f.

[185] Arvay and Latimer, *supra* note 7, at pp. 325 and f.

[186] *Criminal Code*, s. 235 and 745 (murder), s. 238 (manslaughter), s. 220 (criminal negligence causing death).

[187] *Ibid.*

[188] *Ibid.*

[189] Duff, "Choice, Character, and Criminal Liability", *supra* note 5, at pp. 349 and f.

[190] Uma Narayan, "Degradingness and Intrusiveness" in Andrew von Hirsch (ed.), *Censure and Sanctions* (Oxford: OUP, 1993), pp. 80 and f. Although Narayan characterizes the fallacy as being related to the penal measure being worse (i.e.: execution versus imprisonment), the same reasoning is equally applicable with respect to the severity of the punishment.

punishment is not that serious because it *could* have been worse.[191] This is one way in which the majority of the Supreme Court of Canada justified the constitutional legitimacy of the objective standard of fault for manslaughter in *Creighton*. In their words:

> The most important feature of the stigma of manslaughter is the stigma which is not attached to it. The *Criminal Code* confines manslaughter to non-intentional homicide. A person convicted of manslaughter is not a murderer. He or she did not intend to kill someone.[192]

And further on:

> I come then to the second factor mentioned in *Martineau*, the relationship between the punishment for the offence and the *mens rea* requirement. Here again, the offence of manslaughter stands in sharp contrast to the offence of murder. Murder entails a mandatory life sentence; manslaughter carries with it no minimum sentence. This is appropriate. Because manslaughter can occur in a wide variety of circumstances, the penalties must be flexible. An unintentional killing while committing a minor offence, for example, properly attracts a much lighter sentence than an unintentional killing where the circumstances indicate an awareness of risk of death just short of what would be required to infer the intent required for murder. The point is, the sentence can be and is tailored to suit the degree of moral fault of the offender.[193]

But the severity of punishments should be assessed in their own right, as opposed to merely in comparison to the most serious crime. Otherwise, being convicted for any crime other than murder that results in the victim's death is simply dismissed as not sufficiently stigmatizing.

Second, the stigma associated with a punishment should not necessarily be evaluated in terms of what the minimum punishment *is*. Rather, it ought to be evaluated in terms of what the maximum punishment *can be*. In *Creighton,* the majority suggests that manslaughter is not particularly stigmatizing for two reasons. First, judicial discretion can temper the severity of the punishment so as to reflect the degree of moral blame.[194] Second, there is no mandatory minimum punishment for manslaughter whereas there is for murder.[195] Yet some have convincingly argued against such justifications. Roach notes that it is objectionable to leave the constitutionality of a fault requirement to judicial discretion, notably because some crimes carry mandatory minimal sentences of imprisonment even without any subjective fault requirement whatsoever.[196] For

---

[191] *Ibid.*

[192] *R. v. Creighton*, 1993 CarswellOnt 115, 1993 CarswellOnt 989, [1993] 3 S.C.R. 3, [1993] 3 S.C.R. 346, 83 C.C.C. (3d) 346, 23 C.R. (4th) 189, at p. 47.

[193] *Ibid.*, at pp. 48-49.

[194] *Ibid.*, at pp. 48-49.

[195] *Ibid.*

example, manslaughter committed with the use of a firearm leads to the imposition of a mandatory minimum sentence of four years imprisonment.[197] At least in that case, judicial discretion cannot necessarily temper the sentence to make it reflect the defendant's culpability.

Third, conceiving of stigma as a comparative and opprobrium-centric rationale fails to give sufficient consideration to the stigmatization felt or experienced by the offender. Surely, a reasonable person would objectively believe that being labelled as a killer and imprisoned for the rest of their life is seriously stigmatizing, irrespective of the penalty or moral blame attached to a murder conviction.[198]

## VI. CONCLUSION

This article argued that objective *mens rea* ought to be revisited for several reasons. Notably, in a criminal law system based on notions of choice, rationality, and fair stigmatization, the objective standard of fault generates important concerns. There is an increased potential to unfairly stigmatize those who commit objective *mens rea* offences. This can notably occur with respect to those who fail to advert to certain risks for non-culpable reasons, yet fall short of the threshold required to establish incapacity. Three contexts illustrate this problem.

First, in some cases, a person begins engaging in a new activity that generates risks. In order to acquire experience and mitigate future risks, they must necessarily engage in the risk-creating activity. Where the risks they create are largely attributable to their inexperience, and they have no other way of acquiring that experience, it should militate in favour of absolving as opposed to grounding moral blame.

Second, in some cases, an individual's makeup constitutes a marked departure from the norm. As such, their ability to consistently meet the required standard of care may be relatively exceptional, even though they are presumed to be constantly able to do so. The objection is that it is wrong for the

---

[196] Kent Roach, "Mind the Gap: Canada's Different Criminal and Constitutional Standards of Fault" (2011) 62 U. Toronto L.J. 545, pp. 562-3; *Criminal Code*, s. 236(a).

[197] *Ibid*. See also: *R. v. Morrisey*, 2000 SCC 39, 2000 CarswellNS 255, 2000 CarswellNS 256, [2000] 2 S.C.R. 90, 148 C.C.C. (3d) 1, 36 C.R. (5th) 85; *R. v. Ferguson*, 2008 SCC 6, 2008 CarswellAlta 228, 2008 CarswellAlta 229, [2008] 1 S.C.R. 96, 228 C.C.C. (3d) 385, 54 C.R. (6th) 197. Both cases ruled that the provision did not constitute a cruel and unusual punishment. Cited in Roach, *ibid*. It should be noted, however, that since recent developments with respect to the constitutionality of mandatory minimum punishments more generally, the provision may eventually be struck down. See: *R. v. Lloyd*, 2016 CSC 13, 2016 SCC 13, 2016 CarswellBC 959, 2016 CarswellBC 960, [2016] 1 S.C.R. 130, 334 C.C.C. (3d) 20, 27 C.R. (7th) 205

[198] See e.g.: Glanville Williams, "Convictions and Fair Labelling" (1983) 42 Cambridge L.J. 85, pp. 85 and 87; James Chalmers and Fiona Leverick, "Fair Labelling in Criminal Law" (2008) 71 Modern L. Rev. 217, p. 223.

law to presume that their ability to constantly meet the requisite standard of care is the rule as opposed to the exception. This is particularly objectionable where an individual's failure to consistently meet the standard of care is non-culpable in that they did their best to become a prudent person.

Third, some conditions such as FASD may increase an individual's likelihood of failing to advert to certain risks. The propensity for alcohol or drug addiction, coupled with the risk of easily being led during cross examination, means that those with FASD may be at an increased risk of being convicted for crimes requiring proof of objective *mens rea*. In such cases, courts ought to be particularly careful and alert to these problems in assessing whether *mens rea* has been proven, and perhaps adopt a less rigid approach to how this might affect their capacity to both perceive risks and avoid them.

Constitutional concerns relating to the objective standard of fault have also been discussed. Notably, due to the importance of fair stigmatization and recognition of a choice-based conception of culpability in Canadian criminal law, there are three problems with objective *mens rea*. First, some crimes, such as criminal negligence and manslaughter, may lack the normal moral/pragmatic justifications that legitimize objective fault for driving-related offences.[199] Thus, it is difficult to justify why these offences which carry harsher punishments are legitimate absent such moral/pragmatic justifications. Second, it is difficult to justify objective fault for offences when there was no awareness of the relevant risk, the potential punishment is severe, and proof of objective *mens rea* substantiates the mental element of the underlying and resulting offence.[200] Lastly, the current justifications for constitutionally requiring subject fault for some crimes such as theft is neither principled nor justifiable. More importantly, there are few legitimate justifications for failing to require some form of subjective foresight of risks for offences such as manslaughter and criminal negligence causing death, which are both punishable by life imprisonment.[201] By conceiving stigma as a comparative as opposed to a stand-alone concept, it ignores how offenders labelled as killers and sentenced to life imprisonment are so seriously stigmatized that proof of subjective foresight of some form of harm should be required.[202] For all of these reasons, it is time to revisit both the theoretical and pragmatic basis for objective fault in Canadian criminal law.

---

[199] Arvay and Latimer, *supra* note 7, at p. 325

[200] *Ibid.*

[201] *Ibid.*

[202] *Ibid.*