

THE REASONABLE PERSON
IN SUBSTANTIVE CANADIAN CRIMINAL LAW

by

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Thesis Abstract: The Reasonable Person in Substantive Canadian Criminal Law

Canadian Criminal Law uses the standard of the reasonable person as an open textured definition for the threshold of criminality if conduct is, *per se*, useful for society but becomes undesirable when done in certain circumstances, without proper precautions. Indicating that the agent did not intentionally cause harm, 'unreasonableness' tends to be found in the situative patterns of accidents and mistakes, which are represented in my research paradigmatically by the offence of manslaughter (ss.220,222 of the Canadian Criminal Code) and the defence of self-defence (s.34). My thesis inquires into the concept of reasonableness, approaching the topic in four different ways.

First, in a case study of current Canadian law the focus is on the leading cases of R.v.Creighton and R.v.Lavallee. The effects of s.7 of the Canadian Charter of Rights and Freedoms are considered. It is submitted that there are different tests to determine reasonableness in either case, and a new theoretical foundation is offered which justifies the difference.

Second, doctrinal analysis explores whether the common law principle of '*mens rea*' requires reasonableness to be assessed on the basis of certain criteria. The dispute between objectivist and subjectivist views whether the notion of fault requires 'awareness of risk' on part of the accused leads to an inquiry into moral theory. Pursuing the search for criteria this philosophical aspect is examined as well as its utilitarian counterpart, economic analysis.

The third approach critically assesses critically the cultural norms which fill out the reasonable person's appearance. Referring to critical race- and feminist legal theory, the focus is on a

multicultural society's postulations regarding the standard. An analysis of how the concept of reasonableness can acknowledge cultural norms which are different from the decisionmaker's is undertaken.

Fourth, in a comparative effort the patterns of unreasonably caused accidents and mistakes are presented in the context of both the German legal system and *George Fletcher's* writing 'Rethinking Criminal Law'. Taking advantage of system theory, especially the concept of 'wrongdoing' as opposed to 'attribution', it is argued that a different assessment of the consequences of unreasonable behavior is not justified, i.e. honest but unreasonable self-defence leading to homicide should be punished as negligence but not as murder.

Rudolf Alexander Mikus
The Reasonable Person in Substantive Canadian Criminal Law

Table of Contents

| | |
|---|----|
| Abstract | ii |
| Table of Contents | iv |
| Chapter One: The Concept of the Reasonable Person | 1 |
| Reasonableness in the Criminal Law | 1 |
| Mens Rea and Reasonableness | 4 |
| Morals, Customs and Reasonableness | 7 |
| Goal of the Thesis | 11 |
| Chapter Two: The Canadian Criminal Law and the Reasonable Person | 15 |
| Introduction | 15 |
| The Development of the Negligence Standard | 16 |
| Moral Criteria | 16 |
| Subjective Awareness of Risk | 19 |
| The Modified Objective Test in <i>R.v.Hundal</i> | 24 |
| Is the Modified Objective Test Partly a Subjective One ? | 28 |
| The Case of <i>R.v.Creighton</i> | 30 |
| The Double Test of Marked Departure and Capacity <i>post R.v.Creighton</i> | 34 |
| Incapacity and Insanity | 39 |
| Reasonableness in the Law of Self Defence | 40 |
| Section 34 of the Criminal Code | 41 |
| The 'Battered Woman-Cycle' and Apprehension of Death | 43 |
| Necessity of Force Used | 45 |
| <i>R.v.Petel</i> : Individual History | 47 |
| The Impact of <i>Creighton</i> on the Law of Self Defence | 48 |
| Chapter Three: Theories of Responsibility and Punishment | 55 |
| Introduction | 55 |
| The Principle of <i>Mens Rea</i> | 58 |
| The Nature of the Principle | 58 |
| The Supreme Court of Canada's Conception of Mens Rea | 64 |
| Fortuity of Consequences | 64 |
| Theory of Action | 66 |
| Moral Theory (of Ordinary Language) | 68 |
| The Significance of Choice in Criminal Negligence | 68 |

| | |
|---|---------|
| The Canadian Charter and Constitutional Deficiencies | 69 |
| The Moral Duty to Take Care | 71 |
| Aspects of Special and General Deterrence | 75 |
| Economic Analysis | 77 |
| Schwartz' Concept to Induce Optimal Care | 80 |
| Community Service as a Matter of Vindication | 83 |
| Chapter Four: Social Protection Critique | 87 |
| Introduction | 87 |
| What are the Determinant Cultural Norms ? | 89 |
| The History and Future of the Reasonable Person | 89 |
| Women and the Culturally Different | 92 |
| Rationality and Cultural Background | 95 |
| Rationality and Religion | 97 |
| How Can the Concept of Reasonableness be Opened ? | 100 |
| The Judge and Jury Issue: Direct Community Influence | 100 |
| Three Ways for Opening in Contrast | 102 |
| Standards Between the Tasks of Regulating and Accepting | 106 |
| The Need for a Uniform Standard | 106 |
| Dependence of the Uniformity Requirement on the Standard's Regulating Effect | 108 |
| Chapter Five: Comparative Study. | 111 |
| George Fletcher and the German Criminal Legal System | 111 |
| Introduction | 111 |
| George Fletcher's System | 116 |
| The Concept of Wrongdoing | 116 |
| The Concept of Attribution | 119 |
| Reasonableness in the German Legal System | 120 |
| Wrongdoing in Negligence | 120 |
| Elements of Mitigation | 124 |
| Wrongdoing in the Law of Self Defence | 127 |
| Mistake in Self Defence: The 'Erlaubnistatbestandsirrtum' | 128 |
| German Law: Other Mistakes | 134 |
| The Level of Attribution ('Schuld') in German Law | 134 |
| The Canadian Law in the Light of Both Systems | 138 |
| Wrongdoing in the Law of Negligent Manslaughter | 138 |
| The Requirement of a Specific Risk in Canada | 141 |
| The Law of Self Defence | 144 |
| The Nature of a Mistake in Self Defence | 145 |
| The Mistake - Accident Distinction | 150 |
| Attribution in Negligence and Self Defence | 152 |
| Unreasonable Self Defence in the Systemic View | 153 |
| Chapter Six: Concluding Remarks | 157 |

| | |
|---|-----|
| The Composition of Approaches to Reasonableness | 157 |
| The Search for Criteria | 158 |
| Appendix: Table of Cases | 163 |
| Bibliography | 165 |

INTRODUCTORY CHAPTER: THE CONCEPT OF THE REASONABLE PERSON

I. Reasonableness in the Criminal Law

The concept of general orders backed by threats given by one generally obeyed....approximates [close] to a penal statute..." HLA. Hart¹

In my thesis I will focus upon such general order. Criminal punishment usually applies to violations of such orders. Do not kill, steal, deceive - these are orders we basically think of when reading *Hart's* definition. In many instances, criminal conduct can be defined easily by a simple description of the conduct itself. But sometimes legal rules employ an open definition, forbidding conduct done in an 'unreasonable fashion' or requiring a 'reasonable decision' of the agent. There is no description of the forbidden conduct itself which is comparable to the norm 'do not kill'. The conduct *per se* may be useful for society, like driving a car. Yet it is undesirable when it is done in certain circumstances, without proper precautions. In these instances, to behave unreasonably invokes criminal liability. It is another function of 'reasonableness' to relate conduct to undesirable, harmful consequences and to determine the threshold of responsibility beyond the basic law of causality. The use of the label 'unreasonableness' indicates that the accused did not intentionally cause harm. Its purpose is to restrict the agent's liability in the sensitive area where there was no intentional rebellion against the social order but just clumsiness, stupidity. My thesis explores what 'unreasonableness' on part of the agent consists of.

From the viewpoint of theory of action's analytical surgeon, unreasonable behavior causing harm is often connected with certain adjusters in natural language like

¹) HLA Hart, The Concept of Law (Oxford Clarendon Press 1961) [hereinafter Concept] Chapter I, p.24

accidentally, mistakenly, inadvertently, carelessly, involuntarily, or unintentionally². These adjusters assert (or imply) specific ways in which the deviations positively differ from the standard case. For my purpose, I do not want to schematize each such deviant case but instead to reduce the phenomena to two patterns which are, in a broader sense, accidents and mistakes. First, an agent engages in risky conduct and, unfortunately, the risk becomes reality. The harmful outcome occurs as an unintentional³, but causal consequence of his or her conduct. The second pattern involves a wrong subjective apprehension of the factual⁴ situation that the action took place in. The 'wrong' element, the deviation from the reasonable person, occurs within the agent, before any conscious decision was made. Unreasonableness is part of the decision, or it appears even after the decision in the very fashion the conduct is carried out. In both cases, the agent might cause harm without, in advance, foreseeing it. Both the Supreme Court of Canada⁵ and the American author *George Fletcher*⁶ seem to separate along these lines, in approach as well as in outcome. For analytical purposes, I will maintain the distinction throughout my thesis. It will be observed later what structural elements the

2) C. Coval, J. Smith, and P. Burns, The Concept of Action and its Juridical Significance, 30 University of Toronto Law Journal (1980) 199-224 at p.200. The authors explore the meaning of each adjuster in normal language. See M. Moore's presentation of the theory of action in Michael S. Moore, Act and Crime (Oxford Clarendon 1993)

3) I do not inquire further into the concept of 'intention'. For the purposes of my thesis, intention is defined as voluntarily inflicting harm.

4) My inquiry into reasonableness focuses on what is commonly labeled as a 'mistake of fact', since the opposite, a mistake (only) 'of law' does not negate the agent's intention to perform certain conduct.

5) The Supreme Court of Canada's distinction is mirrored in the dichotomy between the decisions R.v.Lavallee and R.v.Creighton. R.v.Lavallee (1990), 1 S.C.R. 852, 76 C.R. (3d) 329-365; R.v.Creighton (1993), 23 C.R. (4th) 189-239.

6) Fletcher, G., Rethinking Criminal Law (Little & Brown New York and Toronto 1975), Chapter VI at 393-514 [hereinafter Rethinking Criminal Law].

distinction flows from and whether a different judicial treatment of both phenomena is justified. However, it must be added that these paradigms are just situative patterns of how harmful consequences might occur. They are not themselves the basis of the accused's liability. Liability always involves some negative deviation from conduct that is approved by society.

With respect to the two main paradigms I will explore the rules concerning negligent manslaughter and mistaken self-defence. Negligent manslaughter, defined in ss.219, 220, and 222 (5)(b) of the Canadian Criminal Code⁷, blames conduct causing death which, basically, consists of a marked departure from the standard of a *reasonable* person. Self defence, s.34 CCC, excludes liability if the defendant had a *reasonable* apprehension of an assault, danger for life and limb, *etc.* The law uses the concept of reasonableness similarly in related contexts. There are the offences of unlawful act manslaughter (s.222 (5)(a)) and dangerous driving (s.249 (1)(a) CCC)⁸, there are the defences of provocation (ss. 35, 36 CCC), and defence of property (ss.38, 41 CCC). The substantive problems, however, are basically the same.

How does the concept of 'reasonableness' fit in with the rule of law? The first objection to the use of any such open-textured concept in criminal law could be the principle '*nulla poena sine lege*'⁹. *Nulla poena* not only requires that there is law

⁷) Criminal Code, R.S.C. 1985, c.C.-46 as amended. Cited 'CCC', *infra*.

⁸) According to the Supreme Court of Canada in R.v.Hundal (1993) 19 C.R. (4th) 169, the finder of fact must be satisfied that a reasonable person in similar circumstances ought to have been aware of the risk and the danger manifested.

⁹) '*Nulla poena sine lege*' is founded historically on the philosophy of the enlightenment, on Jacques Rousseau's theory of the social contract. It is the notion of reason which unifies all men, being expressed by the law. The existence of unviolable Human Rights requires the state not to act arbitrarily. In order to give the individual a chance to comply with these rules, definitions of criminal offences need to define criminal conduct to a certain degree. See H.H. Jescheck, Strafrecht Allgemeiner Teil 4th ed. (Duncker & Humblot Berlin 1989) at 118.

before punishment is applied, but also that the very law makes it clear to a certain degree which conduct is prohibited. Does that mean, can that mean that the use of any such open-textured concept is excluded from criminal law? The citizen will know better how she is obliged to behave in certain social situations by employing common sense than by reading legal prescriptions. It is simply impossible for a legislative body to determine enumeratively all cases of unreasonableness. Today, most legal systems accept that there is nevertheless room for the criminal law. The single decisionmaker, the judge, transforms the reasonableness requirement into a concrete order, having regard to the very situation the accused acted in. It is a matter of law to determine what this order looked like in the accused's situation. However, society needs the single decisionmaker to act on behalf of itself as a matter of practical constraint. It is impossible for a legislative body like parliament to assess all situations which are potentially dangerous in advance. But as a first result, it can be inferred that the '*nulla poena*'-principle urges to assist the decisionmaker as far as possible with further clarifying criteria. The search for such criteria will lead as a thread through my thesis.

II. Mens Rea and Reasonableness

It is crucial for my thesis to discover how the concept of reasonableness is built into structure and principles of the Canadian legal system. Since Canadian law was produced by the English common law, the categories of *actus reus* and *mens rea* found the approach to any criminal offence. The most disputed issue concerning the reasonable person flows from the dichotomy between objective and subjective theories of *mens rea*. The interrelation between *actus reus* and *mens rea* must be clarified. *Actus reus* embraces the wrongful act and outcome. The *mens rea* requirement assesses the accused's attitude towards the *actus reus*, whether seen as the direct mental equivalent or more generally. The focus is on objective and subjective approaches to

reasonableness. However, it is not easy to present the competing positions since crucial terms are often used for different phenomena. For the sake of a clear definition, the terms 'objectivity' and 'subjectivity' shall be set out briefly.

An objective standard is supposed to measure certain behavior's qualitative or quantitative deviation from the norm, meaning the behavior expected by society. Assume that a person, being allowed to drive at 90 km/h on a highway, increases his or her speed up to 120 km/h. There is a quantitative deviation of 30 more km/h. This could be called the 'objective aspect' of the actus reus of the offence in question. However, deviation might be more difficult to determine in different cases: Mr. Finlay, for instance, did without lawful excuse store firearms and ammunition in a careless manner¹⁰. His conduct being the basis for the offence is not the pure storage of weapons. It is the omission to take additional efforts to prevent risk possibly flowing from the storage. This was the thing that really happened, that increased the risk to others, however more difficult to assess by facts and numbers. This was what makes Finlay a risky person, and what justifies attaching the stigma of criminality to his conduct.

The pure subjective position is conceptualized as the unjustifiable taking of a known risk. It is "recklessness" which is usually being contrasted by this definition to negligence. The latter is stipulated as being of an 'objective' character¹¹. To check the accused's knowledge of circumstances and risks differs from the reasonable person test, which is the finding that there was no knowledge on the part of the accused albeit he or she should have known. However, a subjective test is the theoretical alternative to the

¹⁰) R.v.Finlay, 23 C.R. (4th) 1993, p.321. The facts are presented by Lamer C.J.C. at 324.

¹¹) Stuart, D., Canadian Criminal Law. A Treatise (3d ed. Carswell 1995) [hereinafter Treatise] at 129.

reasonable person-test, and commentators have suggested replacing 'reasonableness' generally with an inquiry into the accused's mind.

According to a middle point of view, the definition of subjectivism embraces not only an active state of mind (i.e. the accused's awareness that harm might occur) but also consideration of the accused's personal frailties, from an external point of view. Subjectivism is interpreted as making the accused's frailties important in the decisionmaking process. Given that definition, the test becomes a mixed objective - subjective one, although the accused's subjective view of the situation is not of any importance at all. The term 'situation' is open-textured again, allowing for the inclusion or exclusion of certain features personal to the accused. Eventually, it becomes apparent that there is general ambiguity in the use of the terms 'objective' and 'subjective'.

'Objectivity' could mean that the decisionmaker must focus on the accused's conduct but, basically, must exclude the actor with his or her thoughts and abilities from the assessment. Setting aside any notion of justice, would 'uniformity' in judgment flow from this? It has been argued that the refusal to take the personal background into account decreases objectivity¹². Because, otherwise, it is the single decisionmaker who introduces his or her personal values and experiences into the standard. Whatever the standard is, it would become (a) more dependent on the judge and (b) less on the real 'moral' quality of the deed, as opposed to (c) a solution adopting more "subjective" frailties of the accused. For the sake of clarity, I will stay with the former interpretation throughout my thesis: an 'objective' evaluation assesses the act, and not the actor.

¹²) See I. Grant, D. Chunn, and C. Boyle, Homicide, (Toronto Carswell 1993) at 6-44. See also Grant, I. and C. Boyle, Equality, Harm and Vulnerability. Homicide and Sexual Assault post Creighton (1993) 23 C.R. (4th) 252-253.

After all, the significance of the objective - subjective dichotomy must be seen in the evidentiary context of decisionmaking. Even a totally "subjective" approach does not guarantee that it is really the accused's actual state of mind upon which the decision is based. Proof of what went on in the accused's mind is no different, in principle, from proof of any other fact¹³. It requires evidence from which the trier of fact may infer beyond any reasonable doubt that this was what was in the accused's mind. This may be simple where, for example, the accused admits it or makes statements from which it can be inferred. In other cases, however, it may be necessary to infer the mental element from the surrounding facts. Naturally, the process of inference-drawing is a process of using common sense, logic and experience, and the more unreasonable the accused's story is, the less likely it is that judge or jury will believe it or even that it will raise a reasonable doubt. In other words, from a practical point of view, a jury is likely, in the ordinary course of events, to conclude that an accused did foresee or did know because that is a reasonable inference to draw from the established facts. The decisive question is whether the decisionmaker is convinced beyond reasonable doubt. Eventually, the question whether to adopt an objective or subjective approach shifts the problem either to the substantive law or to the law of evidence.

III. Morals, Customs and Reasonableness

Canadian Criminal law which has long been closely connected with and oriented with English common law finds itself currently in a phase of self-orientation. Unlike England, Canada drafted a written Criminal Code, and a Law Reform Commission was continuously working at suggestions for improvement¹⁴. Both structural and

¹³) See A.Mewett and M.Manning, On Criminal Law (Toronto Butterworths 1994) [hereinafter Mewett & Manning] at 194.

¹⁴) Law Reform Commission of Canada, Report 31 Recodifying Criminal Law, Ottawa 1987, at 1. The Commission harshly criticized the present criminal code: "It is

substantive issues are subject to revision. But the problems Canadian criminal law has to deal with today are different from Blackstone's problems some two hundred years ago. Needs and tensions in Canadian society are different from the English society in the 18th century. Social change has affected both the importance and the substance of the "reasonable person".

There is a need for the law to react to recent technological developments. A hundred years ago, the most dangerous individuals were amoral, intentional criminals: murderers, rapists and thieves threatened the validity of basic community rules. As well moral offenders, like homosexuals, the sexually promiscuous (in certain cases), and practitioners of witchcraft were also outlawed. Unfortunately, the world still has to cope with murderers, rapists and thieves, but some types of organized, or white collar, criminality threaten much more the roots of today's social contract than do other types of moral deviance. Similarly, carelessness by agents in responsible positions is prone to cause huge and irreversible damage; the *Exxon Valdez* disaster¹⁵ is just one example thereof. The damages occur independently from the agents' moral blameworthiness, if assessed in liberal, enlightened terms. The latter incorporates most recent problems in

poorly organized. It uses archaic language. It is hard to understand. It contains gaps, some of which have had to be filled out by the judiciary. It includes obsolete provisions. It over-extends the proper scope of the criminal law. And it fails to address some serious current problems. Moreover, it has sanctions which may well violate the Canadian Charter of Rights and Freedoms." Some of these problems might be common to different countries' criminal codes, too. The language and organization of the Code are beyond the scope of my thesis. I am concerned, however, with substantive rules which are themselves determined by its structure. See further, Law Reform Commission of Canada, Report 33, Recodifying Criminal Procedure Volume I, Ottawa 1991.

¹⁵) On March 24, 1989 the Exxon Valdez super tanker plowed into Blight Reef in Alaska's pristine Prince Williams Sound, spilling an estimated 10.8 million gallons of crude oil. The volume of the oil spilled is still subject to dispute. See New York Times, March 24, 1990 at 8 col 1. See further, Alaska Oil Spill Commission, Spill: The Wreck of the Exxon Valdez III (Juneau 1990).

negligence law. To what extent should attentiveness be enforced by the criminal law, particularly if there is no doubt that damages will be subject to civil litigation? Arguably, Rousseau's social contract¹⁶ has to be amended: in exchange for the benefits of technology, society gave up the right to be inattentive, however human this might be.

A second striking difference from Blackstone's time and place is the Canadian multicultural society. There are people of a variety of different cultures living together, all of them adding their ideas about rules of conduct, and criminal deviance. In a multicultural society, the balance between uniform regulation and creative freedom for individuals and groups cannot afford to be conditional, in unproved reliance, upon the standard of the (white) English Protestant. What accounts for some of the tensions in the current discussion are not only developments in society but also the reluctance to reflect them. Surprisingly, in the leading case of R.v.Creighton¹⁷, McLachlin J. commenced her analysis of "negligent manslaughter" with a note of caution. She doubts that a legal rule, rooted in the history of common law and having stood the "practical test of time" could violate "our fundamental notions of justice". In my view, history will hardly be any evidence for today's appropriate 'notions of justice', however it might reveal underlying thoughts and principles of positive rules.

Moreover, it is not only the person's origin which is relevant, but the interdependence between custom, morality and reasonableness. There are American authors who currently argue that a paradigm shift is taking place in the criminal

¹⁶) Jean Jacques Rousseau, On the Social Contract, edited by Roger D Masters and translated by Judith R Masters (New York St Martin's Press 1978)

¹⁷) See R.v.Creighton *supra* note 5 at 200 [para.13], concerning the constitutionality of manslaughter in light of s.7 of the Canadian Charter of Rights and Freedoms.

process¹⁸. Criminal law used to be rooted in a concern for individuals, and preoccupied with such concepts as guilt, responsibility, and obligation. It viewed committing a crime as a deviant or antisocial act which is deserving of a response, and one of its central aims was to ascertain the nature of the responsibility of the accused and hold the guilty accountable. Responsibility and guilt were closely related to the personal state of mind; the 'bad will' was what creates the accused's moral fault.

But, in contrast, the criminal law has recently been observed to give importance to a "radically different" orientation. It is concerned with managing groups assorted by levels of dangerousness. Crime is taken for granted and social deviance accepted as a normal condition. Theorists are skeptical that liberal interventionist crime control strategies do or can make a difference. Thus the aim of the law is not to intervene in an individual's life for the purpose of ascertaining responsibility, making the guilty 'pay for their crime' or changing them. Rather it seeks to regulate groups as part of a strategy of managing danger. Fault is no longer the precondition for liability but is, itself, a consequence of liability. Professor *Henry Steiner* pinpointed the development cynically:

"Fault could be better understood as a characterization of defendant's conduct that was attached to a judgment of liability rather than invoked as a moral and legal premise of that judgment."¹⁹

Does this constitute the end for traditional principles of morality in criminal law? Does criminal law degrade to just an aspect of tort law, adding a prohibitory price to

¹⁸) M. Feely and J. Simon, Actuarial Justice: the Emerging New Criminal Law. In David Nelken ed., The Futures of Criminology (London Sage 1994); Feely, M. and J. Simon, The New Penology: Notes on the Emerging Strategy of Corrections and its Implications (1992) 30 *Criminology* 449.

¹⁹) Steiner, Henry, Moral Argument and Social Vision (Madison University of Wisconsin Press 1988) at 23

damages?²⁰ The moral blameworthiness of unreasonable behavior has often been doubted before, at least if there was no awareness of risk on the part of the accused. However, if a human was killed, a simply pragmatic assessment of damages leaves a somewhat uneasy feeling of 'not being enough'. What any pragmatic approach, without moral assessment, needs to provide is appropriate satisfaction particularly in those cases where a human was killed or severely injured.

IV. Goal of the Thesis

The main issue in my thesis is the search for a 'just' concept of reasonableness, which is suitable for today's technological and multicultural society. Whatever criteria look like, they must be able to react to changes. They must be clear and certain enough to make change visible. It is not the search for justice which distinguishes my work from many other juridical efforts. It was *Aristotle* who gave a very early but still frequently quoted answer, separating the notions of *justitia commutativa* and *justitia distributiva*²¹. The concept of justice is interrelated with the concept of equality, whereby equality (at least with respect to the -for the criminal law important- aspect of 'justitia distributiva') must be understood not as a formal, but as a relative idea. *Justitia distributiva* means that everybody gets what she deserves according to the role she plays in society. Thus *Aristotle* leaves open the decisive question, the crucial search for the 'just' criteria which could fill out the openness of relativity. What exactly is it that a person deserves, and how can the law be used to transform the criterion in each

²⁰) See his theory in J. Coffee Does Unlawful Mean Criminal? Reflections on the Disappearing Tort/Crime Distinction in American Law (1991) 71 Boston University Law Review 193-248

²¹) Aristotle Ethica Nicomachea Book V. See Aristotle, The Nicomachean Ethics, translated with an introduction by David Ross; rev. by J.L. Ackrill and J.O. Urmson (New York Oxford University Press 1980). See F. Haft, Aus der Waagschaale der Justitia 2nd ed. (Muenchen Beck DTV 1990)

single case? In *Kant's* tradition, the idea of a 'reason', which exists before any human being and their general world view, must be denied²². A concept as open as 'reasonableness' seems not to be able to guarantee any certain transformation of general criteria at all. But is this necessary at all? Cannot the search for general principles be replaced by a 'rule of reason'? Is it the case that any notion of reasonableness must be based on a set of principles? The latter dispute was revealed as a structural difference between Anglo-American and Continental European, especially German approaches²³. In my view, it is important to survey the criteria which might underlie the Anglo-American, particularly the Canadian understanding of reasonableness. If not built on abstract, explicit 'principles', is it morality, custom, or fashion which determines the decision, after aspects like power and eloquence have been excluded? I will argue that, in a multicultural society, there is not a sufficient general notion of any morality or any custom prevailing throughout society as a whole to enable us to use these notions as the threshold of reasonableness. The more the general consensus of values diminishes the more there is need to replace a 'substantive' idea of justice with a 'formal' or 'procedural' one. There is need for a positive system which allows legal decisionmaking with as little reference to moral values as possible.

In the single criminal decisionmaking process, the notion of morality would be replaced by system theory. Theorists like *Luhmann* and *Teubner* argued that systemic and procedural straightforwardness are tools equally suitable as morality to fulfill the

22) Immanuel Kant, Critique of Pure Reason, with an introduction and glossary by Wolfgang Schwarz (Aalen Scientia 1982). See also Immanuel Kant Kritik der Reinen Vernunft 2nd ed (1781), Vorrede zur zweiten Auflage.

23) For a discussion of the need for clarification of divergent preconceptions, see Albin Eser Common Goals and Different Ways in International Criminal Law: Reflections from a European Perspective (1990) 31 Harvard International Law Review 117 at 119.

most basic task of criminal law²⁴. The law must be able to achieve stability, built on a general acceptance of its decisions. I do not want to go so far as to say that it is possible to sacrifice any material aspect. But today, certain customary or moral standards should influence the law basically on the legislative level. Arguably, open-textured concepts like the 'reasonable person' must be filled out by the application of binding constitutional norms and derivative principles developed in the same spirit. However significant the practical problems of democracy are, there is no other way for any person or group to introduce his or her notion of 'reason' in the decisionmaking process than the way of politicization. It is my goal to explore and to underline this idea. But, equally, I will search its borderlines, for exceptional ("hard") cases, in which the constitutional balance retreats and norms and values very personal to the accused may determine reasonableness or, put differently, where the constitutional guarantee requires that the subjective viewpoint of the very accused prevails.

The collection of these views directs us to determine, as a preliminary task, the state of the relevant positive of Canadian Criminal law. In Canada, the issue of reasonableness shows a constitutional dimension, primarily through s.7 of the Canadian Charter of Rights and Freedoms, and secondarily s.15 and s.27. I will commence with an investigation of the law of manslaughter and self defence, with respect to tests of reasonableness. For the sake of comparison, I will even assume that the self - defendant killed the aggressor. The nature of the tests being suggested leads straight into principles of common law and moral theory. It is necessary to separate the Supreme Court's cases from general common law theory, in order not only to reflect the Charter dimensions but also to inquire into 'principles' without being restricted by positive law. Having been analyzed abstractly, the reasonable person will uncover her -or arguably

²⁴) Niklas Luhmann Legitimation durch Verfahren, 2nd ed (Frankfurt 1989); Gunther Teubner How the Law Thinks: Towards a Constructivist Epistemology of Law (1989)
23 Law and Society Review 727-757

rather his- face concretely: who is this ominous person? This will be the research question in the fourth chapter. Finally, the Canadian approach will be compared with the German one and *George Fletcher's* re-examination of the common law. The focus will be on system theory and, particularly, on a paradigmatic aspect for discussing its contribution to achieve -not only social stability and harmony, but justice. Because theoretical considerations beneath the surface are at work in shaping the substantive criminal law²⁵.

²⁵) D.Husak, Philosophy of Criminal Law, (Totowa Rowman & Littlefield 1987) at 2. In Husak's view, misconceptions in general criminal theory are most frequently responsible for judgments that "offend our sense of justice". He states that "[i]t is timely that criminal theory should attract general attention." See *ibid*, Chapter I Orthodox Criminal Theory 1-7 at 3.

CHAPTER TWO: THE CANADIAN CRIMINAL LAW AND THE REASONABLE PERSON

I. Introduction

Canadian criminal law uses the term "reasonableness" explicitly in s.34 CCC (regulating self-defence), but it is silent in the definition of the crime of criminal negligence, in s.219 CCC. However, the Supreme Court has required a minimum of personal guilt for criminal conduct generally; it is not enough that the agent sets a *conditio sine qua non*. In Vaillancourt²⁶, the court held that a minimum requirement for any criminal liability is objective foresight; while some offences (of which murder seems to be the only absolutely clear one) require a minimum of subjective foresight. The court struggled with finding an approach to test this minimum of guilt for the past thirty years, until it found an answer in R.v.Creighton²⁷.

Criminal negligence is defined in s. 219 CCC:

- (1) Every one is criminally negligent who
 - (a) in doing anything, or
 - (b) in omitting to do anything that it is his duty to do,
 shows wanton or reckless disregard for the lives or safety of others.

The use of the words "wanton and reckless disregard" suggests that an ingredient of the offence includes a state of mind or some moral quality to the conduct which attracts the sanctions of the criminal law. However, the accused is not required to *be* "wanton or reckless" but only to show such a behavior - which opens the definition for an objective assessment again. In Creighton, the subjectivist' position was rejected. The *mens rea* of negligence is objective foresight, and the separation of criminal from non - criminal behavior is basically one of the *actus reus*: It is the question whether the accused's

²⁶) R.v.Vaillancourt (1987), 2 S.C.R. 636-671 (S.C.C.)

²⁷) R.v.Creighton *supra* note 5 at 218

deviant conduct amounted to a 'marked departure' from standard conduct, and whether the accused had shown something like due diligence.

But turning the focus on self-defence, the Supreme Court reached another result in R.v.Lavallee²⁸, different in one decisive aspect. The decisionmaker not only has to assess the action but also the agent, in terms of his or her personality and experience. Then, the tribunal has to apply a standard of reasonableness. After R.v.Creighton, there was doubt whether the ruling in R.v.Lavallee had been reversed; but in R.v.Petel²⁹, the Supreme Court affirmed the distinction between them and I will argue that there is not necessarily a contradiction between the two cases.

II. The Development of the Negligence Standard

2.1. Moral Criteria

The separation of criminal conduct from non-criminal used to be done in application of various different criteria: Earlier decisions focused on the accused's state of mind, making a *mens rea* of actual awareness of risk a presupposition of criminal liability. Earlier in this century, courts tended to use normative criteria with moral connotation. The test of reasonableness was not attached to any particular element of an offence, neither to *actus reus* nor to *mens rea*³⁰. In the following, I will present an overview of the development of the "tests" of manslaughter caused by criminal negligence or

²⁸) R.v.Lavallee *supra* note 5 at 352

²⁹) R.v.Petel (1994), 26 C.R. (4th) 145-172

³⁰) G. Fletcher observed a similar approach in Californian courts: judges have stressed the normative content of malice employing highly judgmental terms such as "base, antisocial purposes" and "wanton disregard for human life". See Rethinking Criminal Law *supra* note 6 at 396

unlawful act. An analysis of the issue usually starts with Lord Howard's view of what is meant by criminal negligence in the English case of Bateman³¹:

In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, judges have used many epithets, such as 'culpable' or 'criminal', 'gross', 'wicked', 'clear', 'complete'. But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between the subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment"

It does not appear from the surface of the statement what the standard of negligence itself would be like. The issue however was clarified by Duff J. in R.v.Baker as a "want of ordinary care in circumstances in which persons of ordinary habits of mind would recognize that such want of care is not unlikely to imperil human life"³². The question about the proper determination of the epithets, however, still remains open. It was pointed out that criminal liability not only entailed falling below the standard that a reasonably prudent person would comply with, but also falling below it to such a degree that it becomes morally culpable in the sense that the Supreme Court uses the phrase as a basic requirement for criminal liability. In R.v.Greisman, Middleton J.A. stated³³:

I think the great weight of authority goes to show that there will be no criminal liability unless there is gross negligence, or wanton misconduct. To constitute crime there must be a certain moral quality carried into the act before it

³¹) R.v.Bateman (1925) 19 Cr.App.R.8 at 11-12 (H.L.) See further the more comprehensive discussion by P. Burns An Aspect of Criminal Negligence or How the Minotaur Survived Theseus who Became Lost in the Labyrinth (1970) 48 Canadian Bar Review 47-65; and Mewett & Manning *supra* note 13 at 196-200

³²) R.v.Baker (1929) S.C.R. 354 at 358 (S.C.C.)

³³) R.v.Greisman (1926) 46 C.C.C. 172 at 177-178 (O.C.A.)

becomes culpable. In each case it is a question of fact, and it is the duty of the Court to ascertain if there was such wanton or reckless negligence as in the eye of the law merits punishment.

The Courts refrained from determining the standard of liability beyond the gauge of morality. The finder of fact had to judge the issue without being guided further by any rule of law. There were no criteria of a descriptive character available to assist in the task. The decisionmaker decided what a reasonably prudent person would have done in the factual circumstances and superimposed on top of that a normative test, the quest for moral blame.

The distinction between 'normative' - 'descriptive', however, refers to the distinction between 'value' and 'fact' and is difficult to maintain in many legal contexts. A normative test asks whether the accused can be 'fairly' or 'properly' held liable for a certain outcome. A descriptive definition or test is reflected in the claim that there are identifiable elements that are consistent from case to case. In German legal theory, it was shown that there is no such thing as a purely descriptive definition in any legal rule³⁴. But nevertheless, a normative test is far less bound to general definitions. It is more discretionary and can change from judge to judge and from day to day. Even if most people in a given society would agree that certain conduct was done "wickedly", the criteria for wickedness are not transparent. It is hardly possible to assess and discuss these in an open forum. Therefore, a purely normative test does not work without restricting criteria, but the very criteria are not visible. "A normative test is one that applies directly to the underlying policy, without translating it into measurable and consistent components. A descriptive test, on the other hand, would

³⁴) It should be noted that there is no such a thing as a 'pure' empirical element. This might be illustrated by examination of the meaning of 'person': a foetus? a small child? a human being born without brain? A fatally ill patient in a coma? See U. Kindhaeuser, Rohe Tatsachen und normative Tatbestandsmerkmale (1984) 84 Jura 465 ('Raw facts and normative elements')

specify identifiable elements that are consistent from case to case. The problem with a normative test is that it is discretionary and can change from day to day. The problem with a descriptive test is that it is rigid and may not accurately reflect the underlying principle or policy in every situation."³⁵

2.2. Subjective Awareness of Risk?

In a further effort to separate non-criminal behavior from criminal negligence, juridical debate focused on the introduction of the subjective criterion of 'awareness'. Did the concept of moral culpability require a subjective recognition of the risk, or may it be satisfied where the accused did not address her mind to it in cases where it would have been obvious had she done so³⁶. Only the legal framework was set out in Vaillancourt where the Supreme Court interpreted s.7 of the Charter as requiring a minimum of objective foresight of the risk³⁷. There is no fundamental principle of justice requiring subjective foresight. However, the ruling in Vaillancourt does not mean that objective foresight necessarily suffices in each case of negligence. It was the Supreme Court's task post-Vaillancourt to clarify the test for the minimum fault requirement and to draw a line between offences which do and which do not require subjective *mens rea*.

Subjective *mens rea* stipulates that, as a minimum requirement, the accused has been aware of the risk that harmful consequences might occur. Criminal liability could only be imposed for offences of which criminal negligence is an ingredient if the accused addressed her mind to the risk of the harm, acted in spite of it, and harm

³⁵) A. Stalker Can G. Fletcher Help Solve the Problem of Criminal Negligence? (1982) 7 Queen's Law Journal 274 at 291-92 [hereinafter Problem of Negligence]

³⁶) Mewett & Manning *supra* note 13 at 197

³⁷) R.v. Vaillancourt *supra* note 25. Vaillancourt required a minimum of subjective foresight for the offence of murder, making it clear thereby that there are different offences which require something less than subjective foresight.

actually occurred. Risk is related to harmful consequences, or to the aggravating circumstances of the offence. Awareness, therefore, must logically include the defendant having of an idea that certain consequences might occur. Is awareness of a risk of consequences more than awareness of the violate nature of certain conduct, the *actus reus*?

The concept of subjective awareness seems to filter out all cases in which the accused's moral guilt might be doubted. It is assumed that once the court can prove awareness, it is not a question any longer that the accused was guilty in a moral sense. Commentators have never doubted that awareness 'suffices'³⁸. This point is interesting since the subjective criterion does not necessarily provide for an equal standard among different people. Those who are more scrupulous, who give more consideration to the social role they play and its consequences, or who simply go with "open eyes" through their life, are much closer to the reach of criminal law than those who, being egocentric to a higher degree, do not doubt the correctness of their conduct at all. It is difficult to determine which character is, in the end, less desirable for society. But people who do not even think about risks might be more prone to finally cause a socially damaging consequence, since people aware of danger might be less influenced by an extended reaction time, by lethargy etc.

Before discussing the Supreme Court's approach, some thoughts about the practical consequences should be mentioned. As Sopinka J. pointed out in R.v.Anderson³⁹, the significance of the distinction between the objective and the subjective approach decreases if the risk of harm increases:

³⁸) see Mewett & Manning *supra* note 13 at 197: " does criminal negligence require advertent negligence or will inadvertent negligence suffice?"

³⁹) R.v. Anderson (1990) 53 C.C.C. (3d) at 481 (S.C.C.)

Often the defendant will not, in fact, have foreseen the consequences of his negligent acts for which he is held accountable on an objective basis. In a criminal case the connection must be more substantial. To establish recklessness, the consequences must be more obvious. That is the rationale for the requirement of a marked departure from the norm.

He stated that, under the requirement of a subjective standard, a marked departure constitutes a *prima facie* case of negligence. The trier of fact may infer the necessary mental element from the conduct which is found to depart substantially from the norm. The major difference from an objective test appears to be that evidence might show special features ['frailties'] on the part of the accused which contradict such a conclusion. Because the greater the risk created, the easier it is to conclude that a reasonably prudent person would have foreseen the consequences, so too, it is easier to conclude that the accused must have foreseen the consequences. Criminal liability for awareness is even more problematic if the (unjustified) risk created was very slight, for example, only a transgression of a speed limit by 5 km/h only. The problem is softened to some extent because criminal negligence requires, *per definitionem*, a 'marked departure' from reasonable conduct, thus more than 'mere negligence' or negligence to a degree that would satisfy the standard in civil cases⁴⁰. But, according to s.222(5) of the Code, a conviction for manslaughter may be based on (simply) an unlawful act like the transgression of a speed limit by 5 km/h. Unlawful act manslaughter is not only the more problematic case for the "subjective school of thought"⁴¹, it is, also, the case where the difference between the objective and subjective schools of thought is of greater significance.

⁴⁰) Mewett & Manning *supra* note 13 at 206

⁴¹) *Ibid.* at 203

The proper role of the criterion of 'awareness' has dogged the Supreme Court of Canada in its dealing with highway crimes⁴²: s.233(1) of the Criminal Code makes it an offence to be criminally negligent in the operation of a motor vehicle, which carries with it a maximum penalty of five years imprisonment. In distinction thereof s.249(1) of the Code contains the offence of driving in a manner that is dangerous to the public, commonly called 'dangerous driving', and there are provisions under provincial law prohibiting careless driving, or driving without due care or attention. In O'Grady v. Sparling⁴³ the majority of the Supreme Court held that s.219 defines criminal negligence as advertent negligence and thus s.249 CCC makes it an offence to be advertently negligent in the operation of a motor vehicle. In Binus⁴⁴, it was held that proof of inadvertent negligence was not sufficient to support a conviction for dangerous driving.

Some authors conclude that it was, by 1970, generally accepted that only advertent negligence could be the proper basis for imposing criminal liability, and juries had to be instructed that they had to be satisfied that the accused had adverted to the risk and acted nevertheless⁴⁵. But Canadian cases hardly support this view. In *Peda v. the Queen* the Supreme Court, by a six to three majority, held that the majority view in *Binus* that mere inadvertence would not suffice for dangerous driving was *obiter dicta* and that the jury need only be instructed to find that the accused did drive in a manner that, having regard to all the circumstances, was dangerous to the public and

⁴²) See, in regard to this issue, the more comprehensive discussion by P. Burns *supra* note 30.

⁴³) O'Grady v. Sparling (1960) S.C.R. 804 (S.C.C.)

⁴⁴) Binus v. the Queen (1967) S.C.R. 594 (O.C.A.)

⁴⁵) Mewett & Manning *supra* note 13 at 198

that nothing need to be said to them as to either advertent or inadvertent negligence⁴⁶. Hence dangerous driving was to be judged by an objective test, and criminal negligence only required actual awareness of the risk, only.

The requirement of actual awareness on the part of the accused was never a generally insurmountable threshold of criminality. It made the criminal law too weak a tool to require certain conduct if the accused's view of what is dangerous and what is not departs from society's general knowledge. In R.v.Rogers⁴⁷, the accused, a physician, prescribed a wrong medication for a small boy although it was common knowledge that the medical profession was of the opinion that a different medication should be applied. The evidence clearly showed that Dr.Rogers stubbornly adhered to his view. He did not advert to the risk and wantonly ignore it, but he failed to perceive the risk and thus failed to have and use reasonable care. Since he thus increased the risk and caused death he was convicted.

In R.v.Tutton⁴⁸, the parents of a young child were charged with manslaughter caused by criminal negligence. Their child suffered from diabetes and they decided not to administer insulin although they had received medical advice for its need. They firmly believed that God had performed a miraculous cure and persisted in that belief in the face of the child's deteriorating condition. The jury convicted them although evidence could not prove subjective foresight of harm, and on appeal a new trial was ordered. The six judges at the Supreme Court taking part in the judgment were divided:

⁴⁶) Peda v. the Queen (1969) S.C.R. 905 (S.C.C.)

⁴⁷) R.v.Rogers (1968), 4 C.C.C. 278 (B.C.C.A.). Rogers had obtained the medical degrees of M.D. and C.M. from McGill University in 1917. Although having been struck from the rolls of the B.C. College of Physicians and Surgeons, he purported to have medical knowledge by adding "M.D., C.M." to the sign on his office door and on the instruction paper he handed out. See the presentation of facts *per* Nemetz J.A. at 286.

⁴⁸) R.v.Tutton (1989) 48 C.C.C. (3d) 129 (S.C.C.)

three judges expressly held that liability in criminal negligence was based on objective foreseeability, while three held that subjective foresight was required. In R.v.Waite⁴⁹ the accused was convicted of dangerous driving causing death. Affirming the Court of Appeal, the Supreme Court of Canada ordered a new trial because the trial judge had not properly instructed the jury on the elements of criminal negligence. But as to the issue of awareness, the participating judges split precisely along the same lines as they had in Tutton. By the beginning of the 1990's, the question was thus still open.

2.3. The Modified Objective Test in R.v.Hundal

In Hundal,⁵⁰ the Supreme Court dealt again with the requisite elements for the offence of dangerous driving causing death, and now the judges made it clear that subjective awareness of risk was not among them. Hundal, while driving an overloaded dump truck, proceeded into an intersection against a red light and killed the driver of a car which had moved into the intersection on a green light. *Actus reus* was established since the trial judge rejected the accused's explanation that he was only a short distance from the intersection when the light turned amber - and that it was dangerous to try to stop, and therefore he made a decision to go through the amber light.

Cory J., for the majority, found that the element of mens rea might be proven, in certain offences, by an objective test. However, in order to fulfill the requirements of s.7 of the Charter, the test has to be generally a modified objective one. Such a test would be appropriate to apply to dangerous driving. He referred to the wording of s.249 CCC, which brands driving "in a manner that is dangerous", but which does not mention any subjective element. It would be a denial of common sense for a driver, whose conduct was objectively dangerous, to be acquitted on the ground that he was

⁴⁹) R.v.Waite (1989) 48 C.C.C. (3d) 1 (S.C.C.)

⁵⁰) R.v.Hundal *supra* note 8 at 103-104

not thinking of his manner of driving at the time of the accident⁵¹. In addition, the staggering number of people killed each year in traffic accidents highlights the tragic social cost which can and does arise from the operation of motor vehicles. He concluded, therefore, that there is a compelling need for effective legislation which strives to regulate the manner of driving vehicles: "It is not only appropriate but essential in the control of dangerous driving that an objective standard be applied."⁵²

Cory J's modified objective test was fashioned to allow the individual's human frailties and personal situation to be taken into account, while preserving an objective standard. The idea had been indicated before, in Tutton, by Lamer J. and McIntyre J., who supported the objective view. They had added the caveat that if the accused honestly believed on reasonable grounds that there was no risk, then he is not morally culpable and hence should have a defence. A "generous allowance" should be made for such factors as youth, mental development and education⁵³. Just as the harshness of absolute liability was mitigated to strict liability in R.v.Sault Ste. Marie⁵⁴, it is still open to the accused to raise a reasonable doubt that a reasonable person would not have been aware of the risk. In Hundal, Cory J. recalled the wording of s.249, that the trier of fact must be satisfied that the driving was dangerous to the public,

"having regard to all the circumstances, including the nature, condition and use of such a place and the amount of traffic that at the time is or might reasonably be expected to be on such place"

⁵¹) *Ibid.* at 105

⁵²) *Ibid.* at 106. Cory J. refers to data from Transport Canada showing 3,654 deaths in 1991 and 630,000 property-damage accidents and 3,442 fatal accidents in 1990.

⁵³) R.v.Tutton *supra* note 47 at 129

⁵⁴) R.v.Sault Ste. Marie (city) (1978), 3 C.R. (3d) at 30. Here, the Supreme Court allowed the defence of due diligence against any ascription of liability, thus mitigating absolute liability to strict liability.

The test of mens rea should not be applied in a vacuum. Although an objective one, it must be placed "in the context of all the events surrounding the incident"⁵⁵. But surprisingly, he continued:

"As a general rule, personal factors need not be taken into account."⁵⁶

For the first time, this statement opens the dichotomy between 'circumstances of the act' and 'personal frailties of the actor'. Cory J. hastened to explain the distinction. The licensing requirement for driving would guarantee a certain standard of the driver's physical and mental capability. The fact that a license was issued straightens different frailties into a uniform fiction. Giving examples of 'circumstances', Cory J. referred to a sudden onset of a disease. Similarly, a defence would be granted the driver who takes disabling medication "in the absence of any warning or knowledge". The problem whether the onset of a disease or disability makes the act of losing control of the motor vehicle involuntary will not be discussed further, here⁵⁷. But as McLachlin J. pointed out, if the actus reus were taken as being established the heart attack or epileptic seizure might be viewed as a circumstance which negates the ordinary inference of want of care which flows from the fact of having lost control of a motor vehicle⁵⁸. It

⁵⁵) R.v.Hundal *supra* note 8 at 107

⁵⁶) *Ibid.* at 108

⁵⁷) It might not be possible to decide the matter in general terms, without consideration of the very facts of each situation. P. Burns *supra* note 30 at 57 explains that "in the event of the driver's act being non-volitional, he will not in law be deemed to have 'caused' the *actus reus* of the offence...In such a case, certain defences will be available to the accused such as automatism, act of god or act of a stranger, or, generally, some supervening cause having produced the actus reus" (with further citations).

⁵⁸) R.v.Hundal *supra* note 8 at 112

would be very difficult to distinguish such a circumstance, then, from 'personal factors'. Thus McLachlin J. explicates Cory J's test by explaining that in applying the objective test jurists may take into account all relevant circumstances including those personal to the accused. She considered them to be crucially relevant in order to determine realistically what a reasonable person would have thought in the particular situation in which the accused found himself⁵⁹.

The examples stressed by Cory J. give rise to two more observations: First, the driver surely would not be excused after an appropriate warning. Alcohol, for example, is thus different from Cory J.'s medication, since its effects are well known.⁶⁰ Abstracting from Cory's example, it seems to be the knowledge or warning in advance which makes the difference, so that prior awareness of risk has an inculpatory effect. Reasonable mistakes only are of exculpatory effect. Borrowing from McIntyre J. in Tutton, Cory J. explains:

If an accused [under s.219 CCC] has an honest and reasonably held belief in the existence of certain facts, it may be a relevant consideration in assessing the reasonableness of his conduct."⁶¹

Secondly, it appears that, in such cases, the reasonable person should manage to withstand all influences short of diseases - which seem, according to Cory J's example, to be restricted to physical diseases. Cory J. does not mention unexpected depressions, high spirits or similar occurrences. Does that mean that the reasonable person always expects such events? A sudden infringement of physical abilities could be described as "accidental" to the accused. However, Cory J. remains silent on the general issue of

⁵⁹) See Mewett & Manning *supra* note 13 at 205

⁶⁰) The 'unreasonableness' of alcohol intoxication was underlined in R.v.Reilly (1984) 42 C.R. (3d) 154 at 162 (S.C.C.)

⁶¹) R.v.Hundal *supra* note 8 at 107. Cited by Cory J. in R.v.Tutton *supra* note 47 at 140-41.

accidents. The risk created by dangerous driving increases the likelihood of certain accidents - but accidents might also occur totally independently.

La Forest J. was still reluctant in Hundal to accept a lower level of *mens rea* than subjective recklessness for "most criminal offences". Referring to Wholesale Travel Group⁶², he favoured staying with the separation of regulatory offences and true crimes. True crimes would demand that the accused was aware of the risk, and regulatory offences would not. The modified objective test espoused by Cory J. for dangerous driving - whether or not causing death - would, in his view, not have any place in an offence where negligence was a "true crime". But this distinction has been criticized as "difficult to operate"⁶³.

2.4. Is the Modified Objective Test Partly a Subjective One?

McLachlin J. disagreed with Cory J. about the nature of his test. She argued that equipping the reasonable person with personal factors [of the accused] does by no means render the test subjective. Personal factors do not include the accused's state of mind. Since the Crown is required to check only what ought to have been in the accused's mind, but not to go further and consider what was actually there or not there, the test should not be labeled 'modified' objective.

First, 'objectivity' must be defined, the issue I dealt with in Chapter I. The use of subjective criteria would generate vagueness and ambiguity that would undercut the effectiveness of the rules in gaining compliance, but *Robinson* shows that some

⁶²) It is LaForest J's. single (minority) opinion I referred to. See R.v. Wholesale Travel Group inc. (1991), 67 C.C.C. (3d) at 193 (S.C.C.). 'Regulatory offences' were said to be construed in order to enforce standards which regulate business life. They are dealt with as criminal matters because, if they are violated, the damages caused are very difficult to assess through civil law only.

⁶³) Mewett & Manning *supra* note 13 at 206

individualization of the negligence standard is necessary for a proper assessment of an actor's blameworthiness⁶⁴. It is a different problem from whether the test set out above guarantees the "maintenance of a single, uniform legal standard of care", as McLachlin J. suggests in *Creighton*⁶⁵. *Grant*, *Chunn* and *Boyle* point out that reliance on the single decisionmaker's perception is rather unlikely to guarantee objectivity⁶⁶.

The second ambiguity concerns objectivity and externality. Externality is not a feature of objectivity. The judgment about the accused's decision to act in a certain way is inevitably external. The juror is asked to step into the accused's shoes and to repeat the decision himself. The more she understands the accused's position - that is his situation, his history, his psyche and his way of reasoning- the more appropriate the test seems to reflect personal guilt, but it is not very deterrent of careless causation of serious results. Therefore, given evidence that deterrence with punishment really can influence people's behavior, the test of reasonableness must find a way between the Scylla of non-regarding personal guilt and the Charybdis of lack of protection for society.

Third, is a standard which takes the accused's personal situation into account a "variable" one? Some authors demand an invariant standard which is built on all features of the accused's personality: "Requiring the decisionmaker to inform himself of the overall context in applying the standard [is still congruent with] applying the same standard to all"⁶⁷. It is argued that this would not individualize the standard. Is it

⁶⁴) P. H. Robinson Codifying General Principles of Criminal Law: Rules of Conduct and Principles of Adjudication, Presented to the Conference on Codification of Criminal Law, Washington D.C., January 22, 1990 at 7. Taken from the unpublished paper Codes of Conduct and Codes of Justice.

⁶⁵) *R.v.Creighton* *supra* note 5 at 210 [54]

⁶⁶) I. Grant, D. Chunn and C. Boyle *supra* note 12 at 6-42

⁶⁷) *Ibid.* 6-43

possible to individualize "the situation" but not "the standard" - or is this argument a mere game with words, presenting two competing expressions for the same phenomenon? *Robinson* explains that the most important feature of an objective standard is that it is build on invariant criteria. An individualized (i.e. variant) standard would state a rule that applied differently to each person⁶⁸. As soon as the standard changes with different people acting at the same time, the same place, or under the same external physical circumstances, there is at least some 'variation' in the standard. If personal factors are to be taken into account, the latter happens inevitably. Finally, when the subjective criterion is the actor's state of mind, it creates a fully individualized standard.

2.5. The Case of R.v.Creighton

Marc Creighton was charged with unlawful act manslaughter contrary to s.222(5)(b)CCC because he had caused his girlfriend's death by supplying her with a lethal dose of cocaine, constituting drug trafficking. He and the deceased had consumed a large quantity of alcohol and cocaine during the course of an evening. The following afternoon the accused went to the deceased's apartment to share some cocaine. Without determining the quality or potency of the drug the accused injected it intravenously into himself, C and, with her consent, the deceased. The deceased immediately began to convulse violently and appeared to cease breathing. Expert evidence at trial established that the injection had resulted in a cardiac arrest and that the deceased had later asphyxiated on the contents of her stomach. Both the accused and C attempted unsuccessfully to resuscitate her. The court had to decide whether or not a reasonable person could have apprehended the risk of the victim's death. And, in addition,

⁶⁸) P. Robinson *supra* note 64 at 3

whether Creighton had to meet a higher standard of care because he was an experienced drug user.

It was Chief Justice Lamer, who tailored the modified -here called the "qualitative"⁶⁹- objective test, which the Creighton-court had to decide about, and which eventually did not win a majority. But inadvertence could be a sound basis for a conviction only if a reasonable person with exactly the same human frailties would have been advertent⁷⁰. Lamer C.J.C. suggested that the jury should be instructed to decide according to the following checklist:⁷¹

(1) Would a reasonable person in the same circumstances have been aware that the likely consequences of his or her unlawful conduct would create the risk [of death]?

Lamer C.J.C. introduced this step as, generally, the threshold to an objective test. The reason why it is called "qualitative -objective" is revealed in his second and third step:

(2) Was the accused unaware because...he or she lacked the capacity to turn his or her mind to the consequences of the conduct and thus to the risk [of death] likely to result, due to human frailties?

(3) (If the answer to (2) is 'yes':) In the context of the particular offence, would the reasonable person with the capacities of the accused have made him or herself aware of the likely consequences of the unlawful conduct and the resulting risk of death?

Human frailties encompass personal characteristics habitually affecting an accused's awareness of the circumstances which create the risk. The expression refers to "all the accused's limitations", and the "make up" of the accused, establishing a fairly individual, actor-oriented approach to criminal liability. The qualitative-objective test

⁶⁹) LaForest J. in R.v.Creighton *supra* note 5 at 238

⁷⁰) *Ibid* at 232. Lamer C.J.C. expressly excluded voluntary intoxication from the defence.

⁷¹) *Ibid* at 238

seemed to be the golden way between the goals of efficacy and the recognition of personal guilt.

But the majority in Creighton rejected the test. It was LaForest J. who finally decided that, as McLachlin J. had suggested before, human frailties short of incapacity should not affect the standard. For the sake of equality, efficiency, and protection of possible victims, a uniform standard was preferred. The standard of care should not vary with the background and (psychological) predisposition of each accused. An inexperienced, uneducated and young person, like the accused in R.v.Naglik⁷², should not be judged on a lower standard nor should a person with special experience, like the drug user Marc Creighton or the police officer Gosset⁷³ be held to a higher standard. McLachlin J. tailored a test of 'objective foresight of bodily harm' for manslaughter, which was thought to be most effective in terms of deterrence⁷⁴.

The test had to pass the challenge of s.7 of the Charter. According to the Court's earlier rulings there is no liability for a particular result unless the agent possessed a culpable mental state with respect to that result⁷⁵. But as Sopinka J. had made clear in R.v.DeSousa, the latter was not meant to constitute a general principle of criminal law. He had stated:

"The implicit rationale of the law in this area is that it is acceptable to distinguish between criminal responsibility for equally reprehensible acts on the basis of the harm that is actually caused."⁷⁶

⁷²) R.v.Naglik (1993) 23 C.R. (4th) 335 (S.C.C.)

⁷³) R.v.Gosset (1993) 23 C.R. (4th) 280 (S.C.C.)

⁷⁴) R.v.Creighton *supra* note 5 at 207

⁷⁵) R.v.Martineau (1990) 2 S.C.R. 633 at 645 (S.C.C.)

⁷⁶) R.v.DeSousa (1992) 2 S.C.R. 944 at 967 (S.C.C.)

The Court in Creighton concluded that a meaningful mental element was required with regard to the blameworthiness of the *actus reus*. Provided that there is a sufficiently blameworthy element in the *actus reus* to which some culpable mental state is attached, there is no additional requirement that each other element of the *actus reus* be linked to this 'mental element'. The question is not whether there is symmetry between *mens rea* and the consequences prohibited by the law, but rather whether the fundamental principle of justice is satisfied that the gravity and blameworthiness of the offence is commensurate with the moral fault engaged by that offence. Moral fault is established by *mens rea*, or consequences, or both.⁷⁷

Therefore, McLachlin J. avoided looking at "habitual" characteristics⁷⁸. The only actor-oriented question apposite to *mens rea* in these cases is whether the accused was capable of appreciating the risk, and had he or she put her mind to it. In cases of penal negligence she suggested the following line of inquiry:⁷⁹

"The first question is whether *actus reus* is established. This requires that the negligence constitute a marked departure from the standard of the reasonable person in all the circumstances of the case. This may consist in carrying out the activity in a dangerous fashion, or in embarking on the activity when in all circumstances it is dangerous to do so.

The next question is whether *mens rea* is established. As in the case with crimes of subjective foresight of risking harm, it is normally inferred from the facts. The standard is that of the reasonable person in the situation of the accused. If a person has committed a manifestly dangerous act, it is reasonable, absent indications to the contrary, to infer that he or she failed to direct his or her mind to the risk and the need to take care....

However, the normal inference may be negated by evidence raising a reasonable doubt as to lack of capacity. Thus...it is necessary to ask a further question: Did the accused possess the requisite capacity to appreciate the risk flowing from his or her conduct?"

⁷⁷) R.v.Creighton *supra* note 5 at 206

⁷⁸) *Ibid.* at 215

⁷⁹) McLachlin J. *ibid.* at 218-9

Establishing this purely objective test means that, however low the standard is situative, there are some individuals who cannot meet it⁸⁰. However, the question of guilt is not determined in a factual vacuum. Certainly the legal duty may vary in application to the activity in question and the circumstances⁸¹ of the particular case. Handling a gun is different from handling an umbrella. But this is, as it was pointed out before, a different thing from recognizing different legal standards of care. Because, on the other hand, it was argued, that in comparison, a qualified objective approach loses most of the practical advantages and would cause difficulties in instructing the jury. Manslaughter, therefore, punishable with life imprisonment, carries a stigma not too grave to be attached to inadvertence. The dichotomy between advertence or inadvertence appears no longer to be the main issue in these cases. It is the characteristics of the reasonable person that, *post* Creighton, determines the boundaries of punishment for negligence.

2.6. The Double Test of Marked Departure and Capacity post R.v.Creighton

Post Creighton, lower courts have struggled with the difference between 'human' and 'situative' aspects. Difficulties have been interpreted even as unwillingness to adopt the Creighton - ruling⁸², which may be unsustainable because such cases usually purport to apply Creighton⁸³. Generally, individual characteristics are dealt with in terms of "capacity", but many of these are problematic themselves. While it is clearly a

⁸⁰) D. Stuart and R. Delisle Learning Criminal Law (Toronto Carswell 1990) at 771

⁸¹) R.v.Creighton *supra* note 5 at 217

⁸²) D. Stuart Annotation to R.v.Ubhi (1994) 27 C.R. (4th) at 333. Stuart draws this conclusion from the most recent applications of the Creighton-standard by lower courts.

⁸³) R.v.Topping (1994) 26 C.R. (4th) 396 (S.C.C.), R.v.Ubhi (1994) 27 C.R. (4th) 333 (B.C.C.A.), R.v.White (1994) 28 C.R. (4th) 160 at 176 (N.S.C.A.), R.v.Stellato (1994) 31 C.R. (4th) 60 (S.C.C.), R.v.Blackwell (1994) 29 C.R. (4th), 376 (O.C.A.)

descriptive criterion whether there is a departure or not, the issue of capacity adds a yet not subjective but individual dimension to the test. First, critical commentators used to doubt the significance of the criterion 'a marked departure' assuming that it does not add anything to the threshold required, as a practical matter⁸⁴. However, Canadian Criminal Courts required the marked departure not only as a formal matter, since they have dismissed charges on the ground that clearly shown unlawful behavior causing death did not, beyond reasonable doubt, amount to a 'marked departure'.

In R.v.Topping, the British Columbia Court of Appeal distinguished a marked departure from reasonably prudent behavior from a case of "momentary lapse or ordinary negligence"⁸⁵. The accused was charged with dangerous driving causing death. The trial judge found that the accused was not keeping a proper lookout while approaching a dangerous intersection on a damp road at a speed of 15 km/h in excess of the speed of the posted speed limit. With regard to these facts, the accused's fault, although clearly against the law, did not, beyond reasonable doubt, amount to a 'marked departure'. A more serious violation of traffic regulations seems to be required. However, it does not appear clearly from the wording if, and how, the verdict was influenced by the finding that "the accused was familiar with the intersection"⁸⁶. His experience, being clearly a personal characteristic, is mentioned among the facts which have to be considered in order to find the verdict. This seems to be at odds with McLachlin J's ruling in Creighton which excluded personal characteristics from having any influence. But does it, really, show a reluctance of lower courts to fall into line with the rigour of the Creighton-ruling?

⁸⁴) Hall, J., Negligent Behavior Should be Excluded from Penal Liability (1963) 63 Columbia Law Review 632 at 633

⁸⁵) R.v.Topping *supra* note 83

⁸⁶) *Ibid.*

Impaired driving because of drunkenness is considered to be a marked departure *per se*. It was made clear in R.v.White, that evidence of impairment, i.e. "over 80", does not require an application of the reasonable-person test as well. Borrowing from Campbell⁸⁷, Chipman J.A. summed up the view of the court:⁸⁸

"If there is sufficient evidence before the court to prove that the accused's ability to drive was even slightly impaired by alcohol, the judge must find him guilty".

The Supreme Court of Canada underlined this legal reasoning of the Nova Scotia Court of Appeal in R.v.Stellato⁸⁹, when it, also, denied requiring any more than 'impairment' for a 'marked departure'.

R.v.Blackwell⁹⁰, an Ontario Court of Appeal decision, again was concerned with the tension between 'circumstances of the situation' and 'personal characteristics'. The court confirmed the trial judge's view that David Blackwell, a police officer, who had killed another vehicle's driver while responding to a "code 3" - call, had to meet a higher standard of care⁹¹:

"A police officer, trained, acting reasonably, would have had this vehicle under control, would have been maintaining a lookout."

⁸⁷) R.v.Campbell (1991) 26 M.V.R. (2d) 319 at 320 (N.S.C.A.)

⁸⁸) R.v.White *supra* note 83. Driving impaired, by drugs or alcohol, is a criminal offence against s.253 CCC.

⁸⁹) R.v.Stellato *supra* note 83

⁹⁰) R.v.Blackwell *supra* note 83

⁹¹) *Ibid.* at 376. "Code 3" means a serious, life-threatening event. Blackwell received from the police dispatcher this call over his car radio instructing him to assist a fellow officer on the other side of London, Ontario. Evidence showed that he did not check the traffic situation far enough ahead and thus caused the accident with deadly outcome.

The court explained that Blackwell had to meet this 'elevated *de facto* - standard of care'⁹² not simply because of his experience, but because of the nature of the activity he engaged in. Once a police officer responds to a 'Code 3'-call, he is permitted to drive in a manner normally prohibited to any driver, including a police officer. This activity thus is of a similar character as a licensed one. It is not his personal experience which is of disadvantage to the accused, but a uniform requirement of care referring to the very activity. Thus, the fact that the accused provided evidence that he had not received special training in high-speed-driving could not lower the 'elevated' standard. As McLachlin J. had pointed out in Creighton, each activity demands a certain standard of care⁹³. It is a legal duty to attain that standard.

As a last analytical effort, features of the criterion 'incapacity' will be collected. Seizing on McLachlin J's dicta that individual factors can be taken into account when the issue is capacity, the British Columbia Court of Appeal quashed the conviction of Jatinderpal Ubhi, a 25 - year old person whose mental functioning was at the level of a six- or seven year old⁹⁴. Ubhi was driving a dump load truck loaded with hot asphalt. On the steep grade down to a ferry loading area, the brakes failed. The truck struck a recreational vehicle. Two persons were killed and others were injured. The accused was charged with criminal negligence causing death, and was found guilty after the crown had showed that the brakes had not been adjusted for a considerable time before the accident. Thus Ubhi showed "wanton and reckless disregard for the lives and safety of others" - a 'marked departure' was established.

⁹²) R.v. Creighton *supra* note 5 at 218

⁹³) *Ibid.* 214

⁹⁴) R.v. Ubhi *supra* note 83. Leave to appeal from the judgment was refused by the Supreme Court of Canada on June 30, 1994. See (1995) 31 C.R. (4th) at 405.

Ubhi appealed, and the question on appeal was whether the appellant had the requisite mental capacity to understand the risk flowing from his conduct, whether his mental deficits rendered him incapable of appreciating the risk of harm to others that he was creating without adjusting the brakes. Defense counsel provided evidence "about Mr. Ubhi's true IQ. to ensure that his slowness was not simply cultural". McLachlin J. had expressly stated in her test that attributes related to "age, education, and culture" count as mental disabilities short of incapacity⁹⁵. In addition, she had expressly precluded that licensed activities allow a lower standard for people who do not possess the basic amount of knowledge or experience to engage in the activity. Ubhi did not challenge the standard of reasonable care he had to attain but pleaded incapacity. However important for the standard, the fact that a license was issued to Mr. Ubhi therefore, would not preclude the 'incapacity' - defence, since this would mean that a license itself would prove sufficiently, or guarantee, not only that the recipient possessed sufficient capacity at the time of issuing, but also that this would not change in the future.

It is particularly surprising to experience an IQ's significance for basic rules relating to driving a car. As far as I understood the facts, Ubhi knew that he had to check his brakes right at the checkpoint before Horseshoe bay. He also knew that the check should ensure that the brakes were functioning properly. Since he knew about the rules, there was no IQ necessary to find out about it. But what level of IQ is necessary to know that a truck does not stop if the brakes are out of order? The connection between braking and stopping is most fundamental to driving a car. The fact that someone has ever driven before should be evidence enough to show that he or she understands that. Nevertheless, the court gave weight to Ubhi's mental weakness. This

⁹⁵) R.v.Creighton *supra* at 216 [para. 71].

seems to show that courts are willing to construe the concept of incapacity in a very broad fashion.

2.7. Incapacity and Insanity

It was in order to mitigate the harshness of the objective reasonable person test, that McLachlin J introduced the borderline of 'incapacity'⁹⁶. Is the notion of incapacity just a restatement of the old defence of insanity? The use of a fresh term could indicate that the Supreme Court intends more than just applying this old defence to negligence⁹⁷. In ordinary language, 'insanity' seems to refer exclusively to an illness while 'incapacity' is broader, and not restricted to any particular reason for the inability.

For 'insanity', ordinary language's understanding is underlined by the definition of the defence in s.16 (1) CCC:

16(1). No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Since R.v.Cooper⁹⁸, it is clear that insanity embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning. The nature of mental disorder is a disease of mind. A medical component is required, expert evidence is

⁹⁶) *Ibid.*

⁹⁷) In the US, the issue was still being discussed as recently as 1971. See Fletcher Rethinking Criminal Law *supra* note 6 at 423. Speaking generally about 'criminal conduct', the U.S. Federal Model Penal Code does not exclude negligent actors from pleading insanity. S.4:01 reads as follows:

"A person is not responsible for criminal conduct if, at the time of such conduct as a result of mental disease or defect, she lacks substantial capacity either to appreciate the criminality of his conduct or to conform to the requirements of the law."

⁹⁸) R.v.Cooper (1979), 13 C.R. (3d) 97 (S.C.C.)

necessary⁹⁹. Excluded are self-induced states caused by alcohol or drugs, and equally excluded are transitory mental states such as hysteria or concussion¹⁰⁰. In addition, the trial judge adds a legal or policy component, based on a concern for recurrence¹⁰¹. Can constitutional deficiencies in temperament, intellect, and emotional balance amount to insanity, given their gravity fulfills the requirement of a 'medical component'?¹⁰²

In R.v.Ubhi, the British Columbia Court of Appeal recognized an intellectual deficiency as a matter of incapacity¹⁰³. The focus on Ubhi's IQ indicates that the court preferred to found incapacity on a general disability. It does not explicitly flow from Creighton whether 'incapacity' requires an illness or physical disability. The issue remains open. Is expert evidence necessary to prove incapacity? Is incapacity open as a defence for sensitive, vulnerable, or inexperienced people?¹⁰⁴ Could it extend to emotional instability?

III. Reasonableness in the Law of Self Defence

⁹⁹) This flows, in addition, from s.16 (2) CCC. See R.v.Chaulk (1990) 2 C.R.(4th) 1 (S.C.C.)

¹⁰⁰) See R.v.Cooper *supra* note 98

¹⁰¹) R.v.Parks (1992) 15 C.R. (4th) 289 (S.C.C.). The "continuing danger" and "internal cause" theories reflect two distinct approaches to the legal or policy component. The 'continuing danger' theory considers insanity (mental disorder) any condition likely to present a recurring danger to the public. The 'internal cause' theory regards mental conditions derived from the psychological or emotional make-up of the accused, rather than any external factors insanity.

¹⁰²) As a practical matter, because of uncertainty and unease, the latter three deficiencies were excluded from the notion of a 'mental illness' in the American Restatement of Torts (2nd), s.283 B, comment b and s.283 C, comment b.

¹⁰³) R.v.Ubhi, *supra* note 83

¹⁰⁴) The fact that 'experience' does not affect the standard of reasonableness does not logically preclude this aspect accounting for incapacity in extreme cases.

3.1. Section 34 of the Criminal Code

Self-defence against unlawful assault is permitted in Canada according to s.34 CCC:

s.34 (1). Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2). Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

The law of self-defence against unlawful assault needs to be briefly set out in its main structure. Although the wording of s.34 (2) CCC seems to apply to every case where death or grievous bodily harm was caused in repelling the assault there is no doubt that s.34 (1) CCC covers every causation of death or grievous bodily harm when the force was used without this intention¹⁰⁵. Even intentional killing -and that is the very area of s.34 (2) CCC- allows mistaken apprehension of the circumstances to provide a defence. The wording expressly allows a mistake. Petel¹⁰⁶ underlined that even the combination of several mistakes, as to assault and the intensity of the assault, can be justified. A mistaken but reasonable apprehension provides the accused with a full defence. The main question is now how reasonableness is being tested, and this will be surveyed independently as to the three elements of an assault, the apprehension of death or grievous bodily harm, and the decision whether deadly force is really necessary.

¹⁰⁵) R.v.Kandola (1980) 50 C.C.C. (2nd) 558 at 563 (B.C.C.A.)

¹⁰⁶) R.v.Petel, *supra* note 29

In R.v.Lavallee, the Supreme Court of Canada had to decide three times about the issue of reasonableness. The underlying facts read as follows¹⁰⁷:

The accused, Lyn Lavallee, was charged with the murder of her common law spouse, Kevin Rust, having shot him in the back of his head as he was leaving her bedroom. Her statement made to the police on the night of the shooting described her fear of the victim, his act of loading the gun for her, his physical abuse towards previously and on that night and the fact that he had threatened to kill her in that night. She stated that she had shot him but intended to miss.

Although she intended to miss, Lyn Lavallee was charged with murder. She claimed self-defence. Although at the time of the shooting, Rust did not exert physical violence upon her, the jury at trial found that, nevertheless, she could have had the impression of an inevitable future attack. Upon what basis could this apprehension be characterized as reasonable?

Expert testimony displayed that the situation of a "battered woman" makes future, real (physical) assaults foreseeable. They are "not entirely random in their occurrence". As the expert stated:

"[T]ypically before a beating there's usually some verbal interchange and there are threats and typically she would feel, you know, very threatened by him and for various reasons"¹⁰⁸.

The expert evidence revealed that it may, in fact, be possible for a battered spouse to accurately predict violence before the first blow was struck, even if an outsider to the relationship could not¹⁰⁹. Because the knowledge of the battered spouse is regarded as reasonable knowledge the law here allows the defence. In addition, the Petel-case¹¹⁰ adds generally that previous threats are very relevant in determining what, with

¹⁰⁷) R.v.Lavallee *supra* note 5 at 333

¹⁰⁸) Cited *ibid.* at 349

¹⁰⁹) *Ibid.* at 351

¹¹⁰) R.v.Petel *supra* note 29 at 165

reference to the existence of threats, the respondent believed that it would happen in the specific situation. Both cases, however, do not say what the exact requirements for such a subjective apprehension are. Is it only the battered woman who on the basis of her experience foresees the assault, or may certain history generally create an inference that an assault is about to happen?

3.2. The 'Battered Woman-Cycle' and Apprehension of Death

The next issue is whether or not Lyn Lavallee's apprehension of death or grievous bodily harm was reasonable. It can be inferred from her statement that she really had such fear. She took Rust's warning "either you kill me or I'll get you"¹¹¹ seriously. This is necessary under s.34(2), but not sufficient.

Again, this was judged to be reasonable, based on Dr.Shane's expert testimony¹¹². Having explained the cyclical nature of the abuse he suggested that a battered woman's knowledge of her partner's violence is so heightened that she is able to anticipate the nature and extent of the violence of his conduct beforehand. The Supreme Court made a reference to Julie Blackman¹¹³:

"Repeated instances of violence enable battered women to develop a continuum along which they can "rate" the tolerability or survivability of episodes of their partner's violence. Thus, signs of unusual violence are detected. For battered women, this response to the ongoing violence is a survival skill. Research shows that battered women who kill experience markedly severe and frequent violence relative to battered women who do not kill. They know what sorts of danger are familiar and what are novel...They can say what made the final episode of violence different from others..."

¹¹¹) R.v.Lavallee *supra* note 5 at 351

¹¹²) Dr.Shane in R.v.Lavallee *supra* note 5 at 351

¹¹³) Julie Blackman, Potential Uses for Expert Testimony: Ideas Toward the Representation of Battered Women Who Kill (1986) 9 Women's Rights Law Reporter at 227

Thus expert testimony can assist the jury in determining whether the accused had a "reasonable" apprehension of death. Lavallee's apprehension was reasonable because of her heightened sensitivity¹¹⁴. The problem is, however, how to put this in general terms. Wilson J. inferred that, due to their size, strength, socialization and lack of training women are typically no match for men in hand to hand - combat¹¹⁵. This obviously will increase stress for the woman confronted with such a situation. However, it seems to me that although this may be a factor, the decisive reason was Lavallee's experience:

"Without such testimony [that the accused is in a battering relationship] I am skeptical that the average fact finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship"¹¹⁶.

Accordingly, the belief of a future physical attack by a physically stronger person, seems not to be sufficient. But it is not totally clear what must be added. Is it the special situation of being confronted with a 'batterer'? Or is it the special experience of being battered by this person¹¹⁷ which causes, as inferred by the expert testimony described above, the heightened sensitivity? Also, what is the significant difference between the two latter aspects?

¹¹⁴) This point shows that the term 'reasonableness' is necessarily broader than 'mistake'. Lavallee, here, did not err: to assume Lavallee was mistaken would cast doubt on the expert testimony. It was said that she could, in fact, predict the conduct of the deceased towards her.

¹¹⁵) R.v.Lavallee *supra* note 5 at 348

¹¹⁶) Wilson J. *ibid.* at 352

¹¹⁷) Wilson J. argued that it strains credulity to imagine what the 'ordinary man' would do in the position of a battered spouse, because men do not typically find themselves in that situation, *ibid.* at 346. However, s.15 of the Charter demands that this proposition not be confined to male-female relationships but rather address relative physical size and characteristics of aggression.

3.3. Necessity of Force Used

The Supreme Court in Lavallee had to decide on the third type of reasonableness in s.34 (2) CCC, too. If the defendant had reasonable apprehension of death or grievous bodily harm she is justified under s.34(2) CCC only if she reasonably believed that she could not otherwise prevent death or grievous bodily harm. In both, s.34 (1) and s.34 (2) CCC, the repelling force used may not be more than necessary to enable the defendant to protect her- or himself.

In the context of R.v.Lavallee, this raises the question whether the defendant can be justified although theoretically she could leave the house and call the police. Moreover, she could have left the man and the house earlier. This probably is to be decided differently depending upon whether Lyn Lavallee had a legal duty to retreat or not. If there is no such duty then even an unreasonable belief in the non-existence of such a 'way out' would not render the defence invalid. According to R.v.Antley¹¹⁸ and R.v.Deegan¹¹⁹, there is no duty to retreat. The aggression may be rebutted with force, especially when the defendant is in her own home. In Lavallee, it is pointed out that a person on her property is not asked to leave it, whether she is defending the property itself or herself¹²⁰. This could mean, that, under the law, the defendant is allowed to remain in the home, in the relationship, close to the potential aggressor until the conflict reaches its final stage. However, it is not clearly revealed in Lavallee whether this duty really exists or not, because, later, the jury was required to take into account whether the defendant felt capable of escaping or not¹²¹.

¹¹⁸) R.v.Antley (1963) 42 C.R. 384 (O.C.A.)

¹¹⁹) R.v.Deegan (1979) 49 C.C.C. (2nd) 417 (A.C.A.)

¹²⁰) R.v.Lavallee *supra* note 5 at 356-357

¹²¹) See I. Grant, D. Chunn and C. Boyle *supra* note 12 at 6-51

It seems to appear from Lavallee that a certain psychological state of constraint is relevant to the issue of reasonableness. Expert testimony inferred that Lyn Lavallee, in fact, did not feel free to go¹²²:

"And the one individual, and it's usually the woman in our society,...stays in the relationship because of a number of reasons. One is that the spouse gets beaten so badly that...she loses the motivation to react and becomes helpless and becomes powerless. And it's also been shown sometimes, you know, in- not that you can compare animals to human beings, but in laboratories, what you do if you shock an animal, after a while it can't respond to a threat of its life. It becomes just helpless and lies there in an amotivational state, if you will, where it feels there's no power and there's no energy to do anything."¹²³

It was found that this description applied to Lyn Lavallee. An analysis could lead to qualifying hers as an individual relationship based on psychological constraint which made certain belief reasonable. The accused, it could be argued, found herself in a state of lethargy. She did not have any will or capacity to leave because of 'romantic feelings' or the deceased's begging for forgiveness or whatsoever. It means that the individual state of mind, even 'below' physical duress, must be taken into account to determine reasonableness.

Wilson J. compared Lavallee's situation with that of a hostage. When is 'no way out' a reasonable apprehension? Why was mental constraint equated to physical in this situation? This must be judged from her viewpoint as a woman. Gender, here, is relevant to the meaning of reasonableness¹²⁴ - because men typically do not find themselves in the situation of the battered spouse¹²⁵. But does that criterion suffice to

¹²²) It is beyond the scope of my thesis to draw a line between 'no way out' and apprehension of 'no way out'. 'Reasonableness' is broader than 'mistake', but 'apprehension' shall include both the actual and the perceived existence of the facts.

¹²³) R.v.Lavallee *supra* note 5 at 354 (Dr. Shane)

¹²⁴) I. Grant, D. Chunn and C. Boyle *supra* at 6-42

¹²⁵) Wilson J. in R.v.Lavallee *supra* note 5 at 346

make Lavallee's decision reasonable? In principle, I submit that we again need the history of battering to determine that there was some constraint.

3.4. R.v.Petel: Individual History

R.v.Petel shows that very individual experience may determine the standard of reasonableness. Prior to the day of the killing, according to the accused, an atmosphere of terror had pervaded her house. Lamer C.J.C. stated:

"The threats made by Edsell throughout his cohabitation with the respondent are very relevant in determining whether the respondent had a reasonable apprehension of danger and a reasonable belief to the need to kill Edsell and Raimond"¹²⁶

Of course Colette Petel was a woman - but, contrary to Lavallee, men may very well find themselves in that situation, especially with regard to a similar distribution of physical power. Arguably, gender alone was not the crucial reason in Petel. It was Mrs. Petel's very experience of the threats made by Edsell, and a certain preoccupation as the result thereof, which rendered the decision reasonable. This certain spot of individual history makes the difference between the accused's view and "what an outsider would have done in the same situation"¹²⁷. But there are precedents which refrain from taking specific personal history into account. There is the decision of R.v.Reilly¹²⁸ excluding intoxication from having any impact on the standard of reasonableness. But since Daviault even this may be in question again¹²⁹. From a

¹²⁶) R.v.Petel *supra* note 29 at 170

¹²⁷) *Ibid.*

¹²⁸) R.v.Reilly *supra* note 60 at 163.

¹²⁹) R.v.Daviault (1994) 33 C.R. (4th).at 165 (S.C.C.). *Per* Cory J. at p.190, "it cannot be said that a reasonable person...would expect that such intoxication would lead...to the commission of a sexual assault."

purely doctrinal point of view, it does not seem to be possible to infer any abstract rule governing the issue.

Accordingly, the question "what is the reasonable person test" still remains open. The example of intoxication casts doubt on the possibility of creating a uniform standard which could be expressed in a general term valid for each single situation. At some point a normative decision seems to be necessary, whether certain circumstances creating a mistake are, themselves, protected by the law or not. The reasonable person does not drink alcohol. A different point of view is not acceptable on the basis of social protection. Certainly, it could be argued that alcohol is a very special case. It destroys the basis of reasoning, and therefore a reasonable decision cannot be made, except by coincidence.

IV. The Impact of Creighton on the Law of Self-Defence

The question now is, what does Creighton mean for the law of self-defence? To neglect human frailties means that a mistake as to the apprehension of death or grievous bodily harm is allowed up to the uniform standard of reasonableness discussed in the decision. Relevant factors are only those which create a general inability to recognize and appreciate the risk.¹³⁰ It is argued that the constraint of applying a purely objective standard in s.34 (2) CCC is a step back from the achievements made in Lavallee. Taking the subjective experience and background of the accused in account, could mean attaching a level of subjectivity to the question of reasonableness which,

¹³⁰) R.v.Creighton *supra* note 5 at 233

according to Creighton, cannot be allowed¹³¹. The rejection of background, in particular, could be taken to mean that a woman's history of abuse should not be taken into account.

Some commentators reject the latter view arguing that this reading should not be given to Creighton¹³²: McLachlin J. did not say that the question of guilt is determined in a factual vacuum:

"While the legal duty of the accused is not particularized by his or her personal characteristics short of incapacity, it is particularized in application by the nature of the activity and the circumstances surrounding the accused's failure...¹³³"

This approach tries to get rid of the contradictory aspect on a descriptive level. It shifts personal stress and history of abuse to the act, claiming that Lavallee did not individualize the reasonableness-standard. Lavallee is said to having dealt with aspects of 'the situation' only. The Supreme Court on this view did not allow her appeal because of her mental condition that can be described by the expression 'battered woman syndrome', Lyn Lavallee reacted like a normal person with her characteristics (including a history of violence) would react to such an assault. It is the very situation of massive stress that allows the reasonable assumption of death or grievous bodily harm, and the assumption that the situation cannot be solved differently.¹³⁴

¹³¹) I. Grant, D. Chunn and C. Boyle *supra* note 12 at 6-43. See D. Stuart, Annotation to Petel (1994), 26 C.R. (4th), 148-50, p.143. P. Healy, The Creighton Quartet: Enigma-Variations in a Lower Key (1993), 23 C.R. (4th) 265-279, writes at p.278: "The assessment of reasonableness in self-defence does not exclude the perceptions of the accused in the relevant circumstances. If [it] did, Lyn Lavallee would be serving time for murder or manslaughter."

¹³²) I. Grant, D. Chunn and C. Boyle *supra* note 12 at 6-43. See also I. Grant and C. Boyle *supra* note 12 at 254

¹³³) R.v.Creighton *supra* note 5 at 217

¹³⁴) I. Grant and C. Boyle *supra* note 12 at 253

This could be the end of the matter. However, it seems to be helpful at this point to draw the line between 'situation' on the one hand, and 'human frailty' on the other, as accurately as possible. Assume that, fictively, Lyn Lavallee finds herself in the same situation without having the experience of being battered. Or she might look back to a one-time act of violence, committed by a different man, a couple of years ago and, therefore believes that she knows what is going on. Undoubtedly this does not change the guilt of the batterer. But should the victim be allowed to doubt that she should be allowed to shoot him, although it is, interpreting McLachlin J. in Creighton, the same 'situation'? Stress does not vary much if there is an honest subjective apprehension of deadly danger. Moreover, it is far from clear whether "stress" itself is part of the 'situation', or whether it is a 'human frailty' as a result of human experience. As I understand McLachlin J. in Creighton, "factual circumstances" means same time, same place, and same relation of strength - but not the stress caused by the specific development of a relationship in the past. The more the history determines what is 'circumstance', the less clear is the boundary of 'human frailties'. It is Marc Creighton's history as a drug user that determines his experience, and police officer Gosset¹³⁵ is an experienced gun user because of his past training.

But what is the result of this conclusion for the law of self-defence? Does that mean Creighton rejects Lavallee - or, does it mean that the gun is the proper answer for each physically weaker person who believes that he or she is about to be assaulted? I think it is none of them because, as I will argue *infra*, Creighton considers a different kind of situation and, therefore, does not even affect Lavallee. I would like to step away from the term 'reasonable' and analyze the structure of both situations. It is assumed that Creighton demands a uniform standard of reasonableness for the sake of equality and objectivity. Creighton was intended to be a precedent setting out a

¹³⁵) R.v. Gosset *supra* note 73

standard of culpability. The decision focused on unlawful conduct and criminal negligence causing deadly results, and McLachlin J. expressly dictated the "maintenance of a single, uniform standard of care for *such offences*"¹³⁶. The reasons that McLachlin J stressed, which were boiled down to the general term 'human frailties short of incapacity are not to be considered' do not fit in with the situation of self-defence. Moreover, they lead, when applied to a situation of self defence, to strange outcomes.

As I read Creighton, a fundamental reason for differential treatment of manslaughter on the one hand- and self-defence on the other hand can be shown from a normative point of view. In manslaughter, it is the creation of deadly risk which is to be punished, even if this risk was not subjectively appreciated. Death, the most serious result of human conduct, is what McLachlin J. laid emphasis on, and it is this consequence of the defendant's conduct that carries the criminal stigma. The individual decision to undertake the action¹³⁷, however, is punished, and that is the creation of risk, assuming that it results in death. As far as possible, every action creating such a risk should be abandoned. Madam Justice McLachlin stated:

"Given the finality of death and the absolute unacceptability of killing another human being, it is not amiss to preserve the test which promises the greatest measure of deterrence, provided the penal consequences of the offence are not disproportionate"¹³⁸

¹³⁶) R.v.Creighton *supra* note 5 at 210 (54), emphasis added.

¹³⁷) *Ibid.* at 215: "...minimum standard of care for all those who choose to engage in criminally dangerous conduct" (emphasis added)

¹³⁸) *Ibid.* at 207

The substance of McLachlin J.'s statement is, that the decision to start a possibly dangerous action must be dropped simply because of the risk¹³⁹. This is what makes the offence proportionate in the light of fundamental justice and what is, given the realization of the risk, expressed by the stigma of "manslaughter". Self-defence, however, necessarily involves some risk. Even under s.34(1) of the Criminal Code conduct that creates deadly risk is expressly accepted. Avoiding every risk can be very unreasonable if not impossible in the case of self-defence.

In Creighton the danger of death was initially introduced by the accused. He freely, unnecessarily and without justification started an action that caused another person's death. This is totally different from the situation of self-defence. The use of force, here, is not a totally free decision, being forced upon the defendant. Creighton could afford to stop his action without bearing the risk of greater disadvantages. But failing to defend oneself may mean suffering remarkable disadvantages. From a normative point of view, there must be a different answer to the question, who bears the risk in such cases of a 'wrong' decision? In manslaughter, the law places the burden on the (simply) negligent actor, but in the case of self-defence the initial aggressor must bear it. It was her who made the accused's defence necessary. McLachlin J. referred to the law of torts: "the aggressor must take the victim as he finds him"¹⁴⁰. This is equally valid if he later realizes that the victim is prepared to defend him/herself. The teleological analysis of Creighton reveals that the (absolute) optimum of care is also not required from the self-defendant.

Applying the Creighton-test to self defence, an additional difficulty would be the determination of what the prohibited 'risk' is. As McLachlin J. put it, conduct is

¹³⁹) *Ibid.* at 217 [76]: The morally blameworthy act is the decision to undertake a dangerous activity.

¹⁴⁰) The so-called "thin skull "-rule. See *ibid.* at 207

unreasonable if the risk of causing grievous bodily harm was objectively foreseeable¹⁴¹. Transferred to s.34 (2) "risk" is not the deadly outcome for the aggressor (which is intended in s.34 (2) of the Criminal Code) but the danger of deadly outcome for the defendant. Applying the test suggests that here risk in the 'opposite direction' is unreasonable: it is unreasonable to apply force if it is possible that the (objective) situation does not allow for that, according to the Code. That means the possibility that there will not be any death or grievous bodily harm. In short, it seems to be unreasonable to defend oneself when it is objectively possible that there will be no outcome of death or grievous bodily harm. Hence it can be argued that the pure objective standard in Creighton is not framed for the situation of self-defence. This means that the law is not forced to apply Creighton in such cases.

In addition, I am convinced the Supreme Court of Canada does not see this differently. In Petel, the most recent decision, the court had to decide whether self-defence was reasonable in the light of a history of ongoing attacks upon the accused by the deceased. A unanimous court referred to Lavallee:

"The issue is not, however, what an outsider would have reasonably perceived but what the accused reasonably perceived, given her situation and her experience.¹⁴²"

However, despite using the term "experience" the court did not even make a reference to Creighton, although Creighton was decided on Sept.9, 1993, and Petel was heard on Nov.3, 1993. This was because there was no need. Petel is not, as *Don Stuart* assumed, "flatly contradictory to this aspect in the Creighton-ruling"¹⁴³. This meant to assert that the court forgot about, or could not properly apply, their sophisticatedly

¹⁴¹) See *ibid.* at 201 Nr.18 and more often

¹⁴²) R.v.Petel *supra* note 29 at 170

¹⁴³) D. Stuart, Annotation to Petel *supra* note 129 at 150.

developed test only two months later¹⁴⁴. In order to obtain an additional argument against the Creighton - test¹⁴⁵, *Don Stuart* puts the comparability of both situative patterns into the premises, but he does not analyze the decisions from a normative view. Disregarding the difference between both decisions seems to provide him with an additional argument. However, whatever one's attitude is towards Creighton, teleological analysis demonstrates that separate treatment of the two types of cases is not illogical. When discussing the regulative effects of these standards in society, I will argue that, to the contrary, there are strong reasons for doing exactly what the Supreme Court did.

¹⁴⁴) McLachlin J. was among the unanimous 'Petel'-court.

¹⁴⁵) D. Stuart strongly argued shortly after Creighton against the general adoption of McLachlin's standard. See D. Stuart Continuing Inconsistency But Also Now Insensitivity that Won't Work (1993), 23 C.R. (4th) at 240-251. See also Annotation to Ubhi *supra* note 83 at 333.

CHAPTER THREE: THEORIES OF RESPONSIBILITY AND PUNISHMENT

I. Introduction

"Negligence does not reveal the condition of a man's heart or conscience"
Justice Holmes¹⁴⁶

Responsibility is distinguishable beyond a simple line of guilt, foreseeability, or simply objective deviation. Endeavours to separate negligence from 'pure causation' recall the rule '*actus non facit reus nisi mens sit rea*', which serves as a general principle of criminal law. However problematic it is to uphold the principle's generality, the first question concerns the endeavor's necessity. *HLA Hart* writes that every decision, whether judicial or legislative, must be in accordance with the superior rule of recognition,¹⁴⁷ which is comparable with *Kelsen's* '*Grundnorm*'.¹⁴⁸ The rule of recognition is the rule of ultimate authority which governs all subordinate law in such a way that anything which is contrary to the spirit of the rule is necessarily rendered unlawful. However, it seems quite obvious that the *mens rea* principle could not serve as a rule of recognition in criminal law, since strict liability and negligence seem to be at odds with the principle. If *mens rea* is understood as a mental element corresponding to the *actus reus*, "it is somewhat incongruous to include in the concept of *mens rea* or a guilty mental element what is, in reality, the absence of a mental element".¹⁴⁹ Thus, the overall validity of the *mens rea* principle can be saved only if 'guilty mind' is

¹⁴⁶) Oliver Wendell Holmes The Common Law (Boston Little & Brown Co. 1945) at 50

¹⁴⁷) HLA Hart Concept *supra* note 1 Chapter VI at 92. *Hart* refers to *Kelsen* in his note at 244.

¹⁴⁸) See in this regard Karl Larenz Methodenlehre der Rechtswissenschaft 6th ed (Muenchen Beck 1991) at 128

¹⁴⁹) Mewett & Manning *supra* note 13 at 198

interpreted, more broadly, as 'some kind of moral fault'. Indeed, there are commentators¹⁵⁰ who argue that the phenomenon of 'not thinking where one ought to think' is equally classifiable to be classed as moral fault. However, such commentators do not discuss the issue's theoretical dimension further, even less do they consider it to be a fundamental problem of legitimacy. Perhaps this touches upon a real difference between Anglo-American and German legal thinking. The Anglo-American view seems to be that as soon as a fair outcome is achieved it is not necessary to set up a cohesive system. Conversely, Fletcher's comment on the German debate on theories of wrongdoing might be paradigmatic: "The flaw in the debate is the assumption that one theory of wrongdoing must account for all patterns of liability".¹⁵¹ But is not a theory (about whatever sociological facts) proved insufficient (or, in Karl Popper's words 'rebutted') if exceptions occur? Thomas Kuhn stated that anomalous experiences create the (however long-term) need to substitute a paradigm¹⁵². Does this apply to the legal principle of *mens rea*, or in which way is *mens rea* different from a normative theory?¹⁵³

However, is it possible to draw criteria of culpability from either general principles or from moral theory or both? How is the application of punishment supported in these cases? In broad terms, theories of punishment divide along the

¹⁵⁰) HLA Hart Negligence, *Mens Rea* and Criminal Responsibility, in: Punishment, *Mens Rea* and Responsibility (Oxford 1968) at 136 [hereinafter *Mens Rea*]. R.A.Duff, Intention, Agency and Criminal Liability, (Blackwell 1990) at 151-55

¹⁵¹) Fletcher Rethinking Criminal Law *supra* note 6 at 481

¹⁵²) See A. Fisher The Logic of Real Arguments (Cambridge, Cambridge University Press 1988) at 122

¹⁵³) D.Husak states that "[c]riminal theorists were able to articulate few if any significant generalizations that apply without exception to the whole of the substantive criminal law", see D.Husak, *supra* note 25 at 21. That begs the whole question whether the formulation of any absolute legal principle is possible at all.

themes of retributivism and utilitarianism. This distinction will be reflected in the structure of this chapter. First, the focus is on culpability: what features must an accused's conduct show in order to be beyond an acceptable moral standard for society? I will start with an inquiry into *mens rea* and personal fault. Second, the moral aspect will be excluded from my evaluation. Here, the notion of 'blame' will be excluded: at issue will be whether the law of torts could achieve the same regulatory effect as criminal law.

As in Chapter II, the focus will be on the debate about the notion of 'awareness'. For the moment, it will be independent of the constraints of positive judicial decisions. Although the discussion about the suitability of the notion of 'objective' negligence is not new,¹⁵⁴ recent authors encourage us to consider "afresh whether [it] *should* ever be resorted to in criminal law"¹⁵⁵. The chapter is not restricted to Canadian jurisdiction, but the focus is on Canadian law's roots in common law ideas. However, McLachlin J's objective test of reasonableness in Creighton is still of particular interest. Can a moral evaluation really be divided between the conduct and its agent? Is not a moral verdict always a general assessment of a person, about how

¹⁵⁴) The debate has flourished in common law jurisdictions for half a century. Against objective negligence, see P. Burns, *supra* note 31; J. Hall Negligent Behavior Should be Excluded from Penal Liability (1963) 63 Columbia Law Review 1963 at 632; J.W.C. Turner, The Mental Element in Crimes at Common Law, in: Radzinowicz/Turner ed., The Modern Approach to Criminal Law (London. 1945) [hereinafter Modern Approach]; G. Williams Criminal Law 2nd ed. (London 1961) [hereinafter Criminal Law];

Pro objective negligence, see among others E. Colvin The Principles of Criminal Law 2nd ed (Toronto Carswell 1991) [hereinafter Principles]; G. Fletcher, Rethinking Criminal Law, *supra* note 6; G. Fletcher The Theory of Criminal Negligence: A Comparative Analysis (1971) 119 University of Pennsylvania Law Review at 401 [hereinafter Negligence]; HLA Hart Mens Rea *supra* note 150; T. Pickard, Culpable Mistakes and Rape: Relating Mens Rea to the Crime (1980) 30 University of Toronto Law Review 75.

¹⁵⁵) D. Stuart Treatise *supra* note 11 at 192

she presents herself in the very conduct? It would follow from this that McLachlin J's restricted test is simply insufficient to reach a moral verdict. Nevertheless, I will try to identify specific criteria which arguably allow assessment of moral fault. One goal of this chapter is thus to go beyond the positive law and to identify aspects of the reasonable person which are, as structural principles, existent prior to the positive law. As Professor *Hart* pointed out, morality is not inevitably inherent in the positive law. Considerations of morality and system theory, however, might well be used to evaluate legal decisions.¹⁵⁶

II. The Principle of *Mens Rea*

2.1. The Nature of the Principle

One of the common law's basic maxims is *actus non facit reus nisi mens sit rea*. However, it is not always easy to determine the regulatory effect of the principle. *Fletcher* stated cynically that there is no term fraught with greater ambiguity than this venerable Latin phrase which haunts Anglo-American criminal law. What impact does the maxim have on the criminalization of unreasonableness? What does it mean that the accused's *mens* has to be guilty? In plain translation, *mens* refers to the 'mind', or even 'consciousness' as responsible for the human process of decisionmaking¹⁵⁷. The following shall explore what evidence the maxim itself requires in order to ascribe the verdict 'guilty' to the accused's mind.

¹⁵⁶) HLA Hart Positivism and the Separation of Law and Morals (1958) 71 Harvard Law Review at 593

¹⁵⁷) Fletcher's interpretation "the act is not culpable under the law unless the actor is culpable for acting as he did" seems, perhaps, to stretch the plain meaning, even if Fletcher's interpretation might be justified in the light of history. See Fletcher Negligence *supra* note 154 at 414.

The maxim first appeared in 1641 in *Coke's Institutes*¹⁵⁸ covering more than just one characteristic of criminal conduct. *Coke* invokes the maxim to explain why acquittals would be appropriate in two hypothetical cases. In the first, the actor formulates the intent to steal after he takes possession of the goods. The second is an offence committed by an agent *non compos mentis* (an insane agent). According to *Coke*, neither actor should be convicted because in each case the element of *mens rea* is absent. The first actor did not have the requisite intent to commit larceny; the second was not accountable for his act. In the latter case, the absence of *mens rea* is the absence of responsibility, not the absence of a mental state or particular intention proscribed by the law.

The two different meanings inferred by *Coke* anticipate the separation of descriptive and normative approaches to the principle¹⁵⁹. The distinction is based on different endeavors to clarify the maxim's contours but eventually accounted for much of the present ambiguity. *Mens rea* may either mean a defined state of mind that the crown must prove before its case is established or it may mean moral culpability, the absence of which will excuse the accused¹⁶⁰. Consequently, a commitment to a descriptive or normative theory of *mens rea* shapes one's attitude toward negligence as a basis of liability. Descriptive theorists are likely to view negligence as an aberrant basis of liability; normative theorists are more inclined to view negligence as a proper ground for blaming an actor for making a mistake or causing an accident. The descriptive definition is presented by *Glanville Williams*, "*mens rea* means intention or

¹⁵⁸) E.Coke, *Third Institute*, (1797) Brooks ed. at 54 and *ibid.* at 107. See the summary by Fletcher *Negligence supra* note 154 at 411.

¹⁵⁹) See generally Fletcher *Rethinking Criminal Law supra* note 6 at 398-404; Fletcher *Negligence supra* at 410-21

¹⁶⁰) So C.Coal, J.Smith and P.Burns *supra* note 2 at 222. See, generally, G. Williams *The Mental Element in Crime*, (Jerusalem Magnes Press 1965)

recklessness as to the elements constituting the *actus reus*."¹⁶¹ *Don Stuart* also expressly reserves *mens rea* for a subjective test of an "aware state of mind"¹⁶². *Mens rea* thereafter is a concept of conscious apprehension. If the accused is aware, *mens* is present; if she was not, *mens* is absent. The descriptive approach decreases ambiguity, maintaining relatively clear and workable distinctions, such as those of advertence as opposed to inadvertence. Descriptive criteria seem to infer uniformity and to make decisions more predictable.

Clearly then, *mens rea* requires more than proof of the act causing harm. The critical question is, however, whether this 'more' is necessarily a positive state of mind. Some authors argue that *mens rea* raises a normative issue of 'just' and 'appropriate' blame. Blackstone, for instance, suggested the formula implied that "an unwarrantable act without a vicious will is no crime at all". 'Vicious will', then, is the choice to do a blameworthy act. In this respect, the *mens rea* requirement is not meant to be a means to collect additional data about the accused's state of mind; crucial to the issue of guilt or innocence as a whole. *Kadish*¹⁶³ explained,

"[I]n the sense of legal responsibility, the law absolves a person precisely because his deficiencies of temperament, personality or maturity distinguish him so utterly from the rest of us to whom the law's threats are addressed that we do not expect him to comply."

¹⁶¹) G. Williams Criminal Law *supra* note 154 at 31. See also F.B. Sayre Mens Rea (1926) 45 Harvard Law Review 974, 1026; S. Stewart A Modern View of the Criminal Law (1969) at 46: "an intention to achieve...the result forbidden by the law", and C. Howard Australian Criminal Law (Sydney Law Book Co. 1965) at 10, referring to the descriptive approach as the "modern usage" of *mens rea*.

¹⁶²) D. Stuart Treatise *supra* note 11 at 190.

¹⁶³) Kadish, Sanford The Decline of Innocence (1968) 26 Cambridge Law Journal 273 at 275. See *ibid.*, p.287

As a consequence, defences negating blameworthiness, such as insanity or automatism, negate *mens rea*. It has been said that in legal systems derived from the common law, the normative view seems to prevail.¹⁶⁴

However, the normative view itself appears in two ways, one regarding the normative element as additional, and one as alternative to the (descriptive) state of mind. As to the former¹⁶⁵, *mens rea* does not only refer to the 'mental state' which must accompany the act according the definition of the offence, but also to legal responsibility. The failure of the experiment in the US with the 'Bifurcated Trial'¹⁶⁶ was taken as evidence that issues of guilt and of mental condition are inseparable. This understanding makes one thing very clear: beyond descriptive criteria like intention and awareness, there is need for a second check. As *Kadish* and *Packer* pointed out, it is impossible not to find, say, the requisite intention, but nevertheless to convict on a general verdict of 'blameworthiness'. Since the meaning is unclear, the principle loses its power. Logically, one could conclude that negligence is still excluded by the basic principle as a basis for liability, since the simple requirement of some 'blameworthiness' is not enough to pass the double test. Punishment for negligence would, then, require at least awareness of consequences in order to satisfy the *mens rea* principle.

However, this approach would still be in conflict with the definitional requirement that a negligent actor be unaware of the risk she is taking. Traditionally,

¹⁶⁴) Fletcher Rethinking Criminal Law *supra* note 6 at 401

¹⁶⁵) Kadish, Sanford *supra* note 163 at 287. See Herbert Packer The Limits of Criminal Sanction (Cambridge University Press 1968) at 107-118

¹⁶⁶) Separate trials for establishing *actus reus* and *mens rea* on the one hand and insanity on the other. See, California Criminal Code s.1016. See further, D.Husak, *supra* note 25 at p.141, and D. Louisell and G. Hazard Insanity as a Defence: The Bifurcated Trial (1961) 49 Calif. L.R. 805 at 830

this has been the structural difference between negligence and recklessness. Negligent behavior implies inadvertence and must, therefore, be sharply distinguished from knowingly causing harm, i.e. from conduct that includes at least an awareness of possible harm¹⁶⁷. However, recent English decisions indicate that the definition of recklessness might shift to include acts of negligence. Since R.v.Caldwell¹⁶⁸, awareness of consequences is no longer a necessary condition for recklessness.

Kadish's, as well as *Packer's*, definition of *mens rea* makes it clear that 'descriptive' *mens rea* may be absent while some 'normative' element might be present. Or, put differently, *mens rea* need not include, but rather is different from, a state of mind. Therefore, the normative view is offered as an 'alternative' concept to the descriptive. All that is required to satisfy the *mens rea* principle is a reduction of *mens rea* to some blameworthiness. At least, there is no agreement in Anglo-American literature that any positive state of mind is expressed by '*mens*'. In *Fletcher's*¹⁶⁹ words, *mens rea* is not a mental state but a normative standard of culpability. *Hart* broadens the scope of the *mens rea* principle beyond the cognitive element of knowledge or foresight so as to include the capacities and powers of normal persons to think about and to control their conduct¹⁷⁰. Here, the traditional concept of negligence is compatible with *mens rea*.

¹⁶⁷) J. Hall *supra* note 84 at 634

¹⁶⁸) R.v.Caldwell (1981), 1 All E.R. 961 (H.L.)

¹⁶⁹) Fletcher Negligence *supra* note 154 at 413. He refers to the German writer R. Frank who generated the normative conception of 'guilt' (*Schuld*) which Fletcher wants to attach to *mens rea*. It is dangerous to draw this parallel since, in German legal theory, there is the other category of subjective elements of an offence (*subjektiver Tatbestand*) which corresponds to the descriptive view of *mens rea*. The latter is absent in offences based on negligence. However, the issue will be discussed, *infra*, in a separate chapter.

¹⁷⁰) HLA Hart Mens Rea *supra* note 150 at 140

However, as with the nature of *mens rea*, the nature of negligence remains disputed. What aspect can be the basis for punishing unreasonableness? Is negligence a form of *mens rea*? *Fletcher* would support this view, arguing that negligence is a concept of blame, of attribution¹⁷¹. *Hall* identifies negligence as unawareness of risk, albeit a state of mind, one that should not be criminally blameworthy. Similarly, *Turner*¹⁷² understands the proper legal significance of negligence to be "inadvertence". Given the two-fold meaning of *mens rea*, there are those who support attaching 'negligence' to either structural element of the offence. A third approach is to identify negligence as a course of conduct, not a state of mind¹⁷³. Is it a question of policy whether the standard of liability should be made more or less objective by including or excluding specific personal characteristics of the defendant? Adjusting the balance of advantage between litigants by disregarding excuses, such as the claim that the defendant drove as he did because he was an immature teenager, seems to be a matter of policy. Authors who follow a descriptive approach have to deny the overall validity of the principle for the existing criminal law. For example, *Glanville Williams* separates negligence from crimes 'requiring *mens rea*'¹⁷⁴. On the other hand, the normative approach is weak for structural reasons. The double use of '*mens rea*' confuses the different meanings of the tests¹⁷⁵. In other words, in light of its various possible meanings, the principle of *mens rea* does not demand anything specific. What can be said is that, in applying the 'widest' approach, *mens rea* requires at least some

¹⁷¹) Fletcher *Negligence* *supra* note 154 at 415

¹⁷²) J.W.C. Turner *Modern Approach* *supra* note 154 at 207-211

¹⁷³) P. Burns *supra* note 31 at 49

¹⁷⁴) G. Williams (1961), *supra* note 154 at 122

¹⁷⁵) G. Fletcher *Rethinking Criminal Law* *supra* note 6 at 401: "The terms are ambiguous beyond repair"

'moral fault'¹⁷⁶. It will be discussed *infra* whether it is possible to establish moral fault without subjective awareness.

2.2. The Supreme Court of Canada's Conception of *Mens Rea*

It is not really clear which conception the Supreme Court of Canada follows. In Creighton, McLachlin J. talks about a mens rea of "objective foreseeability of bodily harm",¹⁷⁷ which is a plainly descriptive criterion, but not a state of mind. It was this point of view which provoked the cynical response that, here, '*mens*' is rather the absence of any '*mens*'.¹⁷⁸ However, although not mentioned as such, McLachlin J's second step, the exception for incapacity, seems to fit in with the normative conception of *mens rea*. The normative view is represented by the decision R.v.Chaulk¹⁷⁹ which held that insanity based on "incapacity for criminal intent" which will usually be manifested under s.16 CCC, is a denial of *mens rea*.

2.4. Fortuity of Consequences

¹⁷⁶) This position is still a dangerous concept. Hart pointed out in Morality in the Criminal Law (Jerusalem Magness Press 1965) at 90, that "our moral code may be either silent as to an offence's legal quality, or even divided." Driving on the left side of the street is, *per se*, by no means morally bad. Moral fault arises out of the fact that there is a uniform law requiring motorists' to drive on the right side of the street. Any violation endangers others, which arguably creates a moral duty to think about the positive rule. This aspect was neglected by A.A.Wasserstrom HLA Hart and the doctrines of Mens Rea and Criminal Responsibility (1967) 35 University of Chicago Law Review at 96

¹⁷⁷) R.v.Creighton *supra* note 5 at 202 [para .19]

¹⁷⁸) Mewett & Manning *supra* note 13 at 198

¹⁷⁹) R.v.Chaulk *supra* note 99 at 289

Rudimentary psychological observations do not support the notion of attaching blame to consequences. Many, perhaps most, persons suffer from self-reproach after damage in which they played some necessary part has occurred. *Hall* points out that this self-reproach typically does not focus on one's inadvertence but goes beyond that to the real cause in the relevant, immediately prior, voluntary misconduct¹⁸⁰. Granted that there is a duty to take care not to injure people or to destroy their property, it should not be assumed that any behavior that damages something of value is a violation of that duty. The ethical argument thus asserts that negligent behavior is something other than "violating" a moral duty. *Hall* states that to declare that a person had the competence to be sensitive to ordinary dangers is a tautology, since competence is or includes that sensitivity. In his view, the psychological notion about "unconscious willing" cannot be advanced as a basis of penal liability. Arguably, such "unconscious willing" is a fiction used to construct the conclusion of "guilt" by simply rendering the premise "conscious" irrelevant.

However, it is dangerous to base the exclusion of negligence as an anomalous external standard on an accused's self-reproach. This conceals a confusion between "being culpable" and "feeling culpable". For one to act with a sense of guilt - with knowledge that one is doing wrong- is neither necessary nor sufficient for culpability. It is an important feature of the law that, for the sake of creating a 'general rule', to conclude 'being' from 'feeling' cannot be valid. This is most clearly underlined by the common law dictum that ignorance of law is not a defence. This rule is part of most Western legal systems, and it is incorporated in s.19 CCC.

However, the problem underlying *Hall's* reasoning might go somewhat deeper. It was argued that consequences occur always as a matter of fortuity and should,

¹⁸⁰) J. Hall *supra* note 84 at 641

therefore, never influence the criminal stigma applied¹⁸¹. Interestingly, this point of view is plainly contradictory to McLachlin's statement in R.v.Creighton that consequences, or the absence of consequences, can properly affect the seriousness with which Parliament treats specified conduct¹⁸².

For example, criminal blame could be restricted to those who engage in open rebellion against society's rules. However, the latter reasoning needs to explain why we feel uneasy if it is applied to the signal man who said, after the disaster: 'Yes I went off to play a game of cards. I just did not think about the 10:15 when I was asked to play'¹⁸³. But there is something the signal man did deliberately wrong, which is neglecting the duties of his work. Neglecting the duties of a signal man may be punished, not necessarily less strictly than manslaughter¹⁸⁴, but differently. It appears, then, that the 'School of Awareness' creates the need to introduce such offences.

2.4 Theory of Action

Among the 'School of Awareness', it is argued that punishment should apply only to actions which occur by responsible agency based upon voluntary choice - as opposed to random consequences. The notion that moral disapproval rests solely upon voluntary

¹⁸¹) J. J. Gobert The Fortuity of Consequence (1993) 4 Criminal Law Forum at 1-46; G. Fletcher Rethinking Criminal Law *supra* note 6 at 479 arrives at the same conclusion.

¹⁸²) R.v.Creighton *supra* note 5 at 207 [para.37]

¹⁸³) Introduced by HLA Hart Mens Rea *supra* note 150 at 150. As Hart rightly concludes, the 'School of Awareness' would exclude the signal man from liability for negligent manslaughter.

¹⁸⁴) Just to complete this thought: the range of punishment could include life imprisonment, as it does with offences like drug trafficking (s.4(3) of the Narcotic Control Act), which may be regarded as less dangerous for society and therefore less serious a crime.

action is based on the thinking of such important philosophers as Aristotle¹⁸⁵. Society has a moral license to punish if the actor chooses to break the law. But it is this kind of choice which is hard to find in the case of negligence and, it is sometimes argued that, merely having the chance to avoid a harmful outcome is not enough¹⁸⁶.

At this point, the notion of voluntariness of conduct merits some attention. Negligent behavior still requires *actus reus*, and thus some voluntary action, too. It is just that the harmful outcome itself was not intended. Even if someone is said to have done what she did accidentally, it is still her action which caused the result. In the most attenuated case of an action only the relevant causal ancestry is needed. Beyond ascribability of the *actus reus*, the basic action, no criterion can be derived from the concept of human action which compellingly forbids or requires to make the agent responsible for what she caused. Exploring the concept of action, *Coval, Smith and Burns* explain¹⁸⁷:

"So long as we see fit still to attribute the concept of an action in relation to an agent, then however attenuated the case may have become, he is still subject to some degree of criticism, punishment and praise, or responsibility - subject to policy - all of which disappears when the concept of action cuts out."

It is for policy reasons only that action chains are more than mere causal chains.

Similar problems arise with the interdependence between 'choice' and 'awareness' of consequences. Yet if an actor is aware of consequences there is no reason to conclude that she caused them by choice. The driver who tries to pass the slow truck does not cause the accident by choice. Choice is itself a normative concept and seems to imply that the actor appreciates the consequence, after she has assessed

¹⁸⁵) Aristotle *supra* note 21

¹⁸⁶) A. Wasserstrom *supra* note 176 at 104

¹⁸⁷) C. Coval, J. Smith and P. Burns *supra* note 2 at 212

costs and benefits. This discussion leads to the problem of intent and is beyond the scope of my paper. However, it might have been shown that a pure, descriptive assessment of 'choice' is impossible. The concept of responsibility is, for policy reasons, in force well beyond the choices and intentions of an agent. It is argued, then, that voluntariness should not be equated with choice¹⁸⁸. The statement does not make it clear whether voluntariness refers to consequences, or to conduct. In the first case, voluntariness can, in fact, be equated with choice. In the second, the argument reduces itself to a claim for *actus reus*; which is, as stated *supra*, a tautology.

III. Moral Theory (of Ordinary Language)

3.1. The Significance of Choice in Criminal Negligence

Is it possible to apply moral theory in order to determine the appropriate policy? It is an argument based on the notion of justice, *Aristotle's*¹⁸⁹ *justitia distributiva*, that equality bears a relative aspect. The state is obliged not to apply a formal standard of equality to those who can provide reasons for being treated differently. In most cases, lack of awareness and wrong interpretation are caused by constitutional deficiencies. If, in a given situation, the defendant does not assess a certain risk but the reasonable person would do so, she shows lack of intelligence but not a criminal mind. Her conduct may become criminal if she does not, for example, turn her mind to the risk already appreciated. But if she continues in spite of apprehension, this would be at least a case of recklessness. Some people are born feckless, clumsy, thoughtless, inattentive, irresponsible, with a bad memory and a slow reaction time. *Glanville Williams* explains

¹⁸⁸) HLA Hart *Mens Rea* *supra* note 150 at 145

¹⁸⁹) Aristotle *supra* note 21

that unawareness is such a typical human features, "with the best will in the world, we all of us at some times in our lives make negligent mistakes"¹⁹⁰.

The same argument can be made against excluding character deficiencies from the 'incapacity' - defence. In Canadian criminal law, incapacity does not embrace awkwardness. If taken seriously, the term 'incapacity' must embrace these people who cannot help doing evil because of character deficiencies. It cannot be denied, generally, that character deficiencies compel an agent to omit care just as the physical might do. But to include that element of constraint in the notion of incapacity would mean to accept the view that everybody is bound, by her characteristics, to act in a certain way. Thus the element of choice would be excluded from any human action. Such a deterministic view has not been rebutted scientifically, but it is not suitable for the use of criminal law, since otherwise there is no way to constitute any fault at all. Criminal law must assume that human beings do have a choice, that they can decide to act in the one or the other way¹⁹¹. Criminal law must assume that people, dependent upon their choice of how to perform certain conduct, can be more or less attentive towards risks they might impose on others. Any concept of criminal guilt accepts that some have an easier time than others in complying with prohibitions against negligent conduct.

3.2. The Charter and Constitutional Deficiencies

Protection of the disadvantaged is an important feature of Canadian public policy. As the relation between the provisions of s.15(1) and 15(2) of the Canadian Charter of Rights and Freedoms reveals, the protection of the disadvantaged is always the creation

¹⁹⁰) G. Williams Criminal Law *supra* note 154 at 122

¹⁹¹) See generally H.H. Jescheck *supra* note 9 at 367 ('*Problematik der Willensfreiheit*'). As a criticism of the notion of free choice, see G. Calabresi, Ideals, Beliefs and Attitudes in the Law, (Syracuse 1985), Chapter I, The Gift of the Evil Deity, p.1

of an unnaturally legal disadvantage for the ordinary person. The recognition of constitutional deficiencies would be an exemption from the principle that all human beings are treated equally, and thus an adjusting law under s.15 (2) of the Charter. There is the question flowing from that, namely, whether the merits of advancing the interests of few outweighs the merits of formal equality, the merits of treating all people equally? In the context of negligence, the other side of the coin is that the privilege for inattentiveness disadvantages people who are sensitive enough to apprehend even tiny small risks, although, in the long run, these people might be less prone to cause damage. The issue is simply whether public policy should respect the attributes named above as being strong enough to allow a general exemption to everybody's duties in a given situation. The 'benefit of being disadvantaged' is to be beyond the reach of the law. If deficiencies make conduct reasonable, society does not have any tool to regulate them.

But the descriptive criterion of awareness is not the only or most suitable way to take constitutional deficiencies into account. The alternative concept is that generous allowances will be made for individual factors even if liability is being assessed objectively. As tailored by *Pickard*, the idea is to take the relevant characteristics of the particular actor, rather than those of the ordinary person, as the background against which to measure the reasonableness of certain conducts and beliefs.

"The finder of fact must ask whether or not the belief was reasonably arrived at in the circumstances, given those attitudes and capabilities of the defendant which he cannot be expected to control. Such a measure avoids unfairness to those who may be incapable of achieving objectively reasonable standards without excusing those who are capable of so doing but have not exercised their capacities in a situation that required care.¹⁹²"

¹⁹²) T. Pickard *supra* note 154 at 79

Pickard's logical deduction does not embrace the separation of frailties which the accused is and is not expected to control. The law might use descriptive criteria to filter out those instances of negligence which are based on not-appreciated human frailties. However, the last step has to be a normative one - which is the evaluation of the very frailty. The evaluation of differences between human beings seems to be a matter of public policy, rather than one of compelling moral normativity.

3.3. The Moral Duty to Take Care

Commentators have undertaken efforts to found criminal negligence on moral theory. *Richards* identifies two crucial elements upon which the application of negligence is justified. From a moral point of view, these criteria have to be fulfilled in order to create a basis for criminal negligence. There must be (1) a certain level of risk imposed upon others and (2) the purposes of the actor in imposing such a risk may not legitimate the risk¹⁹³. Interestingly, *Richards* clings to the notion of awareness and consciousness of the risk - as opposed to the *actus reus*, the deviation from the standard being the discriminating element. He recalls the 'moral principle of greatest equal liberty and opportunity' which assures that persons have the greatest possible freedom in planning their lives compatible with a like freedom for all. He concludes that intentional acts are the most appropriate basis for a restriction of personal freedom or wealth, and that negligence is justly accorded a lower degree of liability:

"Although such forms of conduct do not evince plans, they do represent forms of harm producing conduct over which people have the capacity and opportunity of control and deliberation associated with planful action."¹⁹⁴

¹⁹³) D. Richards, The Moral Criticism of Law (New York University Press 1977) at 204

¹⁹⁴) *Ibid.* at 207. My presentation does not deprive his reasoning of any further clarifying, logical steps.

Thus he, apparently, requires a voluntary act as well as the agents capacity to apprehend the dangerousness of his or her conduct. He continues stating that

"people who fail to observe reasonable standards of care in certain circumstances...fail to exercise normal capacities of care that they had a fair opportunity to exercise.¹⁹⁵"

His moral theory justifies punishment for negligence because the conduct itself was voluntary. He does not explain further how his second presupposition mentioned above, the agent's purposes, fits in with his theory. Arguably, scrutiny of the accused's purposes introduces a subjective element. But he does not explain how these purposes are to be tested. Is the accused beyond the reach of moral culpability because she intends to do something good? Thus parents might, for the best of reasons, but negligently, administer the wrong medication to their child. Police officer Blackwell's driving would be justified because he responded to a "code-3" call¹⁹⁶. Canadian law clearly reaches a different conclusion in this question. What *Richards* drafts is rather the idea that 'purposes' reflect awareness of an exceptional situation. This, then, raises the problem of mistake, which he, unfortunately, does not discuss in detail.

The fortress of subjectivism faces difficulties to explain cases in which the act of forgetting itself causes harm. *Duff* refers to the example of the bridegroom who has missed his wedding¹⁹⁷. He explains to his bride that he was in the pub with his friends at the time, and that the wedding just slipped his mind. His bride would surely be unimpressed by this story. To forget his wedding itself manifests an utter lack of concern for his bride and their marriage. Had he cared at all, he could not have forgotten the wedding. *Duff* concludes that lack of care, as manifested in his conduct, is

¹⁹⁵) *Ibid.* at 207

¹⁹⁶) *R.v.Blackwell supra* note 82; See also *R.v.Tutton supra* note 47.

¹⁹⁷) *R.A.Duff supra* note 150 at 163

the fault for which she (rightly) condemns him. For our purposes, moral blameworthiness should be proven beyond doubt.

HLA Hart explored the relationship among negligence, *mens rea*, and responsibility, approaching the issue (in accordance with common law tradition) from the view of general moral theory. He builds his argument on the fact that, in daily life outside the law courts, people are frequently blamed for being inattentive. In normal language, he explains, the difference between both the verdicts "he could have helped it" and "he could not have helped it" is not equal to the difference between advertence and in advertence of a certain risk.

"The evidence in such cases [leading to either of the verdicts] relates to the general capacities of the agent. It is drawn, not only from the facts of the instant case, but from many sources such as his previous behavior, the known effect upon him of instruction or punishment, etc."¹⁹⁸

It was Wasserstrom who went to great efforts to indicate logically weak points in Hart's reasoning¹⁹⁹. There is a problem of general character remaining here, concerning the validity of Hart's conclusion. Is there any rule in moral theory demanding that the law enforce each moral standard²⁰⁰? His syllogism lacks the element of the general rule. Such a general rule should state that whatever is valid in ordinary language is good for the law, too²⁰¹. What assumptions can this rule, fictively valid, be based on? Is it a

¹⁹⁸) HLA Hart, Mens Rea *supra* note 150 at 151

¹⁹⁹) A. Wasserstrom *supra* note 176 at 103

²⁰⁰) HLA Hart himself explores the issue further in Social Solidarity and the Enforcement of Morality (1967) 35 University of Chicago Law Review at 1

²⁰¹) HLA Hart argues that men, *if ever* responsible for *anything*, should be responsible for such omissions to think, HLA Hart, Mens Rea, *supra*, note 150 at 151 (emphasis in original). This rhetorical conclusion disguises his omission to positively found his claim for responsibility for "such omissions".

basic common law principle that shared notions about morality determine the scope of the law, including the scope of the criminal law? Authors of what I called the 'School of Awareness' seem to deny the validity of such a rule, at least they approach the issue differently. Restricting the scope of the criminal law beyond 'blame in ordinary life', they apply criteria derived from observation of 'what should be subject to criminal blame'. The attitude towards this general rule decides who wins the debate about subjectivism or objectivism.

Is this sufficient reason to support the notion of fault in criminal negligence? *Hayden* pointed out that the scope of moral duties is much broader than the one of legal duties, especially in the law of omissions (to take reasonable care)²⁰². In other words, it is a logically wrong conclusion that everything which is morally incorrect amounts to a degree of blameworthiness which might invoke the criminal law. *Hall* argues that even assuming that in a wide sense of "fault" a negligent harm-doer is culpable, the serious social consequence of punishing should be reserved to voluntary harm-doing²⁰³. As well, it has been a feature of Canadian jurisprudence in the past twenty years that criminal sanction should be applied with restraint²⁰⁴. The requirement of a 'marked departure from the standard of a reasonable person' has been underlined by the Supreme Court, and the Law Reform Commission insists that it be added to the Code. Commentators urge that further effort be made to restrict liability for gross negligence²⁰⁵. The criminal law is to be invoked as *ultima ratio* only, it does not come

202) P. T. Hayden Cultural Norms as Law: Tort Law's "Reasonable Person". (1992) 15 *Journal of American Culture* at 45

203) J. Hall, *supra* 84 at 636

204) P. Healy, *supra* note 131 at 267

205) D. Stuart Treatise, *supra* note 11 at 196. See Law Reform Commission of Canada, Working Paper No. 46 Omissions, Negligence and Endangering (Ottawa 1985)

into play as long as other remedies can cope with certain occurrences. The government of Canada expressly asserted this to be its policy, according to the report of the sub-committee on the recodification of the General Part in Canadian Criminal law²⁰⁶. Assume that our bride is so upset about the groom's failure that she kills herself, would we hold him criminally responsible for that? Would this, really, amount to manslaughter by criminal negligence? I will turn to alternative concepts, *infra*, which might, given the notion of *ultima ratio*, substitute for the criminal sanction.

IV. Aspects of Special and General Deterrence

Above, we dealt with the retributivists' approach to criminal punishment in negligence and the issue whether the specific defendant's culpability amounted to a degree society holds to be sufficient for criminal sanction. How must the standard in criminal negligence be framed best in order to reduce deviant, undesirable conduct, from an utilitarian point of view? The issue has not found much attention in criminal law literature yet, it always has been a domain for criminology.

Negligence is arguably an unreliable index of the actor's moral desert, but it could qualify as a plausible rationale for the practical forfeiture of the actor's autonomy²⁰⁷. Punishment, then, could be applied according to the dangerousness of the conduct, or to the dangerousness of the agent. Such an understanding of justice is, of course, open to the notion of risk management. If public policy, if society's needs and frailties determine justice, there is no reason why society should not take advantage of that and manage risks as effectively as possible. It is a goal of all criminal law to reduce criminal conduct, to reduce deviance of society's norms. Still searching for

²⁰⁶) Citation by P. Healy, *supra* note 131 at 270. See Law Reform Commission of Canada, *supra* note 14

²⁰⁷) Fletcher, Negligence *supra* note 154 at 418

appropriate criteria of reasonableness, whether descriptive or normative, I will turn the focus on utilitarian aspects now.

Does the utilitarian point of view prefer certain criteria to justify criminal liability? The extensive debates about the appropriate theory of punishment shall not be reflected in my thesis. It is beyond the scope of my thesis to assess the impact of different attitudes towards the rationale of punishment for negligence. However, the utilitarian approach of deterrence merits some attention. It was argued that punishing negligence has a deterrent impact on other potential risk-creators (which is the notion of general - deterrence). Stuart argues that we are often capable of becoming less inadvertent²⁰⁸, which argument applies equally to the individual agent. Another argument put forward is based upon policy considerations since the utilitarian theory of deterrence, which is normally accepted as a justification for criminal punishment, finds itself in some difficulty when applied to negligence. *Glanville Williams* moulds this thought into a question: "even if a person admits that she occasionally makes a mistake, how, in the nature of things, can punishment for inadvertence serve to deter?"²⁰⁹

The imposition of criminal sanctions, generally, rests heavily upon the admittedly unproved notion of deterrence and there seems little reason for not using the same rationale to penalize certain forms of negligent conduct. *Fletcher* goes even further claiming that each punishment furthers compliance, including plainly unjust sanctions against the apparently innocent²¹⁰. This seems to go too far. His observation might be true if the criminal law itself is perceived as a bare threat, if the state is perceived as the bank robber equipped with special power. But the concept is hardly

²⁰⁸) D. Stuart, *Treatise supra* note 11 at 194

²⁰⁹) G. Williams, *Criminal Law supra* note 154 at 123

²¹⁰) Fletcher, *Rethinking Criminal Law supra* note 6 at 401, refers to random executions in NAZI-concentration camps.

ever asserted as a legitimate basis upon which to handle deviance under the rule of law. However, commentators seem to agree that the rules of criminal law are at least of some impact on the citizens' behavior. Criminal law provides autonomous actors with a reason to behave in a particular way.²¹¹ I will argue that, in a society based on the rule of law, punishment based on unreasonable behavior has to be applied carefully in order to achieve the goal of deterrence. It was Hawkins who pointed out that "wrong punishment" does not deter but alienates²¹².

Criminality may commence where people know about the risk but yet, owing to lack of judgment, believe that they can so act as to avert it. Some discrimination between persons suffering from emotional instability and persons suffering from poor intelligence may very well be justified. It is wrong to assume that the negligent harmdoer exhibits indifference to social values, and that she is of a callous character. In the following, I examine how rules of liability should be framed best in order to minimize social damage.

4.1. Economic Analysis

In my introductory chapter, I indicated that criminal law is observed to replace moral criteria by risk management, 'management' being a term borrowed from economics. Tort law has already adopted the policy of risk-management. Authors tend to connect risk management with heightened liability, which is attached unseen to the occurrence of damages. Heightened liability increasingly neglects matters like personal fault²¹³. If

²¹¹) See Fletcher, Rethinking Criminal Law, *supra* note 6 at 479, interpreting the German 'personal theory of wrongdoing'.

²¹²) Keith Hawkins Environment and Enforcement (Oxford Clarendon Press 1984) at 3-9, esp. *ibid.* at 5

²¹³) See Henry Steiner *supra* note 19 at 20; *ibid.* at 22

criminal law takes the same step, the distinction might not be valid any more. The compensation of losses is traditionally the task of tort law, while criminal punishment incapacitates offenders and thereby excludes culprits from being malefactors in society. Can a utilitarian view of criminal law render the traditional 'division of labor' meaningless?

Economic analysis is concerned with the law's efficiency. Efficiency is usually measured in terms of costs and benefits. Costs of importance are the social costs, such as an increased number of accidents if criminal law refrains from creating deterrent effects. Costs, too, are the expenses in time and effort to determine subjective ability - and therefore, liability. Criminal prosecution and incapacitation of the accused, whether justified or not, is also costly for society. Economic analysis pursues a technical, utilitarian approach to problems of negligence in order to decrease future losses to society. Economic analysis works in sociological models, which exclude certain aspects of the world in order to figure out interdependencies between especially highlighted aspects. However interesting, for this reason my final conclusion cannot be based thereupon. The reasonable person has been subject to economic analysis mainly in tort law. The focus is on the question of who should bear the costs of harm, the injurer or the victim? Criminal law does not, per se, shift any assets from the injurer to the victim. It is concerned with imposing additional costs on the injurer which are not reflected, as benefits, in the victim's compensation. In my analysis, differences between 'prohibiting' and 'pricing' will be accounted for.

The search for an appropriate valuation of costs and benefits usually starts with justice *Learned Hand's* 'formula'. *Learned Hand*, in the case of United States v. Carroll Towing Co. first reduced the reasonable person standard to an algebraic formula²¹⁴. There, a barge was left unattended for several hours and while unmanned

²¹⁴) 159 F. 2d 169 (2d Cir. 1947) at 173

broke away from its moorings and struck another boat. The question was whether the owner of the barge was negligent in not having a bargee on board. Hand said that there could be no 'general rule' on the facts before the Court, and instead that the barge owner's liability is a "function of three variables" that could be stated as the equation $B < P \times L$, where B is the burden (cost) of avoiding the accident; P the probability that the barge would break away; and L the gravity of the resulting injury, if it does. Cost-benefit analysis is applied to accident law; negligence means failing to avoid an accident where the benefits of accident avoidance exceed the costs.

There are many instances where the formula's application seems unproblematic, such as a drunken and speeding driver who strikes a child in a school zone. The burden of precaution, socially valued, is trivial compared with the related reduction in $P \times L$. But the decisionmaker must decide what counts as the private or social costs associated with the way that the defendant conducts his or her activity. Tort law excludes from damages many losses stemming from the victim's injury and suffered by persons or enterprises related to the victim - the pain of family members or friends, economic losses in the victim's workplace, and so on. The question, however, is whether criminal law should consider all these costs.

Insofar, as McLachlin J's argument that the greatest measure of deterrence is necessary²¹⁵ seems to be in plain accordance with economic analysis, she concludes that a uniform standard constitutes the greatest measure of deterrence. But there is research casting doubt on the statement that a uniform standard of reasonableness is necessarily more efficient, which will be considered *infra*. The Hand Formula poses additional dilemmas for criminal law. Manslaughter is never justified because the accused can name huge personal benefits flowing from the conduct. Assume an automobile manufacturer has released a car series with defective brakes. It might be

²¹⁵) R.v.Creighton *supra* note 5 at 207

cheaper not to recall all cars and exchange the brakes than to await the accidents and pay the damages. Criminal law cannot encourage car manufacturers to proceed this way.

4.2. Schwartz' Concept to Induce Optimal Care²¹⁶

Warren Schwartz' analysis identifies two tasks the reasonable person standard must serve. They are (1) inducing each person who engages in an activity to take what is optimal care for that person, and (2) minimizing the number of people who engage in the activity when, because of their inability to take sufficient care, they should not. He distinguishes three possible standards of liability: there is strict liability, liability by taking care below the standard subjectively attainable, and liability by taking care below a uniform objective standard. *Schwartz'* definition of 'subjective' does not refer to a mental state of the injurer, but requires the agent to take as much care as it is possible according to all her personal frailties. His subjective standard seems to match the test which Wilson J. constituted in R.v.Lavallee, albeit it is not clear whether Wilson J. required a higher want of care if the accused's personal experience allows for that. The objective test in R.v.Creighton is consistent with *Schwartz'* uniform standard.

Both strict liability and subjective negligence standards extending to decisions affecting the ability to take care will yield optimal investment to take care. Strict liability induces optimal behavior because the injurer bears all costs of harm to victims and thus will make all expenditures that will minimize the likelihood of causing harm. A subjective standard also induces optimal behavior because failure to take care will

²¹⁶) W. Schwartz, Objective and Subjective Standards of Negligence. Defining the Reasonable Person to Induce Optimal Care and Optimal Populations of Injurers and Victims (1989) 78 Georgetown Law Journal (1989) at 241-279. Schwartz' research builds on the works of W. Landes and R. Posner, The Economic Structure of Tort Law (1987), and S. Shavell, Economic Analysis of Accident Law (Cambridge Harvard University Press 1987).

result in liability. However, if a uniform standard is to be measured according to the capabilities of an average person, any deterrent effect upon better equipped persons disappears. But if the standard is set very high, nobody can really attain it and the deterrent effect is no different from the one attained by a subjective standard²¹⁷. With an unattainable single standard, everyone who causes harm will be liable because she falls below the standard. Schwartz defines that phenomenon as *de facto* strict liability.

Schwartz argues that the reasonable person had better not be the optimal creature she is sometimes asserted to be, since an absolutely high standard deters equally as strict liability. It is an 'average' standard only that deters selectively²¹⁸. But an 'average' standard cannot mean that the agent is free to violate some requirements of care. Otherwise Mr. Ubhi could claim that he was short of time and that he never had to worry about his brakes before. Each standard of care required in a certain situation is *per se* optimal. The better way to mitigate requirements seems to be to allow deviation to a certain degree, which is done in Canadian law with the element of a 'marked departure'.

But an objective standard might yield one additional result: a single standard creates self-enforcing incentives for optimal behavior in deciding whether to engage in a certain activity, since unqualified people do not engage in activities requiring skills²¹⁹. Conduct in accordance with the agent's subjective standard may, beyond a

²¹⁷) See Schwartz' citation of the 2nd Restatement of Torts: "The actor is required to do what an ideal individual would do in his place. The reasonable man is a fictitious person, who is never negligent, and whose conduct is always up to standard. The reasonable person is not to be identified with any real person, and in particular she is not to be identified with the members of the jury, individually or collectively. It is therefore error to instruct the jury that the conduct of the reasonable person is to be determined by what they themselves would have done". *ibid.* at 268

²¹⁸) *Ibid.* at 263

²¹⁹) *Ibid.* at 261

certain point, be insufficient for society as a whole, even if it is optimal for the individual. Schwartz defines the "certain point" as the ability the individual should have if she is to engage in the activity²²⁰. A subjective standard that expressly asks whether the individual should have engaged in the activity achieves the same end as an objective standard. It could be the requirement of a license which separates out those people who should not engage in the regulated activity. Still, the relatively high process costs of determining individual ability to take care count as a negative component in his two-stage subjective test. The subjective standard can thus be recommended only if these costs are regarded as less significant than the "misallocative" effects of an objective standard²²¹. In fact, the costs of determining a variant standard in the single situation were important in the Creighton - decision: it was LaForest J's argument that the uniform objective test be easier to apply which eventually tilted the decision towards McLachlin J's standard²²². According to *Schwartz'* model, he thus sacrificed the introduction of an optimal level of care.

But none of different possible standard settings will deter a person who should engage in the activity, meaning one whose cost-benefit calculation is positive, from doing so. A person who derives greater benefit from engaging in the activity than the sum of the costs of care and the costs of harm to others, always has the option to risk a *de facto* rule of strict liability and to engage in the activity. The only way to deter people who gain large personal benefit by engaging in the activity is to impose costs

²²⁰) *Ibid.* at 266. See *ibid.* Fn.32

²²¹) *Ibid.* at 273. The misallocative effects are that people with an ability to take care above their standard are not enough encouraged to take what would be for them optimal care.

²²²) R.v.Creighton *supra* note 5 at 238

that exceed the harm they cause - and that could be criminal liability²²³. It is true that a case can still be made for just adding criminal sanctions to tort compensation. But it need not necessarily be criminal law, since punitive damages can be of an equal effect. However, damages assessed are not always equal to the harm caused to the victim and, therefore, in fact victims are not indifferent between not being harmed and being harmed but compensated²²⁴

4.3. Community Service as a Matter of Vindication

If risk management is taken seriously, the question is whether a criminal response to negligent behavior is necessary at all. The most prudent and reasonable person will sometimes be inattentive in his or her life. However, it is often said that deterrence with punishment can influence people's general attitude towards taking care. Even if some results cannot be avoided, we are capable of becoming more attentive. Professor *Wechsler* explained that "punishment supplies men with an additional motive to take care before acting, to use their faculties, and to draw upon their experience"²²⁵. *Wechsler's* argument is certainly valid, but one must not fall into the trap of requiring "punishment". Such an additional incentive can be provided by any negative, grave consequence for the agent. Moral blame and criminal stigma is not the only way. Given that it is possible to consider appropriate compensation, tort law may be able to take over the task.

²²³) W. Schwartz *supra* note 216 at 261

²²⁴) *Ibid.* at 244. It strains credulity to talk about 'indifference' in the context of compensation if the victim dies.

²²⁵) H. Wechsler commenting on the tentative draft of the Model Penal Code No.4 at 126-7 and No.9 at 52-3. See further HLA Hart, *Mens Rea supra* note 150 at 157.

*John Coffee*²²⁶ reduces the difference between criminal and tort law to 'prohibiting' versus 'pricing'. The criminal norm demands "do not go further", while the tort norm expresses "if you go further, your behavior may be costly to you because you must compensate those who are injured by your conduct"²²⁷. Pricing misbehavior means forcing the defendant to internalize the costs she imposes on others. Defendants will thus take precautions only up to the point where the expected legal liability equates the precaution and avoidance costs. A criminal sanction, however, inherently creates an abrupt, discontinuous increase in the costs the actor must incur when she violates the legal standard. In contrast, this abrupt increase disappears when a pricing system is used because prices are continuous and thus bring costs and benefits into balance. This reasoning could mean that tort law would attach a price to manslaughter, that it would encourage an assessment human life solely in monetary terms.

But any pricing (or prohibiting) effect is always attached to conduct, not to the consequences. The issue is not pricing manslaughter, but pricing risky conduct. As distinct from intentional offences, this conduct might even be useful to society once the unjustified risk is subtracted. Professor *Cooter* argues that society is better advised to use prices, not criminal sanctions, when it has great difficulty in specifying the precise standard of precaution to be observed. He advises²²⁸:

If lawmakers can identify socially desirable behavior, but are prone to error in assessing the costs of deviation from it, then sanctions are preferable to prices. However, if officials can accurately measure the external costs of behavior, but cannot accurately identify the socially desirable level of it, then prices are preferable to sanctions."

²²⁶) J. Coffee Jr., *supra* note 20 at 193-246

²²⁷) *Ibid.* at 208

²²⁸) R. Cooter Prices and Sanctions (1984) 84 Columbia Law Review 1523-1560 at 1524

The open construct of the reasonable person is paradigmatic for difficulty in specifying the precise standard of conduct. Prices can be attached retrospectively in relation to the gravity of the consequence resulting out of the conduct. It is not necessary to conclude from a grave consequence, moral blameworthiness of the conduct itself.

But is it possible at all to define an acceptable compensation for manslaughter? It is the unrecoverable consequence of death which is not being compensated totally, even if large payments to relatives and heirs of the victim take place. Money is something substantially different from human life. In addition, there is the second aspect that pure monetary restitution is not really a deterrent for some people, even if punitive damages come into play. Society cannot afford to sell the right of unreasonable behavior to the rich. These may be the two main reasons for the reluctance to leave manslaughter solely to tort law, rather than any unconscious notion of a breach of morality.

My chapter could end here with the conclusion that, therefore, a criminal reaction is necessary. But I will turn the focus briefly on the concept of community service as a utilitarian solution. The negligent actor would have to spend personal time and effort for the benefit of people more or less closely related to the victim. She would be required to do that in addition to monetary damages due to existing laws. Vindication of the community's interests instead of those of the victim, shifts the focus onto group rights as opposed to individual rights. The individual victim is dead, but criminal sanction cannot alter that. The concept of community service does not necessarily need criminal (moral) stigma to attach to it. It does not even necessarily need to be mentioned in a criminal record, which means that vindication would be satisfied once the community service is completed. In terms of risk management, setting aside liberal inquiry into the notion of fault, the concept suggested here is consistent with that theory. Canadian law is already using community service as a

useful alternative to prison terms, while in Germany, for example, it is only available as a sanction for juvenile offenders.

CHAPTER FOUR: SOCIAL PROTECTION CRITIQUE

I. Introduction

"Life casts the moulds of conduct, which will some day become fixed as law.
Law preserves the moulds, which have taken form and shape from life"
Benjamin N. Cardozo²²⁹

The last chapter's doctrinal analysis was concerned with the logical structure of reasonableness, and the approach was essentially technical and analytical. Moreover, it attempted to be ideologically neutral since guilt is determined according to the creation of a certain amount of risk. The ideological question of whether certain kinds of risk should attract criminal sanction, and which kinds of risk these may be was not totally neglected, but of less significance in this approach. The causal action and its result, the harmful outcome, were deemed undesirable and left in Pandora's black box, as they were not examined further. The risk which was subject to consideration is unjustifiable risk, *per definitionem*. But doctrinal analysis is not ideologically neutral. It is neutral only insofar as it does not assess the accused prior to her conduct, as a human being²³⁰. It tries to separate and evaluate similar situations according to structural features of the very conduct.

This chapter will depart from any doctrinal endeavor. The law is examined in its function to protect society. The social protection approach to criminal law departs from any general notion of (moral) guilt and surveys which groups benefit from the present state of law, and which groups should benefit thereof. Social protection demands that

²²⁹) B. Cardozo, The Nature of the Judicial Process (New Haven Yale University Press 1921) at 64

²³⁰) This expression is also subject to critique. It is said that fundamental inequalities between human beings cause bias in any such doctrinal analysis, against weaker subjects of the population. See hence Chapter III.

criminal law protect those groups in society which are worth protection²³¹. Protection is meant to be *ex ante* - thereby assuming that criminal law does in fact affect people's conduct- as well as *ex post*, giving credit to certain people and precluding them from prosecution. The process of decisionmaking in criminal law involves two parties, the accused and the decisionmaker. The interrelationship between these parties has been neglected in the previous chapter. Once it is highlighted several questions arise: What is it that makes the decisionmaker agree with the accused? Is it natural reason, or reasonableness as a property of each human being, given by birth and attached by nature? The fact that there are people who act unintentionally and unreasonably is already evidence that such an assumption is untenable. It is the decisionmaker's cultural background, her world view which *de facto* provides the criteria for reasonableness. This chapter inquires into whether there is a certain cultural background prevalent in today's society, and in which way reasonableness is influenced thereby.

Commentators have shown that disparity exists between social reality and the legal view of that reality. That is, the law has been criticized as being divorced from the social reality in which it operates. It has been argued that injustice is thereby perpetrated on individuals who become involved in the legal system²³². Surely, the best solution would be to change the "societal reality", but it is obviously beyond the scope of my thesis to search for further aspects which still could make the culturally different the socially disadvantaged. It is beyond my scope here to add to the collection

²³¹) A. Mewett, The Enigma of Manslaughter (1992) 34 Criminal Law Quarterly at 371, defines 'social protection' as the view that it is "culpable to create a dangerous situation without taking adequate steps to counteract that danger". Opposing an absolute, moral notion of blameworthiness, his definition focuses on the conduct itself. My definition is broader than his because it concerns the whole approach to the criminal law's purpose.

²³²) See D. Donovan and S. Wildman, Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defence and Provocation (1981) 14 Loyola of Los Angeles Law Review 435-468 at 462

of social critique. In the concept of my thesis, the critique's existence is taken as an empirical issue. I will investigate if and how such critique affects legal rules and structure.

The discussion will examine whether it would be a feasible and desirable solution to allow each citizen to live up to his or her own standard of reasonableness, since the law would lose its function as a regulating instrument. I will argue that sometimes the law's regulating role is more, and sometimes it is less, important. Sometimes a criminal verdict has hardly any future-oriented, regulating dimension, especially in the case of self-defence. An evaluation will lead back to the difference between the two paradigms of manslaughter and self-defence.

II. What are the Determinant Cultural Norms ?

2.1. The History and Future of the Reasonable Person

The reasonable person was born as a man. His origins are found in Roman law's *bonus* or *diligens paterfamilias*²³³. The man of ordinary prudence was first mentioned in reported English law in the 1837 case Vaughan v. Menlove. The term, however, appears to predate the case, since Tindal J. stated²³⁴ that "the care taken by a prudent man has always been the rule laid down". The man of ordinary prudence became the prudent and reasonable man, or simply the reasonable man almost twenty years later in Blyth v. The Birmingham Waterworks Co²³⁵. Later, he became popular as "the man on the Clapham omnibus", typifying his ordinariness. In Hall v. Brooklands Auto

²³³) See G. Calabresi, *supra* note 191; W. Parker, The reasonable person: a gendered concept? (1993) 23 Victoria University of Wellington Law Review at 105

²³⁴) Vaughan v. Menlove (1837) 3 Bing (NC) 468, per Tindal CJ at p.475 (Court of Common Pleas)

²³⁵) (1856) 11 Ex 78

Racing Club²³⁶ the House of Lords described him as the "man who takes the magazines at home, and in the evening pushes the lawn mower in his shirt sleeves". Still it is difficult to pinpoint the attributes of the reasonable person accurately. The most consistent characteristic is an ability to fit squarely within existing societal norms.

Who, then, is the reasonable person? Given the inherent and intentional flexibility of the creature, can we generalize about its behavior? He was, as noted, born as a "man", and while modern cases use the gender neutral "person" appellation, he is still a man in the American Restatement of Torts. Thousands of reported cases give us an historical picture of the limits of socially acceptable behavior. At the end of his first century of life, the reasonable man was characterized amusingly by A.P. Herbert, who hailed him as "the embodiment of all those qualities which we demand of the good citizen":

He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound; who neither star-gazes nor is lost in meditation when approaching trapdoors or the margin of a dock;...who never mounts a moving omnibus and does not alight from any car while the train is in motion...and will inform himself of the history and habits of a dog before administering a caress;...who never drives his ball until those in front of him have definitively vacated the putting-green;...who never swears, gambles or loses his temper; who uses nothing except in moderation, and even while he flogs his child is meditating only on the golden mean.²³⁷

In his tort-treatise, *Prosser* calls him a creature "who never has existed on land or sea"; he stands as a "model of all our qualities, with only those human shortcomings and weaknesses which the community will tolerate on the occasion"²³⁸. Although his

²³⁶) (1933) 1 KB 205, 224 (H.L.); *per* Greer LJ., quoting an unnamed American author.

²³⁷) A.P. Herbert, Misleading Cases in the Common Law (London Methuen 1939) at 12-16

²³⁸) W. Keeton, D. Dobbs, R. Keeton and D. Owen, eds., Prosser and Keeton on Torts (1984), sec.132, at 174. See P. Hayden, *supra* note 202 at 47

normality is stressed, courts tend to require more. Once an accused faces a charge, she needs to explain all omissions to take care.

Commentators paint a picture of the perfect neighbor. They derive their criteria exclusively from what is considered good and useful in society. But useful and good by and for whom? There is a significant number of people whose notions about the issue are different. It would be too strong to say that they 'could' not act in accordance with the ideals mentioned above. But some of the time they do not - and thereby might fall below the threshold of criminality. For example, is it reasonable to drive the way Italians are stereotypically said to drive? They drive fast, squiggle between cars, and act as though they are perennially involved in a sporting event²³⁹. If it is accepted that stereotypes have some truth in them, do these people perennially behave against the law?

On the other hand, can it be ignored if a person has frequently been targeted by racial harassment? Consider the following situation: Mr. Law, a black man who had moved to a white neighborhood, had had his home vandalized with racist epithets sprayed on the walls. In response to a burglary report from a neighbor, the police seek to enter the Law house to investigate the burglary. Mr. Law, believing someone is breaking into his home, shoots through the backdoor and kills the policeman on the opposite side. Given that an ordinary white male person is prohibited from shooting through the door without having taken other precautions and checks, did Mr. Law act reasonably?²⁴⁰ He was neither harassed by the policeman nor was the misapprehended

²³⁹) For the sake of clarification, I borrow from G. Calabresi, *supra* note 191 Chapter II

²⁴⁰) The facts are similar to the California Case Law v. State, 21 Md.App.13, 318 A.2d 859 (1974). Mr. Law was convicted of second degree murder and assault, which was reversed on grounds other than reasonableness. This decision is fundamental to the social critique applied by D. Donovan and S. Wildman, *supra* note 232 at 438

burglary directly linked to harassment. The case reveals the whole problematic nature of the issue and we do feel compassion for Mr.Law, given his background and experience. Consensus weakens if it is considered that reasonableness is, in fact, a measurement of what is useful in society. Even if we understand Mr.Law, can we encourage others to adopt his reasoning? Can we give credit for that from a legal point of view, without being unjust to other people, and without giving up any descriptive approach to reasonableness? It is the task of the future reasonable person not only to show compassion in a multicultural society, but also to set positive standards, to influence society.

2.2. Women and the Culturally Different²⁴¹

Feminist legal theory criticized that although statute law has for a long time used the word "man" as a generic term meaning all people, the reasonable man was clearly of the male gender²⁴². Etymological observations have been taken as evidence that the law was in fact talking about the generic term when it said "man", imposing a male standard of what is reasonable on both men and women. In America, attitudes which stereotypically are female and are linked to accidents received no more protection than those which stereotypically were linked to Italians or Blacks. In addition, *Parker*

²⁴¹) The label "culturally different" itself constitutes discrimination since it assumes deviance. The mainstream standard is being labeled 'correct' and 'real'. There is nothing like the latter which matches the concept of multiculturalism. Multiculturalism knows many variations, but no deviation. However, I will stay with this frequently used term since the issue is opening traditional structures in order to make multiculturalism possible.

²⁴²) W. Parker, *supra* note 233 at 106, refers to s.6 United Kingdom Interpretation Act: "In any act, unless the contrary intention appears, (a) words importing the masculine gender include females; (b) words importing the feminine gender include the masculine."

critiqued that the "rationality"-requirement tends to exclude women's reasoning from the standard²⁴³.

It is an underlying assumption of the Supreme Court of Canada's ruling in R.v.Lavallee²⁴⁴ that Canadian criminal law's reasonable person matches what *Calabresi*, in 1985, had said about the standard: that all defendants are measured by the average man - and the average white, Anglo-Saxon, Protestant man at that²⁴⁵. The Supreme Court of Canada took a great effort to rescue "reasonableness" from what was perceived to be the "reasonable man" standard. Referring to *Lyn Lavallee*, Wilson J. made it clear that the definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man":²⁴⁶

"If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation".

Post Lavallee, in fact, reasonableness changed and reflected different notions of that term. The change will be exemplified by a case which was recently decided by the British Columbia Supreme Court. In R.v.Caplette, the accused had killed her husband after he had "manipulated and controlled" her, "ridiculing her figure and her

²⁴³) W. Parker, *supra* note 233 at 111. Is rationality, is logic a gendered concept? I doubt that. Generally, *Parker's* argumentation is difficult to understand. *Ibid.* at 109, she cites decisions dealing with male plaintiffs and male defendants in order to provide evidence for the standard to be 'male'. She does not discuss the issue of the standard's invariability - thus rendering her argument worthless - since nobody assumes that there has been a prevailing 'reasonable women' standard.

²⁴⁴) Wilson J. explained that the concept of reasonableness may be tilted toward an understanding of situations more likely to be experienced by males than females in our society. See I. Grant, D. Chunn and C. Boyle, *supra* note 12 at p.6-41.

²⁴⁵) G. Calabresi, *supra* note 191 at 22

²⁴⁶) R.v.Lavallee, *supra* note 5 at 346

cooking"²⁴⁷. She felt unable to extricate herself from the relationship, and in the course of a struggle she challenged and killed him. Caplette was originally charged with second degree murder. Taking her background of abuse in account, the court finally convicted her of manslaughter and suspended the sentence. Judge Oppal commented that

"It would be totally inappropriate if she were to be further victimized by a jail term",

thereby responding to "current thinking in the area of spousal abuse".²⁴⁸ It seems to be the case that political correctness, today, requires that. How important was Caplette's gender for the decision? Interestingly, unlike Lyn Lavallee, Caplette did not plead self defence. Since she was formally convicted, the Court did not, according to Creighton, stipulate that her conduct met a uniform standard of care, but it nevertheless reflects emerging cultural norms. It might still not be possible to argue that the domination of 'male' norms has been turned into the opposite, but Wilson's statement about the reasonable person's world certainly does not match Canadian legal reality any more.²⁴⁹

It appears so far that individual history may frame the basis upon which reasonableness is to be judged. But is the influence on the reasonableness-test limited to personal experience, or may experience collected by different members of a certain group in society be added? *Grant*, *Chunn*, and *Boyle* argue that Lavallee applies not only to women but equally to First Nations people, colored, and other minorities. In

²⁴⁷) R.v.Caplette Doc.No. CC931136, Vancouver Registry (B.C. Supreme Court) judgment on Feb 7, 1995. See also Vancouver Sun of Feb 8, 1995 at 1 col 1.

²⁴⁸) *ibid.* at 8 col.32-37. Oppal explained that "Society needs no protection from Miss Caplette", *ibid.* at 8 col.30.

²⁴⁹) Wilson J. in R.v.Lavallee, *supra* note 5 at 346. An intensive search in other areas for change in cultural norms would be beyond the scope of my thesis.

the case of a young black male, who genuinely fears that he is going to be shot by a police officer, at least s.15 of the Canadian Charter of Rights and Freedoms requires Canadian courts to apply Lavallee²⁵⁰. This may serve as an example, where certain group-knowledge, even in the absence of personal experience, could influence the test of reasonableness.

The question in any 'reasonable person' test is not whether the defendant responded as reasonably as he or she personally could be expected to do, but whether he or she responded as reasonably as could be expected of someone normal, average and ordinary. In order to prove reasonableness, everybody who does not match this very pattern, would thus have to prove that someone different from him- or herself had behaved the same way²⁵¹. In the actual situation the agent probably does not even have the chance or the possibility to tell what action would be reasonable in the decisionmaker's view. Such a legal deficiency applies to women, First Nations people, and other subjects with culturally different backgrounds. Arguably, such a concept of reasonableness imposes strict liability on the culturally different; at least there is an encouraging effect on society to adopt a more open notion of reasonableness, however difficult this might be. What might be appropriate in the context of a 'melting-pot' appears to be at odds to the idea of multiculturalism, which implies the need to label different cultural ideas as 'reasonable', too. It is necessary to understand feminine patterns of conduct, not simply as acceptably condoned, but as reasonable. To exclude any of those from reasonableness would mean denying their social desirability.

2.3. Rationality and Cultural Background

²⁵⁰) I. Grant, D. Chunn and C. Boyle, *supra* note 12 at 6-56

²⁵¹) H. Allen, One Law for All Reasonable Persons? (1988) 16 International Journal of the Sociology of Law 419-432 at 422

What are the real differences between the ominous white male and other people? Commentators sometimes talk about differences in reasoning²⁵², and sometimes they stress a uniform concept of reason, pointing out that the differences concern something other than that²⁵³. Is it helpful to separate 'reason' from 'apprehension of the situation'? Rationality and analytical logic do not vary with the person who applies it. If someone tried to apply that differently, one would just apply it wrongly. What really varies among humans is how external facts are interpreted, and what reaction patterns respond to that interpretation. The more that reaction is based upon unconscious patterns, as opposed to conscious rationality, the more differences in background are brought into play.

Psychological research has revealed that the culturally different react differently to the same situations²⁵⁴. It is a person's world view which not only composes his or her attitudes, values, opinions and concepts, but also affects how people think, make decisions, behave, and define events. World views are highly correlated with a person's cultural upbringing and life experiences. Interactional components of a world view are comprised of a person's economic and social class, religion, gender and race. This approach justifies the distinction between various groups in society, in contrast to single

252) C. Gilligan, In a Different Voice: Psychological Theory and Women's Development, (Harvard University Press 1982); W. Parker (1993), *supra* note 233 at 111

253) For example see I. Grant, D. Chunn and C. Boyle, *supra* at 6-43, stressing a concept of uniform reason built on different experiences.

254) See D. Wing Sue and David Sue, Counseling the Culturally Different (New York J. Wiley 1990) Dimensions of World Views (Chapter VII) at 137-153;

individuals - which is a highly controversial issue²⁵⁵. According to Sue²⁵⁶, reaction patterns of different groups vary in terms of 'control ideology' and 'personal control'. 'Control ideology' is a measure of general belief about the role of external forces in determining success and failure in the larger society. The notion that awareness, effort and ability are distinguishing frailties is represented in the Protestant ethic, but is not necessary. 'Personal control' reflects a person's belief about his or her own sense of personal efficacy or competence to influence the social and factual environment. Thus the impression whether certain facts constitute an assault might vary remarkably. Consider the case of a Latina woman who is raped in her home by a man she knows slightly. The man leaves and later phones from a bar to say he will come and repeat the act unless she remains silent. She loads her rifle and walks through town. When she encounters her assailant on a public street with a knife in his hand, she shoots and kills him²⁵⁷. The fact that she had been brought up as a Catholic and that her religious beliefs affected the reaction she had to being raped appeal to her world view. The degree of responsibility or blame placed on the individual or system varies with the world-view, too. Deterrence with individual blame might be of less impact, and even the overall-validity of *Hart's* concept of individual blame based on moral theory must be regarded as being questionable.

2.4. Rationality and Religion

²⁵⁵) It is argued that "individual centered" Anglo American culture emphasizes the uniqueness, independence, and self-reliance of each individual [therein being not different from the German], in contrast to 'minorities' - as to which Sue observed Blacks, Hispanic and Chinese. See D. Wing Sue and David Sue, *supra* note 254 at 141

²⁵⁶) D. Wing Sue and David Sue, *supra* note 254 at 142-144

²⁵⁷) Example referred to by D. Donovan and S. M. Wildman, *supra* note 232 at 437. The example reminds of the facts to R.v.Lavallee. See also People vs. Inez Garcia, Crim No. 4259 (Super. Ct. Monterey., Cal.1977).

Religion is an issue reaching beyond cultural heritage, since it does not refrain from substituting for rationality and logic. Is the reasonable person religious or rational? The problem becomes delicate if causal chains discovered by rational scholarship are simply denied by religious (or cultural) beliefs. For Canadian Criminal law, Tutton²⁵⁸ seems to tailor a standard which is hostile towards contradictory religious idiosyncrasies. Does Tutton exclude a certain belief because it appears odd to the prevailing ones, or does it render religious influence irrelevant ?

An exploration of the issue with respect to the United States' law of torts²⁵⁹ might enlighten us. Generally, courts strongly confirmed that the reasonably prudent person can act upon religious beliefs²⁶⁰. However, critics assumed that "odd" religious beliefs are excluded from reasonableness, which are to be found in beliefs of "extremist" as well as "new immigrant" groups. Cultural background in accordance with so-called 'WASP' criteria²⁶¹ but would match what is a common sense of rationality, or at least constitute line-dropped 'reasonable' exceptions²⁶². But can society really afford reversing Tutton without making the law lose all regulatory effect?

Assume a fictive religion that teaches that it is a religious obligation to kill everybody who insults it by making anti-religious statements. Clearly, Canadian Criminal law must punish the religious obedient as a murderer. The simple fact that a belief is religious cannot render it reasonable. As soon as other people's rights are

²⁵⁸) R.v.Tutton, *supra* note 48. See, for the U.S., Kennedy Memorial, Hospital v. Heston, 58 NJ.. 576, 279 A. 2d 670 (1971).

²⁵⁹) G. Calabresi, *supra* note 191 Chapter III

²⁶⁰) See, for example, Troppi v. Scarf (1971) 187 NW (2d) 511, Friedman v. New York (1967) 282 N.Y.S. (2d) 862

²⁶¹) G. Calabresi, *supra* note 191, uses the letters 'WASP' for the White Anglo-Saxon Protestant.

²⁶²) *Ibid.* at 57

infringed, the Charter freedom, laid down in s.2 (b), is restricted. However, intentional conduct violating expressly stated provisions of the code is treated differently from accidental, in which the accused is careless or negligent. Here, the agent does not really have a chance to reconsider her conduct for the reason that it is against the criminal code. The Charter requires that there is no establishment of certain religions or cultures. Section 2 of the Charter is a significant factor for the decisionmaker to consider in deciding what is reasonable and what is not. Tort law must decide between the positions of the plaintiff and the defendant. It is a rule in tort law that where one of two admittedly innocent persons must suffer a loss it should be borne by the one who caused it²⁶³. Because of that rule's strictness, victims who caused or increased the harm themselves while abiding to idiosyncratic religious rules would always be compensated. The Charter wants to grant all various religions as much acceptance as the established, but not enough to require identifiable innocent victims to pay the price. Arguably, the establishment of some beliefs over others is an unhappy but necessary compromise²⁶⁴ in order to limit damage and responsibility.

But the argument does not really legitimate the use of criminal law. Unlike tort-law, criminal law is not torn between the pull of a no-establishment clause and the desire to compensate all victims of idiosyncratic behavior. Compensation is not a goal of the criminal law at all. There was no monetary damage caused by the accuseds' unreasonable behavior in Tutton. But their belief was at odds with society's (rational, since proven reliable) trust in medical scholarship. It is not acceptable that, because some are exempted on the basis of conscience, others must serve and perhaps die. The person who must serve should not be exposed to suffering because of someone else's belief, this aspect of social protection was surely the rationale in Tutton. Could this be

²⁶³) See P. T. Hayden, *supra* note 202 at 48

²⁶⁴) In the words of G. Calabresi, *supra* note 191 at 66

different with any other religious belief? In Creighton, McLachlin J. did not found the need for her uniform standard on the need for victim's compensation but on the "public's conscience"²⁶⁵. However, to refer to the conscience is also critical in this context, since there is no such thing as a uniform conscience in a multicultural society.

III. How Can the Concept of Reasonableness be Opened?

3.1. The Judge and Jury Issue: Direct Community Influence

Given that many world views in contemporary society are not represented in the concept of the reasonable person, any effort to reform must try to open the concept and make it more suitable for these world views. One way to open the concept could be to leave the determination of the relevant cultural norms to a panel of ordinary people, the jury. The division of labor between judge and jury is an important issue to explore in assessing the function of the reasonable person standard, as well as its general desirability. I will briefly set out the technical frame of this process²⁶⁶. According to well established common law precedent, the judge determines whether any duty exists as a question of law. If the accused did not owe any duty she must be acquitted. If a duty is owed the judge determines further the scope, that is, she sets out the standard of care and describes the appropriate test. Once duty and scope of duty questions are resolved by the court, the finder of fact's job begins. In a jury trial, the judge instructs the jury as to the applicable standard of care and tells them to apply it to decide whether the accused has breached his or her duty. The reasonable person standard itself remains unchanged whether a judge or a jury applies it to the particular accused in a particular case.

²⁶⁵) R.v.Creighton, *supra* note 5 at 207

²⁶⁶) As explained by P. T. Hayden, *supra* note 202 at 48

Each finder of fact is asked to bring his or her experience to bear, his or her own views of what is reasonable in society for a person in a similar situation to do. Reasonableness is always supposed to be the community standard of behavior, but the question is whether it is being tailored by a member of the legal elite as opposed to a group of lay persons on a jury voting as a sort of committee. *Holmes'* vision that ultimately judges will be able to set rules of conduct that clearly reflect the community's judgment of reasonable behavior²⁶⁷ is heavily disputed today: the jury, by definition, provides the "voice of the community", they present the "collective cultural view"²⁶⁸. *Hayden* argues that a flexible legal standard applied by juries allows for more individualized and just results in individual cases than would more rigid rules of conduct. Allowing juries to apply the open-ended standard is apt to increase the opportunities for transforming the normative content of these concepts in accordance with the changing social values of the group from which juries are drawn²⁶⁹.

It is beyond the scope of this paper to deal exhaustively with the pros and cons of a jury trial²⁷⁰. I will raise two issues briefly, which are the selection process and the desirability of (purely) community judgments. The manner of selecting and impaneling juries has an obvious and direct affect on the kind of normative rules that shape the empty vessel of the reasonable person standard. Since members of one community can

²⁶⁷) Baltimore & Ohio Railroad Co. v. Goodman, 275 US 66 (1927) per Holmes CJ for the majority.

²⁶⁸) P.T. Hayden, *supra* note 202 at 51. *Ibid.* at 53

²⁶⁹) J.G. Fleming, The American Tort - Process (1988) at 116-17

²⁷⁰) Judge J. Frank quoted Balzac's definition of a jury as "twelve men chosen to decide who has the better lawyer". "To my mind", he wrote, "a better instrument than the usual jury trial could scarcely be imagined for achieving uncertainty, capriciousness, lack of uniformity, disregard of the [rules], and unpredictability of decisions". J. Frank, Courts on Trial : Myth and Reality in American Justice (Princeton University Press 1949) at 109

live without knowledge or understanding of the daily lives of members of another community, it becomes the law's problem to select jurors from the correct community. It is argued that the selection process of the decisionmakers must be broadened to include more members from underrepresented groups²⁷¹. Arguably, the problem is being shifted on just another level - the appropriate, reasonable juror has still to be found. Since R.v.Parks, Canadian law allows a juror's challenge for cause (according to s.638 CCC) where there is a realistic possibility that one or more jurors will discriminate against the accused because of his or her color²⁷². The challenge is permitted to determine whether a prospective juror would not be impartial, because of racial prejudice. But what is a 'realistic possibility'? Courts are not assisted further in filling out this term.

Secondly, there is doubt that lay persons really have a chance to infuse their concept of 'reason', which would be built entirely upon their world view, into the standard. Given the huge amount of technical terms and sophisticated legal rules, jurors might be bogged down by unimportant details or the parties' general appearance at trial. The present OJ Simpson murder trial in Los Angeles might serve to exemplify that the lay person cannot become a competent decisionmaker.

3.2. Three Ways for Opening in Contrast

The many ideas to open the law in general and the concept of reasonableness in particular for all groups in society can be categorized in three main approaches. First,

²⁷¹) See as to this issue I. Grant, D. Chunn and C. Boyle, *supra* note 12 at 6-45. Public Inquiry into the Administration of Justice and Aboriginal People, Vol.1 p.379: "[S]tudies clearly show that Aboriginal people are not properly represented on juries, even on juries trying an Aboriginal person accused of committing an offence against another Aboriginal in an Aboriginal community."

²⁷²) R.v.Parks *supra* note 101 at 81

the decisionmaker's world view could be adjusted to the accused's. This approach means that each accused gets a judge who bears the same values and, therefore, approaches the case with an elevated degree of insight. This judge will not only see the facts, she will understand them. The public must perceive its judges as fair, impartial and representative of the diversity of those who are being judged. This concept is built on the demand for judges of both sexes, all colors, and all backgrounds²⁷³. In practice, this concept creates many problems. How is the appropriate group determined? Who should be the judge for a woman with a white father, her mothers parents being East Indian and First Nation²⁷⁴? Should the accused have the right to elect the juror? Such a system might provide for a 'just average' but might fail if, in the individual case, the wrong bias is applied. Offsetting male bias with female bias, it has been argued, would only be compounding the injustice²⁷⁵.

In contrast, *Hilary Allen* offers a cumulative approach, holding up the notion of formal equality. The accused may plead that his or her behavior would have been reasonable "in *either* sex"²⁷⁶. Any response to a given situation that would not be considered reasonable in both would be excluded. Jury members should be instructed that in deciding whether the defendant acted as a reasonable person, they must have in mind

"[T]he whole range of reasonable human responses, even any that would normally be considered reasonable only in one or the other, and then ask

²⁷³) Gladys Kessler, cited in B. Wilson, Will Women Judges Really Make a Difference? (1990) 28 Osgoode Hall Law Journal 507-522 at 518

²⁷⁴) The difficulty increases if one want to determine what exactly 'white', 'East Indian' is, etc.

²⁷⁵) Karen Selick, Adding More Women Won't End the Bias in Justice System (1990), 9:35 Lawyer's Weekly, 7 at 7, cited in B. Wilson, *supra* note 273 at 516

²⁷⁶) H. Allen, *supra* note 251 at 430

themselves whether the behavior of the defendant (regardless of gender) fell anywhere within the range."

She claims that her test could serve to introduce a "truly neutral" person into the law, by way of "*fiat*". In her view, the criminal law would thus allow for the introduction of a gender-appropriate reaction. She does not define the scope of the term 'situation' in the way she uses it. Would a male of Lyn Lavalée's size and strength be allowed to refer to the battered women syndrome? Arguably, any male could refer to a woman's heightened fear after facing physical threats. The most problematic point in Allen's approach but is her exclusive consideration of gender issues. Her standard is prone to collapse if, in a multicultural society, all possible differences between people have to be included. It would not only allow everybody his or her own notion of reasonableness, but equally everybody else's notion as well. *Allen's* complaint that legal discourse has so far found itself unable to sustain a neutral construct²⁷⁷ appears to be shortsighted. Legal discourse is never 'neutral' because it is concerned with normative evaluations. It must be possible, for the decisionmaker, to somehow define the person of his or her standard. If the hypothetical is oriented neither at the accused's nor at the decisionmaker's frailties but at a third person's, there is a need for guidelines to assist the finder of fact. The law is not a product of judicial neutrality, thus it appears that what *Allen* offers is not an alternative standard but a retreat by the law.

Bertha Wilson offers a third approach. Women judges will have an impact on the process of judicial decision making and on the development of substantive law. She argues that judges should have a special "ability to listen". *Wilson* wants the judge to step into the skin of the accused making the defendant's experiences part of [the judge's] experience²⁷⁸. It is this understanding of the accused that provides the means

²⁷⁷) *Ibid.* at 424

²⁷⁸) B. Wilson, *supra* note 273 at 519-521

to judge fully human and that may be introduced by women. The first difference, it appears, is the methodology of improvement, it is not balance by numbers but better quality. Women alone have the 'special ability to listen'. Thus it might improve the system of justice most if all male judges were replaced! What is important is the shift from reliance on underlying, probably unconscious values of the judge to imagination and sympathy to "the client's story"²⁷⁹. *Wilson* contrasts her view to the notion of a judge's impartiality. She quotes Socrates: "Four things belong to a judge: to hear courteously, to answer wisely, to consider soberly, and to decide impartially". If not neutrality towards the accused, what is it then that qualifies a judge? *Wilson* seems to require an extra effort. To 'listen' is more than to 'hear'. It means to broaden the context of the dispute, to show the issue in a larger perspective or as impacting on other groups not directly involved in the case. A true understanding of the accused and his or her case marks the ground a 'truly human' judgment should be based on.

Juergen Habermas explains that 'understanding' means accepting the prerequisites of the discourse [the accused] offers²⁸⁰ and not, forcing [the accused] to think, and explain, in the world view of [the decisionmaker]. Habermas' theory stipulates that understanding means accepting the speaker's views and values which are not explicitly announced. He infers that only then can the speaker's actual statement make sense to the recipient. Transferred to the test of reasonableness, it requires the decisionmaker to accept the prerequisites of the accused's thinking first - that means at

²⁷⁹) Patricia Cain, Good and Bad Bias: A Comment on Feminist Theory and Judging, (1988) 61 South California Law Review, 1945, at p.1954. Similarly, H. Allen, *supra* note 251 at 427, doubts that male judges are able, at all, to understand the way women reach conclusions, given a certain situation of facts. However, the existence of such a phenomenon could be based on a lack of ability to explain rationales behind the reasoning.

²⁸⁰) J. Habermas, Theorie des Kommunikativen Handelns (Stuttgart Reclam 1980). See J. Habermas, The Theory of Communicative Action translated by T. McCarthy (Boston Beacon Press 1984)

least to know them- and then base the judgment about reasonableness on them. This may require the decisionmaker to attach the verdict 'reasonable' even if she thinks that the prerequisites mirror a totally wrong view of the world.

As to such prerequisites, I doubt that it is still possible to distinguish between individual experience and other influences. In a world full of multiple sources of information, the idea that a person's reasoning is based on his or her singular experience appears strange. But the decisive criterion is influence on the very individual, not abstract group-experience. This means, as I read *Wilson*, that a black youth may utilize all his information as to how police officers are expected to (usually!) treat blacks.²⁸¹ It means that reasonable fear of rape is very well possible even in the absence of personal experience, but, for instance, reference to the battered-woman-syndrome is not, because a 'battered woman' is defined as one who stays in the relationship after being beaten twice.²⁸² This definition is distinguishable from 'ordinary women' and points out the need for the juror to rely upon expert evidence.

IV. Standards Between the Tasks of Regulating and Accepting

4.1. The Need for a Uniform Standard

Does the prevalence of certain cultural norms in society exclude the application of a standard *different* to them? Damage does not occur just within a certain community. Is it really desirable that the "way Italians stereotypically drive", in *Calabresi's* words, determines the standard? There is increasing recognition of the difficulties inherent in the use of an "ordinary person" test for the law in a multicultural society. Canadian law

²⁸¹) I borrowed the example from I. Grant, D. Chunn and C. Boyle, *supra* note 12 at 6-56.

²⁸²) *R.v.Lavallee*, *supra* note 5 at 350, Referring to L. Walker, *The Battered Woman Syndrome* (1984), at 95-96

has to confront the issue within an environment of aboriginal cultures, and a large number of English speaking people, along with people from a great variety of other cultural backgrounds. Discussing provocation in Hill, the Supreme Court found it impossible to conceptualize a sexless or ageless ordinary person: "Features such as sex, age, or race do not subtract from a person's characterization as ordinary"²⁸³. Equality between sexes is protected in s.15 of the Canadian Charter of Rights and Freedoms; cultural variety is protected in s.27. But does this mean that jurors are required, in cases of conflict, to suspend commitments to fundamental liberal values such as racial and religious tolerance, and endorse moral agnosticism or cultural relativism?

Colin Howard argues that different levels of self control can be expected from people living in separate communities while the same standard should be required from people who voluntarily join another community. It could be either the group who originally founded and constituted the community who determines the standard, or it could be the group who outnumbers all other groups within the community²⁸⁴. There would still be people in such a community who have to live up to a different standard. The shift from a state's level to a community's level diminishes the general problem only if it is a culturally homogenous community. *Howard's* conclusion, however, is convincing: there must be a single, certain standard, based upon certain values and customs.

But, apart from cases concerning conflicting norms, does s.27 of the Charter guarantee each culture that their own notion of reasonableness is inferred as a basis for

²⁸³) R.v.Hill (1985) 51 C.R. (3d) 97 (S.C.C.). The "ordinary person" test was treated in Hill the same way as the (objective) "reasonable person"-test.

²⁸⁴) C. Howard, What Colour is the Reasonable Man?, (1961) Criminal Law Review, 41. Howard seems to suggest implementing the second model, since he refers to numbers of Aboriginal and White people in Australia. Otherwise, he consequently had to recommend applying Aboriginal law all over Australia.

determination of criminal liability? A problematic case can be found in the Australian decision R.v.Dincer²⁸⁵. The accused was described as a traditional Muslim, Turkish by birth, who stabbed his teenage daughter to death because of her sexual relations with her boyfriend. He pleaded provocation in a murder charge. Both offender and victim shared the same (Muslim) religion. The judge instructed the jury that they should apply the test of the 'ordinary conservative' Turkish Muslim, though without any expert evidence to assist them in this task. However, such a test would reduce the protection offered to daughters of Muslim faith if they also have got parents of Muslim faith. Thus, the law would disadvantage them because of their religion. Certain attitudes must be seen as outside the realm of the 'ordinary' person although they are common within a certain culture.

Jurors might, or should, be required to assume that the ordinary person shares the values of the Charter permitting racial oppression to be taken into account, but not racism. Since a large body of constitutional jurisprudence is developing, this is not just a shift of meaning and values to a 'higher level'²⁸⁶, but can be seen as an effort to lay down binding cultural norms explicitly. The question, however, is what this standard should look like and it must be open for transcultural discussion. It must be possible for each culture to take part in constituting the law, but not that each culture gets their own law. It appears, that this is a legislative task, and not a matter of jurisdiction. Reliance on the decisionmaker's morality is not enough, and reliance on his or her ability to listen is dangerous.

4.2. Dependence of the Uniformity Requirement on the Standard's Regulating Effect

²⁸⁵) (1983), 1 V.R. 460 (S.C.)

²⁸⁶) I. Grant, D. Chunn and C. Boyle, *supra* note 12 at 6-16

As a last aspect of this discussion, the focus will be on the regulating effect of a certain standard. Two features of the standard must be dealt with, one being what is society's appropriate standard, and the other is the way in which it is enforced. In this sense, 'enforcement' embraces politicization as a public discussion of certain norms²⁸⁷. With respect to manslaughter, enforcement of a standard applies to the potential accused's decision making process, to his or her 'mind'. Given that an enforced standard will be attained, the setting of the standard does have some regulating effect. This is what McLachlin J. seems to demand in Creighton. Since the offence of 'manslaughter' is designed to protect life [as opposed to other cultural values], one is just not permitted to engage in conduct which imposes increased risk on others. This is why she talks about 'uniformity'. Rendering whatever conduct reasonable would explicitly allow such behavior, not just 'accept' it, with all its consequences. The only feasible standard in a multicultural society seems to be one of greatest consideration for others, no matter what the agent's cultural background dictates or allows. It does not need scientific research to find out about that. I do not argue that a 'WASP' - standard should be maintained. But the "obligation to consideration" requires, as far as possible, a descriptive foundation and restriction of liability²⁸⁸. Anything else means either to totally lose social control totally by imposing no standard, or allowing the decisionmaker to dictate social standards, using "objective" reasonableness as a "convenient screen for the imposition of their own standards"²⁸⁹. *P.T. Hayden's*

²⁸⁷) As it is happening for example with respect to the phenomenon of 'date rape' at the moment. The public discussion clearly influences the 'cultural' norms of society. Surprisingly, this aspect is denied by B. Wilson, *supra* note 273 at 507. She argued that the law seldom initiates changes in society.

²⁸⁸) McLachlin J. seems to destroy much of her effort again when restricting liability to a "marked departure", which, as a normative criterion, opens the door again for culturally different approaches.

²⁸⁹) W. Parker, *supra* note 233 at 108

approach to rely on open laws applied by a 'community - jury' is exactly the wrong way to go.

However, in different situations the law plays a much less active part, and criminal law does not really influence future behavior. This shall be explained using the paradigm of self - defence. Here, in *Wilson's* words, the law can only respond to changes in society, rather than by initiating them²⁹⁰. By permitting the defence of self defence, the law respects a very personal situation of constraint, since a reaction out of fear might hardly be controllable. The state withdraws its monopoly of power and the law retreats on purpose; the reason for implementing the rule is acknowledgment, not restriction. Here, the democratic idea of majorities may seriously harm people who think differently. I would even go further and abolish the ignorance of law rule for erroneous interpretations of correctly apprehended facts in self defence. Consider the woman introduced above who had been raped before. If she interprets her running into the aggressor on the street as an assault, she knew about all the 'facts' of the incident. Arguably she merely thought that she would be allowed to react the way she did, which is a mistake of law. Criminal law would be unjust to exclude from legal validity certain interpretations, however founded in culture and custom.

²⁹⁰) B. Wilson, *supra* note 273 at 507

CHAPTER FIVE: COMPARATIVE STUDY. GEORGE FLETCHER AND THE GERMAN CRIMINAL LEGAL SYSTEM

I. Introduction

The quest of Western legal theory for the last hundred years or so has been the cultivation of a general part of the criminal law...The general part has as its object the study of issues that cut across all offenses and merit analysis in isolation from their specific applications. - George Fletcher²⁹¹

Why did legal theory undertake this effort? What is the advantage of a general part in particular, and a criminal legal system in general? A criminal legal system is not intended to constitute a logically clear system of norms, without contradictions and gaps, allowing for creation of all subordinate rules and decisions by way of deductive conclusion. Legal decisionmaking is different from the exact scientific process of formal logic or natural science²⁹². But a cohesive system can achieve a transparent composition of single values and norms which, arguably, guarantee a higher degree of reliability, predictability, and uniformity on the part of a judicial decision. It is the goal of this chapter to discuss these advantages in the context of Canadian criminal law.

A system should make sure that occurrences of equal gravity and significance for society are assessed similarly by the law. Insofar, the system might substantively influence legal decisions. In *D.Husak's* words,

"Attention to theory can shed light on recurrent substantive problems and thus help stimulate principled criminal law reform."²⁹³

²⁹¹) G. Fletcher, Rethinking Criminal Law, *supra* note 6 at 393

²⁹²) See for this purpose Wolfgang Schild, Vom Wert und Nutzen eines systematischen Rechtsdenkens (Berlin DeGruyter 1990) at 181 ('About Value and Benefit of Systemic Thinking in the Law').

²⁹³) D.Husak, *supra* note 25 at 7

In Canada, the reformation of the criminal law's general part has been a big issue in recent years. There was the Law Reform Commission's proposal to re-define the law's structure by enactment, which was, however, rejected by parliament in 1994. Recent developments in the Supreme Court's rulings about tests of negligence reflect an effort to systemize, and authors define legal principles descriptively moulding them into general norms²⁹⁴.

Interestingly, the Western criminal law systems mentioned above, which were developed after the French Revolution (meaning, basically, that they became free from religious constraints), show many similar features. In this chapter, my analysis will be based on the argument that the composition of a general part is dependent upon positive national law in a limited way only. In *Fletcher's* words,

"[T]he history and "nature" of the criminal law are both relevant, though neither can provide an adequate foundation for the normative aspirations of the general part."²⁹⁵

He continues that, in the absence of any 'general political or moral theory', the importance of comparative analysis increases²⁹⁶. System comparison is more than just the presentation of two different painter's pictures with the same goals. Structure of human conduct is existent prior to the system. It is the task of the system to reflect such structure, and not just to create some rules and criteria arbitrarily. Arguably, as a

²⁹⁴) McLachlin J. expressly favoured the pure objective standard for the sake of uniformity. See *R.v.Creighton*, *supra* note 5 at 218. See, for Canadian Commentators, E. Colvin, *Principles* *supra* note 154; Coval, C., J. Smith and P. Burns, *supra* note 2; D. Stuart, *Treatise* *supra* note 11; A. Stalker, *The Fault Element in Recodifying Criminal Law: A Critique* (1989) 14 *Queen's Law Journal* 119 at 127; A. Stalker, *Problem of Negligence* *supra* note 35 at 274 .

²⁹⁵) Fletcher *Rethinking Criminal Law*, *supra* note 6 at 395

²⁹⁶) *Ibid.*

consequence of development and discovery, these criminal law systems are bound to move in the same direction.

But system thinking frequently faces massive critique, too; it is said that the 'really just' decision might be precluded by adherence to abstract norms. A system is never able to decide all cases beyond any doubt by plain application of rules. There are always hard cases in which the decisionmaker might find arguments for application of either the one or the other rule. *Lucinda Vandervort* reveals such a borderline at the mistake of fact and mistake of law distinction²⁹⁷. Since the distinction does not provide clear results in some cases, she argues that the distinction should be abandoned, and that all mistakes should generally be allowed if the decisionmaker finds them to be 'reasonable'. Her purely normative criterion would allow the single decisionmaker's values unrestrictedly to assess the mistake's significance. In Chapter II, I talked about descriptive and normative criteria, when observing the Supreme Court of Canada's test of negligence moving towards more descriptive ones. There is nothing wrong with *Vandervort's* criterion being normative, but she refrains from adding any transparent, clarifying element²⁹⁸. It is hard to see how the law would gain anything in terms of 'justice', and it surely would lose in terms of 'predictability'.

The task of the criminal justice system is to identify situative patterns which repeat themselves if different offences are committed. As a technical matter, this is done by organizing the criminal law into a General and a Specific Part. The General Part covers all matters of general import containing rules of general application on

²⁹⁷) L. Vandervort, Mistake of Law and Sexual Assault. Consent and Mens Rea (1987) 2 Canadian Journal of Women and the Law 233-309 at 255-9

²⁹⁸) Continuing her reasoning, one could suggest replacing all criminal law by the single rule "whoever behaves wrongly will be punished accordingly".

definitions, liability, defences, criminal involvement and jurisdiction²⁹⁹. Referring to self-defence, *Fletcher* explains that if self-defence is an issue in assault as well as in homicide cases, then the contours of self defence should be worked out in a general fashion, rather than assayed once in the context of one crime and again in the context of another³⁰⁰. But organization is a matter of technique. It does not compel the presuppositions of unreasonable behavior to follow all the same criteria since there are substantive differences between manslaughter and self-defence which require different treatment. I argued in Chapter II that there is good reason for using a different test in either situation. However, I will approach the issue again from a comparative point of view.

With reference to the General Part's organizational task, what is in question here is not only the determination of reasonableness but also the consequences which flow from unreasonableness. The fact that conduct does show 'unreasonableness' as a common feature indicates that similar treatment might be appropriate. What was 'wrong' with the accused's conduct was her inattentive behavior, and it would be the task of the General Part's rules of general application to make sure that the accused is punished for neither more nor less than this 'wrong'.

One way criminal legal systems have been observed to generally organize the attachment of responsibility and punishment to the accused is to separate the two main aspects of 'wrongdoing' and 'attribution'. The American author *George Fletcher*³⁰¹

²⁹⁹) See Law Reform Commission of Canada, Report 31 Recodifying Criminal Law, (Ottawa 1987) at 9. See also Report 33, Recodifying Criminal Procedure Vol.I (Ottawa 1991). In the context of German criminal law reform, see H.H. Jescheck, *supra* note 9 at 15.

³⁰⁰) G. Fletcher, Rethinking Criminal Law, *supra* note 6 at 393, presenting further examples.

³⁰¹) *Ibid.*

explains that wrongdoing covers the definition of the offence, thereby including subjective mental elements if they are specifically required, and the lack of justification. Attribution covers aspects of responsibility but should be understood more broadly than what is covered, at the moment, by such narrowly defined defences like insanity, infancy, involuntary intoxication and so on. As a follower of his, *Anne Stalker* claims that *Fletcher's* distinctions reflect more accurately those distinctions that people actually draw than do traditional concepts of *actus reus*, mental (or fault) element, and various defences³⁰². German law separates 'wrongdoing' (*Unrechtstatbestand*) from 'attribution' (*Schuld*), too. 'Wrongdoing' represents the degree to which society disapproves of certain conduct. Measurement is the maximum amount of punishment which can be applied, and the more punishment that is possible, the worse the wrong is deemed to be³⁰³. Wrongdoing explains *what* the accused is reproached for, and *what* she should have done differently or better. Attribution then explains *why* she is blamed for her conduct.

Turning the focus on manslaughter and self defence again, I will use the concepts of wrongdoing and attribution in my investigation whether different assessment of the consequences of unreasonable behavior can be justified. I will argue that the structural similarity of an accused's wrongdoing in both cases suggests punishing unreasonable self-defence in homicide as negligence, but not, for example, as murder. My comparative effort will lead to another suggestion concerning the relevance of a general rule: an overall and strict application of the principle of causality

302) A. Stalker, *Problem of Negligence* *supra* note 35 at 288. She does not explain her statement further. It might be doubted that lay people separate wrongdoing from attribution. A system, however, need not reflect the lay person's apprehension. It should analyze why even lay people reach certain conclusions.

303) As opposed to the actual amount of punishment which, as a result of the sentencing process, considers all personal factors.

could assist in the search for criteria restricting the broad scope of liability which is left by an objective test of reasonableness. My analysis will explore criminal law's reasonable person in both George Fletcher's writing and the German legal system, thereby focusing, again, on the law of negligence and the law of self-defence. I will present many features of positive German law (as well as of Fletcher's system) which do not flow directly from conventional system theory, and which may mark a different approach without consequences for a general theory.

II. George Fletcher's System³⁰⁴

2.1. The Concept of Wrongdoing

Wrongdoing is defined as the unjustified commission of an offence. It includes all those factual elements that indicate that an act contrary to law has been performed. Thus, if certain conduct in certain circumstances leading to a certain consequence is required for an offence, the determination that all of these elements in fact exist is part of the determination that there has been wrongdoing. In addition, if a specific mental element is required by the offence, this is an aspect of wrongdoing, too. The state of the agent's mind is a factual feature. If an intent to kill or to commit an indictable offence is required by the definition of the offence, proof of that intent is part of the proof of wrongdoing. If an intent to kill was part of the definition of murder, there would be no murder at all if the agent did not intend to kill. Therefore, it would be against the theory to state that the particular accused is not guilty of the murder, because there was simply no murder to be attributed to this or any other person. The same can be said for knowledge. If knowledge that the victim is a police officer is required for the offence of assaulting a police officer, there has been no wrongdoing of assaulting a police

³⁰⁴) G. Fletcher, Rethinking Criminal Law *supra* note 6 Chapter VI, The Quest for A General Part at 393-514, especially Subchapter 6.6 The Concepts of 'Wrongdoing' and 'Attribution' at 454-491.

officer if the assaulter was unaware of the true nature of the person she was assaulting. True, a police officer has been assaulted, but there has been no offence³⁰⁵.

The wrongdoing of an offence covers not only the inculpatory aspect of the 'definition' but also the exculpatory aspects of justification. Justification comprises those situations in which the definition of the offence has, in fact, been met, but there are still conditions which would lead the law to say that there has been no wrongdoing. This is, in essence, a license to perform the conduct in question. The most obvious example is simple self-defence. If a person kills in actual self-defence, a court might well find that all of the definitional requirements for murder have been met and yet that no murder has been committed. This is not the same as saying that a murder occurred but the accused is not guilty of it. When a person kills in self-defence, there is no murder because the killing was justified³⁰⁶. This is the same reason why an execution by the state after a lawful trial is, *per se*, not murder. A different term must be used which does not carry the moral stigma of murder.

Substantively, 'wrongdoing' and 'justification' are the reverse sides of the same coin. Given the totality with which justification reverses wrongdoing, it is surprising that, in *Fletcher's* system, the distinction between 'no wrongdoing' and 'justified wrongdoing' makes a difference for the required mental element. If an element of the definition is absent, there has been no wrongdoing even if the accused thought that the

³⁰⁵) This aspect is clearly pointed out by A. Stalker, Problem of Negligence *supra* note 35 at 288. See G. Fletcher, Rethinking Criminal Law *supra* note 6 at 695:

"As we learned in studying the personal and social theories of wrongdoing, there are good reasons for regarding the actor's intent as an element bearing on wrongdoing, and specifically the definition of the offence."

³⁰⁶) A. Stalker, Problem of Negligence *supra* note 35 at 289. This statement is apparently true but Stalker does not really make it clear why it is useful to call a justified killing 'not an offence at all'. As will be discussed later, there are significant consequences, for example, if a second person takes part by abetting: if there has not been any offence, there is no way of even talking about 'abetting'.

element was present. Thus an accused cannot be convicted of murdering someone who was already dead at the time of the shooting, even if the accused thought the victim was alive and also had an express purpose of killing her³⁰⁷. If, on the other hand, the accused killed the victim because he hated her and it later turned out that, unknown to the accused, she was pointing a gun at him, the accused has no valid claim of self defence even though, objectively, the facts might support self defence. For a claim of justification to work, the accused has at least to be aware of the relevant facts, and to respond to them³⁰⁸. Fletcher explains the difference between the application of wrongdoing and the application of justification in two ways. First, he submits that there is an intuitive recognition of the difference. Second, he draws a distinction between 'norms' and 'privileges'. He suggests that for society to find a violation of a norm, the norm must actually have been violated and that there is therefore no wrongdoing if the definitional criteria of the norm have not been met. However, a privilege (or justification) is a license not to meet the norm and can only be acknowledged if the actor has 'exercised' the privilege, has merited being treated as an exception, in other words, if the actor knew of the facts which justified his conduct. Fletcher's approach makes it necessary to explain that risk-taking below the threshold of criminality, therefore being reasonable, does not match the definition of the offence and is not a matter of justification³⁰⁹. The rule is the same in German law: if the accused did not know about the justificatory element, she will be convicted for the whole offence ('*Fehlen des subjectiven Rechtfertigungselements*'). But many commentators doubt that

307) Fletcher does not say whether he, thus, would bar punishment generally. The law of attempts opens a way to punish even if there is no (complete) wrongdoing.

308) G. Fletcher, Rethinking Criminal Law *supra* note 6 at 555-566. It will be examined *infra* in what way a mistake can substitute those facts.

309) *Ibid.* at 485-86. See also A. Stalker, Problem of Negligence *supra* note 35 at 295. She explains that "The excessiveness of risk is part of the definition."

this result of the distinction is really appropriate and want to convict for just an attempt - equally as, in the first sample case mentioned above, the accused who shot the dead person will be convicted of attempted murder only³¹⁰.

2.2. The Concept of Attribution

Wrongdoing, then, is a primary and indispensable component of any offence. There must be a finding of wrongdoing before any attempt can be made to attribute the wrongdoing to the particular accused. However, the second aspect of the test is equally important. Attribution embodies the question of whether, even if there has been a wrongdoing, this accused should be held accountable for it. The concept of attribution is personal to the accused; normally, it will not affect society's evaluation of the wrongdoing. When an insane person kills someone, society will excuse her not because they look at the outcome as less wrong than any committed by a sane person, but rather because under the circumstances it is not considered appropriate to blame the accused. The conduct itself remains 'wrong'. The difference between justification and excuse is that, in the latter case, society does not appreciate the accused's conduct. Self defence, as a justification, is, to the contrary, an appropriate and particularly desirable reaction to an unlawful assault. Therefore, it can be concluded that justified conduct is not 'wrong'. Fletcher criticizes the current law whereby excuses are linked solely to such descriptive criteria like 'awareness' or 'foresight of consequences'. He suggests that the criminal law should also, as a matter of attribution, account for excuses based on overwhelming pressure, mental illness or similar reasons for human weakness:

"The attribution of wrongdoing to a particular actor turns always on whether it 'is fair' to hold that individual accountable for the wrongful act."³¹¹

³¹⁰) See, in particular, H.H. Jescheck, *supra* note 9 at 294 with further citations. It would be beyond the scope of my thesis to present the whole discussion.

³¹¹) G. Fletcher, Rethinking Criminal Law, *supra* note 6 at 492, emphasis added.

He states that solely descriptive criteria cause the problems confronting the common law relating to offences that can be committed negligently because a straightforward application of the mens rea principle would not leave room for attribution³¹². He does not, however, provide a cohesive test of attribution apart from his criterion of 'fair accountability'.

III. Reasonableness in the German Legal System

3.1 Wrongdoing in Negligence

As with *Fletcher's* theory of criminal responsibility, the distinction between wrongdoing and attribution is fundamental to German law. In addition, German legal theory separates wrongdoing from justificatory elements³¹³. If the accused's conduct fulfills the definition of the offence, with its objective and subjective elements, there is wrongdoing. Wrongdoing indicates that the conduct was criminal, although this verdict might be reversed if there were reasons for justification. On top of that, the criminal conduct must be attributed to the accused. Attribution might be excluded for reasons personal to the accused, whereby society does not require her to comply with the law, or forgives her criminal action in certain circumstances. The principle '*nulla poena sine lege*' applies strictly to wrongdoing, while justificatory elements may be extended and

³¹²) *Ibid.* at 493-95

³¹³) This is done for the sake of systemic clarity. If conduct is justified, no negative value remains which would be attached to the accused. Justified conduct is appreciated by society.

restricted in accordance with the beliefs and values of society³¹⁴. The question of attribution arises only if society does not appreciate the conduct, if the accused may be labeled criminal. Attribution embraces personal excusing conditions ('*Entschuldigungsgründe*'). It is also excluded if the law refrains from intervening for 'higher reasons'. Theft within a family, for example, is prosecuted only with the victim's consent, for the sake of peace within the family.

Wrongdoing in the law of negligence is defined as unlawful risk - taking³¹⁵. Some risk taking below that threshold, like (simply) driving a car does not fulfill the elements of 'wrongdoing'. As in *Fletcher's* system, it would be improperly called 'justified' risk-taking, since the risk created itself is too low to need any justification. Wrongdoing is determined by the following three elements:

- (1) A reasonable person in the accused's situation would have been aware that she could cause the harmful consequence,
- (2) The accused did not exercise the amount of care which a reasonable person would have exercised in order to avoid the consequence, and
- (3) The lack of care must have caused the harmful consequence³¹⁶.

There is a legal duty to take appropriate care, and punishment for negligence is considered to be society's reaction to the violation of such a duty. There is, also, a legal duty to appropriately apprehend the dangerousness of the situation (the 'internal'

³¹⁴) For example, German law does not permit to use more serious self defence to lie in order to protect anything of low value, for example property which would be very cheap to replace. This restriction of self-defence appears plainly from s.34 of the Canadian Criminal Code, but not from the wording of the German Code. Thus German courts had to explain why the restriction does not violate '*nulla poena sine lege*'.

³¹⁵) See, generally, H.H. Jescheck, *supra* note 9 at 508-540

³¹⁶) The third requirement is dropped if the definition of the offence does not contain any harmful consequence, like dangerous driving.

care, *innere Sorgfalt*). Every social agent is required to observe the external conditions of his or her conduct, dependent upon the degree of the danger and the value of endangered things. This might include the duty to inquire into the nature of conduct in order to gain necessary knowledge³¹⁷. Given all other requirements, a person may be held criminally responsible for making an unreasonable mistake. The second duty is to appropriately respond to the external situation (the 'external' care, *aeussere Sorgfalt*), which is directly comparable to the notion of exercise of due care in Canadian law. This might encompass the duty to refrain from engaging in the activity if the agent does not possess requisite skill or knowledge³¹⁸. Commentators point out that the requirements must not reflect an exaggerated or impossible standard of care, because it is accepted that, in the era of technology, a certain degree of danger cannot be prohibited. A truck driver need not anticipate a latent defect in his vehicle, and if it is clear that a pedestrian recognizes the approach of a car, the driver need not expect him to enter the road. Does this indicate that, *de facto*, the standard approximates the threshold of criminality in Canadian law, being a 'marked departure' from the norm?

Some external duties are based on the general notion of due care, and some are based on by-laws, like traffic-regulations. Given all other requirements, each unlawful act would be considered a violation of a duty. As to the causation of death, there is no separation of manslaughter by unlawful act and negligence in German law.

The reasonable person's conduct is assessed objectively, the measure being the prudent and careful person in the accused's shoes (*'der gewissenhafte und besonnene*

³¹⁷) BGHSt 21, 59 required a physician to be informed about the patient's previous illnesses before she applies any treatment. See H.H. Jescheck, *supra* note 9 at 524

³¹⁸) For example BGH VRS 25, 455 for the tired driver. The taxpayer is obliged to inform herself about her obligations under the tax regime of the state. Professionals must be informed about most recent scientific developments in their profession.

Mensch des Verkehrskreises, dem der Handelnde angehört')³¹⁹. The basis for determining breach of the duty is the very situation as it appeared to the accused *ex ante*. The reasonable person's frailties are attached to the social role the accused engaged in. Although this seems to allow for certain variations of the standard depending upon the background of the accused, Canadian law reaches similar results in application of McLachlin J's theory of the 'licensed activity'³²⁰. As shown above, the latter is not dependent upon the issuance of a formally recognized qualification but upon the engagement by the defendant in an activity which, itself, requires special skill. In both legal systems, it is not the accused's actual limitations which tailor the reasonable person's abilities but the so-called 'factual situation', which is actually all facts minus the accused's human frailties. Instead, certain conduct is prohibited, no matter how well the accused is equipped to carry it out, or how important the conduct was for her³²¹.

The more difficult issue is whether the standard in German law incorporates the accused's personal characteristics. This issue has not been widely discussed. In assessing the social role, the decisionmaker does not even look at 'average' qualities. She inquires not empirically but normatively, focusing on which qualities should a person show in order to safely carry out the activity. Lower experience does not lower the standard, it only leads to a complete prohibition to engage in the activity. However, German law adds certain special knowledge to the standard, requiring the actor to take

³¹⁹) H.H. Jescheck, *supra* note 9 at 522. The translation of '*Verkehrskreis*' is somewhat difficult. It does not only refer to the background of the accused. It refers to the social role the accused engages in, see *infra*.

³²⁰) *R.v.Creighton*, *supra* note 5 at 218

³²¹) See, as to this aspect J. Coffee, *supra* note 20 at 228. Economic analysis argues that the expectancy of very high personal gain might influence the personal cost-benefit analysis so that even an ill-equipped person 'should' engage in the activity. Prohibiting such conduct makes it clear that the law does not subscribe to that view.

(personally) optimal care; human frailties and subjective characteristics lift the standard. The reasonable person will have the accused's knowledge about the dangerousness of a certain intersection, or about the fact that, at a certain time, students will run out of a building serving as a school. In front of an incline, the driver of a big truck has to fulfill the standard of the reasonable and prudent driver, his knowledge about the incline included. This last aspect seems contrary to the Canadian situation as a result of Creighton, and certainly not in Topping, where knowledge of the dangerous intersection seemed to lower the standard.³²²

3.2. Elements of Mitigation

Canadian law mitigates the harshness of manslaughter in general and criminal negligence in particular by requiring a 'marked departure' from the norm on the part of the defendant. German law does not impose a comparable restriction³²³. As soon as one of the duties presented above is violated, this might be theoretically sufficient. The scope of criminal liability is narrowed by three patterns, sometimes called principles. Every accused is free to rely on these principles, and there are no exceptions.

First, there is a descriptive element. It must have been exactly the violation of the duty to take care which caused the harmful consequence ('*Kausalitaet der Pflichtwidrigkeit*'). It is only the violation of the duty which separates the accused's conduct from a reasonable person's conduct. Therefore, it is argued, it must have been objectively possible for a reasonably prudent person to avoid the harm. Even if the accused's unreasonable behavior caused the harm, but the same harm would have occurred as a consequence of reasonable behavior, there is no criminal causation of

³²²) R.v.Topping *supra* note 83 at 396

³²³) However, I want to be cautious here since, as I inferred *supra*, the sentiment that the threshold should require a marked departure may influence the standard setting.

harm. Wrongdoing, thus, is excluded³²⁴. The pattern of the 'lawful alternative conduct' ('*Rechtmässiges Alternativverhalten*') serves as a general principle in order to establish a chain of causality. Regarding intentional offences, it leaves room for liability because of an attempt. Regarding offences based on negligence, it excludes liability. There is some dispute about the validity of the principle only insofar as the facts leave some doubt whether, without violation of the duty, the consequence really could have been avoided. Some commentators refer to the presumption of innocence. '*In dubio pro reo*' gives the accused the benefit of each doubt, as long as the doubt is based on a question of fact. Others argue that, if the unreasonable conduct of the defendant increased the risk, there is no room for '*in dubio*' any more. '*In dubio*' would apply only if it is not clear, on the facts, whether the risk really was increased ('*Risikoerhöhungslehre*')³²⁵. But again, this dispute does not apply if evidence shows that reasonable behavior, however less risky in general, could not have avoided the harmful consequence.

The second restriction on liability applies if the reason for establishing a certain duty did not include the very result (the harmful consequence)³²⁶ in its prohibitive

³²⁴) H.H. Jescheck, *supra* note 9 at 527

³²⁵) *Ibid.* at 528. For strict application of '*in dubio pro reo*', see German Supreme Court BGHSt 11, p.1,7; 21, p.59,61; 24, p.31,34. See, further, H. Welzel, Das Deutsche Strafrecht. Eine Systematische Darstellung, 11th ed (Berlin DeGruyter 1969) at 136, and J. Wessels, Strafrecht Allgemeiner Teil, 24th ed (Heidelberg C.F. Mueller 1994) 202-03. It is argued that each situation in which the increase of a risk seems to be established can be expressed in different terms which raise doubt as to the issue whether the violation of a duty really increased the risk. He concludes that, for this reason, the law should stay with the plain '*in dubio*' rule.

For limited application of '*in dubio*', see Claus Roxin, Pflichtwidrigkeit und Erfolg bei Fahrlässigen Delikten (1962) 74 ZStW 430, Ingeborg Puppe, Zurechnung und Wahrscheinlichkeit (1983) 95 ZStW 293, and Ingeborg Puppe, Die Beziehung zwischen Sorgfaltswidrigkeit und Erfolg (1987) 99 ZStW 602.

³²⁶) It might be useful to distinguish between 'result' (*Erfolg*) and 'encroachment on a legally protected interest' (*Beeinträchtigung des geschützten Rechtsguts*). If, like in

scope ('*Schutzzweck der Norm*'). The idea is similar to the causality of the duty-violation. But, as opposed to the former factual restriction, it is, here, a normative restriction to liability. The accused must not be blamed for anything occurring just by chance as the consequence of his unreasonableness. In the decision of the German Supreme Court BGHSt 33, 61³²⁷ the accused caused a car accident with deadly outcome. He was speeding, but could not have avoided the accident driving with accepted speed, and thus was excluded from liability because of 'lawful alternative conduct'. The prosecution argued that, had he complied with the posted speed, he would have got to the place of the accident later and it would have been avoided. The court replied that speed limits are not intended to delay the driver's arrival at a certain point.

The third restrictive element is foreseeability of consequences, in a very strict way. The law requires foreseeability of both the concrete consequence and of the main elements of the chain of causality. Employing the first prong means denying liability if only bodily harm, but not death was foreseeable. The translation of the second prong faces more difficulty. The chain of causation was held not to be foreseeable in the case of OLG Hamm VRS 26, 426³²⁸, where the victim of a traffic accident died in hospital, as the consequence of a normal anesthesia. The OLG Stuttgart denied foreseeability after a car dangerously overtook another on the highway, the passed

negligent manslaughter and negligence causing bodily harm, an offence requires a particular result, proof of the result is necessary for liability. The latter question of the protected legal interest and its encroachment is a jurisprudential issue, analyzed independently of the criteria for liability. See G. Fletcher, Rethinking Criminal Law *supra* note 6 at his note 31

³²⁷) BGHSt 33, 61 at p.65

³²⁸) 'OLG', meaning '*Oberlandesgericht*', is the equivalent to a Court of Appeal in a Canadian province.

driver died because of a heart attack³²⁹. A similar result accrued after the victim of a car accident choked and died thereafter in hospital³³⁰. It is an open question what exactly should be required for foreseeability, and the Supreme Court tends to interpret foreseeability widely. In RGSt 54, 349³³¹ the accused threw a stone at the victim who, although injured only slightly, died because of haemophilia. It is clear that German criminal law does not adhere to the so-called 'thin skull'-rule of the law of torts. But it does not follow the other extreme, either. Consequences are not fortuitous, they are significant. German law lays great emphasis on the principle that the criminal verdict must accurately reflect the consequence of the violate conduct, only. Consequences which occur as the result of *per se* lawful aspects of conduct do not count as criminal wrongdoing. German law goes even beyond *Fletcher's* theory requiring that wrongdoing must be the specific cause of a harmful consequence.

3.3. Wrongdoing in the Law of Self Defence

The defence of self defence is a justificatory element. Justifications are general exemptions from the norm which respect that, in the exceptional case, to conduct as described in the offence is not prohibited. Justifications are self defence, the defence of necessity, a victim's consent, official permits or in some cases a superior order³³². They represent diverse values of society, and the applicability of a justification often depends upon the weight of both the protected and the endangered interest. It is the

³²⁹) OLG Stuttgart VRS 18, 365

³³⁰) OLG Stuttgart NJW 1982, 295

³³¹) 'RG', meaning '*Reichsgericht*', was the German Supreme Court until 1945.

³³²) A more sophisticated presentation of the scope of these justifications would be beyond the scope of my thesis. See generally H.H. Jescheck, *supra* note 9, Subchapter 2.1.c, at 288-361.

constitutional rule of proportionality which requires a different evaluation of competing interests, thus rendering any uniform attachment to certain offences impossible. In short, if it is appreciated to fulfill the elements of an offence in certain situations (which means that it would be 'justified'), this appreciation, or justification, does not negate the fact that the accused fulfilled the elements of the offence. *Jescheck* adds that conduct which does not comprise an offence lacks, for the criminal law, the appropriate gravity³³³. Justified conduct is, *per se*, of grave concern for the criminal law but it is deemed 'not wrong' because of exceptional reasons. There is a difference between killing a fly and killing a human being in self-defence, and it has to be reflected in the criminal assessment of the situation. In these cases, system theory does not provide a 'better outcome', but it allows us to reflect the factual situation more appropriately.

If the defence of self defence is not available to the accused, her wrongdoing consists of unlawful assault, or unlawful killing. Equally, the issue of self-defence is not raised if elements of the underlying offence are absent, for example the defendant's necessary intent to cause the harmful consequence. Problems with these underlying elements are beyond the scope of the paper, and will not be discussed further. So far, there is no difference between German and Canadian law. The question, here, is but how the law assesses the person who unreasonably, i.e. by mistake or accident, defends him- or herself. Can she be blamed for a wrongful killing?

3.4. Mistake in Self Defence: The '*Erlaubnistatbestandsirrtum*'

In German law, the problem of mistake in self defence is regulated by four provisions of the Criminal Code, ss.32, 33, 16, and 17³³⁴. If the accused had an honest, but unreasonable apprehension of a situation which, fictively, would allow self-defence,

³³³) *Ibid.* at 289-90 with further citations.

³³⁴) See *ibid.* at 288; *ibid.* at 297-314

she has a complete defence (see (1), *infra*). However, this does not exclude her liability for a mistake, which is assessed according to the general rules set out *supra*, at part 3.2. If the accused's apprehension does not match the pattern, in which the law allows self-defence, the defence is not available (see (2), *infra*), and she will be held liable for the underlying offence. This dichotomy, which reminds one of the distinction between mistake of law and mistake of fact, will be explored later in my thesis.

Section 16.1 of the German Criminal Code allows for mistakes which refer to an element of the offence. The section is also applied to mistakes referring to elements of justification. Self defence is defined in s.32 of the Criminal Code³³⁵. In the case of any unjustified, imminent assault, s.32 allows such force as is necessary to repel the assault. The defence is available also in order to rebut an assault on other people. In certain cases, to apply the full range of the defense would be an abuse of the law, and the courts have developed fact patterns in which the right to self defence is restricted, at least partially³³⁶.

A situation allowing for self-defence is defined in s.32 StGB: Everybody has the right to defend him- or herself against an unlawful, imminent assault. Assault ('*Angriff*') is every violation of, or threat to, any legally protected interest of the accused's, based on human action. In contrast to the meaning of the term 'assault' in normal language, the elements of assault do not require any intent, or positive state of

³³⁵) The wording of s.32 StGB reads as follows:

"Eine Tat, die durch Nowehr geboten ist, ist gerechtfertigt. Notwehr ist die Verteidigung, welche erforderlich ist, um einen gegenwaertigen, rechtswidrigen Angriff abzuwenden."

³³⁶) Case law attached these to the element of "*Gebotenheit*", which is translated best with 'normative appropriateness'.

mind. Not even culpability is required for the violate action³³⁷. Each legally protected interest of the defendant's is protected, amongst which are not only life and bodily integrity, but also freedom of the person, personal honor, property, and the right to the own personality. Given all further presuppositions of s.32 are present, the whole scope of personal rights can be defended against unlawful violations, but there is no right to self defence against any lawful violation. The initial aggressor does not have any right to defend herself.³³⁸ Finally, the attack on the accused's protected position must be imminent.³³⁹

If the accused had an honest apprehension of such a situation described above, she will be provided with a complete defence. However, German legal theory had some difficulty to build this rule into its system. Section 16 states that each honest mistake as to an element of the offence negates the element of intention.³⁴⁰ But, the application of the provision is difficult to place into the general system. Assume that the accused knew that she fulfilled the elements of the underlying offence. In the ordinary sense of language, she wanted to kill, assault, etc. She just erred about those facts which would allow her to do so. From a systemic point of view, the mistake about the question

³³⁷) There is rich judicial soil provided by the German courts in order to distinguish situations which fulfill the requirements of an assault. It is not considered to be any assault, if two people are engaged in a mutual fight, BGH GA 1960,213.

³³⁸) In Canadian law, the initial aggressor does still have such a right under s.37 CCC. Nevertheless, there seems not to be a big difference to the German ruling, since the defendant's use of excessive force would render his or her defence an unlawful assault. The initial aggressor, then, had the right to self-defence.

³³⁹) See the examples mentioned by H.H. Jescheck, *supra* note 9 at 306

³⁴⁰) S.16.1 StGB reads as follows: '*Wer bei Begehung der Tat einen Umstand nicht kennt, der zum gesetzlichen Tatbestand gehoert, handelt nicht vorsaeztzlich. Die Strafbarkeit wegen fahrlaessiger Begehung bleibt unberuehrt.*' If the accused is mistaken about any element of the definition of the offence, she does not act with criminal intent. This does not exclude liability for negligence.

whether certain conduct is allowed or not, is a mistake concerning the lawfulness of the conduct. As laid down in s.17 StGB, a mistaken view that certain conduct is allowed does not help the accused. It is relevant only as a mitigating aspect at the sentencing stage.³⁴¹ Some commentators argue that this rule must be applied to every mistake about elements of justification ('*Strenge Schuldtheorie*', theory of strict culpability). As a consequence, the finder of fact has to assess the situation objectively. Any deviant subjective belief of the accused's would be irrelevant, and the accused would be punished according to the terms of the intentional offence. Most commentators, as well as the Supreme Court, conclude that the consequent systemic solution does not, appropriately, reflect the guilt of the offender.³⁴² In German law, Lyn Lavalée, for example, would have to face a murder charge, because that law requires an *imminent* attack for self defence. German law would have difficulty in solving such a socially sensitive situation on the level of wrongdoing and would probably resort to simply excusing Lavalée.

In order to avoid following the 'strict theory of culpability', German legal theory stressed the structural similarity to a mistake as to an element of the offence. Whoever apprehends a factual situation which, objectively, allows for self defence, errs about either the descriptive or normative elements of a legal rule. The 'theory of negative elements of an offence'³⁴³ regards justifications as negative elements of each

³⁴¹) S.17 StGB reads as follows: "*Fehlt dem Taeter bei Begehung der Tat die Einsicht Unrecht zu tun, so handelt er ohne Schuld, wenn er diesen Irrtum nicht vermeiden konnte. Konnte der Taeter den Irrtum vermeiden, so kann die Strafe nach s.49 gemildert werden.*" (If the accused did not perceive the unlawfulness of his conduct, and he could not have avoided the error, the result shall not be attributed to him. If he could have avoided the error, the sentence can be mitigated).

³⁴²) H.H. Jescheck, *supra* note 9 at 417. See BGHSt 3, 105 at 106, BGHSt 3, 194 at 196, BGHSt 3, 357 at 359, BGH GA 1969, 117 at 118

³⁴³) '*Lehre von den negativen Tatbestandsmerkmalen*'.

offence. Murder, for example, would be (qualified) intentional killing without any justificatory reasons to do so. However, the mainstream of German scholarship does not accept the theory. It is convincingly argued that the accused's intent to commit the offence must include an intent to do so without justification, because intent, the offender's state of mind, has to mirror each objective element. It would be a pure fiction to assume that the intentional killer thinks about justification, and proof of facts cannot be based upon a pure fiction³⁴⁴.

Eventually, mainstream scholarship as well as the Supreme Court preferred the application of s.16 to s.17. Section 16 was applied by analogy, because the reason for inferring s.16 matches the problem which arises in the case of self-defence. It is part of the teleology of s.16 StGB that no one who was mistaken about facts shall be liable for an intentional offence which she did not want to commit. Therefore, German law totally excludes intentional wrongdoing if the actor mistakenly apprehended a situation giving rise to self defence³⁴⁵.

³⁴⁴) See H.H. Jescheck, *supra* note 9 at 419

³⁴⁵) See BGHSt 3, 105 at 106, BGHSt 3, 194 at 196, BGHSt 3, 357 at 359, BGH GA 1969, 117 at 118. See also A.Schoenke & H.Schroeder Strafgesetzbuch. Kommentar, 24th ed (Muenchen Beck 1991) Cramer ed. §16 Nr.14, A.Eser, Strafrecht I 4th ed (Muenchen Beck 1992) Nr.14 A Nr.16ff; K.Engisch, Tatbestandsirrtum und Verbotirrtum bei Rechtfertigungsgruenden (1958) 70 ZStW 583; E.Schmidhaeuser, Einfuehrung in das deutsche Strafrecht 2nd ed (Opladen Westdeutscher Verlag 1975) at 418

Some commentators argue that, in self-defence, the mistake does not negate wrongdoing completely: As a consequence of the mistake, the accused's intention [to commit the underlying offence' for example murder] is different from the ordinary case, but it is still naturally existent. However, it does not allow for a morally bad verdict about the accused. Therefore, the accused's intention should not be negated. It is suggested just to apply the legal consequences of s.16, which means that the accused will not be punished for the intentional offence. For the accused, these commentators reach the same result eventually. But wrongdoing is not negated. The theory bears practical differences for agents who participate in the offence by abetting etc. In case they know about the real situation [they do not make the mistake] participants can be punished. Criminal participation does require a main agent's wrongdoing only, not his

However directly s.16 StGB is applied, it only eliminates the aspect of intentional wrongdoing. The accused's actual intent matched society's values, but, of course, society cannot permit his or her making an unreasonable mistake that causes harm³⁴⁶. Whereas, in comparison with a person causing harm by negligence (see *supra*), it would be plainly unjust not to consider that aspect at all.

To make a mistake is an aspect of conduct measured by the law of negligence. In German law, wrongdoing in intentional offences and wrongdoing in negligent ones are assessed independently. This principle is laid down in s.16(2) StGB. Even if s.16 paragraph 1 excludes liability, the courts have to check whether the accused violated one of her legal duties to pay careful attention in the given situation³⁴⁷. The accused's wrongdoing is assessed exactly as described above. The violation of any of the duties must have led to his or her mistake, which means that the reasonable person would have assessed the situation differently. The mistake's chain of causality must be proven, and the assumption of 'normally correct behavior' provides the measuring rod. As a consequence, a reasonable mistake concerning elements of the defence excludes

or her culpability. The theory is supported by Jescheck (1989), *supra* note 9 at 418; J.Wessels, *supra* note 325 at 274; H.Kruempelmann Die Stufen der Schuld beim Verbotsirrtum (1968) Goltdammers Archiv 142; K.Lackner, Strafgesetzbuch mit Erläuterungen. Kurzkomentar (21st ed Muenchen Beck 1995) §17 (commentary 5b).

This theory might be of practical advantage, but it pays the price of a theoretically straightforward assessment of the accused's conduct. *Ex ante*, society can not require him or her to abstain from the defence. The accused does not decide against society's values. It does not make sense to explain that his or her intention is still (partially) wrong.

³⁴⁶) It is the presumption of innocence which requires the law to assume that the accused, his mistake being canceled, would have reacted appropriately in the situation given.

³⁴⁷) S.16 paragraph 2 reads as follows: '*Die Strafbarkeit wegen fahrlässiger Begehung bleibt unberuehrt.*' (Liability for negligence is not excluded thereby). See, as to the legal duties in the German law of negligence, *supra*, II.2.

any wrongdoing, and therefore excludes liability completely, whereas an unreasonable mistake establishes the wrongdoing requirement of negligently caused harm. Of course, in the latter case, the courts have to check the question of attribution.

3.5. German Law: Other Mistakes

Finally, there is one more point to consider. The foregoing analysis focused on the accused whose mental apprehension of the facts objectively allowed self-defence, and any other belief on the part of the accused is irrelevant in determining the matter of her wrongdoing. As a consequence of the relevant legal rules, any other belief, even if it is based on a proper assessment of the facts, would be a wrong belief about the *scope* of the law. Various possible mistakes fall within this category, for example, an assumption that using more than minimal force is allowed, that defence against harassment below an attack is permitted, or that the law does not exclude the use of deadly force for minor reasons. German law does not depart from the Canadian rule that 'ignorance of law is no excuse'³⁴⁸ - other than the way in which it treats the normative elements of the offence as facts, i.e. their core of significance ('*Parallelwertung in der Laiensphaere*'). None of these errors can negate wrongdoing - which clearly means that society does not approve at the conduct. Moreover, the conduct is severe enough to invoke criminal punishment. However, it is a question of attribution whether or not punishment will actually be applied to the accused. There are provisions which take the self defendant's personal situation of stress into account, forgiving her wrong without rendering it lawful. Such a provision has the quality of an excuse, and will exclude liability on the level of attribution.

³⁴⁸) D. Stuart, *Treatise supra* note 11 at 293. See for the German law generally H.H. Jescheck, *supra* note 9 at 274-282; *ibid.* at 410-20

3.6. The Level of Attribution ("Schuld") in German Law

Wrongdoing is attributed to the accused if the accused herself can fairly be blamed, if the wrongdoing reflects her 'blameworthy attitude' (rechtlich missbilligte Gesinnung)³⁴⁹. Fletcher's notion of attribution finds its counterpart in the German law's notion of 'culpability' ('*Schuld*') representing an independent dimension of liability. The actor's accountability for an act may be negated by an excuse, or other reasons like insanity *etc.* However, the conduct itself remains wrongful; society does not appreciate the act³⁵⁰.

According to her capacities, the accused must have been able to perceive the duties identified objectively above, and she must have been able to fulfill them. Otherwise the accused's wrongdoing is excused, which in a narrow sense means that it will not be attributed to her. The focus is on the accused's personal frailties, and it determines whether these frailties, hypothetically, would have allowed her to comply with the standard of reasonable care. If the accused did not comply because of physical

³⁴⁹) Translated from H.H. Jescheck, *supra* note 9 at 535. The German term '*Schuld*' means, translated straightway, 'guilt'. However, Fletcher's concept of attribution matches substantively what underlies the German law's concept of 'personal guilt' as personal responsibility and blameworthiness for the wrongdoing which the accused conducted. Note that other requirements of attribution, like sanity and (potential) awareness of the conduct's unlawfulness must be fulfilled, too. The latter is more a theoretical requirement without any further significance in practice. See, generally, as to German law theory H.H. Jescheck, *supra* note 9 at 382-87.

³⁵⁰) G. Fletcher, *Rethinking Criminal Law* *supra* note 6 at 458-459. He explains the difference between excuse and justification. Justificatory claims, such as self-defence, negate wrongdoing; they represent the denial of a condition implicit in the prohibitory norm (i.e., unless your life or limb is in danger). Excuses, in contrast, do not negate wrongdoing. Rather they challenge the attribution of the wrongful act to the actor. (Simply) excused acts are not appreciated by society. Self-defence is possible against excused, but not against justified assaults. Further practical differences arise with respect to the civil law of damages and certain consequences in public administration law.

or mental disabilities, lack of general knowledge or experience, age, or because she faced a situation of personal pressure, she will not be blamed for that³⁵¹. BGH VRS 7, 181 excused the driver's tiredness which appeared suddenly and unexpectedly; equally a sudden onset of disease might be excused. The non-medical practitioner, consulted as such, is excused for not having medical knowledge³⁵². Equally, the accused must have had the ability to foresee the harmful consequence of his conduct. Death might be not foreseeable as a consequence of an insterile abortion, performed by the intellectually weak farmer on her daughter. Another example is the grandmother who uses a metro for the first time and, therefore, does not know that the doors close automatically. She cannot know that she endangers her grandchild if she does not make the child stay away from the doors³⁵³.

Confusion, as well as an experience of terror or threats, may also excuse the accused's wrongdoing. Attribution is always a question of the factual constellation, a verdict based singularly on the abilities of the accused. It was said, *supra*, that wrongdoing might consist of engaging in an activity without having the requisite skill, or knowledge. If this was the accused's violate conduct, the same lack of knowledge or skill does not excuse her. In order to cut off attribution, the accused must have been unable to perceive her lack of skill, knowledge *etc.* The ability to perceive and fulfill the duties' obligations must always be related to the very legal duty the accused violated.

The problem the law faces here is that the accused did not intend or approve the consequence, but, in fact, would have preferred to have avoided them. The reason why

³⁵¹) H.H. Jescheck, *supra* note 9 at 537

³⁵²) RGSSt 67, at 12; *ibid.* at 19-20. The court would probably have decided the Canadian case R.v.Rogers *supra* note 47 at 278, the same way the B.C. Court of Appeal did, since Rogers *did purport* to have general medical knowledge.

³⁵³) Examples provided by H.H. Jescheck, *supra* note 9 at 539, with further citations.

she, nevertheless, did not, is assessed normatively. If the accused was unable to comply because of low qualities of character, like, for example inconsiderateness, indifference, or thoughtlessness, she is excluded from pleading inability. From a deterministic viewpoint, this raises the problem of whether there can still be guilt. HLA Hart assumes that there can- after he had excluded, apparently, the latter inability from his concept of capacity. His final conclusion, that the problem of determinism is not different in all criminal law generally, is certainly valid.³⁵⁴

The measure applied is subjective in the sense that the court looks at the actual accused, but the court has to infer the accused's characteristics from objective facts. The Supreme Court confirmed that wrongdoing, proved properly, establishes a prima-facie case³⁵⁵. Generally, wrongdoing may be attributed, as long as there is no evidence casting doubt on the accused's guilt. In many dangerous situations of contemporary life, in hospital, at construction sites, and on the highway, it is quite obvious to everybody that the slightest carelessness might cause the most serious results.

As indicated at the presentation of wrongdoing, the accused's culpability, if her 'intention' was canceled by s.16 StGB, is assessed according to the rules of the law of negligence. Beside that, German law provides s.33 StGB as a special excuse, whereby the defendant who used more force than (objectively) necessary is excused if she did so because of 'confusion, fear, or terror'.³⁵⁶ The provision privileges unreasonable conduct carried out in such a psychological condition. As long as a situation objectively allows for self-defence, the agent may even intentionally use excessive force ('intensive

³⁵⁴) HLA Hart, Mens Rea, *supra* note 150 at 156

³⁵⁵) BGH DAR 1954, at 17-18. See H.H. Jescheck, *supra* note 9 at 538

³⁵⁶) S.33 StGB reads as follows: *Ueberschreitet der Taeter die Grenzen der Notwehr aus Verwirrung, Furcht oder Schrecken, so wird er nicht bestraft.*

excess'). But case law has made it clear that the provision does not apply if objectively the situation does not allow for any defence at all (so called 'extensive excess'). Therefore, an accused is entitled to rely upon either s.16 or on s.33 StGB, but never upon both.³⁵⁷

IV. The Canadian Law in the Light of Both Systems

4.1. Wrongdoing in the Law of Negligent Manslaughter

Although Canadian criminal law does not use the categories of "wrongdoing" and "attribution", efforts have been made to analyze it in the light of these categories. For example, *Anne Stalker* has offered "a new approach to the topic of criminal negligence"³⁵⁸. Applying Fletcher's theory to the test set out by the Supreme Court in *R.v.Creighton*, the first step is to identify which elements could be covered under the term of 'wrongdoing'. Basically, wrongdoing would consist of the violate action. Wrongdoing is judged in terms of the conduct of the actor in the actual circumstances, by measuring the 'risk' against the appropriate societal standards. As opposed to intentional offences, wrongdoing does not require any state of mind, nor any awareness of consequences. Wrongdoing consists of objective fault only. In criminal negligence, the beliefs and desires of the actor are irrelevant to the issue of wrongdoing. *Fletcher* explains that negligence is not any mental state but a different way of committing an offence. The wrong in risk-taking does not consist in improper motivation, but in the

³⁵⁷) H.H. Jescheck, *supra* note 9 at 444

³⁵⁸) A. Stalker argues that Fletcher does more than providing new names for old tests: "His merits can be seen in the strength of his analysis." A. Stalker, *Problem of Negligence* *supra* note 34 at 295

failure to take proper precautions³⁵⁹. The second step, attribution, infers a subjective, or individual, aspect.

Fletcher's theory does not provide for any reason to adjust the threshold of criminality to the accused's frailties. Accordingly, Madame Justice McLachlin's test in Creighton appears to be in plain accordance with his theory³⁶⁰. Fletcher's wrongdoing, the "definition of the offence" consists of the *actus reus* as well as of corresponding mental elements, which would be, for example an intent to kill. The *actus reus* was described in Creighton as a marked departure from the conduct of a reasonable person. McLachlin J explains this to be "conduct done in a dangerous fashion", which appears to be the objective prong of the definition of the offence. The very concept of "danger" necessarily means that a reasonable person would foresee harm. I submit that this is, substantively, the only relevant test required for wrongdoing, since the *mens rea* is "objective foresight of risking harm" and is "normally inferred from the facts"³⁶¹. Conduct is dangerous only because of foresight of harm, which would render the second prong superfluous. From a logical point of view, this argument is supported sufficiently if it is shown that foresight of risking harm, on the part of the decisionmaker, is a necessary condition in order to characterize conduct as dangerous. The decisionmaker thus defines the threshold of criminality.

It is not totally clear whether these considerations apply equally to the reverse situation; if an actor creates little risk but is aware that consequences might occur. In

³⁵⁹) G. Fletcher, Rethinking Criminal Law *supra* note 6 at 442. He explains the nature of negligence *ibid.* at 479, explaining how it is to be determined.

³⁶⁰) The (different) analysis of Fletcher's work in R.v.Creighton appears not to be justified. He applies subjective criteria to attribution, only. As to the analogue issue of 'capacity', Canadian law allows a court to take subjective criteria into account.

³⁶¹) McLachlin J. in R.v.Creighton, *supra* note 5 at 218 [para. 79]

Fletcher's system there would be no wrongdoing and, therefore, no responsibility³⁶². As indicated above, German law divides differently, in the sense that risk is either 'accepted' or 'unlawful'³⁶³. 'Accepted' risks are those condoned as an inevitable consequence of a technological society, like driving a car at a certain speed or polluting under a valid permit. If harmful consequences occur, unlawful risks can be the basis for criminal liability unless they are irrelevant under the aspect of '*Schutzzweck der Norm*'³⁶⁴. That situation was not discussed in Creighton, since Creighton's drug trafficking created more than a small risk. It can be inferred from McLachlin's test that conduct that is not a 'marked departure' does not even pass the first step. But is it possible to think of conduct creating a high risk which does not constitute a 'marked departure'? In England, *Glanville Williams* seems to derive this result from the doctrine of remoteness of consequence. He introduces the example that D, by an act of negligence, cuts P's finger and that P who, unbeknownst to D, suffers from haemophilia, dies. He submits that D is not guilty of manslaughter³⁶⁵. An unreasonable, but marginal departure from the standard of a reasonable person does not

³⁶²) My analysis excludes here the law of intended, but unsuccessful attempts. It is a different question whether punishment might be applied here even if the objective risk was very little. Reasonableness does not play an important role there.

³⁶³) In German '*erlaubtes Risiko*' or '*rechtswidrige Risikoschaffung*'

³⁶⁴) H.H. Jescheck, *supra* note 9 at 529. He explains the term "*verkehrsrichtiges Verhalten*" *ibid.* at 534.

³⁶⁵) G. Williams, Criminal Law *supra* note 154 at 112

invoke the criminal law. Would the result be different, if the accused was not only 'aware' of consequences, but acted on purpose?³⁶⁶

It flows from these observations that all approaches objectively separate criminally relevant risks from irrelevant ones. The categorizing terms are partly different, but the difference is essentially one of the positive law rather than of systemic structure. Canadian law as well as *Fletcher's* system relies more on normative rather than descriptive criteria. Albeit German law employs some sophisticatedly descriptive fact-patterns, the basic problem remains: somewhere there must be a line, based on normative assessment, which separates acceptable from criminal risk. It is the decisionmaker, who has to re-define this line in each single case. All that a legal system can do is to assist her, up to a certain level, by defining situative fact patterns as narrowly as possible.

4.2. The Requirement of a Specific Risk in Canada

It is beyond any doubt that an accused's criminal liability is restricted by the rule of causality. However, it is unclear whether it must have been her departure from the norm which caused the consequence. McLachlin J. pointed out in *Creighton* that foreseeability of death is not required for a conviction of manslaughter³⁶⁷. From a comparative point of view, a strong argument can be made against that rule.

In order to analyze the relationship between risk and consequence I will distinguish between qualitative and quantitative matches thereof. The requirement of

³⁶⁶) The issue of intent is beyond the scope of the paper. But consider the (hypothetical) case in which the nephew and appointed heir encourages his rich uncle to go for a hike in the woods in stormy weather, hoping that some lightening flash will kill his uncle. In fact, the uncle dies in a thunderstorm. Would the nephew be guilty of murder, or manslaughter?

³⁶⁷) *R.v.Creighton*, *supra* note 5 at 207

foreseeability of death could be defined as a quantitative match of risk and outcome. But McLachlin J. did not explicitly say whether risk of harm must relate to the victim, or whether a certain way of affecting the victim is necessary in order to constitute danger. A qualitative match of risk and outcome must be denied if the harm was caused by a different risk. This happens if not the accused's unjustified risk was responsible for the harmful outcome but some other risk, however closely related. Is it a defence if the very aspect of the accused's conduct, which is deemed unreasonable, did not cause the outcome? Is it a defence that the duty the accused violated was not intended to protect society against the very outcome, or are all duties deemed to protect against any possible harm? In German law the issue is covered by the requirement of 'causality of the violate element'.

Assume that car driver Albert speeds and kills a child who runs in front of him unexpectedly. Evidence makes it clear that a reasonable person could not have prevented the outcome even if Albert had driven with lawful speed. Albert's way of driving created a risk for all other users of the road - including the injured child. But analyzed precisely, the child was victim of the general risk that cars cannot stop in time, which is inherent in the public use of cars and, therefore, deemed justified by society. This certain event was not foreseeable by even a reasonable person in Albert's shoes. For that reason, the Alberta Court of Appeal denied an accused's liability in a similar case in 1940³⁶⁸. The issue was not raised, for example, in Hundal³⁶⁹ because it was the accused's high speed and lack of care at the intersection which made him run into the victim's car. Since Creighton, however, the issue is at least unclear again, if

³⁶⁸) R.v.Wilmot (1940) 74 C.C.C. 1. An intoxicated driver had accidentally killed a cyclist. The court could not establish "a connection" between intoxication and death.

³⁶⁹) R.v.Hundal, *supra* note 8

not reversed by the transplantation of tort law's "thin skull"-rule into the criminal context.³⁷⁰ McLachlin J. suggested that

"[T]he principle that if one engages in criminal behavior, one is responsible for any unforeseen actions stemming from the unlawful act"³⁷¹

has been a well established tenet in Canadian criminal law. She points out that

"[T]he unlawful act must be objectively dangerous, that is likely to injure another person."³⁷²

It is not clear whether the dangerous (and eventually causal) part of the act must also be unlawful. It is important that consequences occur - but not, that they are caused by the accused's fault. The accused -just generally- was caught departing from the path of the law (this concept of liability is defined by the Latin expression *versari in re illicita*³⁷³). Even in that case, *Coval, Smith and Burns* write, "where an accidental result is ascribed to the agent as his action and he is completely exculpated, we require that the standard of care we deem possible still be maintained"³⁷⁴. The effect is, that conduct which constitutes a marked departure from the reasonable person's is punished - and not the causation of the consequence. In such cases, then, the consequences are largely inconsequential for the purposes of the criminal law. The latter appears to be at odds to McLachlin J's reasoning that it is exactly the gravity of the consequence which merits

³⁷⁰) R.v.Creighton, *supra* note 5 at 207. The implementation of the thin skull rule has been subject to critique in Canadian legal scholarship, too. See D. Stuart, Continuing Inconsistency But Also Now Insensitivity That Won't Work (1993), 23 C.R. (4th), 240 at 242; E. Colvin, *supra* note 154 at 90

³⁷¹) R.v.Creighton *supra* note 5 at 204

³⁷²) R.v.Creighton *supra* note 5 at 198

³⁷³) In German law, the principle '*versanti in re illicita imputantur omnia que sequuntur ex delicto*' was explicitly excluded in BGH VRS 65, 127. See generally H.H. Jescheck, *supra* note 9 at 235, and *ibid.* at 409.

³⁷⁴) C.Coval, J.Smith and P.Burns, *supra* note 2 at 211

the stigma of manslaughter³⁷⁵. Without straight application of the principle of causality, the legitimacy of punishing that conduct -as opposed to such conduct which did not result in any harm at all- becomes a weak one. It is difficult to understand, in *J.Gobert's* words³⁷⁶, why the consequence is of any importance at all?

I will argue now that, to require our driver Albert to prevent the accident would mean that we demand more than what we deem possible. A reasonably prudent person might have foreseen some risk of harm but not of death. This happens if an agent injects the victim with an amount of drugs which is below the lethal range. McLachlin J. seems to explain in Creighton that Canadian law does not require any causality of the violate element. A conviction for manslaughter may be based on foreseeability of bodily harm - even if the hypothetically reasonable person, the decisionmaker herself, would not have taken the possibility of a deadly outcome into account³⁷⁷:

"It might well shock the public's conscience to convict a person who has killed another only of aggravated assault - the result of requiring foreseeability of death - on the sole basis that the risk of death was not reasonably foreseeable."

Given the reasonable person's nature being that of an "excellent but odious creature"³⁷⁸, the learned judge's statement is not absolutely convincing. Conduct in compliance with her standard cannot be a sound basis for liability. It is the task of the criminal law to separate incidents of liability for harmful consequences from incidents which are properly attributable to bad luck. The search for descriptive criteria to

³⁷⁵) R.v.Creighton, *supra* note 5 at 207

³⁷⁶) J.Gobert, *supra* note 181

³⁷⁷) R.v.Creighton, *supra* note 5 at 202

³⁷⁸) A.P. Herbert, Uncommon Law; Misleading Cases in the Common Law (London Methuen & Co 1935), quoted in C.A.Wright and A.M.Linden, Canadian Tort Law. Cases, Notes and Materials, 7th ed. (Toronto Butterworths 1980) at 418

restrict liability is a difficult task to achieve³⁷⁹, as it was shown in Chapter III at the example of 'awareness of risk'. 'Causality of the violate element' offers itself as an excellent criterion to assist the 'marked departure' therein.

4.3. The Law of Self -Defence

In the case of (unreasonable) self-defence, the Canadian law seems to assess criminal wrong differently from that of the German system. It seems to be the law that, as long as the accused acted reasonably, she is beyond the scope of liability. If she was found to act unreasonably, then the full force of punishment for the underlying offence [e.g. murder], is applied.³⁸⁰ German law separates different mistakes from one another. A (general) mistaken belief that her conduct was allowed does not grant privilege to the defendant. But if the agent was mistaken about elements of the definition of the offence or defence, she will not be deemed to have committed the intentional wrongdoing of the underlying offence. But the defendant might be liable for acting negligently. It appears, in the important pattern of unreasonable apprehension of the situative preconditions of self-defence, different types of 'wrongdoing' are attributed in both the Canadian and the German system. Since *Fletcher* generally encourages allowing reasonable mistakes³⁸¹ to be of legal significance, the requirements for a mistake in self-defence are distinct in the three systems. This observation thus raises two issues:

³⁷⁹) See D. Stuart, *Treatise*, *supra* note 11 at 196, supporting the suggestion of the Law Reform Commission of Canada that a further effort be made to restrict liability for gross negligence to causing or risking serious harm like death or serious injury, referring to Working Paper No.46 *Omissions, Negligence and Endangering* (Ottawa 1985). The approach is different from what I suggest, but there is the same feeling that the 'marked departure' itself still might be too wide.

³⁸⁰) See *R.v.Reilly* *supra* note 60 at 162

³⁸¹) G. Fletcher, *Rethinking Criminal Law* *supra* note 6 Chapter IX at 683

first, why has a mistake in self-defence to be reasonable, and second, in the positive Canadian law, does an acquittal on the basis of reasonable self-defence preclude liability for negligence?

4.3.1. The Nature of a Mistake in Self-Defence

Does the structure of the Canadian legal system require that a mistake in self-defence be reasonable? Canadian law knows two types of mistakes, mistakes of fact and mistakes of law. Neither of them requires reasonableness in order to be of significance, since an honest mistake of fact is always a valid defence, and a mistake of law is hardly ever one. Is a mistaken apprehension of any element in self defence a mistake of fact or a mistake of law? For my purposes, mistake as to an assault will serve as a paradigm, though the issue applies equally to each mistake mentioned in s.34 CCC. The first question is whether a mistake as to an assault is a mistake of fact or one of law. Mistake of fact was characterized as the lack of knowledge about empirical or socio-factual elements of the activity³⁸². If there is subjective apprehension of a person approaching with an uplifted knife, it can be said that this phenomenon of reality is, of course, known to the defendant. What she may err about is the social meaning of the behavior she is confronted with. Two ways to apply the fact-law distinction seem to be theoretically possible. The first is that 'facts' are what are subject to objective measurement only. But this naturalistic view falls well short of the real meaning. Fraud as well as libel, then, is only 'the movement of lips, transmission of acoustic waves and vibration in the preceptor's ear. Mistake, then, is restricted inevitably to deficiencies in the quality of ears or eyes. It does not mirror what people are punished for, since a moral verdict can hardly be based on 'oral causation of acoustic waves'. This is

³⁸²) L. Vandervort, *supra* note 297 at 255. Mewett & Manning, *supra* note 13 at 364 speak of a 'factual' element only.

certainly not how human beings experience reality. It is the social meaning of human action that 'mistake' is concerned with, and that must be valid for both mistakes of fact and mistakes of law³⁸³. 'Correct' interpretation, excluding mistake of law, means understanding the spirit of the element, not knowing the literal definition. As I read her this is congruent with *Vandervort's* decisive question: "was the accused aware in the requisite sense of what described in empirical or socio-factual terms, he or she was doing or not?" If the answer is yes the mistake should be irrelevant for culpability³⁸⁴. The problem of interpretation arises with respect to 'all'³⁸⁵ 'normative', or 'socio-factual' elements of an offence.

If both the accused's and the law's (the decisionmaker's) interpretation of the socio-factual circumstances are basically the same, there is no erroneous apprehension of facts. If the accused nevertheless thinks that she has to defend herself, it is the idea of the ignorance of law rule that she should not have a defence. As long as the accused knew what was going on externally she did not err about facts. The law, however, may determine how 'narrow' the appreciation of the accused should be. The narrower its definition, the less likely it is that she will make an erroneous interpretation. For example, in order to cut off the mistake of fact argument, *Vandervort* suggested restricting the meaning which could be given to 'consent', and to amend s.244 CCC by a more detailed definition³⁸⁶. It appears, the opposite problem exists with reference to

383) German law, therefore, got rid of the distinction 'mistake of fact or law'. It replaced it by the distinction 'mistake as to an element of the offence' or 'mistaken belief that a certain action is allowed'. The latter is an excuse only if the mistake was 'not avoidable'. That barely ever happens, an exceptional example is the person with a totally different cultural background.

384) L. Vandervort, *supra* note 297 at 256

385) U. Kindhaeuser, *supra* note 34

386) She offers the example of the 1982 Minnesota Criminal Code, Minnesota Statutes Annotated, ss.609.341(4): 'Consent means a voluntary uncoerced manifestation of a

the social meaning of assault. The code restricts it expressly in s.265 (1b) by reference to 'a threatening word or gesture'. Faced with mere words, an interpretation of the conduct as an "assault with gesture or with force applied" is excluded³⁸⁷. The phenomenon the code excludes will be correctly understood. The better argument, it seems, favours such an interpretation as a 'mistake of law'. Arguably the definition in s.265 CCC is too narrow and excludes serious attacks³⁸⁸. Once it is accepted that pure words can be the basis for an assault, a misrepresentation of these words could be an 'acceptable' mistake.

I will argue in the following that 'proper' application of the ignorance of law rule would force the decisionmaker to apply this rule to each mistake in self defence. The mistake as to an assault in self defence does not negate the defendant's *mens rea* to the killing itself. Both Mr. Reilly and Mrs. Petel did want to kill and their mistakes did not affect the *mens rea* as to the offence they were charged with. *Mens rea* neither includes nor demands any knowledge that a defence is absent. It could be argued that this error simply affects the question whether or not the law allows the killing in a given situation. The accused wrongly assumes the prohibitory norm does not cover her situation. Mistakes as to the interpretation of the law are considered to fall within the

present agreement to perform a particular sexual act'. See L. Vandervort, *supra* note 297 at 306 Fn.180

³⁸⁷) See, for example R.v.Byrne (1968), 3 C.R.N.S. 190 (B.C.C.A.), R.v.Judge (1957), 118 C.C.C. 410 (O.C.A.). However, it is argued that R.v.Lavallee alters the meaning of assault for the purposes of self-defence in deciding that Kevin Rust's words were an assault. See I. Grant, D. Chunn and C. Boyle, *supra* note 12 at 6-40. Therefore, as long as the words show a future dimension, they might qualify as an assault.

³⁸⁸) The focus on physical force neglects important issues of harm: vulnerable people might feel endangered although there was no act or gesture. In addition, the mental section of a human being is as vulnerable as the physical. There is no reason to call harm different which affected the latter.

scope of the ignorance of law rule, according to Lamer J. (as he then was) in R.v.Molis³⁸⁹. Consequently, *Mewett & Manning* explain that, generally, mere intent, or belief, to act in the circumstances of a defence does not suffice, and that a defence is available only if the facts that constitute it exist³⁹⁰. It was stipulated in R.v.Nelson³⁹¹ that it is the doctrine of mistake of fact which is applicable to self defence. But if the focus is on the underlying offence, each mistake as to the existence of an assault is nothing more than a mistake of law.

But if the focus is shifted from the 'offence' to the 'defence', it appears that the defendant did not misinterpret the law. She intended only to do something which the Code expressly allows. She erred about a socio-factual element as it was defined above. The facts she expected to exist would have justified her conduct. Although her mistake does not negate the *mens rea* of the offence, its structure is comparable to a typical mistake of fact. The system, it appears, is not a complete one. Moreover, it seems to attach the ignorance of law rule to all mistakes. A straight application of the distinction between mistake of fact and mistake of law would eventually lead to similar problems as are faced under the German legal system. Is this just a superficial resemblance or could it indicate some deeper structure in, at least, Western legal thinking?

Does the requirement that a mistake in self defence be reasonable flow from its special character as one that has the qualities of both a mistake of fact and a mistake of law? This question cannot be finally answered. But what are the consequences if all mistakes in self defence are judged to be ones of law? A rule that any mistake in self defence is irrelevant would require the defendant to check all circumstances of her defence, the objective, factual situation with absolute accuracy. This would, in effect,

³⁸⁹) R.v.Molis (1980), 50 C.C.C. (2d) 558, p.563 (S.C.C.)

³⁹⁰) *Mewett & Manning*, *supra* note 13 at 366

³⁹¹) R.v.Nelson (1992), 13 C.R. (4th) 359 (O. C.A.)

establish a form of absolute liability. Such a rule could probably be challenged under s.7 of the Canadian Charter of Rights and Freedoms. Moreover, the law cannot give higher priority to the interests of the initial aggressor as opposed to the person who is forced by the situation to defend her rights. The initial aggressor must bear the risk that the (initial) victim may misinterpret the facts. Otherwise, one basic idea in the law of self defence would be converted into its opposite. This must be equally true if the law, let us say arbitrarily, draws a line between what is an assault and what is not. The law of self defence respects a very personal situation of constraint, in which the state withdraws its monopoly of force. Can this really be different if the law, *de facto* unknown for many people, excludes certain interpretations from legal validity, however popular for certain groups in society?

It is said that the ignorance of law rule is upheld because of the social costs that might otherwise be caused³⁹². This is certainly true in the normal course of events because the law might lose its regulatory function and give way to the law of the jungle. It is a consequence of democracy that the majority makes the rules and not the individuum. But in the special situation of facing an attack, the democratic idea of majorities might seriously harm people who think differently. Also, the social costs seem to be higher with the ignorance of law rule than without. It is congruent with the idea of self defence to allow mistakes, and reasonableness seems to be the only feasible way to restrict their scope.

4.3.2. The Mistake - Accident Distinction

If the Canadian law of self defence is analyzed in the light of *Fletcher's* concept of 'wrongdoing', it turns out that 'wrongdoing' is determined quite differently from 'unreasonable negligence'. To assess the objective part of wrongdoing would mean to

³⁹²) See Mewett & Manning, *supra* note 13 at 382

allow self defence only if the decisionmaker objectively determines that the situation is appropriate for that form of conduct. If the element of assault was absent, the defence would be unnecessary and it would be, as such, 'harm' to society. However, the law seems to render the determination of the objective situation unnecessary. Section 34 of the Criminal Code provides justification for an agent who caused such harm in reasonable apprehension of an appropriate situation. This is not to say that the standard necessarily becomes a subjective one. The requirement of a "reasonable apprehension" still leaves room for the decisionmaker to apply a uniform standard. Does the additional requirement fit in with *Fletcher's* theory?

One significant difference between mistakes and accidents might be that unreasonable negligence causes harm accidentally while an unreasonable apprehension causes a mistaken belief. As a first step I will draw from a theory of action which supports Fletcher's view that there is a structural difference between accidents and mistakes, and later survey whether a different assessment of the phenomena flows necessarily from this distinction. *Coval*, *Smith* and *Burns* point out that, in cases of accident, the agent intends to perform an action, which does not occur because an unforeseen event intervenes which produces a vector effect on the agent's behavior and causes an unintended result³⁹³. 'Accidentally' questions the foreseeability of all possible causal factors, while mistakenly claims that false beliefs were instrumental in effecting the conduct. Other criteria which show a growing sensitivity of the law to the limitations of an agent are whether normal choice was used, a particular standard was attained, or relevant effects were foreseen. There seems to be no reason why mistake and accident should not be evaluated differently.

Moreover, *Stalker* finds reasons in *Fletcher's* theory to be less generous towards mistakes than towards accidents. Accidents happen in the realm of causation, in the real

³⁹³) C.Coal, J.Smith and P.Burns, *supra* note 2 at 207

world, and not in someone's mind. No one can really determine when an accident will happen. Therefore the risk of accident that the actor has created is part of that objective set of circumstances that determines wrongdoing. If the risk falls below the threshold of unreasonableness, there is not enough danger to society to warrant the exercise of the criminal law. On the other hand, mistakes do not happen in the real world, they happen in the actor's mind. *Stalker* concludes that therefore they could come under the actor's control. For the most part, they do not affect the danger of the activity. Which is the same whether the actor is acting on a mistaken belief or not. Whereas when the risk of accident varies, it takes with it the dangerousness of the conduct: when the risk of mistake varies, it does not affect the dangerousness of the conduct³⁹⁴. In particular mistakes as to justificatory elements of an offence do not affect either the violation of the norm or the wrongful nature of acting in ignorance:

"If an actor believes that he is being attacked and responds with force, his injuring the putative aggressor can avail himself of justified force in response, and others who aid the putative defender can be held liable as accessories in the perpetrator's wrongful act. If a mistaken claim of justification functions as an excuse, then one can expect it to meet the standard applied to other excusing conditions - namely that it actually excuse the actor from blame."³⁹⁵

Therefore, a mistake does not negate culpability unless the making of the mistake was blameless. Fletcher continues to explain that there is no culpability for ignorance where the circumstances fail to put the actor on notice of the relevant risk³⁹⁶. The crucial idea is that even if ignorance does not *negate* culpability, it might attach *different* culpability. It is the theoretical foundation of his system which is similar to the German one, and which allows, in this case, the further conclusion that it is the agent's legal

³⁹⁴) G. Fletcher, Rethinking Criminal Law *supra* note 6 at 504-14; A. Stalker, Problem of Negligence *supra* note 35 at 296

³⁹⁵) G. Fletcher, Rethinking Criminal Law, *supra* note 6 at 696

³⁹⁶) *Ibid.* at 712

duty to respond to the risk. Failure to do so is the wrongdoing that he or she is appropriately blamed for.

4.4. Attribution in Negligence and Self-Defence

In Fletcher's system, the second step of 'attribution' is a subjective, or individual aspect. As a result of the Creighton-analysis, the aspect of attribution appears in the third step of Madame Justice McLachlin's test whereby no one is criminally liable who lacks the capacity to attain the standard. This aspect seems to be at odds with the notion of utilitarianism, which can be identified as being the mainstream aspect for the 'policy - considerations' recalled in the Creighton-ruling. *Grant* and *Boyle* note that those who may pose the most danger to society, that is, those incapable of appreciating the danger, are most beyond the reach of the law³⁹⁷. This is in fact a price the criminal law is willing to pay, as long as it is, in *Fletcher's* words, not fair to hold the individual accountable³⁹⁸. This statement is not designed to depict the criminal law as a system that is oblivious to the utilitarian value of preventing harm. Indeed, the system of enacting rules and punishing those accountable for violating them serves the interests of the community. The critical distinction is the between the system of punishment as a whole and the determination of liability in individual cases³⁹⁹. As indicated in the foregoing chapters, there was a lengthy debate concerning which criteria would be properly applicable to the notion of 'fairness' so as to exclude criminal liability for the incapacitated offender.

³⁹⁷) I. Grant and C. Boyle, *supra* note 12, in their note 26

³⁹⁸) G. Fletcher, Rethinking Criminal Law, *supra* note 6 at 492

³⁹⁹) *Ibid.* Chapter 6.3.2.

Neither *Fletcher* nor the Canadian Supreme Court raises the issue whether, in self-defence, liability might also be excluded in the case of incapacity. Arguably, the whole test of reasonableness was made an aspect of wrongdoing, and there is no additional criterion which negates attribution if the defendant was unable to fulfill the requirements of reasonableness.

4.5. Unreasonable Self-Defence in the Systemic View

I will focus again on unreasonable self defence in Canadian law, employing my system comparison to suggest a re-organization of the determination of wrongdoing. The most serious difference, between acquittal and conviction for murder, which can result from the finding 'reasonable' or 'unreasonable' seems to be too harsh for a criterion of soft contours like reasonableness⁴⁰⁰. The Supreme Court of Canada has rejected excessive self-defence as a device for convicting of manslaughter rather than of murder⁴⁰¹. However, the question whether there is enough elasticity in the defence to make a half-way house reduction to manslaughter for excessive self defence unnecessary seems not to be a fruitful approach here.

Murder stipulates that the accused is deemed to have acted with a blameworthy intention to kill - despite her honest belief to the contrary, that she acted within the limits of the law. What she really did wrong was to arrive at her mistaken view. Arguably the accused is not punished for her fault - which would be an unreasonable 'assessment of the situation' - but for murder. She should be acquitted of the intentional offence, and this must be the consequence of each honest mistake in self-defence.

⁴⁰⁰) See further the criticism by I. Grant, D. Chunn and C. Boyle, *supra* note 12 at 6-46.

⁴⁰¹) R.v.Faid (1983) 33 C.R. (3d) 1 (S.C.C.); R.v.Gee (1982) 29 C.R. (3d) 347 (S.C.C.); R.v.Brisson (1982) 29 C.R. (3d) 289 (S.C.C.).

However, this would exclude not only Lyn Lavallee and Colette Petel from liability, but also someone who, say by fear, exceeds the boundaries of reasonableness.⁴⁰² Liability for intentional conduct would be remarkably reduced, and such a pure retreat of the criminal law surely cannot be the most desirable solution to the problem.

But to quash a charge of murder in the light of an honest mistake in self defence does not necessarily mean that the accused goes free. Does an acquittal on the basis of reasonable self-defence preclude liability for negligence? Would the German law's solution be precluded, in principle? In fact, in neither Lavallee nor Petel was the issue of negligence discussed, although the procedural rule of 'issue estoppel' does not exclude a court's jurisdiction to enter a conviction on a lower, included charge. One reason why the issue was never raised might be the fact that both, manslaughter and self - defence, apply the standard of the reasonable person. Therefore, one could infer that a finding of reasonableness would exclude liability on all possible counts. However, it was shown *supra* (Chapter II) that, in fact, the standard varies. Wilson J. stated in R.v.Lavallee, that the decisionmaker should look at the whole story of the accused⁴⁰³, and in Petel, the Chief Justice explained that reasonableness changes with the personal experience of the agent - a ruling McLachlin J. expressly tried to avoid in Creighton⁴⁰⁴. The test for negligence is broader, and people who pass it in self-defence might nevertheless be convicted for manslaughter under McLachlin J's

⁴⁰²) This is different, for example, in the law of provocation (s.37 CCC), where a person who kills in a homicidal rage in limited circumstances can be convicted of manslaughter *via* that defence.

⁴⁰³) R.v.Lavallee, *supra* note 5 at 326. *Per* Wilson J, "Fairness and the integrity of the trial process demand that the jury have the opportunity to hear certain expert evidence", *ibid.* at 359.

⁴⁰⁴) R.v.Petel *supra* note 29 at 170

uniform-standard test. As *Patrick Healy* pointed out that, applying that assessment of reasonableness, it would

"[E]xclude the perception of the accused in the relevant circumstances Lynn Lavallee would be serving time (for murder or manslaughter)".⁴⁰⁵

However, in the model proposed here she could be liable for manslaughter. Might it not be a marked departure from what a prudent person would do if Lyn Lavallee, after the second serious incident, goes from the hospital right back to Kevin Rust? It could be said that this inevitably caused, or contributed to the situation which led to his death. Applying Creighton, it was her unreasonable apprehension which arguably rendered the defence itself unreasonable and, therefore, caused the undesirable, harmful consequence. The ruling in Creighton might well apply to that situation. Lavallee's role as a victim could be taken into account at sentencing and, of course, she might even be excused because she did not have any alternative to going back to Kevin Rust, and thus her conduct in this respect would not be unreasonable. But society would make it clear that the gun is not the appropriate answer to any dispute. The focus would be on the real problem, which is the (im)possibility of ending such a relationship in advance of harmful social consequences. That solution would make sure that it is the very wrongdoing which is the primary basis of the stigma that it attracts. Only then can the criminal law achieve the regulatory effect in society it is designed to achieve.

⁴⁰⁵) P. Healy, *supra* note 131 at p.265,278

VI. CONCLUDING REMARKS

I. The Composition of Approaches to Reasonableness

Although I tried to reveal as many of her features as possible, the reasonable person remains open-textured and difficult to pin down. It must be borne in mind that it was not possible in my thesis to construct a cohesive theory of reasonableness. What is deemed 'reasonable' is ultimately the result of public policy, which means that many different considerations flow together and form a simple decision of 'reasonable' or 'unreasonable'.

For analytical purposes, it has been useful to divide these considerations up into different chapters. Each chapter dealt with the notion of fault and the substantive rules of manslaughter and self defence which result in homicide, but from different points of view. This facilitated consideration of the various connotations of the term 'reasonableness'. Reasonableness cannot be covered solely by reference to moral values, absolute principles, history, or utilitarianism. After all, each of these aspects influences public policy. Public policy requires a positive decision about which group in society should be protected. The approaches I have chosen are not meant to be contradictory legal opinions or attitudes, and it is not necessary to decide which one is most convincing.

The approaches to 'reasonableness' presented in Chapters II, III, and V, discuss three possible barometers of an agent's conduct, which are her awareness of risk, the way she was expected to behave according to her history, and a narrow definition of her capacity. The goal was to identify criteria which could be substituted for 'reasonableness' or at least narrow down the range of its definitions. Chapter II selectively centred on Canadian positive criminal law, Chapter III on principles and theories which adhere to a certain supreme idea, and Chapter V on the general structure of a criminal justice system. This permitted an assessment of general theories free from

the constraint of positive law. Chapter IV discussed the interdependence of a decisionmaker's world view and the final verdict. The reality of the decisionmaker's criteria of 'reasonableness' was subject to a critical assessment. The division of aspects was not meant to be a clinically pure separation and similar arguments were relevant to different contexts.

II. The Search for Criteria

The Supreme Court of Canada set out an objective test for manslaughter. That test attaches liability where bodily harm was objectively foreseeable and where the accused was capable of foreseeing it.⁴⁰⁶ A qualitative-objective test was provided for self defence resulting in homicide requiring the decisionmaker to take the accused's personal experience into account.⁴⁰⁷ Notwithstanding the Court's positive rulings, Chapter III surveyed how the verdict "unreasonable" becomes legitimate in light of the structural requirements of the common law. The *mens rea* principle does not provide any descriptive criteria for testing 'reasonableness'. *Mens Rea* does not require any positive state of mind on the part of the accused - in particular, it does not require 'awareness of risk'. It is the notion of fault which determines the threshold *mens rea*. Authors are reluctant to define fault generally, apart from stressing omission to take care when society requires one to do so. It was argued that, in cases of negligence, the occurrence of consequences is always fortuitous, and that criminal stigma should therefore not attach. Theory of action shows that although an agent may be aware of consequences, there is no reason to conclude that she caused them 'by choice'. It is not possible to infer fault in negligence deductively from the accused's free choice. For

⁴⁰⁶) R.v.Creighton *supra* note 5 at 218

⁴⁰⁷) R.v.Lavallee *supra* note 5 at 355

policy reasons, the concept of responsibility is in force well beyond choice and intention of an agent.

Even an inquiry into moral theory could not reveal criteria about what constitutes unreasonableness. It seems that a negative moral verdict requires no specific state of mind. Moreover, the notion of fault need not even be dependent upon characteristics over which the agent has control. Rather, the accused's general purpose for acting is subject to the moral verdict. The debate about morality is dominated by *HLA Hart* who introduced the requirement that the accused must be capable of conforming to a certain standard of care and that otherwise generous allowances are to be made.⁴⁰⁸ Moral fault is identified as 'blame in ordinary life' which again refers to public policy.

Since reasonableness could not be defined by an inquiry into absolute principles and moral criteria, the focus was on the question of how it must be tested from a utilitarian point of view given the criminal law's goal of inducing an optimal level of care in people's behavior. Applying economic analysis, a standard that varies with the accused's frailties appears most suitable to induce an optimal level of care. Yet, the costs of determining the individual standard of optimal care for each accused are tremendous. In fact, the latter pragmatic argument was decisive in *R.v.Creighton*.⁴⁰⁹ I argued that a pure utilitarian policy does not even need to use the criminal law, and that

⁴⁰⁸) HLA Hart, *Mens Rea* *supra* note 150 at 168

⁴⁰⁹) *R.v.Creighton* *supra* note 5 at 238

a combination of compensation and vindication on the part of the injurer could manage the risk of negligently causing harm just as well.⁴¹⁰

My next step was an inquiry into the social protection approach to reasonableness. The reasonable person, although frequently labeled 'ordinary', became the embodiment of all these qualities required of an optimal citizen. There has been criticism that this 'good citizen' consists exclusively of the frailties of the group which is dominant in society, even though constitutional norms, in Canada ss.15 and 27 of the Charter, demand that no particular group in society be privileged. The determinants in the reasoning of this group are reflected in the reasonable person standard and brought to bear on the decisionmaking process. It is cultural backgrounds and world views which affect how people think, make decisions, behave, and define events. In other words, any concept of reasonableness depends upon the world view of the person who applies it. Therefore, it is the decisionmaker's cultural background which *de facto* frames the criteria of reasonableness. A general concept of reasonableness in the criminal law must be open to influence by all groups in society - including women and cultural minorities. Politicization of cultural norms is important to allow them to influence the process of decisionmaking and the substantive law's synthesis. I discussed three ways in Chapter IV how (different) cultural norms can become the law.

But should all the various cultural norms in a multicultural society be reflected in the standard of reasonableness? It seems to be desirable neither to provide a decisionmaker of matching cultural background for each accused nor to just allow whatever world view which is not simply idiosyncratic to be reasonable. The fact that harm caused by unreasonable behavior may affect people of different cultural

⁴¹⁰) The lack of positive results made me wonder whether it makes sense at all to link reasonableness to principles of the criminal law. The alternative would have been to approach the issue just descriptively, from a sociological view. However, comparative analysis, in Chapter IV, showed that there can be positive rules which meaningfully restrict the openness of 'reasonableness'.

backgrounds suggests that there should be uniform criteria. I contended that the latter argument is valid only if the criminal law is used to direct conduct in a certain direction, such as traffic regulations. Here, the standard should be technical and visible to allow people to be informed about the relevant norms. On part of the accused, criteria for restricting liability beyond the rule of causality should be provided in accordance with regulatory needs, in a way which is as independent from the decisionmaker's values as possible and oriented towards efficacy.

However, the defence of self defence in homicide evaluates *ex post* a situation of personal constraint. Typically, the accused found herself being apprehended by some aggressor. The issue is how sensitive should the law be in its attempts to understand the accused's personal situation? I suggested that the accused not be held to the strict objective standard used in cases of negligent manslaughter. The distinction drawn by the Supreme Court of Canada appears to be more than a product of random man-made rules: differences in the situative patterns of manslaughter and self defence already suggest a different assessment of responsibility.

Finally, from a comparative view, suggestions can be made for both situative patterns. With reference to manslaughter, 'causality of the violate element' was introduced as a criterion to restrict liability. It connects liability closely with the very norm, or duty, that the accused violated, and it could add to the criterion of a 'marked departure'. Concerning deadly self defence, recommendations can be made for an acquittal from a murder charge if the defendant held an honest but unreasonable belief that deadly self defence was necessary. This means that the defence to a murder charge does not need the 'reasonableness' requirement any more. However, if the accused's mistaken apprehension was not blameless, she would be liable for that mistake, but on the basis of negligence, not of murder. In order to protect self defendants with different cultural world views, even the distinction between mistakes of fact and mistakes of law should no longer be relevant.

Reasonableness as an open textured concept remains an indispensable element of the criminal decisionmaking process. Of course, my conclusions cannot answer the principal question in a given case: has the accused acted reasonably or not? Finally, since the significance of a decision's outcome is restricted, positive law must, in the context of reasonableness, attempt to formulate rules to assist the decisionmaker in her task as effectively as possible.

Rudolf Alexander Mikus

The Reasonable Person in Substantive Canadian Criminal Law

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R.v.Blackwell (1994) 29 C.R. (4th) 376 (O.C.A.)
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R.v.Faid (1983) 33 C.R. (3d) 1, 2 C.C.C. (3d) 513 (S.C.C.)
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R.v.Hill (1985) 51 C.R. (3d) 97 (S.C.C.)
R.v.Hundal (1993) 19 C.R. (4th) 169, 79 C.C.C. (3d) 97 (S.C.C.)
R.v.Judge (1957) 118 C.C.C. 410 (O.C.A.)
R.v.Kandola (1980) 50 C.C.C. (2d) 558 (B.C.C.A.)
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R.v.Martineau (1990) 2 S.C.R. 633, 58 C.C.C. (3d) 353 (S.C.C.)
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R.v.Rogers (1968) 4 C.C.C. 278 (B.C.C.A.)
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R.v.Stellato (1994) 31 C.R. (4th) 60 (S.C.C.)
R.v.Topping (1994) 26 C.R. (4th) 396 (S.C.C.)
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 BGHSt 11, 1
 BGHSt 21, 59
 BGHSt 24, 31
 BGHSt 33, 61
 BGH DAR 1954, 17
 BGH GA 1960, 213
 BGH GA 1969, 117
 BGH VRS 7, 181
 BGH VRS 25, 455
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Rudolf Alexander Mikus

The Reasonable Person in Substantive Canadian Criminal Law

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