JUSTICE AND CRIMINAL CULPABILITY

Eric Colvin

Professor of Law, Bond University, Queensland

I. INTRODUCTION

The commission of a criminal offence requires not only the breach of some rule of conduct but also some measure of blameworthiness for this breach. The law which deals with the problem of blameworthiness is variously described by terms such as the law of 'criminal responsibility' or 'criminal culpability'. Its principal concerns are the mental states which accompany breaches of conduct-rules and the special contexts within which breaches can occur. As with many analytical distinctions, the distinction between criminal conduct and criminal responsibility or culpability is not clear cut. It can be argued that some contextual defences, such as self-defence and necessity, are better viewed as modifying the applicable conduct-rules rather than providing grounds of exculpation. The margins of the categories are not, however, a present concern. The concern of this paper is with the function of the law of criminal responsibility or culpability. 'Criminal culpability' will be the term used throughout the paper.

Culpability is the central issue in academic literature and university courses on 'criminal law'. Indeed, the term 'criminal law' itself is widely used in both academic and professional discourse as a synonym for the law of criminal culpability. Separate labels are given to subjects such as criminal procedure, evidence and sentencing. Yet, despite the attention which it has received, the law of criminal culpability is notoriously confused. Wild fluctuations of approach are frequently encountered in judicial decisions, reform proposals and academic writings. These fluctuations occur with respect to the most fundamental features of the law. Consider, for example, the disagreements over basic principles which produced sharp divisions within the High Court of Australia in O'Connor[1] respecting the intoxication rules, the House of Lords in *Caldwell* [2] respecting the concept of recklessness, and the Supreme Court of Canada in *Tutton*[3] respecting the concept of criminal negligence. Consider also the dramatic divergences between jurisdictions over the concept of criminal negligence,[4] the role and meaning of recklessness,[5] and the rules relating to mental impairment due to intoxication.[6]

In this paper, I shall argue that an important factor in this confusion has been competition between two different views of the role performed by the law of criminal culpability within the wider framework of criminal law. These two views operate as meta-theories rather than substantive theories of criminal culpability. They do not directly tell us what the substantive law of criminal culpability should be. Instead, they offer explanations of why the criminal law should be concerned with the problem of culpability, explanations from which substantive theories of criminal culpability can then be derived.

1 (1980) 29 ALR 449 (HCA)
2 [1982] AC 34 (HL)
3 (1989) 69 CR (3d) 289
4 See eg *Callaghan* (1952) 87 CLR 115; *Tutton*, supra; *Yogaskaran* [1990] 1 NZLR 399 (CA).
5 See eg *Caldwell*, supra; *Sansregret* (1985) 18 CCC (3d) 223 (SCC); *Kural* (1987) 29 A Crim R 12 (HC).
6 See eg *Majewski* [1977] AC 443 (HL); *O'Connor*, supra; *Bernard* (1988) 67 CR (3d) 113 (SCC).

II. Two Perspectives on Criminal Culpability

Why are we concerned at all with the problem of blameworthiness? Why do we not maximise the deterrent and denunciatory power of criminal law by convicting everyone who breaches prescribed rules of conduct, regardless of their states of mind and regardless of exculpatory or extenuating circumstances?

Concern with the problem of culpability is usually viewed as a requirement of justice. Arguments for the importance of aligning criminal law with the requirements of justice can be made from both utilitarian and non-utilitarian perspectives. From a utilitarian perspective, it can be argued that correspondence with notions of justice is a foundation for the moral credibility of criminal law.[7] Convicting and punishing the morally innocent could generate a culture of antagonism towards the law which harms or destroys its capacity to guide social behaviour. Most commonly, however, non-utilitarian arguments for a concern with justice are advanced. Whatever the cost for deterrent and denunciatory power, it would still be unjust to convict a person of a criminal offence without consideration of that person's culpability. In its origins, this perspective on the demands of justice has links to rights-based critiques of utilitarianism as a general philosophy.[8] In its application to the problem of criminal culpability, the approach has been advocated by theorists such as HLA Hart[9] and George Fletcher.[10]

Despite its widespread appeal, there is an ambiguity in the proposition that attention to the problem of culpability is a requirement of justice. Is our concern simply with the justice of convicting a person of an offence, with the conviction viewed as a discrete act of condemnation and evaluated apart from the penal liability which is attached? Or is our concern with the justice of convicting a person of an offence carrying a specific measure of penal liability, with the conviction seen as an integral step in a process leading to some measure of punishment? I shall call these two perspectives on criminal culpability, the 'condemnation theory' and the 'proportion theory'.

The divergence between the two perspectives can be illustrated by the debate over the intoxication defence at common law. The traditional position at common law has been that evidence of self-induced intoxication may be used to negative the mental elements of 'specific intent' offences but not 'general intent' offences.[11] The latter category of offences includes assault and its compounds, rape and manslaughter. For these offences, an intoxicated person can be convicted even though the person was acting as an automaton, or lacked any knowledge or foresight which would ordinarily be required for the offence. The justice of convicting a person under these circumstances was defended by the House of Lords in *Majewski*,[12] on the ground that a person who intentionally becomes intoxicated cannot escape blame for the consequences. Lord Elwyn-Jones said at 474:

7 See, for example, Robinson, 'Foreword: The Criminal-Civil Distinction and Dangerous Blameless Offenders' (1993) 83 Journal of Criminal Law and Criminology 693 at 706–708.

8 See, especially, Rawls, *A Theory of Justice* (1972).

9 See, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968).

10 See, *Rethinking Criminal Law* (1978).

11 See, especially, *Majewski* [1977] AC 443 (HL). The rule has been abandoned for the purposes of the common law in Australia: see *O'Connor* (1980) 29 ALR 449 (HCA). The present status of the rule in Canada is uncertain: see *Bernard* (1988) 45 CCC (3d) (SCC).

12 [1977] AC 443

If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition.

Similarly, Lord Salmon said at 482:

A man who by voluntarily taking drugs gets himself into an aggressive state in which he does not know what he is doing and then makes a vicious assault can hardly say with any plausibility that what he did was a pure accident which should render him immune from any criminal liability.

Yet, critics of the intoxication rules rarely take issue with this analysis of culpability. The objection which is usually levied against the intoxication rules is not that the offender was free of fault or even that criminal liability was unmerited. The objection is rather that it is unjust to convict of the particular offences falling within the 'general intent' category, and thereby to expose the offender to the same penalties as would be faced by a person who had chosen to commit or to risk committing the harm involved in the offence. It is this concern with the penal consequences of a conviction which distinguishes the 'proportion' theory from the 'condemnation' theory.

The 'condemnation' theory of criminal culpability operates as both a shield and a sword. As a shield, it reflects the general principle of morality that suffering should not be imposed on blameless persons. It insists that an offender must have been at fault for the commission of the harm or wrong, in the sense that there was a fair opportunity and good reason to have avoided committing it. In the words of George Fletcher:

If the law ignored the question of attribution, namely, the question of whether individuals were properly held accountable for their wrongful acts, the criminal law undoubtedly would generate some unjust decisions. If it were true that the only relevant norms of the legal system were those of wrongdoing, injustice would be inescapable in cases in which individuals could not but violate the law.[13]

The 'condemnation' theory can, however, also be used as a sword. Not only may some degree of fault be regarded as *necessary* for criminal liability, it may also be regarded as *sufficient*. Again, the words of George Fletcher are apposite:

The assessment of attribution and accountability obviously requires the application of standards to the particular situation of the actor ... . [T]he standard has a variety of forms, but it always recurs to the same normative question: could the actor have been fairly expected to avoid the act of wrongdoing? Did he or she have a fair opportunity to perceive the risk, to avoid the mistake, to resist the external pressure, or to counteract the effects of mental illness? This is the critical question that renders the assessment of liability just.[14]

On this approach, the only question is the justice of a conviction as an act of condemnation. A conviction is just if the person is at fault, regardless of what the conviction may entail for penal liability. The justice of exposing an offender to a particular range of punishments is treated as a separate issue for the law of sentencing.[15] The law of criminal culpability operates as an applied branch of general moral philosophy, oriented towards an

13 *Rethinking Criminal Law* (1978) 511, quoted by Wilson J in *Tutton* (1989) 69 CR (3d) 289 at 319 (SCC). See also, Hart, 'Negligence, *Mens Rea* and Criminal Responsibility' in *Punishment and Responsibility: Essays in the Philosophy of Law* (1968).

14 Fletcher, *Rethinking Criminal Law* (1978) 510. See, however, the same author's concern with the problem of incremental culpability at 297–303, a quotation from which is included in footnote 36.

15 See, for example, Wells, 'Swatting the Subjectivist Bug' [1982] Crim LR 209 at 213.

assessment of the moral character of a person's conduct and unconcerned with the relationship between crime and punishment.

The relationship between crime and punishment is central to the 'proportion' theory of criminal culpability. This theory treats the law of criminal culpability as an applied branch of a specialised philosophy of punishment rather than of a general moral philosophy. The question to be asked is not only whether the accused is blameworthy, but also whether there is sufficient culpability to justify the penal liability which will follow from conviction. The focus is on the morality of the state's response to the crime as well as on the morality of the accused's conduct.

Underlying the 'proportion' theory of criminal culpability is the moral principle that the degree of punishment should be proportionate to the degree of blameworthiness. In the words of the Lamer CJ of the Supreme Court of Canada, summarising HLA Hart, it is a 'fundamental principle of a morally based system of law that those causing harm intentionally be punished more severely than those causing harm unintentionally'.[16] This is a limiting as well as a justifying principle for punishment. It allows higher levels of punishment for higher degrees of culpability but it also insists upon those higher degrees of culpability before higher levels of punishment can be justified. In addition to the assessment of actual sentences, the principle can be applied to measures of penal liability and therefore to the law of criminal culpability. This has been recognised by the Supreme Court of Canada in its decisions of the significance of the constitutional entrenchment of 'principles of fundamental justice' in s 7 of the Canadian Charter of Rights and Freedoms.[17] The Canadian decisions have stressed the varying degrees of social stigma as well as penal liability which may follow conviction of a criminal offence.[18] The 'proportion' theory could easily accommodate the problem of degrees of stigma, It is, however, doubtful whether introducing such an elusive variable could provide much practical assistance for the design of criminal offences.

Both the 'condemnation' and 'proportion' theories offer plausible explanations for concern with the problem of culpability. They do, however, have different implications for the substantive design of the law. In particular, the 'proportion' theory will tend to set the threshold of criminal liability higher than will the 'condemnation' theory, at least for criminal offences carrying high levels of penal liability.

The primary purpose of this paper is to argue that failure to attend to the distinction between these meta-theories has contributed to the confusion over basic principles of criminal culpability. Too often, judges have adopted one or the other track, without articulating their premises and without recognising that alternative premises may have shaped contrary conclusions. Three particular issues will be examined. Two are enduring problems: the *level* and the *scope* of culpability which is to be attached to criminal offences under general principles. The third issue is one which is becoming increasingly prominent: the degree to which objective tests in criminal law should be personalised to fit the capacities of the accused.

16 *Martineau* (1990) 79 CR (3d) 129 at 138, summarising Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 162.

17 See *Vaillancourt* (1987) 39 CCC (3d) 118 at 134; *Martineau* (1990) 79 CR (3d) 129 at 138–139; *Logan* (1990) 79 CR (3d) 169 at 178–179.

18 In *Logan* (1990) 79 CR (3d) 169 at 178–179, it was suggested that stigma is a more important consideration than penalty in determining the level of culpability required by principles of fundamental justice. For criticism of this view, see Colvin, *Principles of Criminal Law* (2nd ed, 1991) 64.

III. LEVELS OF CULPABILITY

A person may justly be blamed for some harm or wrong if that person could and should have avoided committing it: that is, if there was a reasonable opportunity to have avoided it and good reason to have done so. This is the core proposition of the 'condemnation' theory of criminal culpability. 'Good reasons' may be assessed by either a minimalist morality, which adopts the standards of the ordinary person, or a perfectionist morality, which adopts the standards of a saint or hero. Assuming a minimalist morality, the threshold of criminal culpability is established at the level of negligence. Failure to avoid committing a harm or wrong, when there was the opportunity to have done so and the ordinary person would have taken this opportunity, is negligent behaviour.

The argument that simple negligence can be an appropriate level of culpability for the criminal law has been made by several academic writers.[19] In contrast, there have been relatively few judicial endorsements of this approach, except with respect to minor regulatory offences.[20] The New Zealand judiciary, however, has been willing to accept simple negligence as an appropriate standard of culpability for manslaughter, on the ground that this was the intent of the legislature. The Crimes Act (NZ) imposes a series of duties to protect the lives or health of certain persons and to take reasonable precautions and to use reasonable care to avoid endangering lives when doing dangerous acts or when in charge or control of dangerous things.[21] The courts have repeatedly held that these provisions are unambiguous and that they impose liability for any degree of negligence.[22] The conclusion has been that the text leaves no room for the introduction of the high degree of negligence which constitutes 'criminal negligence' in the common law of crime. Under the Act, negligence which would be sufficient for liability in the law of torts would also suffice for a criminal conviction of manslaughter. The New Zealand courts have not sought to justify this position by reference to any arguments of principle, but neither have they expressed any disquiet.

The duty-imposing provisions of the Criminal Codes of Queensland and Western Australia[23] are essentially the same as those of the Crimes Act (NZ). The Australian courts, however, have interpreted them in a way which reflects the 'proportion' theory of criminal culpability. In *Scarth*,[24] a two–one majority of the Queensland Court of Criminal Appeal held that there would not be a breach of the duty to take reasonable precautions and to use reasonable care unless the negligence was sufficiently great to pass the standard for criminal negligence at common law. The dissenting judge complained that this interpretation departed from the plain meaning of the text. The majority disagreed. They took the view that the terms 'reasonable precautions' and 'reasonable care' are not self-explanatory terms, and that it was therefore proper to invoke the common law as an aid to interpretation.[25] Any pretence at a textual justification was, however, abandoned

19 See, for example, Hart, 'Negligence, *Mens Rea* and Criminal Responsibility' in *Punishment and Responsibility: Essays in the Philosophy of Law*; Fletcher, *Rethinking Criminal Law* (1978) 504–514; Galloway, 'Why Criminal Law is Irrational' (1985) 35 UTLJ 25; Wells, 'Swatting the Subjectivist Bug' [1982] Crim LR 209.

20 See eg *Wholesale Travel Group Inc* (1991) 8 CR (4th) 145 at 161 (SCC).

21 Crimes Act (NZ) ss 151–157.

22 See *Dawe* (1911) 30 NZLR 673 (CA); *Storey* [1931] NZLR 417 (CA); *Yogaskaran* [1990] 1 NZLR 399 (CA).

23 Criminal Code (Qld) ss 285–289; Criminal Code (WA) ss 262–267.

24 [1945] St R Qd 38

25 At 44–46 and 56. Stanley AJ at 56 and 58 also made it clear that he thought the use of the higher standard of criminal negligence was correct as a matter of principle.

when the High Court of Australia dealt with the same issue in *Callaghan*[26]. In a unanimous opinion, the Court conceded that the words of the text 'smack very much of the civil standard of negligence'.[27] It was, however, concluded that a different interpretation was needed when the words were used in 'a description of fault so blameworthy as to be punishable as a crime' and that the higher standard of criminal negligence would be appropriate for 'a criminal code dealing with major crimes involving grave moral guilt'.[28] Some members of the Supreme Court of Canada have even taken the further step of holding that, because of the serious consequences of committing an offence of criminal negligence, subjective advertence to the risk of causing harm is required.[29]

Proportion between level of culpability and severity of penal consequences has been one of the central concerns of the Supreme Court of Canada in relation to s 7 of the Canadian Charter of Rights and Freedoms. Section 7 guarantees the right not to be deprived of life, liberty, or security of the person except in accordance with 'the principles of fundamental justice'.[30] In *Reference re s 94 (2) of the Motor Vehicle Act*[31] the Supreme Court held that the combination of absolute liability and liability to imprisonment would violate s 7: it would be contrary to the principles of fundamental justice to deprive a blameless person of liberty. Subsequently, the constitutionality of a number of offences has been challenged on the ground that, although some culpability was specified in the ordinary offence description, the prescribed level was too low. In *Martineau*[32] a five–two majority of the Supreme Court held that, because of the penalty and stigma for murder, subjective foresight of death is constitutionally required for this offence. In reaching this conclusion, express reference was made to Hart's formulation of the principle of proportionality.[33] Lamer CJ concluded at 139:

> The essential role of requiring subjective foresight of death in the context of murder is to maintain a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender. Murder has long been recognised as the 'worst' and most heinous of peace time crimes. It is, therefore, essential that to satisfy the principles of fundamental justice, the stigma and punishment attaching to a murder conviction must be reserved for those who either intend to cause death or who intend to cause bodily harm that they know will likely cause death.

Of course, the 'proportion' theory does not itself necessitate the adoption of a subjective test of culpability for murder or any other offence. It is a meta-theory which dictates how the level of culpability required for an offence should be determined. It demands that considerations of proportionality should be taken into account. Whether or not this leads to the adoption of a test of intention, recklessness, criminal negligence or simple

26 (1952) 87 CLR 115
27 At 121.
28 At 121 and 124.
29 See *Tutton* (1989) 69 CR (3d) 289. The Criminal Code (Can) s 219 contains a vague definition of criminal negligence, referring to a person who 'shows wanton or reckless disregard of the lives or safety of other persons'. In *Tutton*, three judges held that the test was objective and three held that it was subjective.
30 The text of s 7 reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." The text, has, however, been interpreted as conferring one right rather than two, that is, a right not to be deprived of the listed interests except in accordance with the stated principles.
31 (1985), 48 CR (3d) 289
32 (1990) 79 CR (3d) 129
33 See above, text accompanying note 12.

negligence will depend on substantive theories of the differences between these measures of culpability and of the relative seriousness of the penalties which are in issue.

The Canadian courts have been relatively cautious in their use of the doctrine of proportionality since *Martineau*. The demands of justice have been held to require foresight of death for a conviction of attempted murder,[34] and it has been suggested that a conviction for theft should require proof of some 'dishonesty'.[35] In addition, the distinction between civil and criminal negligence has been given constitutional recognition. It has been held that some offences of negligence, including the 'careless' use or storage of firearms, constitutionally require proof of a *marked* departure from the standard of the reasonable person.[36] On the other hand, it has been held that the considerations of proportionality for manslaughter are different from those for murder, so that neither foresight nor even foreseeability of the risk of death is constitutionally required.[37] In *Creighton*[38] a five–four majority of the Supreme Court of Canada held that it is constitutionally sufficient for manslaughter that an unlawful act which causes death carries an objectively foreseeable risk of bodily harm, as long as the foreseeable harm is neither trivial nor transitory.[39] Moreover, it has been held that subjective advertence to danger is not required for the offence of dangerous driving, and that a marked departure from the standard of care of a reasonable person is a constitutionally sufficient level of culpability for the offence.[40] Similarly, it has been held that the constitutional requirement for the offence of failing to provide necessaries of life for a child is a marked departure from the conduct of a reasonably prudent parent and not subjective disregard of the child's needs.[41] Indeed, simple negligence has been said to be sufficient to meet the demands of justice in relation to regulatory offences,[42] and objective foreseeability has been held sufficient for the 'result' component of several compound offences.[43] The Supreme Court has repeatedly insisted that the Charter can only be used to identify a *minimum* standard of fault, which is not necessarily the *appropriate* one, and that there are few offences for which intention or recklessness is a constitutional requirement.[44]

IV. The Scope of Culpability

The 'condemnation' and 'proportion' theories offer different approaches to the problem of what can be called 'the scope of culpability'. Various offences contain two or more conduct elements. Must culpability be

34 See *Logan* (1990) 79 CR (3d) 169 (SCC). The conclusion was based on the stigma rather than the penalty. See also above, note 14.

35 See *Vaillancourt* (1987) 39 CCC (3d) 118 at 134 (SCC); *Logan* (1990) 79 CR (3d) 169 at 179 (SCC).

36 See *Creighton* (1993) 23 CR (4th) 189 at 209 (SCC); *Finlay* (1993) 23 CR (4th) 321 at 332 (SCC).

37 *Creighton* (1993) 23 CR (4th) 189 at 201–202 (SCC).

38 (1993) 23 CR (3d) 189

39 The dissenters argued that a manslaughter conviction would only be just if there was foreseeability of the risk of death itself.

40 *Hundal* (1993) 19 CR (4th) 169 at 176–177, 181, 182–183 (SCC).

41 *Naglik* (1993) 19 CR (4th) 335 at 350–352 (SCC).

42 *Wholesale Travel Group Inc* (1991) 8 CR (4th) 145 at 176–178, 204–205 (SCC); *Durham* (1992) 15 CR (4th) 45 (Ont CA).

43 See *Canada v Pharmaceutical Society (Nova Scotia)* (1992) 15 CR (4th) 1 at 41–43 (SCC); *DeSousa* (1992) 15 CR (4th) 66 (SCC); *L (SR)* (1992) 16 CR (4th) 311 (Ont CA); *Creighton* (1993) 23 CR (3d) 189 (SCC).

44 See *Vaillancourt* (1987) 39 CCC (3d) 118 at 134; *Wholesale Travel Group Inc* (1991) 8 CR (4th) 145 at 205 (SCC); *DeSousa* (1992) 15 CR (4th) 66 at 82 (SCC).

established for each conduct element or will it suffice that there is culpability for some part of the conduct? Assault occasioning bodily harm provides an example. Is it sufficient for a conviction that a culpable assault happened to cause bodily harm, even if the outcome was an unforeseeable accident? Or must there be some culpable state of mind respecting the bodily harm as well as the assault? The problem usually arises in relation to compound offences, such as assault occasioning bodily harm, where an underlying lesser offence is coupled with aggravating features to create a more serious offence. Conceivably, the same questions could be asked about an offence with an element which is a moral or civil wrong but not an criminal offence. There would be little contemporary support, however, for the more complex position taken in *Prince*[45] that culpability respecting the moral or civil wrong would provide sufficient culpability for the more complex offence.

From the perspective of the 'condemnation' theory, the scope of culpability is of no significance. A finding of culpability with respect to some part of the offence is a finding that the accused could and should have avoided engaging in that conduct and therefore necessarily could and should have avoided committing any resulting harm or wrong. An accused who is held liable for the fortuitous consequences or incidents of culpable conduct cannot claim moral innocence. The initial fault establishes the justice of liability for offences with additional, aggravating features. If the contrary view is taken that justice requires some culpability for all elements of the offence, it must be because of considerations of proportionality.[46] If such considerations can be invoked, it may be arguable that the penal liability for the aggravated offence is out of proportion to the fault of the accused.

These issues have been rarely examined in either judicial decisions or academic literature on criminal law. They have received some attention in a series of cases on the guarantee of fundamental justice in s 7 of the Canadian Charter of Rights and Freedoms. As yet, however, the Canadian courts have not openly confronted the competing imperatives of the two theories of criminal culpability.

The problem of the justice of partial culpability first came before the Supreme Court of Canada in relation to constructive murder. In *Vaillancourt*[47] the Court struck down a provision of the Criminal Code which had made it murder where death ensued as a consequence of using or carrying a weapon during the commission of certain listed offences of a serious nature. This was a particularly crude version of constructive murder because the prosecution was not required to prove any culpability respecting the death or even the infliction of injury. The offence could be committed if death resulted from the weapon discharging accidentally. The Court held that, in view of the penalty and stigma of a murder conviction, justice precludes a conviction in the absence of some element of moral blameworthiness which is specific to the death itself.[48] This ruling was affirmed in the subsequent decision of the Supreme Court in *Martineau*.[49]

45 (1875) LR 2 CCR 154

46 See Fletcher, *Rethinking Criminal Law* (1978) 300: "Liability contingent on a fortuity is precisely the kind of arbitrary rule that, in the language of Justice Traynor, erodes the 'relation between criminal liability and moral culpability'."

47 (1987) 39 CC (3d) 118

48 39 CCC (3d) at 134. See also the comment of the majority of the High Court of Australia in *Wilson* (1992) 174 CLR 313 at 322 that the felony murder doctrine at common law prevented the 'matching of moral culpability to legal liability in homicide'.

49 (1990) 79 CR (3d) 129

This latter case invoked the guarantee of fundamental justice to strike down another provision of the Criminal Code which based liability for murder on death ensuing from the intentional causation of bodily harm in the pursuit of certain serious offences.[50] As was noted earlier,[51] the Supreme Court also insisted on subjective recklessness respecting death as the minimum for a constitutionally acceptable measure of culpability.

A caution was given in *Vaillancourt* that the preconditions of justice for a murder conviction would apply to few other offences.[52] The significance of this limitation became apparent with *DeSousa*.[53] In that case, the Supreme Court held that an offence of unlawfully causing bodily harm did not violate s 7 of the Charter. It was said that the fault element of the offence, as a matter of standard statutory interpretation, would be objective foreseeability of bodily harm, together with whatever fault might be required for the underlying offence. The argument for the appellant was that the principles of fundamental justice required proof of subjective foresight of bodily harm rather than just objective foreseeability. The Court could have dismissed this argument on the ground that objective foreseeability was a constitutionally sufficient level of culpability. Instead, it was seemingly concluded that s 7 of the Charter did not constitutionally mandate any form of culpability with respect to the infliction of bodily harm. The Court invoked a general principle of the common law that a person who engages in unlawful activity does so at risk of incurring liability for accidental consequences or incidents of that activity. Speaking for the Court, Sopinka J at 86 articulated this principle in a way which draws a clear connection to the 'condemnation' theory:

> There appears to be a general principle in Canada and elsewhere that, in the absence of an express legislative direction, the mental element of an offence attaches only to the underlying offence and not to the aggravating circumstances .... This has been confirmed by this court in a number of cases including those which have held that sexual assault requires intention simply in relation to the assault and not the aggravating circumstance .... To require fault in regard to each consequence of an action would substantially restructure current notions of criminal responsibility. Such a result cannot be founded on the constitutional aversion to punishing the morally innocent. One is not morally innocent simply because a particular consequence of an unlawful act was unforeseen by that actor.

The present author was cited in support of the proposition in the first sentence of this passage.[54] The reference to sexual assault in the above passage indicates that the Supreme Court of Canada saw no injustice in excluding the sexual component from the culpability which is required to be proved for that offence.[55] Moreover, there are decisions upholding the compatibility of principles of fundamental justice with partial culpability for the offence of assault causing bodily harm[56] and manslaughter by unlawful act causing death.[57]

No recognition was given in *DeSousa* to proportionality as a general consideration in determining the scope of liability. The principle was

50 79 CR (3d) at 137–138.
51 See above, at text accompanying note 25.
52 39 CCC (3d) at 134. See also footnote 35 and accompanying text.
53 (1992) 15 CR (4th) 66
54 See Colvin, *Principles of Criminal Law* (2nd ed, 1991) 57.
55 On the fault element for sexual assault, see *Chase* (1987) 37 CCC (3d) 97 at 103. A sexual assault was said to be an assault 'committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated'.
56 *Brooks* (1988) 41 CCC (3d) 157. It was concluded in *Brooks* that no culpability need be proved for the causation of bodily harm.
57 *Creighton* (1993) 23 CR (3d) 189 at 203–207 (SCC).

acknowledged in *Creighton*[58] but did not determine the outcome of the case. In *Creighton*, the Supreme Court held by a five–four majority that, where an unlawful act causes death, principles of fundamental justice require no more for a manslaughter conviction than that the risk of bodily harm may have been foreseeable. The dissenting minority argued from the principles of proportionality that there must be foreseeability of the risk of death itself. The majority, however, disagreed that the demands of proportionality were so high. While acknowledging that 'the seriousness of the offence must not be disproportionate to the degree of moral fault',[59] the majority nevertheless concluded: 'Fundamental justice does not require absolute symmetry between moral fault and the prohibited consequences.'[60]

The decision in *DeSousa* produced strong criticism from Don Stuart, the editor of the Criminal Reports and the author of a widely-cited treatise on Canadian criminal law.[61] His startled reaction to the reasoning of the case illustrates the gulf between understandings about the role of the law of criminal culpability. In a comment on *DeSousa* in the Criminal Reports,[62] he lamented its departure from the principle of proportionality which had been articulated in *Martineau*. He characterised this departure as 'inconsistent and unprincipled'.[63] He even suggested that the idea that fault requirements might not extend to all elements of an aggravated offence was a heresy perpetrated by the two academic writers who were cited by the Court, Blackstone and the present author, and that the idea lacked any supporting authority.[64]

There may be room for disagreement over the *strength* of a principle endorsing partial culpability for aggravated offences. This principle does, however, have an established lineage. For example, it is settled law in several jurisdictions that, on a charge of assault occasioning bodily harm, there is no need to prove anything but causation with respect to the bodily harm.[65] This is the position in England[66] and in the common law jurisdictions of Australia,[67] and it was already the position in Canada before *DeSousa*.[68] Another example is assault on a police officer in the execution of her duty. In this instance, however, the picture is more complicated. In *Forbes and Webb*[69] it was concluded that it made no difference whether or not the accused knew that the person alleged to have been assaulted was a police officer. The decision was approved by Bramwell B in *Prince* (1875) 13 Cox CC 138 at 143, with this explanation: "Why? Because the act was wrong in itself." *Forbes and Webb* appears still to express the accepted law in England, where it is understood to mean that even a reasonable mistake of fact cannot provide a defence.[70] There are, however, decisions

58 (1993) 23 CR (3d) 189
59 23 CR (3d) at 205.
60 23 CR (3d) at 207.
61 Stuart, *Canadian Criminal Law* (2nd ed, 1987).
62 Stuart, 'The Supreme Court Drastically Reduces the Constitutional Requirement of Fault: A Triumph of Pragmatism and Law Enforcement Expediency' (1992) 15 CR (4th) 88.
63 15 CR (4th) at 89.
64 15 CR (4th) at 94–97. The present author's diagnosis of the principle does not simply endorsement of its merits.
65 Some exceptions are found in those Australian states with Criminal Codes, where a defence of accident or chance may negative liability for the outcome.
66 See *Roberts* (1971) 56 Cr App R 95; Smith and Hogan, *Criminal Law* (6th ed, 1988) 397. The test of causation which was used in *Roberts* was one of foreseeability. Subsequent cases, however, have adopted a looser test for causation: see, especially, *Pagett* (1983) 76 Cr App R 279.
67 See *Percali* (1986) 42 SASR 46; *Coulter* (1988) 30 A Crim R 471 at 472 (HCA); Fisse, *Howard's Criminal Law* (5th ed, 1990) 144; Gillies, *Criminal Law* (2nd ed, 1990) 527.
68 See *Starrat* (1972) 5 CCC (2d) 32 at 33 (Ont CA); *Brooks* (1988) 64 CR (3d) 322 (BCCA).
69 (1865) 10 Cox CC 362
70 See Smith and Hogan, *Criminal Law* (6th ed, 1988) 391.

in Canada and South Africa limiting liability to common assault where there was no awareness that the victim might be a police officer.[71] Moreover, although a three–two majority of the High Court of Australia in *Reynhoudt*[72] approved *Forbes and Webb*, it was indicated that the general defence of honest and reasonable mistake of fact in Australian law could be available.[73] Recognising a general defence of honest and reasonable mistake of fact weakens the impact of the principle of partial culpability for aggravated offences. Under present Australian law, however, the defence requires a mistake in the form of a positive belief and is not available in cases of mere lack of awareness.[74] The defence is therefore likely to offer assistance in very few cases of assault causing bodily harm.

The general principle of partial culpability for aggravated offences was recognised, although distinguished, by the New South Wales Court of Criminal Appeal in *Environmental Protection Authority v N.*[75] The case concerned the Environmental Offences and Penalties Act (NSW) s 51, which provides: "A person who, without lawful authority, wilfully or negligently disposes of waste in a manner which harms or is likely to harm the environment is guilty of an offence." The particular charge alleged that the offence had been committed 'wilfully', and the issue was whether 'wilfully' in s 5(1) governs only the disposal or whether it extends to the harmful impact on the environment. In adopting the latter interpretation, the Court noted but distinguished the lines of authority relating to assault causing bodily harm and assault upon a police officer. The reasoning was that those cases had concerned offences in which an underlying wrong was accompanied by aggravating circumstances or consequences. In contrast, merely disposing of waste without lawful authority is not an offence under the Environmental Offences and Penalties Act.

At one time, the offence of manslaughter by unlawful act causing death would have been another clear-cut example of the operation of the principle of partial culpability for aggravated offences. It has been said that, in the nineteenth century, manslaughter could be committed at common law by any unlawful act which happened to cause death, even if that act was in no way dangerous.[76] Indeed, this was how the Canadian Criminal Code was interpreted as late as *Smithers*.[77] Manslaughter by unlawful act causing death was said to require neither intention to inflict death or injury, nor foreseeability of such outcomes.

The principle of proportionality has, however, gained increasing ascendency over the offence of manslaughter by unlawful act. The present law of England and Canada is that the unlawful act must carry an appreciable or foreseeable risk of causing some bodily harm.[78] A four–three majority of the High Court of Australia has taken the further step of requiring an appreciable risk of *serious* injury. In *Wilson*[79] the majority stressed the

71 See *McLeod* (1954) 111 CCC 106 (BCCA); *Wallendorf* [1920] SALR 383.

72 (1962) 107 CLR 381

73 On the defence of honest and reasonable mistake of fact, see *Thomas* (1937) 59 CLR 279; *He Kaw Teh* (1985) 15 A Crim R 203 (HCA).

74 See *State Rail Authority (NSW) v Hunter Water Board* (1992) 65 A Crim R 101 (NSWCCA).

75 (1992) 59 A Crim R 408

76 See *Wilson* (1992) 174 CLR 313 at 323; *Creighton* (1993) 20 CR (3d) 189 at 198–199 (SCC).

77 (1978) 34 CCC (2d) 427 at 436 (SCC); Criminal Code (Can) s 222 (5)(a) provides: "A person commits culpable homicide when he causes the death of a human being by means of an unlawful act." Under s 234, culpable homicide that is not murder or infanticide is manslaughter.

78 See *Church* [1966] 1 QB 59; *Newbury* [1977] AC 500 (HL); *Creighton* (1993) 23 CR (3d) 189 (SCC). In *Creighton* at 199, it was said that the risk must be of bodily harm which is neither trivial nor transitory.

79 (1982) 174 CLR 313 at 334

importance of 'a close correlation between moral culpability and legal responsibility'. Three options for manslaughter by unlawful act were considered and rejected in light of this test of proportionality: (a) the nineteenth century position that manslaughter would be committed when any unlawful act caused death; (b) the English position that the act must carry an appreciable risk of some harm albeit not serious harm; (c) the position adopted in some earlier Australian cases that a blow which was intended to inflict some harm would suffice.[80] The conclusion was that the test of proportionality demanded an appreciable risk of serious injury. Curiously, no consideration was given to requiring foreseeability of death itself.

The ambivalence of the common law over the scope of culpability can be contrasted with the position under the Australian Criminal Codes.[81] All the Australian Codes include two general defences: accident or chance[82] and reasonable mistake of fact.[83] These defences can only be removed by express or necessarily implied provisions to the contrary. A person is not criminally responsible in Queensland or Western Australia for an event which occurs by accident, or in Tasmania for an event which occurs by chance, or in the Northern Territory for an event which is unintended and unforeseen. These provisions ordinarily require proof of some form of culpability which is specific to the injury or death identified in the offence description. In Queensland, Western Australia and Tasmania, the test for culpability is foreseeability;[84] in the Northern Territory it is subjective awareness.[85] Moreover, under the Codes of Queensland, Western Australia and the Northern Territory a person who acts under a reasonable mistake is not criminally responsible to any greater extent than if the facts had been as they were supposed to be. Thus, in the case of an offence such as assault upon a police officer, a reasonable mistake about the status of the victim will confine liability to common assault. Tasmania, on the other hand, only permits a defence where the mistake is such that it would 'excuse' the conduct.

The Australian Codes have not completely escaped the competition between the 'condemnation' and 'proportion' theories of criminal culpability. For many years, the defence of accident in Queensland and Western Australia has been denied in 'eggshell skull' cases, where a victim of violence suffered unforeseeable injury or death because of a pre-existing condition of an unforeseeable kind.[86] This exception to the test of foreseeability has now been repudiated by the Queensland Court of Appeal in *Van den Bemd*[87] but that decision is under appeal to the High Court of Australia. Unfortunately, the principles underlying neither the exception nor its repudiation have been articulated by the Australian Courts.[88]

80 174 CLR at 323, 327, 334.
81 The Codes have been used as a model for many African and Pacific jurisdictions. See O'Regan, 'The Migration of the Griffith Code', in *New Essays on the Australian Criminal Codes* (1988).
82 Criminal Code (Qld) s 23; Criminal Code (WA) s 23; Criminal Code (Tas) s 13; Criminal Code (NT) s 31.
83 Criminal Code (Qld) s 24; Criminal Code (WA) s 23; Criminal Code (Tas s 14; Criminal Code (NT) s 32.
84 See *Vallance* (1961) 108 CLR 56 at 61, 65, 82; *Kaporonovski* (1975) 133 CLR 209 at 231–232.
85 Criminal Code (NT) s 31(1).
86 See eg *Martyr* [1962] Qd R 398; *Mamote-Kulang* (1964) 111 CLR 62.
87 (CA No 236 of 1992)
88 The merits of the 'eggshell skull' principle were extolled in *Creighton* (1993) 23 CR (3d) 189 at 203–205 (SCC).

V. The Personalisation of Objective Tests

The 'condemnation' and 'proportion' theories are of obvious relevance to questions about the level and scope of culpability. It is hardly surprising that shades of these theories should be present in the case-law. What is curious is that their competing demands should have received so little scrutiny. There is an emerging problem in criminal law which can also be illuminated by consideration of the imperatives of the two theories: this is, the degree of personalisation in objective tests.

How far should objective tests, which measure the accused against the reasonable or ordinary person, be tailored to fit the personal capacities of the accused? A *personalised* objective test measures the accused against a reasonable or ordinary person possessing her own capacities; an *unpersonalised* test refers to 'normal' capacities and not to those capacities actually possessed by the accused. Objective tests are used for a variety of purposes in criminal law. For example, liability for negligence will depend on whether the conduct of the accused deviated from the conduct of a reasonable person and, where 'criminal negligence' is in issue, how great the deviation was. Objective tests are particularly common in the area of exculpatory defences. For example, in some jurisdictions, the defence of self-defence requires a belief, held on reasonable grounds, in the necessity of the response.[89] Duress, at common law, requires a threat to be made in circumstances where 'a person of reasonable firmness' could not be expected to resist.[90] The defence of provocation typically requires not only that the accused actually lose self-control but also that the provocation be sufficiently serious to cause an ordinary person to lose self-control.[91]

Increasing attention has been focused on how the standard of the reasonable or ordinary person should be constructed for the purposes of criminal law. There has been ready acceptance in recent years of the need to *contextualise* this construct, so that the reasonable or ordinary person is not a casual observer of the situation but is placed in the position of the accused, knowing what the accused does and being subject to the same experiences and pressures. Thus, for the purpose of the defence of provocation, the objective gravity of provocation is assessed by reference to the characteristics and history of the person to whom it is directed;[92] for the purpose of the defence of self-defence, the objective likelihood and danger of an attack is assessed in light of the prior experience and the vulnerability of the person under threat.[93] What is more problematic is the capacities for understanding, foresight, fortitude and self-restraint with which the reasonable or ordinary person should be endowed and against which the conduct of the accused is to be measured. Should there be one, fixed standard against which all accused persons are judged regardless of their own capacities? Or should there be a variable standard, tailored to the capacities of the individual accused, which allows the accused to be judged against a reasonable or ordinary person with those particular capacities? Or should the standard be personalised for some variables, such as age, but not for

89 See eg *Zecevic* (1987) 162 CLR 645; Criminal Code (Qld) ss 271–272; Criminal Code (WA) ss 248–249; Crimes Act (NZ) ss 48–49. See, however, the subjective approaches adopted in *Beckford* [1988] AC 130 (PC); Criminal Law Consolidation Act (SA) s 15(1), as and by Criminal Law Consolidation (Self-Defence) Amendment Act 1991.

90 See eg *Howe* [1987] AC 417 at 426, 458–459 (HL).

91 See eg *Camplin* [1978] AC 705 (HL); *Stingel* (1990) 50 A Crim R 186 (HCA); Criminal Code (Qld) s 268; Criminal Code (WA) s 245; Crimes Act (NZ) s 169.

92 See eg *Camplin* [1978] AC 705 (HL); *Stingel* (1990) 50 A Crim R 186 (HCA).

93 See eg *Lavallee* (1990) 76 CR (3d) 329 (SCC).

others? This problem of *personalisation* is quite separate from that of contextualisation.

An argument for a limited degree of personalisation can be based on the core proposition of the 'condemnation' theory that criminal liability should not be imposed unless there was a fair opportunity to have avoided committing the harm or wrong. The 'normal' standard would apply where the accused could reasonably have been expected to meet this standard. A more personalised standard, however, should be substituted in cases where any deficiencies in the capacities of the accused meant that the normal standard was not reasonably within grasp. The new standard would be that of a reasonable or ordinary person with the capacities of the accused.

It is in such terms that arguments for personalisation are most often presented. A passage from HLA Hart has been widely quoted:

> It may well be that, even if the 'standard of care' is pitched very low so that individuals are held liable only if they failed to take very elementary precautions against harm, there will still be some unfortunate individuals who, through lack of intelligence, powers of concentration or memory, or through clumsiness, could not obtain even this low standard. If our conditions of liability are invariant and not flexible, i.e. if they are not adjusted to the capacities of the accused, then some individuals will be held liable for negligence though they could not have helped their failure to comply with the standard.[94]

Two qualifications are sometimes made to this argument. The first is that the practical difficulties of designing a law of criminal culpability may prevent any more than a few key variables being taken into account.[95] The second is that the capacities which should be taken in account are those, such as age and intelligence, over which a person has no control. Thus, even with a highly personalised objective test for the defence of provocation, differences in the capacity to control temper may be considered irrelevant if this capacity is itself something which a person can and should work to develop. Subject to these qualifications, a variable standard has been represented as a requirement of 'fair opportunity', which is an aspect of the 'condemnation' theory of justice in the attribution of criminal culpability.

The 'condemnation' theory requires no more than a very limited personalisation of objective tests. The argument respecting fair opportunity does not insist that everyone should have the same or even a roughly approximate opportunity to meet the relevant standard of understanding, foresight, fortitude, or self-control. As long as a person is within the range of 'normal' capacities and can therefore be expected to meet a 'normal' standard, it is immaterial that there may have been relative difficulty in attaining it. A person can fairly be blamed for failing to meet standards of understanding, foresight, fortitude or self-control, even though that person may have experienced greater difficulties in meeting the relevant standards than other persons. As long as the standards are reasonably within reach, the handicapped person is just expected to try harder.

Of course, people often fail to reach standards which are within their grasp. Moreover, it may well be thought unjust to impose severe punishment on a person who has failed to meet a standard which was a relative difficult one for that person even if there was some measure of fault. Lack of personalisation in objective tests is a greater problem for criminal law

94 Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 154. See also Pickard, 'Culpable Mistakes and Rape: Relating *Mens Rea* to the Crime' (1980) 30 UTLJ 75; Stuart, *Canadian Criminal Law* (2nd ed, 1987) 192–196.

95 See Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 155.

than for the law of torts because of the penalties involved. Clearly, the problem of relative difficulty must be addressed in the law of sentencing. Whether or not this aspect of personalisation must also be addressed in the law of criminal culpability depends on the role assigned to this body of law. From the perspective of the 'condemnation' theory, the problem of relative difficulty can be left to the law of sentencing. The only issue for criminal culpability will be whether the accused could and should have met the standard. The 'proportion' theory, however, might call for some inquiry into the justice of holding everyone in the normal range to the same standard. Regardless of the judgment that the accused could and should have met this standard, it might still be germane to ask whether the standard was likely to have been met by an ordinary person endowed with the capacities and the deficiencies of the accused. In some instances, the level of penalties may be disproportionate to the degree of fault involved in failing to meet an attainable but difficult standard. It may then be more appropriate to measure the accused against the standard which would actually have been achieved by an ordinary person possessing the same particular capacities rather than a standard which could and should have been achieved.

These issues have received some attention in recent decisions of the Supreme Court of Canada. The result has been an endorsement, by an narrow majority of the Court, of an approach to personalisation which is consistent with the tenets of the 'condemnation' theory of criminal culpability. In *Creighton*[96] the Court was faced with the problem of how the objective test of the reasonable person should be formulated for the purposes of offences of negligence.[97] The conclusion of a five–four majority was that there should be a uniform standard which could be applicable to all persons, regardless of their particular frailties, except in cases of incapacity to meet this standard. Speaking for the majority, McLachlin J referred expressly to the principle that there should not be criminal liability without moral fault:

> In my view, considerations of principle and policy dictate the maintenance of a single, uniform legal standard of care for all such offences, subject to one exception: incapacity to appreciate the nature of the risk which the activity in question entails.
> This principle that the criminal law will not convict the morally innocent does not, in my view, require consideration of personal factors short of incapacity ....
> In summary, I can find no support in criminal theory for the conclusion that protection of the morally innocent requires a general consideration of individual excusing conditions. The principle comes into play only at the point where the person is shown to lack the capacity to appreciate the nature and quality or the consequences of his or her acts. Apart from this we are all, rich and poor, wise and naive, held to the minimum standards of conduct prescribed by the criminal law.[98]

No consideration was given to whether more extensive personalisation might be required by considerations of proportionality.

The practical effects of this approach can be seen in the judgment of McLachlin J in *Naglik*.[99] In that case, a mother was charged with failing to provide her child with the necessities of life. It was held that, in determining whether there was a marked departure from the standard of conduct of the

96 (1993) 23 CR (4th) 189

97 The particular offence which was in issue in *Creighton* was manslaughter by unlawful act, which requires foreseeability of the risk of bodily harm: see above, text accompanying notes 30, 45–46.

98 23 CR (4th) at 210–212.

99 (1993) 23 CR (4th) 335 (SCC)

reasonable parent, the mother's youth, inexperience and lack of education were immaterial.[100] Such factors would only have been material if they had deprived her of the capacity to appreciate the risks of neglecting the child, and there was no evidence suggesting lack of such capacity.

A minority of the Supreme Court of Canada has argued for greater personalisation of objective tests. The principal spokesperson for this point of view has been Lamer CJC. In *Tutton*[101] he called for 'a generous allowance' to be made for factors which are particular to the accused, such as youth, mental development and education.[102] This position was reaffirmed in *Creighton* and several associated cases.[103] Thus, in *Naglik*, Lamer CJC was prepared to contemplate adjusting the standard of reasonable conduct to allow for the youth, inexperience and lack of education of the mother, although he expressed doubts about whether a personalised standard would materially assist her.[104] Unfortunately, the arguments presented by Lamer CJC for personalised objective tests has been based, not on the principle of proportionality but on the principle that there should be no criminal liability without moral fault.[105] This principle cannot bear the weight of extensive personalisation which Lamer CJC seeks to put on it, as McLachlin J has observed.[106] The principle of no liability without fault requires no more than that the accused have had the capacity and good reason to meet the relevant standard. Only the principle of proportionality can support the personalisation of objective tests in all cases where there are frailties or inadequacies.

Cases such *Creighton* and *Naglik* accept a very limited degree of personalisation of objective tests in criminal law. They do, however, represent a significant advance for criminal law. Traditionally, criminal law has been extraordinarily unreceptive to arguments for personalisation. For example, the High Court of Australia has made the casual comment that the objective test for criminal negligence takes no account of even the age of the accused.[107] This also appears to be the position in England, where the harshness of refusing to personalise objective tests was seen in the notorious case of *Elliot v C*.[108] In that case, a fourteen year-old girl, of low intelligence and exhausted from lack of sleep, had set fire to a shed. The magistrate concluded that the risk of doing so would not have been obvious to her and therefore acquitted her of an offence relating to destroying the shed. The Divisional Court reversed the decision on the ground that the risk would have been obvious to a 'reasonably prudent person', which it considered sufficient for a conviction under the English law.[109] The test, said Goff LJ, was 'purely objective'.[110]

100 23 CR (4th) at 340.
101 [1989] 1 SCR 1329 at 1434
102 The phrase 'a generous allowance' is taken from Stuart, *Canadian Criminal Law* (2nd ed, 1987) 194.
103 See *Creighton* (1993) 23 CR (4th) 189 at 229–234 (SCC); *Gosset* (1993) 23 CR (4th) 280 at 296–300 (SCC); *Naglik* (1993) 23 CR (4th) 335 at 350–351.
104 23 CR (4th) at 351. There was some evidence that she had resisted offers to assist her to overcome here inadequacies.
105 See *Creighton* (1993) 23 CR (4th) 189 at 229–234 (SCC); *Gosset* (1993) 23 CR (4th) 280 at 296–300 (SCC); *Naglik* (1993) 23 CR (4th) 334 at 350–351 (SCC).
106 *Creighton* (1993) 23 CR (4th) 189 at 210–213.
107 *Stingel* (1990) 50 A Crim R 186 at 197 (HCA).
108 [1983] 2 All ER 1005 (Div Ct)
109 [1983] 2 All ER at 1008–1009, 1011. The statute required the offence to have been committed 'recklessly'. The Court interpreted 'recklessly' in an objective sense, following *Caldwell* [1982] AC 341 (HL).
110 [1983] 2 All ER at 1011.

Personalisation in the law of provocation has faired little better than in the law of negligence. It is at least now established that the relevant ordinary person has the power of self-control of an ordinary person of the age of the accused.[111] The House of Lords has also said that objective powers of self-control may be particularised for the sex of the accused,[112] but the High Court of Australia has expressly disagreed.[113] The position of the High Court is that variations between the powers of self-control of different classes or groups should be taken into account in determining the range of what can be characterised as 'ordinary', but that no accommodation should be made for anyone whose capacity for self-control falls below the normal range.[114] The exception for age was justified on two grounds: compassion and the 'ordinariness' of the development from childhood to maturity.

There are some signs of a more flexible approach to the use of objective tests in cases there the sufferings of 'battered women' have gained the sympathy of courts. Psychiatric evidence has suggested that prolonged exposure to abusive relationships may impair the capacity to identify and pursue options for escape. In *Lavallee*[115] it was suggested that such evidence could be considered in assessing the reasonableness of a belief that it was necessary for self-defence to kill the abuser. Similarly, in *Runjanjic* and *Kontinnen*,[116] where the common law defence of duress was in issue, psychiatric evidence of the mental effects of abuse was considered to be relevant in determining whether 'a person of reasonable firmness' could have succumbed to the threats. There is, however, a sharp contrast between developments in this area of criminal law and the general reluctance of the courts to embrace the idea of personalisation of objective tests.[117]

The courts have made little effort to defend their traditional resistance to personalising objective tests. The High Court of Australia, however, has endorsed a rationale offered by Wilson J of the Supreme Court of Canada: the principle of equality before the law. The argument is that the principle of equality is violated by personalising objective tests because it lowers the standard of conduct expected of some people in comparison to others. In *Stingel*[118] the High Court of Australia approved the following passage from the judgment of Wilson J in *Hill*:[119]

> The objective standard, therefore, may be said to exist in order to ensure that in the evaluation of the provocation defence there is no fluctuating standard of self-control against which the accused are measured. The governing principles are those of equality and individual responsibility, so that all persons are held to the same standard notwithstanding their distinctive personality traits and varying capacities to achieve this standard.

111 See *Camplin* [1978] AC 705 (HL); *Hill* (1986) 25 CCC (3d) 322 (SCC); *Stingel* (1990) 50 A Crim R 186 (HCA).
112 *Camplin* [1978] AC 705 (HL).
113 *Stingel* (1990) 50 A Crim R 186 at 196 (HCA).
114 50 A Crim R at 196.
115 (1990) 76 CR (3d) 329 at 397 (SCC)
116 (1991) 53 A Crim R 362 (SACCA)
117 See also *Mungatopi* (1991) 52 A Crim R 341, where the Northern Territory Court of Criminal Appeal left open the possibility of identifying the self-control of the ordinary person in the law of provocation with that of the ordinary member of a remote Aboriginal settlement. The identification of the relevant community to which the ordinary person belongs may be viewed as a separate issue from that of personalisation.
118 (1990) 50 A Crim R 186 at 193
119 (1986) 25 CCC (3d) 322 at 345 (SCC). *Stingel* and *Hill* were both cases on provocation. In *Tutton* (1989) 69 CR (3d) 289 at 321 (SCC) Wilson J argued that the personalisation of the objective test for negligence would be just as inappropriate.

In this conception of equality before the law, equality is taken to require that the same standard of conduct applies to everyone and that there is equal responsibility for failure to meet this standard. In *Tutton*[120] Wilson J insisted that one fixed standard should be applied regardless of a person's intelligence or even age:

> [A]n instruction to the trier of the fact that they are to hold a young accused with moderate intelligence and little education to a standard of conduct that one would expect from the reasonable person of tender years, modest intelligence and little education sets out a fluctuating standard which in my view undermines the principles of equality and individual responsibility which should pervade the criminal law.

This argument about equality before the law calls for two comments. The first is that the goal of establishing clear and universal behavioural norms must be balanced against the principle that there should be no criminal liability without fault. It must be assumed that Wilson J is contemplating a case where it is at least *possible* for the person of tender years, modest intelligence and little education to meet the standard, even though meeting it may be more difficult than it would be for the average person. There must be an exemption from criminal liability for the person who lacks the capacity to achieve the standard even with effort. Justice requires at a minimum that objective tests be personalised in accordance with the guidelines set out by McLachlin J in *Creighton*.[121]

Secondly, the argument advanced by Wilson J does not distinguish between the standards of conduct which are set for the community and the conditions under which a person can fairly be held criminally liable and thereby exposed to particular measures of punishment. The importance attached to maintaining behavioural standards diverts attention from any consideration of issues of proportionality between fault and penal liability. The same point can be made about the judgment of McLachlin J in *Creighton*, despite her acknowledgment of the need to immunise from criminal liability those who cannot meet the relevant behavioural standards. Considerations of proportionality provide the strongest arguments of personalising objective tests. Yet, such considerations have been largely ignored in the debate over how far personalisation should extend.

VI. CONCLUSIONS

The objective of this paper has been to show how certain areas of confusion in the law of criminal culpability can be illuminated by reflection about two different perspectives on the role of this part of criminal law. Under the 'condemnation' theory, the role of the law of criminal culpability is to ensure that criminal liability is imposed only on those persons who can justly be blamed for their conduct. Under the 'proportion' theory, the law of criminal culpability takes on the additional role of ensuring that the culpability of the accused is in proportion with the penal liability which attaches to the offence. Traces of these differing perspectives can be seen in the case-law and in academic writings. Criminal law has, however, failed to confront their divergent imperatives, with the result that a stable base for the development of principles of criminal culpability is lacking.

120 (1989) 69 CR (3d) 289 at 321 (SCC)
121 See above, note 78 and accompanying text.

It has not been part of the objectives of this paper to argue for the merits of one of these perspectives over the other. The choice will depend in part on wider views about the character of criminal law. Those who emphasise the value of criminal law as an instrument for the moral education of society may tend to view punishment and proportionality as potential distractions which can be safely left to the sentencing stage. In contrast, those who focus on the evils of punishment and the need to justify its use are likely to insist that the issue of proportion be on the agenda when criminal liability is determined.