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# Objective *Mens Rea* and Attenuated Subjectivism: Guidance from Justice Charron in *R. v. Beatty*

Palma Paciocco \*

## I. INTRODUCTION

Justin Ronald Beatty was driving on the Trans-Canada Highway on July 23, 2003 when, for no apparent reason, his truck suddenly crossed the solid centre line and collided with an oncoming car, killing three people. Beatty was charged with dangerous operation of a motor vehicle causing death. He was acquitted at trial on the grounds that his momentary lapse of attention was not enough to establish fault. The Crown appealed, and the Court of Appeal ordered a new trial after concluding that the trial judge had misapplied the fault standard. Beatty appealed to the Supreme Court of Canada, which undertook to clarify the test for penal negligence.<sup>1</sup> Writing for the majority, Charron J. expounded that test and restored Beatty's acquittal. Her judgment offers cogent guidance on a thorny question in criminal law: when is a person criminally liable for causing harm he or she neither intends nor foresees?

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\* S.J.D. candidate, Harvard Law School. I am grateful to the organizers of, and participants in, the Symposium Celebrating the Contributions of Justice Louise Charron; to Graham Mayeda, Lisa Kelly and two anonymous reviewers for their insightful comments on earlier drafts of this paper; to Kenji Tokawa for careful editing; to the Social Sciences and Humanities Research Council Doctoral Fellowship program for financial support during the period of this paper's preparation; and to Justice Louise Charron, for whom I had the honour of clerking in 2010-2011, for her tremendous mentorship.

<sup>1</sup> Penal negligence is distinct from criminal negligence. Criminal negligence is a statutory offence (*Criminal Code*, R.S.C. 1985, c. C-34, s. 219). To make out criminal negligence, the Crown must prove, *inter alia*, that the accused's act or omission "represented a *marked and substantial* departure (as opposed to a *marked departure*) from the conduct of a reasonably prudent [person] in circumstances where the accused either recognized and ran an obvious and serious risk ... or, alternatively, gave no thought to that risk": *R. v. F. (J.)*, [2008] S.C.J. No. 62, [2008] 3 S.C.R. 215, at para. 9 (S.C.C.) (emphasis in original). Penal negligence is the *mens rea* requirement for all other negligence-based offences. The standard for penal negligence is a *marked departure* from the standard of care of a reasonably prudent person in the circumstances. The marked departure standard is discussed *infra*, notes 93-105 and accompanying text.

A core principle of Canadian criminal law is that a wrongful act does not suffice to establish criminal culpability; the accused must also possess a guilty mind. This principle is often expressed via the maxim *actus non facit reum nisi mens sit rea*: the act is not culpable unless the mind is guilty. Although this maxim is ubiquitous, it is hardly instructive, for it immediately begs the question *what is a guilty mind?*<sup>2</sup> This question is so deeply contested and morally freighted as to seem intractable.<sup>3</sup> Nevertheless, it remains critically important we address it. The guilty mind requirement is a key means by which we seek to ensure that only blameworthy people are held criminally liable. Our insistence that criminal liability be reserved for the blameworthy is at the core of our criminal justice culture. We believe criminal punishment is justified, and justifiably stigmatizing, because we take it to accord with our broader moral judgments. Our beliefs about blameworthiness thus animate and validate the criminal justice system even as we continue to debate them.

One of the most controversial aspects of the guilty mind question is the status of objective *mens rea* offences. The paradigmatic crime is a wrongful act accompanied by an overt mental state such as intent or recklessness.<sup>4</sup> This type of crime — a subjective *mens rea* offence — can be contrasted with objective *mens rea* offences. The latter punish harmful acts that fall below objective standards of behaviour without regard to the defendant's subjective mental state. Examples include dangerous operation of a motor vehicle, the negligence-based crime with which Beatty was charged.<sup>5</sup> Canadian courts have generally upheld objective

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<sup>2</sup> See, e.g., Rosemary Cairns Way, "The *Charter*, the Supreme Court and the Invisible Politics of Fault" (1992) 12 Windsor Y.B. Access Just. 128, at 149 [hereinafter "Cairns Way, 'Politics of Fault'"], noting that the maxim is "singularly unhelpful as a unifying principle".

<sup>3</sup> "Criminal law is a species of political and moral philosophy. ... If the rationale or a limiting condition of criminal punishment is personal desert, then legal theory invariably interweaves with philosophical claims about wrongdoing, culpability, justifying circumstances and excuses": George P. Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown and Company, 1978), at xix.

<sup>4</sup> A person is reckless if she perceives that her intended actions will create a risk of harm but decides to proceed anyway. She does not intend to cause harm *per se*, but she deliberately risks it: *R. v. Sansregret*, [1985] S.C.J. No. 23, [1985] 1 S.C.R. 570 (S.C.C.). Recklessness is also called "advertent negligence". It is contrasted with inadvertent negligence, which, as in this paper, is often referred to simply as "negligence". Whereas the reckless or advertently negligent person takes a risk she actually foresees, the negligent person takes a risk that is objectively foreseeable, but which she does not personally foresee.

<sup>5</sup> Recently, in *R. v. H. (A.D.)*, [2013] S.C.J. No. 28, 2013 SCC 28 (S.C.C.), Cromwell J. identified "five main types of objective fault offences in the *Code*": offences defined in terms of dangerous conduct (e.g., dangerous driving); those defined in terms of careless conduct (e.g., the careless storage of firearms); predicate offences, which punish harmful consequences in the absence

*mens rea* offences, but they remain controversial.<sup>6</sup> Some theorists, “subjectivists”, argue that only advertent conduct is blameworthy. They criticize objective *mens rea* offences for punishing inadvertent conduct.<sup>7</sup> Others, “contextualists”, delineate blameworthiness with reference to social expectations and harm. In their view, there is no *prima facie* problem with objective *mens rea* offences because it may be appropriate to punish a person whose inadvertent conduct falls below community standards and causes harm.<sup>8</sup>

This paper intervenes in the subjectivism-contextualism debate by suggesting a new approach to conceptualizing blameworthiness, one that is reflected in Charron J.’s judgment in *R. v. Beatty*.<sup>9</sup> I call this approach the “attenuated subjectivist approach”, and I contrast it with strict subjectivism. Both types of subjectivism are grounded in the principle that an act or omission is only blameworthy if it reflects a choice on the part of the defendant. Whereas strict subjectivists maintain that only those who *deliberately* choose to commit prohibited acts or omissions are blameworthy, attenuated subjectivism rests on a more expansive notion of choice. In advancing the attenuated subjectivist approach, I maintain that people may be blamed for committing prohibited acts if those acts reflect their moral agency, and I assess whether acts reflect moral agency by asking whether the actors could and should have done otherwise. This assessment references social standards, but unlike the contextualist analysis, it retains a primary focus on the defendant’s exercise of choice. I conclude that some objective *mens rea* offences are justified because some negligent actions reflect moral agency.

The attenuated subjectivist approach is admittedly of limited assistance in assessing the fault requirements for particular offences because it begs the key normative question: when is it fair to say someone should have acted differently? To answer this question, we must adopt criteria for assessing blameworthiness. The tort law standard of care is of no direct assistance here because it is not sufficiently restricted to ensure that only the morally blameworthy are criminally punished; the

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of subjective foresight of harm; offences based on criminal negligence (*i.e.*, the statutory offence of criminal negligence; see *supra*, note 1); and duty-based offences (*e.g.*, failing to provide the necessities of life).

<sup>6</sup> The scholarly debates about objective *mens rea* are discussed at *infra*, Part II; the Court’s jurisprudence on the issue is discussed at *infra*, Part III.

<sup>7</sup> See *infra*, Part II.1.

<sup>8</sup> See, *infra*, Part II.2.

<sup>9</sup> [2008] S.C.J. No. 5, [2008] 1 S.C.R. 49 (S.C.C.) [hereinafter “*Beatty*”].

claim that someone “should” have acted differently has far heavier normative implications in the criminal context than in the tort context.<sup>10</sup> Nor can we simply import notions about moral blameworthiness from outside the law. These are too contested to serve as stable legal criteria. So while the attenuated subjectivist approach homes in on the key question, it leaves it open.

The approach does, however, apply readily to objective *mens rea* offences in one context, that of licensed activities. It is fair to presume people who perform licensed activities can and should meet the requisite standard of care. Justice Charron articulates the rationale for this presumption in *Beatty*. She explains that people who engage in licensed activities are presumptively aware of the standard of care and capable of meeting it. They presumptively *can* meet the standard. They are, moreover, on notice that the standard will be enforced, having agreed to abide by it when they chose to undertake the voluntary licensed activity. We can therefore presumptively claim they *should* meet the standard without triggering debates about moral blameworthiness.

This paper proceeds as follows. Part II introduces subjectivism and contextualism. Part III provides a very brief overview of the Court’s jurisprudence on objective and subjective *mens rea* leading up to *Beatty*. This jurisprudence is not entirely consistent with either subjectivism or contextualism. The Court has endorsed subjectivist principles and enshrined some of them as section 7 principles of fundamental justice,<sup>11</sup> yet it has also endorsed numerous objective *mens rea* offences and has resisted constitutionalizing subjectivism in general. This paper does not aim to reconcile all of the Court’s *mens rea* decisions, though Part III does examine a common explanation for their trajectory. Part III is intended to provide background while highlighting how salient the objective *mens rea* debate remains today. Part IV introduces and defends the attenuated subjectivist approach. Part V completes the analysis through a close reading of Charron J.’s reasons in *Beatty*. Those reasons clarified the test for penal negligence by casting it in attenuated subjectivist terms.

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<sup>10</sup> See text accompanying, *infra*, note 96.

<sup>11</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”]. Section 7 of the Charter states, “[e]veryone 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.”

## II. SUBJECTIVISM AND CONTEXTUALISM

Scholars and jurists have long debated the appropriateness of objective *mens rea* offences.<sup>12</sup> In large measure, the debate turns on competing understandings of blameworthiness. Subjectivists view moral blameworthiness as a necessary (though insufficient) condition for criminal guilt, and they believe conduct is not morally blameworthy unless engaged in freely and consciously.<sup>13</sup> They therefore think criminal liability should be reserved for those who consciously choose to perform prohibited acts.<sup>14</sup> Contextualists assess blameworthiness in light of social standards and harmful outcomes.<sup>15</sup> From their perspective, it may be appropriate to criminally punish those who unintentionally cause harm by falling below social expectations.

### 1. Subjectivism

Subjectivism reflects a classically liberal understanding of the state's relationship with individuals.<sup>16</sup> According to this line of thought, the state should maximize individual autonomy by reserving criminal sanctions for those who *choose* to commit unlawful acts. Subjectivists regard *mens rea* doctrines as a key means of enforcing this limitation on the criminal

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<sup>12</sup> See, e.g., Albert Lévy, "Extent and Function of the Doctrine of *Mens Rea*" (1923) 17 Ill. L. Rev. 578; Francie Bowes Sayre, "*Mens Rea*" (1932) 45 Harv. L. Rev. 974; Barbara Wootton, *Crime and the Criminal Law* (London: Stevens & Sons, 1963); H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law*, 2d ed. (Oxford: Oxford University Press, 2008) [hereinafter "Hart"]; George Fletcher, *Rethinking Criminal Law* (New York: Oxford University Press, 2000).

<sup>13</sup> See, e.g., Hart, *id.*; Kent Roach, "Mind the Gap: Canada's Different Criminal and Constitutional Standards of Fault" (2011) 61 U.T.L.J. 545, at 575 [hereinafter "Roach, 'Different Standards of Fault'"]; David M. Paciocco, "Subjective and Objective Standards of Fault for Offences and Defences" (1995) 59 Sask. L. Rev. 271, at 309 (now Justice David M. Paciocco, Ontario Court of Justice) [hereinafter "Paciocco, 'Subjective and Objective Standards'"].

<sup>14</sup> Brian Rolfes, "The Golden Thread of Criminal Law – Moral Culpability and Sexual Assault" (1998) 61 Sask. L. Rev. 87, at para. 28 [hereinafter "Rolfes"]. See also Alan Brudner, "Guilt under the Charter: The Lure of Parliamentary Supremacy" (1998) 40 Crim. L.Q. 287, at 317, presenting a somewhat different criticism of negligence-based criminal offences. In Brudner's view, these offences are "morally problematic" because "punishment is justified in a free society only in the exceptional case where the individual has himself willed it through a wilful denial of the rights of personality, for in that case alone do we honour the autonomy of the person in the very act of taking it away".

<sup>15</sup> See, e.g., James Stribopoulos, "The Constitutionalization of 'Fault' in Canada: A Normative Critique" (1999) 42 Crim. L.Q. 227 [hereinafter "Stribopoulos"]; Cairns Way, "Politics of Fault", *supra*, note 2; Rosemary Cairns Way, "Culpability and the Equality Value: The Legacy of the *Martineau* Dissent" (2003) 15 C.J.W.L. 53 [hereinafter "Cairns Way, 'Culpability'"].

<sup>16</sup> Cairns Way, "Politics of Fault", *id.*, at 134 (identifying and criticizing subjectivism's liberal premises).

law power. According to H.L.A. Hart, *mens rea* doctrines “[respect] the claims of the individual as such, or at least as a *choosing being*, and distribute [the law’s] coercive sanctions in a way that reflects this respect for the individual. This surely is very central in the notion of justice ...”.<sup>17</sup> Subjectivists express concern that without rigorous *mens rea* doctrines, the state might punish individuals for actions that, while dangerous, do not reflect a conscious choice to cause or risk harm.<sup>18</sup>

Because subjectivists are concerned about state overreach, they are suspicious of legal analyses that use policy goals to identify the *mens rea* requirements for particular offences (*e.g.*, an analysis that says proof of penal negligence suffices to establish dangerous driving because road safety is a pressing issue<sup>19</sup>). They believe this type of analysis risks criminalizing behaviour that is potentially injurious but morally blameless.<sup>20</sup> They therefore favour systematic analyses that deduce particular *mens rea* requirements from abstract fault principles, rather than extrapolating them from policy considerations.

Finally, because subjectivists are partial to abstract analyses and are concerned about state overreach, they tend to favour a strong judicial role in determining *mens rea* requirements. In their view, the courts are best placed to support subjective *mens rea* principles and to restrain overzealous legislators who, for their part, have an illiberal tendency to criminalize dangerous behaviour with insufficient regard to individual desert.<sup>21</sup> Subjectivists therefore encourage courts to actively shape *mens rea* standards.

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<sup>17</sup> Hart, *supra*, note 12, at 49 (emphasis in original).

<sup>18</sup> See, *e.g.*, Don R. Stuart, “The Need to Codify Clear, Realistic and Honest Measures of Mens Rea and Negligence” (1972) 15 *Crim. L.Q.* 160, at 183: “Above all, the concept of *mens rea* must be retained as a civil libertarian tool available for the lawyer to use to fend off society’s assertion that the accused be formally controlled and punished.”

<sup>19</sup> Justice Cory deployed this argument, among others, in *R. v. Hundal*, [1993] S.C.J. No. 29, [1993] 1 S.C.R. 867, at 884 (S.C.C.) [hereinafter “*Hundal*”].

<sup>20</sup> See, *e.g.*, Alan N. Young, “Done Nothing Wrong: Fundamental Justice and the Minimum Content of Criminal Law” (2008) 40 S.C.L.R. (2d) 441 [hereinafter “*Young*”]; and Paciocco, “Subjective and Objective Standards”, *supra*, note 13. One can subscribe to this perspective while also recognizing a key limitation of liberalism: its focus on individual choice, conceptualized in the abstract, tends to obscure socio-economic factors that give some individuals a much larger array of options than others. One can believe that an exercise of individual choice should be a necessary condition for imposing criminal liability while also maintaining that broad structural changes are necessary to maximize equal access to options.

<sup>21</sup> See, *e.g.*, Young, *id.*, at 442: “The conventional wisdom that courts cannot second-guess the policy choices made by a legislature rings hollow in a day and age when resort to criminal law as a response to a perceived social problem has become routine and perfunctory.” See also Kent Roach, “Constitutional and Common Law Dialogues Between the Supreme Court and Canadian

## 2. Contextualism

Contextualists resist the subjectivist emphasis on individual intent and focus instead on community standards.<sup>22</sup> James Stribopoulos, for example, writes:

If a person causes harm, in circumstances under which any reasonable member of the community would have realized that harm was a likely consequence of the conduct, it is not the presence or absence of choice which is relevant to blameworthiness. It is the failure to conduct oneself in a fashion commensurate with ordinary community expectations which transforms the conduct from something neutral, to something deserving of condemnation.<sup>23</sup>

In the same vein, Rosemary Cairns Way encourages us to zoom out from a narrow focus on the defendant's experience to consider the victim's perspective as well as community attitudes about the act or omission in question.<sup>24</sup>

Contextualists place a lower value on logical consistency than their subjectivist counterparts and a greater premium on context-sensitivity. They favour an inductive, case-by-case approach to determine the *mens rea* requirements for particular offences, one that looks to the specific context and purpose of each crime. Cairns Way, for example, criticizes the majority position in *R. v. Martineau* for

assum[ing] that the development of an overarching theory is desirable and necessary, that the fairest way to measure responsibility is to apply generalized rules to particular situations, and that logical consistency and analytic clarity are preeminent values.<sup>25</sup>

She praises L'Heureux-Dubé J.'s dissent for resisting "formulaic reasoning" in favour of a more comprehensive, contextualized, and multifaceted fault

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Legislatures" (2001) 80 Can. Bar Rev. 481, at 512 [hereinafter "Roach, 'Dialogues'"], discussing the different concerns of courts and legislatures *vis-à-vis* criminal law and advocating for a balanced "dialogue" approach.

<sup>22</sup> Cairns Way, "Politics of Fault", *supra*, note 2, at 178.

<sup>23</sup> Stribopoulos, *supra*, note 15, at 270-71.

<sup>24</sup> Cairns Way, "Politics of Fault", *supra*, note 2; Cairns Way, "Culpability", *supra*, note 15. See also Dennis Klinck, "The Charter and Substantive Criminal 'Justice'" (1993) 42 U.N.B.L.J. 191, at 211, suggesting that "an adequate account of justice might require a much more subtle and far-reaching inquiry into the social contexts of criminality than a narrowly focused attempt to equate moral blameworthiness, (defined in terms of subjective awareness), with penal, (or other), consequences for the accused".

<sup>25</sup> Cairns Way, "Culpability", *supra*, note 15, at 62.



analysis.<sup>26</sup> Similarly, Nancy Thomson approves of Wilson J.'s concurring reasons in *Reference re Motor Vehicle Act (British Columbia) S. 94(2)*, which frame the fault requirement in a context-specific manner.<sup>27</sup>

*Contra* the subjectivists, Thomson warns us that abstract fault analyses risk “overstat[ing] principles in an effort to settle the issue”, thereby generating skewed standards and foreclosing ongoing analysis.<sup>28</sup> Contextualists value ongoing analysis because they figure blameworthiness as a contingent, evolving concept. For the same reason, they believe judges should assume a limited role in determining *mens rea* standards so as to enable legislative experimentation.<sup>29</sup>

The foregoing descriptions of subjectivism and contextualism are simplistic, but they suffice to frame the discussion. Not all scholars and jurists are rigid subjectivists or objectivists. For example, some scholars endorse the subjectivist account of blameworthiness but nevertheless accept certain objective *mens rea* offences.<sup>30</sup> The same is true of the Supreme Court's jurisprudence, to which I now turn.

### III. THE COURT'S PRE-BEATTY JURISPRUDENCE ON OBJECTIVE *MENS REA*

The Supreme Court has issued a number of decisions bearing on objective *mens rea*. This section provides a brief overview of the key cases leading up to *Beatty*, then offers an explanation for their surprising trajectory.

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<sup>26</sup> *Id.*

<sup>27</sup> Nancy K. Thomson, “Fundamental Justice, Stigma and Fault” (1994) 52 U.T. Fac. L. Rev. 379, at 384. *Reference re Motor Vehicle Act (British Columbia) s. 94(2)*, [1985] S.C.J. No. 73, [1985] 2 S.C.R. 486 (S.C.C.) [hereinafter “*B.C. Motor Vehicle Reference*”].

<sup>28</sup> *Id.*, at 386.

<sup>29</sup> See especially Cairns Way, “Politics of Fault”, *supra*, note 2, at 145 and 176. See also Roach, “Dialogues”, *supra*, note 21, at 512, noting that although judges are institutionally well positioned to consider fault, “fault is a contested and evolving concept and it is not clear that courts should impose the final word on legislatures on these matters”. Roach favours institutional dialogue to balance these considerations.

<sup>30</sup> See, e.g., Donald Galloway, “Why the Criminal Law is Irrational” (1985) 35 U.T.L.J. 25 [hereinafter “Galloway”] and Roach, “Different Standards of Fault”, *supra*, note 13, at 575, noting that if objective *mens rea* offences were presumptively unconstitutional but were subject to a section 1 balancing analysis, the government could likely “justify the use of negligence in connection with manslaughter and the use of constructive liability for aggravated forms of impaired and dangerous driving. It might also have been able to justify blended forms of subjective and objective fault with respect to sexual assault and corporate crime”.

## 1. Major Supreme Court Decisions on Objective and Subjective *Mens Rea*

Not long before the Charter was enacted, in *R. v. Sault Ste. Marie (City)*, Dickson J. (as he then was), writing for the Court, penned the “most well-known subjectivist statement about *mens rea* and true crime in Canadian law”.<sup>31</sup> He wrote: “Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.”<sup>32</sup> He affirmed the statutory presumption that true crimes require proof of subjective *mens rea*<sup>33</sup> and established a further presumption that regulatory offences admit of a due diligence defence.<sup>34</sup> Justice Charron later characterized these presumptions as “presumptive principles of criminal justice”.<sup>35</sup>

The Court demonstrated a strong commitment to subjectivism in the decade the Charter was enacted. In *R. v. Pappajohn*, the majority concluded the defendant in a rape case could be acquitted if he honestly believed the complainant was consenting, even if his belief was unreasonable.<sup>36</sup> In the *B.C. Motor Vehicle Reference*, Lamer J. (as he then

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<sup>31</sup> Paciocco, “Subjective and Objective Standards”, *supra*, note 13, at 274. Paciocco goes on to remark, “[i]t is debatable whether the classic passage from *Sault Ste. Marie* was ever accurate in its suggestion that criminal liability requires subjective fault. We have consistently found clever ways to criminalize the unthinking” (*id.*, at 275). *R. v. Sault Ste. Marie (City)*, [1978] S.C.J. No. 59, [1978] 2 S.C.R. 1299 (S.C.C.) [hereinafter “*Sault Ste. Marie*”].

<sup>32</sup> *Sault Ste. Marie, id.*, at 1309-10 (S.C.R.).

<sup>33</sup> The presumption that true crimes require proof of *subjective mens rea* had already been articulated in earlier cases. See *R. v. Beaver*, [1957] S.C.J. No. 32, [1957] S.C.R. 531 (S.C.C.); and *Sherras v. De Rutzen*, [1895] 1 Q.B. 918 (Div. Ct.). See also *R. v. Pierce Fisheries*, [1970] S.C.J. No. 58, [1971] S.C.R. 5 (S.C.C.), holding that the presumption does not apply to regulatory offences.

<sup>34</sup> True crimes require proof of *mens rea* whereas regulatory offences do not. Because this paper is concerned with *mens rea*, its focus is on true crimes. Regulatory offences are divided into strict liability offences, which admit of a due diligence defence, and absolute liability offences, which do not. Thus, *Sault Ste. Marie* in effect established a statutory presumption that regulatory offences are strict liability offences, not absolute liability offences: *Sault Ste. Marie, supra*, note 31, at 1325-36. The due diligence defence applies when the accused “establishes, on a balance of probabilities ... that he or she took reasonable care or made a reasonable mistake”: Richard Litkowski, “The Charter and the Principles of Criminal Responsibility: A Long and Winding Road” [hereinafter “Litkowski”] in Jamie Cameron, ed., *The Charter’s Impact on the Criminal Justice System* (Toronto: Thomson Carswell, 1996) 271, at 271.

<sup>35</sup> *Beatty, supra*, note 9, at para. 22. Justice Charron notes that before the Charter was enacted, courts charged with assessing *mens rea* requirements could only police the division of powers and interpret provisions in light of these presumptive principles: *id.*

<sup>36</sup> *R. v. Pappajohn*, [1980] S.C.J. No. 51, [1980] 2 S.C.R. 120 (S.C.C.). The unreasonableness of the putative belief in consent could, however, serve as evidence the belief was not honestly held. The Court later clarified the defence is not available where the accused was

was), for the majority, held that absolute liability offences involving the possibility of imprisonment contravene section 7 of the Charter.<sup>37</sup> Writing for the majority again in *R. v. Vaillancourt*, he announced that “there is, as a principle of fundamental justice, a minimum mental state which is an essential element of the offence” and that a small number of criminal offences, including murder, require “a *mens rea* reflecting [their] particular nature” to justify their heightened penalties and stigma.<sup>38</sup> Three years later, in *R. v. Martineau*, Lamer C.J.C. established the minimum *mens rea* requirement for murder: “proof beyond a reasonable doubt of subjective foresight of death”.<sup>39</sup> *Martineau* “represents the apotheosis of subjectivism as a constitutional norm”.<sup>40</sup> After these decisions, many anticipated the Court would entrench constitutional subjective *mens rea* requirements for numerous other offences.<sup>41</sup> It did not.<sup>42</sup>

In *R. v. Nova Scotia Pharmaceutical Society*, the Court held the *mens rea* for any offence “may be demonstrated by proof of intent, whether subjective or objective, or by proof of negligent conduct, depending on the nature of the offence”.<sup>43</sup> In *R. v. DeSousa*, it found the accused need not actually intend the consequences of an “otherwise blameworthy act”.<sup>44</sup> These cases made it clear that an objective *mens rea* standard is constitutionally sufficient for most crimes<sup>45</sup> but left open the question of how that standard should be formulated.<sup>46</sup>

The Court soon addressed this question in *R. v. Hundal*, wherein it held that the *mens rea* standard for dangerous driving is a marked

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wilfully blind to the lack of consent: *R. v. Sansregret*, [1985] S.C.J. No. 23, [1985] 1 S.C.R. 570 (S.C.C.). In addition, *contra R. v. Pappajohn*, the *Criminal Code* now conditions the mistaken belief in consent defence on the accused having taken reasonable steps to ascertain the complainant was consenting: *Criminal Code*, *supra*, note 1, s. 273.2.

<sup>37</sup> *B.C. Motor Vehicle Reference*, *supra*, note 27.

<sup>38</sup> [1987] S.C.J. No. 83, [1987] 2 S.C.R. 636, at 652-53 (S.C.C.).

<sup>39</sup> [1990] S.C.J. No. 84, [1990] 2 S.C.R. 633, at 646 (S.C.C.) [hereinafter “*Martineau*”].

<sup>40</sup> Cairns Way, “Culpability”, *supra*, note 15, at 59.

<sup>41</sup> Stribopoulos, *supra*, note 15, at 251; Litkowski, *supra*, note 34, at 275.

<sup>42</sup> Stribopoulos, *id.*

<sup>43</sup> [1992] S.C.J. No. 67, [1992] 2 S.C.R. 606, at 659 (S.C.C.), quoting *R. v. Wholesale Travel Group Inc.*, [1991] S.C.J. No. 79, [1991] 3 S.C.R. 154 (S.C.C.), *per* Cory J. Here, “nature of the offence” refers to the distinction between true crimes and regulatory offences established in *Sault Ste. Marie*, *supra*, note 31. See *infra*, note 45. Proof of negligent conduct suffices for regulatory offences, whereas proof of subjective or objective intent is required for true crimes.

<sup>44</sup> [1992] S.C.J. No. 77, [1992] 2 S.C.R. 944, at 967 (S.C.C.).

<sup>45</sup> Don Stuart, “The Supreme Court Drastically Reduces the Constitutional Requirement of Fault: A Triumph of Pragmatism and Law Enforcement Expediency” (1992) 215 C.R. (4th) 88, at 92.

<sup>46</sup> Stribopoulos, *supra*, note 15, at 279.

departure from the standard of care of a reasonable person.<sup>47</sup> Justice Cory, writing for the majority, added: “The potential harshness of the objective standard may be lessened by the consideration of certain personal factors” that may negate fault, such as an unexpected seizure, heart attack, or detached retina.<sup>48</sup> He described this test as a “modified objective test”.<sup>49</sup> A few months after *Hundal*, McLachlin J. (as she then was), writing for a bare majority in *R. v. Creighton* and its three companion cases, affirmed the modified objective test.<sup>50</sup> She held, further, that the accused’s level of ability and experience is irrelevant to the test, but added the caveat that the accused must be acquitted if he or she is incapable of meeting the standard of care.<sup>51</sup> The modified objective test is considered in more detail in Part V.

By fully entrenching the modified objective test, *Creighton* and its companion cases confirmed the Court’s retreat from the strong subjectivism expressed in *Sault Ste. Marie*. As Cairns Way puts it, “[n]either the promise nor the peril, depending on your point of view, of the [Court’s early] constitutional decisions have materialized”.<sup>52</sup> Yet, while the Court has not adhered to strong subjectivism, neither has it embraced contextualism. It has maintained the core subjectivist principle that blameworthiness is primarily a function of the accused’s mental state while nevertheless accepting an objective *mens rea* standard for many crimes. This seemingly inconsistent approach has attracted much scholarly attention.

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<sup>47</sup> *Hundal*, *supra*, note 19.

<sup>48</sup> *Id.*, at 883. In her concurring reasons, McLachlin J. (as she then was) noted that someone who drives in a dangerous manner while having a seizure, or after losing consciousness due to a heart attack, lacks the voluntariness necessary to establish the *actus reus*. It should therefore be unnecessary to consider the *mens rea* element at all: *id.*, at 875-76. I think Cory J.’s detached retina example is more apposite, since a person with a detached retina retains voluntary control over her movements, although McLachlin J. would frame the detached retina example in terms of involuntariness, too. She writes: “The better analysis, in my view, is that the onset of a ‘disease or disability’ makes the act of losing control of the motor vehicle involuntary, with the result that there is no *actus reus*”: *id.*, at 875.

<sup>49</sup> *Id.*, at 887.

<sup>50</sup> *R. v. Creighton*, [1993] S.C.J. No. 91, [1993] 3 S.C.R. 3 (S.C.C.) [hereinafter “*Creighton*”]. *Creighton*’s three companion cases are *R. v. Gosset*, [1993] S.C.J. No. 88, [1993] 3 S.C.R. 76 (S.C.C.); *R. v. Naglik*, [1993] S.C.J. No. 92, [1993] 3 S.C.R. 122 (S.C.C.); and *R. v. Finlay*, [1993] S.C.J. No. 89, [1993] 3 S.C.R. 103 (S.C.C.).

<sup>51</sup> *Creighton*, *id.*, at 60-61: “I agree with the Chief Justice that the rule that the morally innocent not be punished in the context of the objective test requires that the law refrain from holding a person criminally responsible if he or she is not capable of appreciating the risk.”

<sup>52</sup> Cairns Way, “Culpability”, *supra*, note 15, at 55.

## 2. Subjectivism and the Limits of Section 7

Many criminal law scholars have concluded the Court is unwilling to establish a general subjective fault requirement under section 7, despite endorsing subjectivist principles, because it does not want to invalidate all the objective *mens rea* offences in the *Criminal Code*, some of which are widely accepted and regarded as important for public safety.<sup>53</sup> In theory, the Court could constitutionalize subjectivism under section 7, then use the section 1 balancing analysis to salvage some objective *mens rea* offences. In practice, however, it has never applied section 1 to section 7 and has “expressed doubt about whether a violation of the right to life, liberty or security of the person which is not in accordance with the principles of fundamental justice can ever be justified, except perhaps in times of war or national emergencies”.<sup>54</sup> As Kent Roach points out, constitutionalizing subjectivism would therefore mean either doing away with all objective *mens rea* offences or fundamentally reconceptualizing section 7 to make section 1 readily applicable.<sup>55</sup>

Roach claims that “subjective fault is a sufficiently compelling and traditional standard of culpability that it should have been constitutionalized as a principle of fundamental justice under section 7”.<sup>56</sup> He notes that subjectivist principles have a strong pedigree in Anglo-American criminal law, cohere with widely shared intuitions about blameworthiness, and fit best with most punishment theories.<sup>57</sup> He argues, further, that the section 1 balancing analysis should be more readily applied to section 7, and that some objective *mens rea* offences could be justified on this basis.<sup>58</sup> I agree, though I will not recapitulate Roach’s arguments

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<sup>53</sup> See, e.g., Stribopoulos, *supra*, note 15, at 272; David M. Paciocco, Book Review of *The Charter’s Impact on the Criminal Justice System*, Jamie Cameron, ed. (1997) 28 Ottawa L. Rev. 249; Jamie Cameron, “Fault and Punishment under Sections 7 and 12 of the Charter” (2008) 40 S.C.L.R. (2d) 553, at 569; and Roach, “Different Standards of Fault”, *supra*, note 13.

<sup>54</sup> *R. v. Heywood*, [1994] S.C.J. No. 101, [1994] 3 S.C.R. 761, at 802 (S.C.C.), citing *B.C. Motor Vehicle Reference*, *supra*, note 27, at 518. See also Thomas Lipton, “All Charter Rights are Equal, But Some are More Equal Than Others” (2010) 52 S.C.L.R. (2d) 449, at 461-62; and Roach, “Different Standards of Fault”, *supra*, note 13, at 570-71.

<sup>55</sup> Roach, “Different Standards of Fault”, *id.*

<sup>56</sup> *Id.*, at 548.

<sup>57</sup> *Id.*, at 566. With respect to punishment theories, Roach notes: “A person who was not aware of the harm that he or she caused or the risk that he or she ran cannot easily be blamed or deterred by the use of the criminal sanction. Such persons also cannot meaningfully acknowledge personal responsibility for the harm that they inadvertently caused”: *id.* Thus, objective *mens rea* crimes are not easily reconciled with specific deterrence, retributive justice or restorative justice.

<sup>58</sup> Roach suggests the government could likely justify some objective *mens rea* offences such as manslaughter and “aggravated forms of impaired and dangerous driving” under section 1, as

here. Unlike Roach, however, I think that even if subjectivism were constitutionalized under section 7, a limited number of objective *mens rea* offences could be endorsed without recourse to section 1. To explain why, I will contrast strict subjectivism, to which Roach subscribes, with what I am calling attenuated subjectivism. But first, I will attempt to build on Roach's defence of subjectivism in general.

#### IV. ATTENUATED SUBJECTIVISM

##### 1. The Case for Subjectivism

As we shall see, strict and attenuated subjectivists share the belief that blameworthiness is chiefly about the actor's mental state; indeed, this belief is what distinguishes them from contextualists.<sup>59</sup> Their shared focus on the actor's mental state is intuitive and familiar. When a toddler colours on the wallpaper, we may scold her but we do not blame her in the way we would blame an adult vandal. We understand she is to blame in the causal sense (*i.e.*, in the sense high wind is to blame for a felled tree) but not in the moral or legal sense. The same principle is captured by the criminal law's capacity requirement, which makes criminal liability contingent on the defendant's ability to understand her actions. We do not criminally punish someone who uttered threats as a symptom of her mental disorder for the same reason we do not view the toddler as blameworthy: we recognize that neither individual truly understood what she was doing, and hence neither made a meaningful choice to commit the proscribed act.

The close relationship between choice and blameworthiness (and hence, between choice and criminal liability) is reflected in numerous

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well as "some blended forms of subjective and objective fault with respect to sexual assault and corporate crime": *id.*, at 575.

<sup>59</sup> Contextualists regard blameworthiness as a function of mental state, but not exclusively or even primarily so, inasmuch as they accept the capacity requirement. That requirement conditions criminal liability on a minimum level of subjective awareness. In this regard, we can contrast contextualists with consequentialists. According to consequentialists, acts are morally right or wrong to the extent that they maximize, or fail to maximize, favourable outcomes. Because punishment is likewise morally justified to the extent that it maximizes favourable outcomes, we ought only to punish an individual if doing so will maximize favourable outcomes by deterring other harmful acts. Mental state is irrelevant. See David A. Pizarro & David Tannenbaum, "Bringing Character Back: How the Motivation to Evaluate Character Influences Judgments of Moral Blame" in Mario Mikulincer & Philip R. Shaver, eds., *The Social Psychology of Morality: Exploring the Causes of Good and Evil* (Washington, DC: American Psychological Association Press, 2012).

criminal law doctrines apart from capacity. It underpins the voluntariness requirement. A person who strikes another during a seizure or while sleepwalking is not criminally responsible for her actions because she did not choose to perform them. Again, she can only be blamed in the causal sense.<sup>60</sup>

Choice also animates the excuses of duress and necessity. In *R. v. Ryan*, the Court recalled that duress and necessity are based on the notion of “normative involuntariness” and clarified that an act is normatively involuntary if the actor has “no realistic choice”.<sup>61</sup> In *R. v. Perka*, Dickson J. (as he then was) explained: “At the heart of [the necessity] defence is the perceived injustice of punishing violations of the law in circumstances in which the person had no other viable or reasonable choice available.”<sup>62</sup>

The defence of mistake of fact reflects a similar logic. “If an accused entertains an honest belief in the existence of a set of circumstances which, if they existed at the time of the commission of an otherwise criminal act, would have justified his act and rendered it non-criminal, he is entitled to an acquittal.”<sup>63</sup> Blackstone categorized mistake of fact as a “defect of will”.<sup>64</sup> In light of the mistake of fact, the accused did not choose to perform the prohibited act in the sense of willing it or its consequences; she thought she was doing something else. Her actions therefore do not reflect her moral agency.

In short, the capacity and voluntariness requirements, the necessity and duress excuses, and the mistake of fact defence all apply two widely accepted principles: an action should not be punished unless it reflects moral agency; and an action does not reflect moral agency unless it expresses the actor’s will. The same principles also animate subjectivism, which is thus uniquely compatible with these criminal law doctrines.

Subjectivism also serves the main purpose of the *Criminal Code*, which, as Donald Galloway notes, is to set out imperatives people are expected to follow.<sup>65</sup> Daniel Robinson explains that the law must require

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<sup>60</sup> *R. v. Parks*, [1992] S.C.J. No. 71, [1992] 2 S.C.R. 871 (S.C.C.).

<sup>61</sup> [2013] S.C.J. No. 3, 2013 SCC 3, at para. 17 (S.C.C.), citing *R. v. Hibbert*, [1995] S.C.J. No. 63, [1995] 2 S.C.R. 973, at paras. 54 and 40 (S.C.C.): “it is a violation of s. 7 of the *Charter* to convict a person who has no realistic choice and whose behaviour is, *therefore*, morally involuntary” (emphasis added).

<sup>62</sup> [1984] S.C.J. No. 40, [1984] 2 S.C.R. 232, at 234 (S.C.C.), quoted with approval in *R. v. Ruzic*, [2001] S.C.J. No. 25, [2001] 1 S.C.R. 687, at para. 45 (S.C.C.).

<sup>63</sup> *R. v. Bulmer*, [1987] S.C.J. No. 28, [1987] 1 S.C.R. 782, at 789 (S.C.C.).

<sup>64</sup> Blackstone, *Commentaries on the Laws of England*, vol. 4 (Chicago: University of Chicago Press, 1979), at 27.

<sup>65</sup> Galloway, *supra*, note 30, at 26.

or prohibit that which “*could be otherwise*” since laws requiring the inevitable, or prohibiting the impossible, would be inane.<sup>66</sup> Laws should address “just those events over which persons have controlling powers subject to their choices, decisions, volitions” — events that can be attributed to their moral agency.<sup>67</sup> If a criminal law required or prohibited an act that is not a function of moral agency, we could not fairly expect people to follow it and hence it would be incompatible with the core purpose of the *Criminal Code*. By linking criminal liability to choice, subjectivism serves the main purpose of the *Criminal Code*, ensuring that the criminal law only sets out imperatives people can be expected to follow. For this reason, and also because it fits well with numerous criminal law doctrines and with common intuitions about blameworthiness, subjectivism is a sound and viable theory of fault.

## 2. Strict Subjectivism versus Attenuated Subjectivism

I turn at last to the difference between strict and attenuated subjectivism. Galloway observes that there are, broadly speaking, three mental states *vis-à-vis* harmful acts: those of a person who cannot choose to avoid harm; a person who chooses to do harm; and a person who neither chooses to avoid harm nor chooses to do harm.<sup>68</sup> People in the latter category are “oblivious to the possibility of harm because of a failure to predict, remember, or think about what [they are] doing”.<sup>69</sup> These three mental states map onto the criminal law categories of involuntariness and incapacity; intent and recklessness; and inadvertent negligence. They also help to clarify the difference between strict and attenuated subjectivism.

Someone who lacks voluntariness or capacity cannot choose to avoid harm. Strict and attenuated subjectivists agree she should not be criminally punished. Someone who acts intentionally or recklessly thereby chooses to do harm. Strict and attenuated subjectivists agree she may be criminally punished. These points of agreement reflect the shared focus on choice discussed above. Finally, someone who acts negligently

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<sup>66</sup> Daniel N. Robinson, “Madness, Badness, and Fitness: Law and Psychiatry (Again)” (2000) 7:3 *Philosophy, Psychiatry, & Psychology* 209, at 210 (emphasis in original).

<sup>67</sup> *Id.*, at 210. See also Benjamin Berger, “Mental Disorder and the Instability of Blame in the Criminal Law” in François Tanguay-Renaud & James Stribopoulos, eds., *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational, and International Criminal Law* (Oxford: Hart Publishing, 2012), at 117.

<sup>68</sup> Galloway, *supra*, note 30, at 29-30.

<sup>69</sup> *Id.*, at 30.



neither chooses to avoid harm nor chooses to do harm. Strict and attenuated subjectivists disagree about her status. Their disagreement is premised on two different understandings of “choice”.

The competing understandings of choice are captured by the following two statements: (A) “we ought only to hold a person criminally liable if we conclude, *inter alia*, that she deliberately chose to perform a harmful act” (where “deliberately chose” implies both an explicit choice and moral voluntariness, *i.e.*, an advertent choice among acceptable alternatives); and (B) “we ought only to hold a person criminally liable if we conclude, *inter alia*, that she could and should have acted differently”. I will say more about how we might determine whether someone could and should have acted differently below.

Strict subjectivists subscribe to statement A, which insists on a deliberate choice as a condition for blameworthiness. As such, they assign blame in cases of intent or recklessness but not negligence. Attenuated subjectivists subscribe to statement B, which insists on a choice in the looser sense of exercising an option. Statement B is underpinned by the familiar edict, “ought implies can”. When we say someone could and should have acted differently, we thereby imply she had the option to act differently — we imply she had a choice. Indeed, we would reject the claim that she “had no choice”. Because attenuated subjectivists do not insist on an advertent choice, they may assign blame in cases of intent, recklessness or negligence. In Galloway’s terms, they may endorse criminal liability for someone who neither chooses to avoid harm nor chooses to do harm. In the remainder of this section, I will explain why I think this approach is preferable.

### 3. The Case for Attenuated Subjectivism

We have just seen that the key theoretical difference between strict and attenuated subjectivism is the former’s insistence on deliberate choice. What might justify this insistence?

I think the strongest argument in its favour relates to the liberal principle that people should have a genuine opportunity to purposefully avoid criminal sanctions by complying with the law. When we punish an individual for taking a risk she does not actually perceive, we thereby punish her for failing to make the choice that someone operating on a different set of premises ought to have made. Punishment is arguably unfair in these circumstances. Indeed, the House of Lords recently

remarked that “[i]t is neither moral nor just to convict a defendant ... on the strength of what someone else would have apprehended if the defendant himself had no such apprehension”.<sup>70</sup>

This argument, though compelling at first blush, is premised on an unduly narrow view of what constitutes a genuine opportunity to comply with the law. It presumes people do not have such an opportunity unless they make a conscious choice to perform or forgo a prohibited act. It is equally plausible, however, to claim people have a genuine opportunity to comply with the law when they have both the capacity to comply and a fair chance to do so. Hart takes this position, stating: “What is crucial is that those whom we punish should have had, when they acted, the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities.”<sup>71</sup> Where these conditions are met, a person has a genuine opportunity to comply with the law. If she fails to recognize that opportunity because of carelessness or inattention, her failure can be attributed to her moral agency; it does not disprove the existence of the fair opportunity.

This account of when someone has a genuine opportunity to comply with the law accords with widely held intuitions about blameworthiness. Galloway writes that “[t]o limit accountability to the results of conscious choice on the basis of respect for individual autonomy is to ignore a host of widely recognized blameworthy attitudes which we deem to be within the control of an individual” such as laziness, forgetfulness and obliviousness.<sup>72</sup> Galloway asks us to compare an individual who misses an appointment because he is unconscious in the hospital with one who misses an appointment because he forgets.<sup>73</sup> We blame the forgetful person but not the unconscious one, even though neither made a deliberate choice to be truant. In the same vein, most people would not say an oblivious hunter is blameless because she “just didn’t think” when she fired on a populated campsite, or that a careless driver is blameless because she was not paying attention.

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<sup>70</sup> *R. v. G*, [2003] UKHL 50, at para. 33, 167 J.P. 621 (H.L.).

<sup>71</sup> Hart, *supra*, note 12, at 152.

<sup>72</sup> Galloway, *supra*, note 30, at 30. See also Hart, *id.*, at 151-52, noting that “a hundred times a day persons are blamed outside the law courts for not being more careful, for being inattentive and not stopping to think”.

<sup>73</sup> Galloway, *id.*, at 30.

Alan Brudner's account of moral agency and negligence helps illuminate our moral intuitions about the truants, the hunter and the driver.<sup>74</sup> Brudner explains that when a person causes an unlawful outcome, that outcome can be attributed in whole or in part to her agency, as distinct from chance.<sup>75</sup> An outcome that is intentionally produced is fully attributable to agency, whereas a negligently produced outcome can be imputed in some measure to chance.<sup>76</sup> The degree to which an outcome can be attributed to agency is a stable, objective criterion for assessing blameworthiness: an act is more blameworthy to the extent that it can be attributed to agency.<sup>77</sup> Thus, a negligent actor is blameworthy, albeit less so than one who acts with intent.<sup>78</sup> On this account, we blame the forgetful truant, the oblivious hunter and the careless driver because we believe the outcomes of their actions can be attributed, in part, to their agency. In other words, we believe they had the capacity and the fair opportunity to act differently. This account of agency is intuitively compelling and is accepted within Canadian law.<sup>79</sup>

The attenuated subjectivist approach is aligned with the foregoing account of agency and blameworthiness. In contrast, as Galloway notes, the strict subjectivist approach "cannot be rationally premised upon any principle of fairness that is entrenched within our culture".<sup>80</sup> Our common notions of fairness do not require us to withhold judgment against the careless, clumsy or impetuous; to the contrary, we recognize that these characteristics reflect moral agency.

Of course, the fact that we regard a person as morally blameworthy is not, in itself, enough to justify criminal punishment. Recall that from the subjectivist perspective, moral blameworthiness is a necessary but insufficient condition for criminal liability. For the purposes of this paper, I will not attempt a complete account of the sufficient conditions for criminal liability. I wish merely to make the following argument. Subjectivists in both camps agree that a defendant should not be convicted

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<sup>74</sup> Alan Brudner, "Proportionality, Stigma and Discretion" (1996) 38 *Crim. L.Q.* 302.

<sup>75</sup> *Id.*, at 309.

<sup>76</sup> *Id.*, at 309-10.

<sup>77</sup> *Id.*, at 309.

<sup>78</sup> *Id.*, at 309-10.

<sup>79</sup> See especially, *Martineau, supra*, note 39, at 645, endorsing "the principle that punishment must be proportionate to the moral blameworthiness of the offender, or as Professor Hart puts it in *Punishment and Responsibility* (1968), at 162, the fundamental principle of a morally based system of law that those causing harm intentionally be punished more severely than those causing harm unintentionally".

<sup>80</sup> Galloway, *supra*, note 30, at 31.

unless she had a genuine opportunity to comply with the law. Again, strict subjectivists believe such an opportunity only exists where a defendant makes a deliberate choice to commit or avoid a prohibited act or omission. This strict subjectivist claim is belied, however, by the claim that inadvertent acts and omissions can reflect moral agency, a claim that is supported by our intuitive responses to the forgetful truant, the oblivious hunter and the careless driver. *Contra* strict subjectivism, then, the principle that defendants must have a genuine opportunity to comply with the law does not entail a deliberate choice requirement.

Recall, moreover, that the subjectivist insistence on a genuine opportunity to comply with the law is premised on the liberal values of individual choice and respect for autonomy. When we consider these values in light of Galloway's argument, we see that they are more consistent with the attenuated subjectivist view than with its strict subjectivist counterpart. When we say a person did not have the opportunity to avoid a risk, we thereby imply she was incapable of avoiding it. In some cases, of course, she *is* incapable, in which case attenuated and strict subjectivists agree she should not be held criminally liable. If she is capable of avoiding the risk, however, then respect for her agency requires us to recognize the full scope of her capacities — including her capacities to pay attention, predict and reason — by holding her accountable for her failure to avoid it.<sup>81</sup> In this light, the attenuated subjectivist approach's conception of moral agency is more consistent with liberalism's respect for individuals. The attenuated subjectivist approach therefore does a better job of serving subjectivist values than its strict subjectivist counterpart.

Finally, the attenuated subjectivist approach is immune to one of the more important criticisms of subjectivism. Brudner notes that subjectivism's focus on the defendant's mental state is often criticized for being overly atomistic and for overlooking "the interpersonal meaning of [the defendant's] act".<sup>82</sup> Strict subjectivism is vulnerable to this criticism because it focuses exclusively on the defendant's mental state without regard to the social values and expectations that motivate the criminal justice system in the first place.<sup>83</sup> In contrast, attenuated subjectivism leaves some

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<sup>81</sup> *Id.*, at 30.

<sup>82</sup> Alan Brudner, "Subjective Fault for Crime: A Reinterpretation" (2008) 14 *Legal Theory* 1, at 20. Brudner presents an alternative account of subjectivism, one that also avoids this common criticism.

<sup>83</sup> As Brudner notes, "a public standpoint [in contrast with individual perspectives] is required to make law, crime, and punishment conceivable": *id.*, at note 25.

space for contextual considerations by making blameworthiness a function of both the defendant's mental state and social norms: the defendant's mental state is central to an assessment of what she could have done, while social norms are relevant to an assessment of what she should have done.

Michael S. Moore's analysis of the "choice" theory of excuses helps clarify the role of social norms within the attenuated subjectivist approach.<sup>84</sup> According to the "choice" theory of excuses, criminal law doctrines like duress, necessity and provocation excuse wrongful acts on the grounds that the actors did not have the capacity or the opportunity to make a choice to do otherwise.<sup>85</sup> Moore argues that, to understand this theory, we must read the sentence "he could have done otherwise" [as] elliptical for "he could have done otherwise if he had chosen to".<sup>86</sup> A person "could have done otherwise if he had chosen to" in circumstances where his choice "was not made *impossible* by factors over which he had no control" (e.g., a sudden coronary) and "was not made *very difficult* by factors over which he had no control" (e.g., a knife pressed to his throat).<sup>87</sup> The question, of course, is what makes choices impossible or very difficult. Moore reduces this question to two sub-issues.<sup>88</sup> The first "relates to the equipment of the actor: does he have sufficient choosing capacity to be responsible?"<sup>89</sup> The second "relates to the situation in which the actor finds himself: does that situation present him with a fair chance to use his capacities for choice so as to give effect to his decision?"<sup>90</sup>

My account of the attenuated subjectivist approach maps neatly onto Moore's analysis. First, to say "she could have acted differently" is to say compliance with the law was not made impossible by factors over which she had no control. To assess this criterion, we ask whether the actor had sufficient choosing capacity to be responsible. This assessment is relatively straightforward since the doctrines of legal capacity and physical involuntariness indicate whether or not the actor had sufficient choosing capacity to be responsible.

Second, to say "she should have acted differently" is to say she had a fair chance to use her choosing capacities. To assess this criterion, we ask whether factors over which she had no control made it very difficult for

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<sup>84</sup> Michael S. Moore, "Choice, Character and Excuse" (1990) 7 *Social Philosophy & Policy* 29.

<sup>85</sup> *Id.*, at 29.

<sup>86</sup> *Id.*, at 35.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*, citing Hart, *supra*, note 12 (emphasis in original).

<sup>89</sup> *Id.*, at 35.

<sup>90</sup> *Id.*

her to comply. This assessment is more challenging. When do factors outside the actor's control make it "very difficult" for her to comply with the law? To address this question, Moore contrasts a person who commits a wrongful act after being threatened with a person who commits the same act out of animus. Both may feel her emotions make it very difficult for her to comply with the law, but only the former has an acceptable excuse. Moore therefore concludes that a person who perceives that he or she has a hard choice to make may still have a fair opportunity. Fair opportunity is "not measured by [a person's] psychological difficulties, but rather by the objective facts of the matter".<sup>91</sup> It is measured by social norms about when someone has a fair opportunity to make a choice. Again, the attenuated subjectivist approach incorporates these norms into its assessment of when someone "should" have done differently.

#### 4. The Limits of Attenuated Subjectivism

The criminal justice system is designed to promote community values and welfare. By incorporating social norms into the fault assessment in the manner described above, the attenuated subjectivist approach serves this intent. At the same time, however, the approach's attention to community norms gives rise to a major difficulty. Standards and norms about blameworthiness are evolving and contested. Thus, to assess whether a given objective *mens rea* offence is acceptable under the attenuated subjectivist approach, we must beg the essential normative question: When is it fair to say someone should have done otherwise? When does someone have a fair opportunity to comply with the law? In this light, the attenuated subjectivist approach appears to be an empty vessel.

Despite this major limitation, I think the attenuated subjectivist approach stands as a *prima facie* justification for one species of negligence-based crimes: crimes that occur in the context of licensed activities such as dangerous driving or the careless storage of a firearm. The licensing requirement creates a presumption that defendants can and should demonstrate the requisite standard of care, thereby bypassing debates about fairness and blameworthiness. Justice Charron's *Beatty* analysis reveals why. I turn to that judgment now.

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<sup>91</sup> *Id.*

## V. GUIDANCE FROM JUSTICE CHARRON'S *R. V. BEATTY* JUDGMENT

### 1. Guidance on the Modified Objective Test

Beatty was charged with dangerous operation of a motor vehicle causing death after he drove into oncoming traffic and collided with another vehicle, killing its three occupants. The trial judge acquitted him, but the British Columbia Court of Appeal ordered a new trial after finding the trial judge had misapplied the modified objective test. Justice Charron restated that test and restored Beatty's acquittal. In this subsection, I will briefly review her restatement of the test by way of background before returning to the issue of attenuated subjectivism.

Justice Charron explained that the modified objective test "modifies" the ordinary civil negligence test in two respects. First, there must be a marked departure from the standard of care (not a mere departure, as for civil negligence). Second, the fault analysis can include some consideration of the accused's actual mental state.<sup>92</sup>

To explain the first modification, the requirement of a *marked* departure, Charron J. cited a passage from Cory J.'s *Hundal* reasons in which he described driving as an "activity that is primarily reactive and not contemplative".<sup>93</sup> For Cory J., this description justified applying an objective *mens rea* standard to driving offences. Because driving is "automatic and reflexive", we cannot meaningfully assess a person's subjective intent with respect to her driving, nor would it make sense to acquit her on the grounds that she did not explicitly decide to drive dangerously.<sup>94</sup> Justice Charron affirmed this analysis but probed it more deeply. She concluded the routine nature of driving cuts both ways: it requires an objective *mens rea* standard, but one that is not set too low:

Because driving, in large part, is automatic and reflexive, some departures from the standard expected of a reasonably prudent person will inevitably be the product, as Cory J. states, of "little conscious thought". ... The fact that the danger may be the product of little conscious thought becomes of concern because, as McLachlin J. (as she then was) aptly put it in [*Creighton*]: "The law does not lightly brand a person as a criminal".<sup>95</sup>

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<sup>92</sup> *Beatty*, *supra*, note 9, at para. 7.

<sup>93</sup> *Hundal*, *supra*, note 19, at 884-85, quoted in *Beatty*, *id.*, at para. 33.

<sup>94</sup> *Hundal*, *id.*, at 884.

<sup>95</sup> *Beatty*, *supra*, note 9, at para. 34.

Virtually all drivers succumb to occasional momentary lapses of attention. If every lapse entailed criminal liability, we would criminalize many instances of commonplace behaviour. Justice Charron cautioned against over-criminalization and explained that the need to restrain the scope of the criminal law justifies the requirement of a *marked* departure from the standard of care: criminal liability must be more limited than civil liability lest we risk “violating the principle of fundamental justice that the morally innocent not be deprived of liberty”.<sup>96</sup>

Justice Charron went on to explain the second *Hundal* modification, the limited consideration of the accused’s actual mental state.<sup>97</sup> As we have seen, *Hundal* said personal characteristics short of incapacity may inform the application of the modified objective test, while *Creighton* deemed them to be irrelevant.<sup>98</sup> Following these decisions, courts struggled with how to approach evidence of the accused’s mental state.<sup>99</sup> Justice Charron clarified matters by delineating the *actus reus* and *mens rea* requirements for dangerous driving. The *actus reus* is set by the statute, which prohibits driving in a manner “dangerous to the public, having regard to all the circumstances ...”.<sup>100</sup> The *mens rea* is a “marked departure from the standard of care that a reasonable person would observe in the accused’s circumstances”.<sup>101</sup> The accused’s actual state of mind may be relevant to this analysis in three ways. First, it could satisfy the *mens rea* requirement. For example, a driver who intentionally endangers others thereby departs markedly from the standard of care.<sup>102</sup> Second, it is relevant to some defences, such as mistake of fact.<sup>103</sup> Third, certain aspects of the driver’s subjective experience — for example, a detached retina — can inform the objective inquiry.<sup>104</sup> This latter point explains how *Hundal* and *Creighton* sit together. Personal factors, in the sense of attributes or abilities, are immaterial to the standard of care itself. We do not ask what a reasonable person *like the accused* would have done. That standard is, however, applied in context, and the context may include subjective experiences particular to the accused, such as a

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<sup>96</sup> *Id.*  
<sup>97</sup> *Id.*, at para. 36.  
<sup>98</sup> *Id.*, at para. 40.  
<sup>99</sup> *Id.*, at para. 42.  
<sup>100</sup> *Id.*, at para. 43.  
<sup>101</sup> *Id.*  
<sup>102</sup> *Id.*, at para. 47.  
<sup>103</sup> *Id.*, at para. 37.  
<sup>104</sup> *Id.*, at paras. 37-38.



detached retina. We ask what a reasonable person in *the accused's circumstances* would have done.<sup>105</sup>

Justice Charron's approach to delineating the *actus reus* and *mens rea* for dangerous driving "sought to ensure that a meaningful analysis of *both* elements would be performed in every case" and addressed the lingering concern that *Hundal* "did not sufficiently emphasize the importance of giving careful attention to the fault requirement of dangerous driving".<sup>106</sup> Her careful attention to the fault requirement, together with her explicit concerns about over-criminalization, suggests a subjectivist orientation. Yet, she accepted the modified objective test for dangerous driving — a seemingly contextualist manoeuvre. Any apparent tension is resolved, however, if we read her judgment as an example of the attenuated subjectivist approach.

## 2. Guidance on the Attenuated Subjectivist Approach

In his *Hundal* reasons, Cory J. discussed the licensing requirement for driving, noting that the "minimum standard of physical and mental well-being coupled with the basic knowledge of the standard of care

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<sup>105</sup> Some of the confusion surrounding the modified objective test comes, I think, from Cory J.'s use of the term "personal factors" to describe experiences like medical emergencies. These experiences are indeed personal in the sense that they are particular to the individual, but they are not an aspect of personality. Justice Cory would have done better, I think, to refer to "individual context" as opposed to "personal factors".

<sup>106</sup> *R. v. Roy*, [2012] S.C.J. No. 26, [2012] 2 S.C.R. 60, at para. 27 (S.C.C.). Chief Justice McLachlin, concurring in *Beatty*, would have defined the *actus reus* and *mens rea* elements differently. In her view, the *actus reus* for dangerous driving is a marked departure from the normal manner of driving. The *mens rea* can be inferred from the *actus reus*, though evidence might undermine this inference: *supra*, note 9, at para. 67. Hamish Stewart prefers McLachlin C.J.C.'s approach: Hamish Stewart, "Beatty: Towards a Coherent Law of Penal Negligence" (2008) 54 C.R. (6th) 45, at 54. In his view, behaviour constituting a marked departure from the normal manner of driving is an aspect of conduct. It should therefore be classified as an *actus reus* requirement, *per* McLachlin C.J.C.'s approach, and not as a *mens rea* requirement as in Charron J.'s schema: "For, to characterize an aspect of conduct as a fault [i.e. *mens rea*] element runs the risk of imposing liability without fault, that is, the risk that triers of fact will convict on the basis of conduct alone": *id.*, at 52. In other words, Stewart is concerned that if conduct alone can satisfy the *mens rea* requirement, we might wind up convicting people who perform harmful actions in the absence of a blameworthy mental state. I share Stewart's concern about the risk of imposing liability without fault, but I think McLachlin C.J.C.'s approach is more likely to lead to this result because it allows the *mens rea* to be inferred from the *actus reus*. Though McLachlin C.J.C.'s approach categorizes all conduct as *actus reus*, it does so at the expense of maintaining a distinct *mens rea* analysis. In contrast, by identifying the marked departure standard as the *mens rea* element, Charron J. affirmed that even objective *mens rea* offences require separate, substantive *mens rea* analyses. I think her insistence on a distinct *mens rea* analysis ultimately does more to ensure the fault requirement will be taken seriously.

required of licensed drivers obviate” the need for a court to establish that “the particular accused intended or was aware of the consequences of his or her driving”.<sup>107</sup> Justice Charron took up this observation and used it to ground her fault analysis. She explained that the licensing requirement is significant for two reasons.

First, because driving is a licensed activity, we can generally assume drivers are capable of meeting the requisite standard of care.<sup>108</sup> In other words, we can fairly presume a driver *could* have met the standard. Second, because drivers choose to engage in a voluntary, regulated, inherently dangerous activity, a driver who fails to meet the requisite standard “cannot be said to be morally innocent”.<sup>109</sup> The driver is presumptively aware of the standard of care and is on notice it will be enforced. Justice Charron therefore concluded that fault “can be based on the voluntary undertaking of the activity, the presumed capacity to properly do so, and the failure to meet the requisite standard of care”.<sup>110</sup> In other words, she found the fault requirement can be met because, by virtue of the licensing requirement, the driver presumptively *could* and *should* have met the standard of care.

By grounding the fault requirement on the driver’s presumptive capacity and the widely held expectation of compliance, both of which are entailed by the licensing requirement, Charron J. modelled the attenuated subjectivist approach. *Beatty* thus stands as a helpful illustration of how this approach can apply in the licensing context without resort to controversial propositions about blameworthiness and fairness.

## VI. CONCLUSION

According to strict subjectivists, subjectivism is inherently incompatible with objective *mens rea* offences. The attenuated subjectivist account is more nuanced. It does not view every objective *mens rea* offence as a *prima facie* violation of subjectivist principles. Whereas strict subjectivists believe an actor is only blameworthy if she deliberately chooses to perform a prohibited act, attenuated subjectivists blame her if her actions reflect her moral agency; that is, if she could and should have done differently. On this latter view, some negligent actors are blameworthy because in some

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<sup>107</sup> *Supra*, note 19, at 884.

<sup>108</sup> *Beatty, supra*, note 9, at para. 30.

<sup>109</sup> *Id.*, at para. 31.

<sup>110</sup> *Id.*, at para. 32.

circumstances we can fairly say that they could and should have done differently. The challenge, of course, is identifying those circumstances.

One important set of circumstances in which the attenuated subjectivist approach applies is the licensing context. For the reasons developed by Charron J. in *Beatty*, that context entitles us to presume the defendant could and should have met the standard of care. It thereby allows us to apply the attenuated subjectivist analysis without engaging in debates about when someone has the capacity and the fair opportunity to comply with the law.

In all other cases, the attenuated subjectivist approach helps us frame the discussion by shifting the focus away from whether there was a deliberate choice to cause or risk harm towards a more expansive analysis of blameworthiness. Where that analysis cannot be grounded in stable premises, such as those provided by the licensing context, I think we should err on the side of presuming that objective *mens rea* offences infringe section 7. As noted above, I agree with Roach that the government should then have the opportunity to justify such offences under section 1. My proposed approach thus encourages a multifaceted analysis of blameworthiness; one that places the burden on the government to justify objective *mens rea* offences except in clear cases of presumptive blameworthiness like those situated in the licensing context. This approach is more nuanced than the other two approaches. Contextualism focuses on policy considerations without sufficient regard to the defendant's mental state. Strict subjectivism truncates and abstracts the fault analysis by fixating on the issue of deliberate choice.

As a matter of practice, of course, the Court has not restricted objective *mens rea* offences to the licensing context,<sup>111</sup> nor has it applied sections 7 and 1 in the manner suggested by Roach. Indeed, its objective *mens rea* case law is hard to reconcile from any theoretical perspective. Yet, although the case law is challenging and the scholarly debates seem intractable, the objective *mens rea* issue merits our ongoing attention. The Court and scholars of all stripes agree that criminal punishment must be justified by fault. This insistence on fault aims "to harmonize notions of moral responsibility and criminal liability".<sup>112</sup> It aims to make the

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<sup>111</sup> "[A]ny possibility of limiting objective *mens rea* to regulatory offences or offences having a regulatory base has now been overtaken by the unanimous decision of the panel (comprising a majority of the Court) in *R. v. DeSousa*": *Creighton, supra*, note 50, at 38 (*per* La Forest J.).

<sup>112</sup> Rolfes, *supra*, note 14, at para. 1.

criminal justice system recognizable as a *justice* system. We must therefore continue to grapple with the nature of criminal fault, including in the challenging context of objective *mens rea* offences, in an effort to ensure that the criminal justice system evolves in a logical, principled manner.

What is perhaps most notable about Charron J.'s *Beatty* reasons is that she undertook a careful fault analysis in the first place. She could have elaborated the modified objective test without re-examining the *Hundal* Court's rationale for treating dangerous driving as an objective *mens rea* offence. Instead, she grounded her analysis on a careful examination of why we punish dangerous driving. In so doing, she demonstrated her commitment to ensuring that the criminal law is not only intelligible, but also principled and just. Whatever our views on the nature of criminal fault, this commitment is one that we can and should admire.

