A PRINCIPLED APPROACH TO THE CONSTITUTIONAL REQUIREMENT OF FAULT

Ted Carlton*

Since 1985, the Supreme Court of Canada has developed a constitutional doctrine that demands minimum fault requirements for criminal offences. In Vaillancourt and Martineau, the Court has stated that for certain offences section 7 of the Charter demands subjective intent or recklessness. The stigma and punishment of each offence will determine the degree of fault required by section 7. Thus far, the Court has only specified murder and theft as offences requiring subjective fault.

This paper argues that this approach, insofar as it attempts to set different constitutionally required fault levels for criminal offences, moves the Court from the arena of constitutional principle into that of public policy. As such, it ignores the principle/policy distinction put forward by the Court in the Motor Vehicle Reference and undermines the legitimacy of the constitutional review of legislated fault levels.

The paper argues that inherent in the policy-based reasoning of the Court are two principles worthy of constitutional protection: first, that there should be a minimum fault level required for criminal offences and

* Ted Carlton is a student-at-law with the Ministry of the Attorney-General of Ontario. The author would like to thank Professor Alan Mewett and Professor Alan Brudner of the University of Toronto for their assistance in the preparation of this article.

This paper was written before the decisions in R. v. Desousa, [1992] 2 S.C.R. 944, 76 C.C.C. (3d) 124; R. v. Durham (1992), 76 C.C.C. (3d) 219 (Ont. C.A.); and R. v. L.(S.R.) (1992), 76 C.C.C. (3d) 502 (Ont. C.A.). Both Desousa and L.(S.R.) address the issue of constructive sentencing. In Desousa, at 140, it was said "[t]here is, however, no constitutional requirement that intention, either on an objective or a subjective basis, extend to the consequences of unlawful acts in general". In L.(S.R.) the Ontario Court of Appeal went somewhat further and demanded objective foreseeability of the consequences for the offence of aggravatd assault. In Durham, the Ontario Court of Appeal upheld the constitutionality of the offence of careless use of a firearm. This decision is now on appeal to the Supreme Court.

Depuis 1985, la Cour suprême du Canada a élaboré une doctrine constitutionnelle selon laquelle on doit établir des degrés minimums de faute pour les infractions criminelles. Dans les affaires Vaillancourt et Martineau, la Cour a décidé que, pour certaines infractions, l'article 7 de la Charte exigait une intention subjective ou de l'insouciance. Les stigmates et la peine rattachés à chaque infraction détermineront le degré de faute requis par l'article 7. Jusqu'à maintenant, seuls le vol et le meurtre ont été désignés par la Cour comme étant des infractions qui exigent une faute subjective.

Dans cet article, l'auteur soutient qu'en adoptant une approche qui cherche à établir les différents degrés de faute requis par la Constitution pour les infractions criminelles, la Cour n'applique plus les principes constitutionnels et se mêle de politique. Cette approche ne tient pas compte de la distinction entre principes et politiques qui a été faite par la Cour dans le Renvoi: Motor Véhicule, et porte atteinte à la légitimité de la révision constitutionnelle des degrés de faute imposés par le législateur.

* Ted Carlton is a student-at-law with the Ministry of the Attorney-General of Ontario. The author would like to thank Professor Alan Mewett and Professor Alan Brudner of the University of Toronto for their assistance in the preparation of this article.

This paper was written before the decisions in R. v. Desousa, [1992] 2 S.C.R. 944, 76 C.C.C. (3d) 124; R. v. Durham (1992), 76 C.C.C. (3d) 219 (Ont. C.A.); and R. v. L.(S.R.) (1992), 76 C.C.C. (3d) 502 (Ont. C.A.). Both Desousa and L.(S.R.) address the issue of constructive sentencing. In Desousa, at 140, it was said "[t]here is, however, no constitutional requirement that intention, either on an objective or a subjective basis, extend to the consequences of unlawful acts in general". In L.(S.R.) the Ontario Court of Appeal went somewhat further and demanded objective foreseeability of the consequences for the offence of aggravated assault. In Durham, the Ontario Court of Appeal upheld the constitutionality of the offence of careless use of a firearm. This decision is now on appeal to the Supreme Court.
second, that given two actors with the same intent, any increase in the label, stigma, or punishment for one of the actors must be rationally based. The paper then describes the content of these principles and revisits some of the leading decisions of this doctrine to determine if the approach advocated in the paper would lead to different results.

L’auteur maintient que le raisonnement de la Cour, qui se fonde sur des considérations politiques, renferment deux principes qui méritent d’être protégés par les règles constitutionnelles. Le premier principe est qu’on devrait prévoir un degré minimum de faute pour les infractions criminelles, et le deuxième, que si deux acteurs ont la même intention, on ne doit pas soumettre un des acteurs à des stigmates ou à une peine plus graves à moins d’avoir des motifs raisonnables. L’auteur explique ensuite ces principes et passe en revue certaines des décisions les plus importantes qui sont à la base de cette doctrine constitutionnelle, afin de déterminer si l’approche préconisée dans l’article donnerait des résultats différents.
I. INTRODUCTION

The constitutionalization of fault requirements in Canadian criminal law by the Supreme Court of Canada has cast doubt on many Criminal Code\(^1\) offences. In *R. v. Vaillancourt*,\(^2\) and later in *R. v. Martineau*,\(^3\) the Supreme Court has used the criteria of the stigma and punishment of an offence as determinative of the fault level or *mens rea* required for conviction. Specifically, the Court has decided that for murder and theft, principles of fundamental justice guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*\(^4\) demand subjective intent or recklessness. Thus, the constructive murder provisions in subsection 229(c) and section 230 of the Code which required only objective foreseeability of death and in some circumstances, only a causal connection, were found unconstitutional.

It is hard to predict the potential breadth of this doctrine. The two key cases deal only with murder. Subsequently, in *R. v. Wholesale Travel Group Inc.*,\(^5\) the Court applied the doctrine to a provincial regulatory offence of false advertising and found only a need for civil negligence. There remain in the Code a great many “true crimes” that require a *mens rea* that is something less than intent or recklessness. The fate of these offences in their present form is not at all clear. What level of stigma and what degree of punishment engage this doctrine and therefore require subjective culpability? Alternatively, when, if ever, can objective or even causal liability be viewed as elements of fundamental justice?

The Court’s analysis so far has been less than satisfying. One of the criteria, punishment, has already been said to be “a secondary consideration”.\(^6\) Stigma, the most important criterion, appears to encompass no more than populist notions of opprobrium attributed to particular

---

6. *R. v. Logan*, [1990] 2 S.C.R. 731, 58 C.C.C. (3d) 391 [hereinafter *Logan* cited to C.C.C.] at 399-400 per Lamer C.J.C.: “Instead, the crucial consideration is whether there is a continuing serious social stigma which will be imposed on the accused upon conviction".
offenders. It is submitted that these are not criteria upon which to anchor a constitutional doctrine. Constitutional doctrines should not be based on public mood. Rather, they must be principled and based upon a demand for rationality in the law. Otherwise, the danger raised by Justice Lamer (as he then was) in Reference re Section 94(2) of the Motor Vehicle Act of courts becoming a "super-legislature" will be realized.

This paper accepts the direction given in the Motor Vehicle Reference that section 7 of the Charter demands a review of the substantive fairness of legislation. Nonetheless, it is argued that the approach in Martineau should be restrained by the principle/policy distinction stated in the Motor Vehicle Reference. The thrust of Lamer C.J.C.'s decision in Martineau is to demand various degrees of fault for offences in the Code based on an assessment by the Court of the severity of the offence. This ad hoc rewording of the Code descends to the level of pure policy. The Code itself does not group offences, beyond the indictable/summary distinction, as more serious or less serious. Parliament simply labels certain kinds of activity as criminal and prescribes minimum and maximum punishments.

A principled approach to the review of the fundamental justice of criminal offences demands that Parliament exercise its power to define and label crimes in a rational manner. It is submitted that inherent in the Supreme Court's decisions in this area are two principles worthy of constitutional protection: that there should be a minimum fault requirement for every offence and that given two actors with the same intent, any increase in the label, stigma, or punishment for one of the actors must be rationally based. The first principle, that of insisting upon only a minimum level of fault, is the approach taken in the Motor Vehicle Reference and Wholesale Travel. The Court has simply stated that for regulatory offences, a minimum level of negligence is required. The Court did not divide regulatory offences into several categories and demand different levels of fault for each. It is argued that this approach should be used for Code offences. The Court must determine the minimum fault requirement for true crimes but, given this decision, is

---

7 See supra, note 3 at 361 per Lamer C.J.C.: "Murder has long been recognized as the "worst" and most heinous of peace-time crimes". See also supra, note 5 at 212 where Lamer C.J.C. held: "In my view, while a conviction for false/misleading advertising carries some stigma, in the sense that it is not morally neutral behaviour, it cannot be said that the stigma associated with this offence is analogous to the stigma of dishonesty which attaches to a conviction for theft." See also R. v. Durham (1991), 6 C.R. (4th) 178, 66 C.C.C. (3d) 66 at 79 (Ont. Ct Gen. Div.) [hereinafter Durham cited to C.C.C.] where Moldaver J. held: "It would appear that the concept is rooted in some form of public consensus, but I am not at all certain whether this consensus depends on the status of the offender or the status of the offence or both; nor am I certain what segment of the society should be considered; nor how broad a segment is required."

precluded from demanding a greater fault requirement for a few selected Code offences.

The second principle is inherent in the decision in Martineau. It is also supported by the Court's decisions in R. v. Arkell,9 R. v. Luxton,10 and R. v. Lyons.11 This principle states that actors possessing the same intent should be punished similarly unless rational principles of sentencing allow one to be labelled and punished more severely. These principles are based on an assessment of a need for retribution due to the moral blameworthiness of the act itself and the possible deterrent effects of the more severe labelling.

The paper begins by examining the purposes of section 7 of the Charter to argue for a principled approach to judicial review. It is argued, through analysing the key cases in the doctrine and by examining the writings of Ronald Dworkin on the subject of legal interpretation, that a constitutional requirement that Parliament exercise its criminal law-making power in a rational manner leads to the two principles mentioned above. The content of these two principles, i.e. the appropriate minimum fault requirement for true crimes and a rational approach to more severe labelling for identical intentions, is discussed. The paper ends by revisiting the decisions in Vaillancourt and Martineau to determine if this approach would lead to a different result and finally, applies this approach to the problem of increased punishment for unintended consequences in assault and driving cases.

II. FUNDAMENTAL JUSTICE

A. The Motor Vehicle Reference

Any analysis of the scope of section 7 of the Charter begins with the Motor Vehicle Reference. This case is notable for two reasons. First, it describes the approach the Court will take to the question of the legitimacy of judicial review. Second, the decision outlines the content of fundamental justice.

The majority decision of Lamer J. begins by prescribing a wide scope for the application of section 7. The substantive/procedural distinction used in American Bill of Rights due process jurisprudence is dismissed. Lamer J. states that this "dichotomy creates its own set of difficulties by the attempt to distinguish between two concepts whose outer boundaries are not always clear and often tend to overlap."12 Thus, the substantive elements of offences are open to constitutional review and invalidation under section 52 of the Charter.

---

12 Supra, note 8 at 298.
Nonetheless, to state that the procedure/substance distinction will not be used to determine the application of section 7 is not to avoid the need for delineation of those legislative spheres that are open to judicial review and those that are not. If there is no delineation then all legislative enactments are open to Charter scrutiny. Then the "spectre of a judicial 'super-Legislature'"\(^1\) that Lamer J. describes will be fulfilled. Thus, given that the substantive merits of legislation are potentially open to judicial review, the key question is how will the Court distinguish between substantive elements that are properly part of the democratic process and therefore immune from Charter scrutiny and those substantive elements that can legitimately be addressed by the courts.

The distinction adopted by the Court is that between principle and policy. This distinction is mandated by the words of section 7, "the principles of fundamental justice", and is consistent with mainstream American theories of judicial review.\(^4\) After noting that sections 8-14 of the Charter are illustrative of principles of fundamental justice, Justice Lamer states:

> It is this common thread which, in my view, must guide us in determining the scope and content of "principles of fundamental justice". In other words, the principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, i.e., ss. 8 to 14, and the character and larger objects of the Charter itself. It provides meaningful content for the s. 7 guarantee all the while avoiding adjudication of policy matters.\(^15\)

Thus, courts may find particular legislative policies to be unconstitutional if these policies conflict with underlying principles or with "basic tenets" of our judicial system. Conversely, courts may not tinker with legislative policies if these policies are consistent with underlying principles.

Lamer J. then discusses when section 1 of the Charter can be used to save the constitutionality of legislative programs that abridge principles of fundamental justice and deny the life, liberty, or security of a person. It is stated that it will be "exceptional" where a violation of section 7 coupled with imprisonment and the stigma of a conviction will be justified using arguments of administrative expediency. Administrative expediency will only be successful "in cases arising out of exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like".\(^16\)

---
\(^{13}\) \textit{Ibid.}


\(^{15}\) \textit{Supra}, note 8 at 302.

\(^{16}\) \textit{Ibid.} at 313.
Lamer J.'s judgment was agreed to by five members of the seven-member Court. McIntyre J. delivered a short concurring judgment. Wilson J. delivered a longer judgment in which the procedural/substantive distinction was rejected. She is candid as to the problems of identifying the content of section 7:

What is "fundamental justice"? We know what "fundamental principles" are. They are the basic, bedrock principles that underpin a system. What would "fundamental principles of justice" mean? And would it mean something different from "principles of fundamental justice"? I am not entirely sure. We have been left by the Legislature with a conundrum. I would conclude, however, that if the citizen is to be guaranteed his right to life, liberty and security of the person — surely one of the most basic rights in a free and democratic society — then he certainly should not be deprived of it by means of a violation of a fundamental tenet of our justice system.\(^{17}\)

Wilson J. stated that any violation of section 7 could not be justified by section 1 as a violation of fundamental justice could never be found to be reasonable or justified. Wilson J. later departed from this approach in \(R. \text{ v. Morgentaler}\) where a section 1 justification of a section 7 violation took place.\(^{18}\)

B. Dworkin's Theory of Law and Interpretation

The decision in the \textit{Motor Vehicle Reference} on the proper reach of section 7 in reviewing the substantive fairness of legislative enactments mirrors Ronald Dworkin's theory of interpretation espoused in \textit{Law's Empire}.\(^{19}\) I do not intend to embark on an extended discussion of Dworkin's theory or even to argue for it over other conceptions of judicial review. It is used because the language of Justice Lamer's decision seems to explicitly call upon Dworkin's theory and I use it therefore to clarify the framework given in the \textit{Motor Vehicle Reference}. Inherent in Lamer J.'s approach are two questions. First, what counts as principle and what counts as "general public policy"? Second, what are the particular principles worthy of constitutional protection? Dworkin provides an answer to both questions. First, it will be shown how Dworkin's approach to interpretation coincides with that given by Justice Lamer.

Briefly sketched, Dworkin provides a theory of law that is purely interpretive, or rather as he describes it, a theory of law as integrity. Unlike positivism which divides cases into hard and easy cases, his theory treats all cases alike. Again, unlike positivism, the theory claims to provide correct answers in every case. Dworkin's judge, Hercules,

\(^{17}\) \textit{Ibid.} at 322.


approaches all cases in the same manner. First, pre-interpretive data, the
rules and standards embodied in statutes and constitutional texts, are
assembled.\textsuperscript{20} There is then an interpretive stage where Hercules searches
for the principles or justifications underlying the existing standards. If
there is more than one interpretation, then these competing principled
interpretations of the law must be evaluated by the criteria of fit and
value. The fitness of an approach evaluates how completely the principle
put forward by Hercules explains previous decisions of the court. The
criterion of value will be used to decide between two interpretations with
roughly equal explanatory force.\textsuperscript{21} Here, there will be an examination of
the justice and fairness of each of the remaining interpretations. Hercules
will approach this task as follows:

It will depend, that is, not only on his beliefs about which of these
principles is superior as a matter of abstract justice but also about which
should be followed, as a matter of political fairness, in a community
whose members have the moral convictions his fellow citizens have,...
[H]e must choose between eligible interpretations by asking which
shows the community’s structure of institutions and decisions — its
public standards as a whole — in a better light from the standpoint of
political morality. His own moral and political convictions are now
directly engaged. But the political judgement he must make is itself
complex and will sometimes set one department of his political morality
against another: his decision will reflect not only his opinions about
justice and fairness but his higher-order convictions about how these
ideals should be compromised when they compete.\textsuperscript{22}

Dworkin believes that this approach will produce unique answers
in all cases. Nonetheless, each decision is only “provisional” and must
be abandoned when a principled interpretation with greater explanatory
force and greater value is presented.\textsuperscript{23} Thus, law as integrity is an
“approach”, not a theory that delivers specific substantive results. No
particular result can be said to define law as integrity and Hercules
himself must revise his own opinions when more complete justifications
are offered.\textsuperscript{24} “In Dworkin’s world, legal knowledge emerges out of a
process of constantly correcting and refining paradigms once thought
immutable, a process which serves the greater consistency of positive
law”.\textsuperscript{25}

Dworkin illustrates his approach by drawing an analogy to a piece-
meal writing of a novel.\textsuperscript{26} Each novelist writes in turn, using only the
previously written chapters as a guide for his or her own project. Each
must write a chapter that continues the story at hand in a way that “fits”
the preceding chapters. Each is constrained; only some variations in the

\textsuperscript{20} Supra, note 14 at 65-66 & 90-92.
\textsuperscript{21} Ibid. at 248-49.
\textsuperscript{22} Ibid. at 249 & 256.
\textsuperscript{23} Ibid. at 258.
\textsuperscript{24} Ibid. at 239-40.
\textsuperscript{25} Valcke, supra, note 19 at 12.
\textsuperscript{26} Supra, note 14 at 228-38.
plot and character development will make sense given the earlier chapters. Nonetheless, even given these constraints, there may be more than one plot development that fits the story. The author is then free to choose from the remaining candidates the story that fits "the work in progress best, all things considered." The judicial process works in the same manner. Judges are restrained by the need to offer a decision that fits past practice but, given this threshold requirement, are able to give voice to the explanation that coheres most successfully with their own conceptions of justice.

In putting forward this approach, Dworkin rejects what he terms "conventionalism" and "pragmatism." Conventionalism is closely identified with the idea that there is a division between hard and easy cases. In easy cases, no interpretation is necessary as the decision is clearly evident from a reading of the statute or prior decisions. Predictability is thus a virtue in a conventionalist scheme. In hard cases, there is no answer and the judge must simply legislate in the interstices between existing law. In contrast, Dworkin believes that a right answer can be discovered in all cases, even the hard ones; hard cases simply call for a more involved interpretive process.

Since conventionalism is itself an interpretation of the legal process, he applies his criteria of fit and value to see if the theory does explain the legal process. Conventionalism does explain the force of judicial precedent when cases are directly "on point" but it does not explain the actual way in which cases are examined to determine the principles inherent in them when the facts presented are slightly different. In fact, Hercules is more constrained than a pure conventionalist who can substitute his or her own opinion whenever the answer is not obvious. Moreover, conventionalism cannot account for dramatic changes in doctrine that arise from a fundamental rethinking of particular doctrines.

A similar criticism of "pragmatism" is undertaken. In contrast to conventionalists, pragmatists have no regard for precedent. Instead, they will use the law to further their own conception of the community's best interests. Pragmatism defined in this manner includes both the natural law and law and economics movements; in both cases extralegal norms determine the outcome of current cases. Such an approach denies the existence of legal rights that are a shield against the interests of the community. Nonetheless, pragmatist judges pretend that rights do exist to provide legitimacy for what is otherwise pure, self-conscious judicial lawmaking.

Again, Dworkin asks whether this approach accurately describes the actual legal process. Does it fit? Pragmatism, unlike conventionalism, can explain the reworking of settled law. Here, judges are just

---

27 Ibid. at 231.
29 Supra, note 14 at 114-17.
30 Ibid. at 130-31 & 137-38.
substituting their own opinion of the best interests of the community for one given in the past. It can also explain why this is done rarely; it is in the best interests of the community to have some certainty in the law so that individuals can plan their own affairs. Pragmatism, however, cannot explain the concern judges display for discovering principles in hard cases; here one would expect the pragmatists' guard to drop and for judges to make explicit their own legislative agendas. Nonetheless, even in these cases judges continue to search for principle, even though popular legitimacy does not demand it. Thus, only law as integrity can explain the existence of consistency in law for easy cases when principles are clear, and the resolution of hard cases through appeals to principle.

From this description of Dworkin's approach, it appears evident it has much in common with that of Lamer J. in the Motor Vehicle Reference. Lamer J. rejects both the conventionalist and pragmatic approaches. First, Lamer J. expressly rejects one variant of conventionalism as determinative of any constitutional issue: an appeal to the "framer's intentions" as given in legislative debates and committees. This is an appeal to limit decisions in the name of consistency and predictability and to ignore the principles inherent in the words of the Charter. Ignoring even the evidentiary problems of determining the intent of the framers, there is the more fundamental problem that this approach denies the perpetual nature of legal discourse: there are only provisional right answers. Moreover, the goal of certainty in constitutional matters is not necessarily that important when fundamental rights are at issue. Thus, Dworkin wishes to incorporate the principle inherent in constitutional texts, not the specific instance of the underlying principle. Again, Lamer J. agrees with this approach and desires to plant the Charter as a "living tree" in Canadian law.

Similarly, Lamer J. rejects pragmatism in the Motor Vehicle Reference. While it is unlikely that judges would explicitly state that their judicial approach is to simply decide cases using their personal views of the good of the community, and that they will mask these decisions in the language of rights, Lamer J. does explicitly state that courts are not to be a super-legislature. He endorses a principled approach to judicial review, that is, law as integrity. Courts will enforce rights that appear from a reading of the history of the common law to be fundamental tenets of our legal system. Similarly, Wilson J. states that fundamental principles are "basic, bedrock principles that underpin a system". This historical inquiry into the principles long protected is endorsed in a limited way by Dworkin:

---

31 Ibid. at 151-59.
32 See supra, note 8 at 306 per Lamer J.: "In view of the indeterminate nature of the data, it would in my view be erroneous to give these materials anything but minimal weight". See also supra, note 14 at 359-63.
33 Supra, note 14 at 365-69.
34 Supra, note 8 at 305-07.
35 Ibid. at 322.
History matters in law as integrity: very much but only in a certain way. Integrity does not require consistency in principle over all historical stages of a community's law; it does not require that judges try to understand the law they enforce as continuous in principle with the abandoned law of a previous century or even a previous generation. It commands a horizontal rather than vertical consistency of principle across the range of the legal standards the community now enforces. It insists that the law—the rights and duties that flow from past collective decisions and for that reason license or require coercion—contains not only the narrow explicit content of these decisions but also, more broadly, the scheme of principles necessary to justify them. History matters because that scheme of principle must justify the standing as well as the content of these past decisions.36

We can now return to the answers Dworkin will provide that may help to make Lamer J.'s framework in the Motor Vehicle Reference more clear: what are principles compared to policies and how should these be interpreted in a constitutional document?

The difference between principle and policy is the difference between rights and legislative strategy. An argument of policy occurs when government justifies a decision "by showing that the decision advances or protects some collective goal of the community as a whole".37 In contrast, an argument of principle justifies a decision "by showing that the decision respects or secures some individual or group right".38 Individual rights are simply constraints on the pursuit of collective goals.39 They have an inherently non-utilitarian composition and are created by statute or by the common law. Law as integrity does not allow courts to reach decisions on grounds of policy. This is the task of the legislature.40 It is the role of the courts to determine if there exists any right that restricts the scope of the policy in question. Again, this is pursued through an interpretive process that identifies in particular doctrines "individuated political aim[s]" that are protected even "when no other political aim is served".41

The second and related question asks if this process is affected by the constitutional nature of the questions involved. The same interpretive approach is to be used. Principled interpretations are to be assessed according to their fit and value. Nonetheless:

The Constitution is different from ordinary statutes in one striking way. The Constitution is foundational of other law, so Hercules' interpretation of the document as a whole, and of its abstract clauses, must be foundational as well. It must fit and justify the most basic arrangements

36 Supra, note 14 at 227.
38 Ibid.
39 Ibid. at 91.
41 Ibid. at 91.
of political power in the community, which means it must be a justification drawn from the most philosophical reaches of political theory.\textsuperscript{42}

The approach is neither liberal nor conservative and it is neither judicial activism nor judicial deference as popularly conceived. It restricts the ability of the judiciary to strike down legislative acts to instances of where compelling reasons of principle, of the "most philosophical" kind, are offered. It refuses to act when issues of policy are at issue:

[Hercules] will refuse to substitute his judgement for that of the legislature when he believes the issue in play is primarily one of policy rather than principle, when the argument is about the best strategies for achieving the overall collective interest through goals like prosperity or the eradication of poverty or the right balance between economy and conservation.\textsuperscript{43}

In approaching the question of constitutionalizing fault requirements, courts must respect the general policy aims of governments to protect society and promote its welfare through the use of criminal and regulatory law. Principles worthy of constraining this collective goal must be found before any interference by courts is legitimate.

\section*{III. Basic Tenets in the Case Law}

What, then, are the basic tenets identified by the Supreme Court of Canada and do they possess the principled nature required by both the Court and Dworkin? It is submitted that there are two principles, two basic tenets, present in the case law. First, the cases stand for the principle that there can be no liability without a minimum level of fault. Second, the cases stand for the principle that where two actors have the same intent, any difference between the stigma and punishment imposed must be based upon rational sentencing principles. It is important to note at the outset that these principles exclude an approach where specific fault levels can be ascribed to certain offences by virtue of an assessment of the severity of the offence.

\subsection*{A. The Principle of a Minimum Level of Fault}

The first principle to be found in the Supreme Court's decisions regarding the substantive impact of section 7 is that there must be a minimum level of fault in any valid offence. This principle is found in the decisions in the \textit{Motor Vehicle Reference} and \textit{Wholesale Travel}.

In the \textit{Motor Vehicle Reference} the Court considered the validity of subsection 94(2) of the British Columbia \textit{Motor Vehicle Act}. Subsection 94(2) of this \textit{Act} stated that the offence of driving while suspended

\textsuperscript{42} Supra, note 14 at 380.

\textsuperscript{43} Ibid. at 398.
The Constitutional Requirement of Fault

in subsection 94(1) "creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension." The Court found that the combination of absolute liability and the possibility of imprisonment violated principles of fundamental justice in section 7. Citing earlier decisions in *R. v. Beaver* and *R. v. Sault Ste. Marie* Lamer J. stated that:

> It has from time immemorial been part of our system of laws that the innocent not be punished. This principle has long been recognized as an essential element of a system for the administration of justice which is founded upon a belief in the dignity and worth of the human person and on the rule of law. It is so old that its first enunciation was in Latin *actus non facit reum nisi mens sit rea*.

Thus, any absolute liability offence coupled with the possibility of imprisonment violates section 7. The Court left open the question as to whether an absolute liability offence coupled with only a fine would be unconstitutional. If it were shown to be a violation of the right to security of the person then a section 7 violation would be made out.

The second consideration of this issue occurs in *Wholesale Travel*. Here, the constitutionality of a strict liability regulatory offence with the possibility of imprisonment was challenged. In a five to four decision the Supreme Court upheld the validity of sections 36 and 37 of the *Competition Act*. On the question of the fault requirement, however, the Court was unanimous in stating that strict liability, that is a requirement of mere negligence, is a permissible degree of fault for regulatory offences. The judgment of Lamer C.J.C., writing for four members of the Court, is especially noteworthy as it comes from the author of the majority judgments in *Vaillancourt* and *Martineau*. He cites the Ontario Law Reform Commission’s *Report on the Basis of Liability for Provincial Offences* which recommended a fault level of either an aware state of mind or a “marked and substantial departure from the standard of care expected of a reasonably prudent person in the circumstances.”

His reasons for rejecting this approach in favour of strict liability echo the principle/policy distinction from the *Motor Vehicle Reference*:

---

44 *Supra*, note 8 at 294.
47 *Supra*, note 8 at 310.
50 Lamer C.J.C., La Forest, Sopinka, and McLachlin JJ. were in a minority on the s. 11(d) issue regarding the use of a reverse onus clause. They would require the accused only to meet an evidentiary burden of demonstrating a defence of due diligence and it would then be required that the Crown prove the absence of due diligence beyond a reasonable doubt: *supra*, note 5 at 223-26. Iacobucci, Gonthier, and Stevenson JJ. found at 265-68 that the s. 11(d) violation could be justified under s. 1. Cory and L’Heureux-Dubé JJ. at 254-61 found no s. 11(d) violation.
51 (Toronto: Ministry of the Attorney-General, 1990) at 46.
It must be remembered that in making these recommendations, the Law Reform Commissions were advising their respective governments on matters of policy. Conversely, the question raised in the appeal before this court is not what is the most appropriate government policy, but rather, what fault requirement is constitutionally required where an accused faces possible imprisonment....Whether a fault requirement higher than this constitutional minimum ought to be adopted where an accused faces possible imprisonment or conviction of any offence under the Criminal Code is a question of public policy which must be determined by Parliament, and for the courts to pronounce upon this would be contrary to what this court has said in Reference re: s. 94(2) of Motor Vehicle Act....that we refrain from "adjudicating upon the merits or wisdom of enactments". It is not the role of this court to "second guess" the policy decisions made by elected officials.\(^{52}\)

Here, Lamer C.J.C. explicitly states that the role of the Court is to declare minimum fault levels so that the innocent are not punished. It is a matter of policy, not principle, to increase the fault requirement beyond this minimum.

Cory J. writing for himself and L’Heureux-Dubé J. on this issue found that regulatory offences were intrinsically different from criminal offences and their nature demanded only a fault requirement of negligence. Regulatory offences address activity that is not harmful in itself; they address activities that are allowed under certain circumstances. The actor is "licensed" to engage in certain activities provided there is agreement in advance to abide by the rules set by the government. These rules include the recognition by the actor that departures from the regulations will be punished using objective standards:

As a result of choosing to enter a field of activity known to be regulated, the regulated actor is taken to be aware of and to have accepted the imposition of a certain objective standard of conduct as a pre-condition to being allowed to engage in the regulated activity. In these circumstances, it misses the mark to speak in terms of the "unfairness" of an attenuated fault requirement because the standard of reasonable care has been accepted by the regulated actor upon entering the regulated sphere.\(^{53}\)

The principle involved in these cases, then, is that there must be a minimum level of fault. Convicting someone on the basis of absolute liability is to treat the individual merely as a tool for achieving a collective goal; in this case the goal of honest advertising. The individual must be deserving of the deprivation of liberty. At a minimum this must be that the actor acted below the standard of a reasonable person. The question is left open for criminal offences.

It is important to note that Lamer C.J.C. did not classify regulatory offences into different categories depending upon the severity of each individual regulatory offence. He did not, for example, say that false advertising is less serious than environmental offences and therefore

\(^{52}\) Supra, note 5 at 213-14.

\(^{53}\) Ibid. at 253.
leave open the possibility that a higher standard of fault beyond mere negligence would be demanded for some regulatory offences.

Applying this principle to "true crimes" in the Code would require a statement of what the minimum degree of fault is for criminal offences. The principle would state a minimum degree of fault; it would not tailor fault requirements according to the Court's own preferences as to the level of fault required. The principle at play is that the innocent should not be punished in furthering the state goal of, for criminal offences, the protection of society. This principle is satisfied by the requirement of some level of fault, not the highest possible degree of fault. Setting fault levels beyond the constitutional minimum for particular offences is, to quote Dworkin, a matter of choosing the "best strateg[y] for achieving the overall collective interest". Supra, note 14 at 398. Once again, Lamer C.J.C., in Wholesale Travel, agrees with Dworkin. Lamer C.J.C. states that "whether a fault requirement higher than this constitutional minimum [of simple negligence] ought to be adopted where an accused faces possible imprisonment or conviction of any offence under the Criminal Code is a question of public policy which must be determined by Parliament." Supra, note 14 at 398. This statement potentially has a very broad scope and supports setting the minimum fault level for Code offences at simple negligence.

This approach denies the legitimacy of the accepted interpretation of Vaillancourt and Martineau: that courts can tailor fault requirements according to an assessment of the severity of the offence. These cases can only be explained by the principle of rational labelling discussed below. Prescribing particular fault requirements for specific offences beyond the constitutional minimum is a policy function of Parliament. Even though Lamer C.J.C. appears to agree with this approach, he nonetheless examines the stigma of the offence of false advertising to determine if it is deserving of a subjective fault requirement:

In my view, while a conviction for false/misleading advertising carries some stigma, in the sense that it is not morally neutral behaviour, it cannot be said that the stigma associated with this offence is analogous to the stigma of dishonesty which attaches to a conviction for theft. A conviction for false/misleading advertising will rest on a variety of facts, many of which will not reveal any dishonesty but, rather, carelessness and the conviction of same does not brand the accused as being dishonest. In my opinion, the same cannot be said for a conviction for theft.

Assessments of stigma are just estimates of the importance society places on the pursuit of the collective goal the offence attempts to further. Stating and pursuing collective goals are matters of policy. Moreover, these estimates of stigma are mutable: impaired driving, domestic assault, and environmental offences all carry more "stigma" now than in the past. This fact should not restrict Parliament's ability

---

54 Supra, note 14 at 398.
55 Supra, note 5 at 213.
56 Ibid. at 212.
to identify the elimination of these offences as a collective goal by amending the fault level needed for conviction as long as it meets a constitutional minimum. Given that Parliament respects the principle that the innocent should not be punished then it should be able to state fault requirements for these offences as it sees fit. Under the current interpretation of Vaillancourt, the more pressing the collective goal identified by Parliament, the more circumscribed is the ability of Parliament to address these collective goals. The policies agreed to by Parliament are respected by the courts only so long as they deal with issues considered secondary. This contradicts the thrust of Lamer C.J.C.’s judgment in Wholesale Travel and is a clear departure from the principle/policy distinction. Thus, to speak of “some offences for which the special stigma attaching to conviction is such that subjective mens rea is necessary to establish the moral blameworthiness which justifies the stigma and sentence”⁵⁷ is to move into the arena of policy. It is for Parliament to decide on grounds of policy when offences should be defined so as to require something more than the constitutional minimum. The task still unaddressed by the Court is the minimum fault level required for “true crimes”. The options open to the Court, of intent and recklessness, criminal negligence, and simple negligence will be discussed later.

B. The Principle of Rational Labelling

The constructive murder provisions in Martineau and Vaillancourt meet any minimum fault level the Supreme Court might establish. There is the intent to commit one of the underlying offences given in section 230 of the Code. The principle of these cases, then, cannot be about setting a constitutionally prescribed minimum fault level. Moreover, as the discussion in the previous section has attempted to make clear, they cannot be a rewriting of the Code by the courts to suit the Court’s assessment of the severity of the offence of constructive murder versus that of murder given in subsections 229(a) or (b). If these cases can only be described in these terms they must be dismissed as illegitimate.

There is, however, a reading of these cases that views them as identifying a second principle, distinct from the principle of no liability without some minimum fault. This principle is that given two actors possessing the same intent, one cannot be punished more severely than the other unless there are rational reasons for this difference. If there are no rational reasons for the difference then the additional punishment and labelling given for one of the offences is arbitrary. The state would be pursuing the collective goal of protection of society by denying the equal treatment of offenders. It would be ignoring the right to equal treatment of the more harshly punished individual; the simple principle that like cases be treated alike. Court enforcement of this idea in the Constitution does not usurp the policy function of Parliament. Parliament

⁵⁷ Ibid.
remains free to label offences, to prescribe fault levels, and to set minimum and maximum levels of punishment. The principle simply demands that Parliament exercise this policy function in a non-arbitrary manner; that the distinctions it draws in the labelling of offences and the setting of punishments be rationally based. It is important to note that this approach accepts a distinction between intent and blameworthiness. Identical levels of intent may in some circumstances attract different assessments of blameworthiness and the corresponding determination of the criminal sanctions.

What then is a rational approach to labelling? The case law supports the idea that two actors with identical levels of intent may only be punished differently if the distinction can be supported on grounds of retribution and deterrence. Retribution here refers not to some notion of vengeance but rather to notions of just desert, or as the cases state, "moral blameworthiness". Deterrence here refers to general deterrence; the creation of disincentives to other members of the community to act in a similar manner. Both justifications must be present before the increased label and punishment is rational. It is recognized that deterrence is normally considered as a section 1 justification. Two points can be made in defence of its consideration within the section 7 guarantee of fundamental justice. First, it actually makes a Charter violation more likely. If it were not to be considered, then meeting the justification of retribution would ensure the constitutionality of the labelling scheme. Including deterrence as a second requirement of rationality means that those labelling schemes that meet the retribution requirement but not the requirement of deterrence will be in violation of the Charter. Second, it can be argued that this interpretation is more consistent with the limited role given to section 1 in the Motor Vehicle Reference which allowed limitations on section 7 rights only in cases of "exceptional conditions, such as natural disasters, the outbreak of war, epidemics and the like."

Can this principle be found in the case law? It is submitted that it can be found implicitly in Vaillancourt and Martineau and explicitly in the cases of Arkell, Luxton, and Lyons. In Arkell the first degree murder classification found in subsection 231(5) of the Code was challenged. Section 231 classifies murder as first or second degree. Subsection 231(2) classifies murder as first degree when the act is "planned and deliberate". This may be viewed as a higher level of intent than simple intent where one intends to commit the act but where planning and deliberation are absent. Subsections 231(4) and (5) state that certain


59 Recent cases have included societal interests in determining the scope of a legal right. See R. v. Askov, [1990] 2 S.C.R. 1199 at 1240, 59 C.C.C. (3d) 449 at 490, per Cory J. regarding the scope of s. 11(b): "As well the societal interest in ensuring that these accused be brought to trial within a reasonable time has been grossly offended and denigrated." See also R. v. Seaboyer, [1991] 2 S.C.R. 577 at 603-06, 66 C.C.C. (3d) 321 at 385-87, per McLachlin J. regarding s. 7.

60 Supra, note 8 at 313.
murders where planning and deliberation is absent, and thus presumptively only second degree, are nonetheless to be punished as first degree.

In Arkell the appellant was convicted of murder committed during the course of a sexual assault and subsection 231(5) classifies this as first rather than second degree murder. Thus, the defendant has an intent identical to that of the second degree murderer; intentional murder with no planning or deliberation. The offender under subsection 231(5), however, is labelled (a "first degree murderer") and punished (a mandatory twenty-five-year parole ineligibility period rather than a discretionary ten to twenty-five-year period) more severely. The crimes in subsection 231(5) are thus deemed to be equivalent in severity to those where a higher level of intent is present. Is this increased labelling and punishment justified or is it a violation of section 7? The Court found it to be constitutionally valid. Lamer C.J.C. came to this by examining the blameworthiness of the offence. Lamer C.J.C. stated that:

In the case of the distinction between first and second degree murder, the difference is a maximum extra 15 years that must be served before one is eligible for parole. This distinction is neither arbitrary nor irrational. The section is based on an organizing principle that treats murders committed while the perpetrator is illegally dominating another person as more serious than other murders. Further, the relationship between the classification and the moral blameworthiness of the offender clearly exists....Parliament’s decision to treat more seriously murders that have been committed while the offender is exploiting a position of power through illegal domination of the victim accords with the principle that there must be a proportionality between a sentence and the moral blameworthiness of the offender and other considerations such as deterrence and societal condemnation of the acts of the offender. Therefore, I conclude that, in so far as s. 214(5) is neither arbitrary nor irrational, it does not infringe upon s. 7 of the Charter.61 [Emphasis added]

Therefore, in assessing the moral blameworthiness of the offender one looks to the inherent nature of the act committed. Here the importance of the actus reus can be considered. Identical levels of intent (e.g. the intention to cause death) can lead to different degrees of labelling if the act itself is more deserving of condemnation. The scheme as a whole must not be “arbitrary nor irrational”. Thus, it must also serve to create a deterrent effect. The concurring opinion of L’Heureux-Dubé supports this view. She accepted the words of McLachlin J.A. (as she then was) in the Court of Appeal judgment:

It follows that the mere fact that a harsher sentence may be imposed for one offence than for another offence which is arguably more blameworthy, does not mean that the scheme that permits the sentence violates s. 7 of the Charter....Many factors entered into the determination of an appropriate penalty for a particular offence; the degree of blameworthiness is only one. The question is one of policy, to be determined by

---

61 Supra, note 9 at 72.
The Constitutional Requirement of Fault

Parliament. So long as Parliament does not act irrationally or arbitrarily or in a manner otherwise inconsistent with the fundamental principles of justice, its choice must be upheld.62 [Emphasis added]

Luxton was released at the same time as Arkell, and it too dealt with subsection 231(5). Here, the murder took place during a forcible confinement. Again, Lamer C.J.C. cited the fact that the offences listed in subsection 231(5) all "involve the illegal domination of the victim by the offender" and therefore the subsection "demonstrates a proportionality between the moral turpitude of the offender and the malignity of the offence."63

This requirement of rationality was used in the earlier case of Lyons which examined the constitutionality of the dangerous offender provisions in Part XXV of the Code. As in Arkell, an offender found to be a dangerous offender suffers more stigma and is open to a longer term of imprisonment in comparison to an offender who has committed the same offence but who is instead sentenced in the normal fashion. This too is found not to be a violation of section 7. The provisions are said to be part of a rational scheme of sentencing:

In a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender. No one would suggest that any of these functional considerations should be excluded from the legitimate purview of legislative or judicial decisions regarding sentencing.64

How, then, do the leading cases of Vaillancourt and Martineau fit the two principles discussed? It was stated earlier that they do not address the first principle. They set maximum, not minimum fault levels. To the extent that they set fault levels on the basis of the Court's own assessment or their estimate of society's assessment of the severity of the offences, they are decisions of policy and therefore illegitimate as constitutional doctrines. The cases, however, are not inconsistent with the application of the second principle. In both cases the Court examined offences that labelled and punished acts as murder when the actor's intent was equivalent to less serious offences.

In Vaillancourt, subsection 230(d) was challenged and it was accepted by at least six of the seven-member Court, citing Rowe v. R.,65 that death could occur in cases where it was not objectively foreseeable.66 Thus,

63 Supra, note 10 at 457-58.
64 Supra, note 11 at 22.
66 The dissent of McIntyre J. left this point open: "I am not prepared to accept the proposition that s. 213(d) of the Criminal Code admits of a conviction for murder without proof of objective foreseeability of death or the likelihood of death": supra, note 2 at 123.
Vaillancourt's intent was equal to that of a second offender who committed unlawful act manslaughter; the intent to commit an unlawful act that would subject another person to the risk of some harm, albeit not serious harm. Nonetheless, for Vaillancourt, the act was labelled as second degree murder which held out the possibility of increased punishment. The principle, as submitted, demands that this increase in labelling and punishment be justified by both retribution and deterrence. The majority judgment of Lamer J. accepted that the rational sentencing goal of deterrence was served by terming this act murder rather than manslaughter. Lamer J., however, felt that this act was no more blameworthy than that of manslaughter and therefore found a section 7 violation. In assessing the need for retribution, or the moral blameworthiness of the offence, Lamer J. looked to the fault level of murder versus manslaughter:

In addition, murder is distinguished from manslaughter only by the mental element with respect to the death. It is thus clear that there must be some special mental element with respect to the death before a culpable homicide can be treated as a murder. That special mental element gives rise to the moral blameworthiness which justifies the stigma and sentence attached to a murder conviction.

Remember that in Arkell it was the blameworthiness of the actus reus, not the mens rea, that determined whether the increased labelling and punishment was rational. The point is that at this stage two acts with the same intent are being compared: two unforeseeable homicides resulting from an unlawful act. It is irrelevant to compare the offence in question to a third offence, murder as defined by subsection 229(a) of the Code, requiring a different level of intent. The key question, given Arkell, is not how constructive murder is similar to intentional murder but rather, how is it different from manslaughter? This can only be answered by examining the actus reus. The key question is whether a death occurring during a robbery is a more blameworthy act than, say, a death arising from a simple assault.

The same objection applies to the decision in Martineau. There, the constructive murder provisions where death is objectively foreseeable were challenged. Thus, Martineau had the same intent as another offender convicted of criminal negligence causing death. Again the question must be why acts set out in subsections 229(c) and 230(a), (b), and (c) are labelled and punished more severely than criminal negli-

---

68 Supra, note 2 at 134.
69 Given the Ontario Court of Appeal’s application in R. v. Nelson (1990), 54 C.C.C. (3d) 285, 75 C.R. (3d) 70 of the Supreme Court decision in R. v. Tutton, [1989] 1 S.C.R. 1392, 48 C.C.C. (3d) 129. The Ontario Court of Appeal has continued to apply an objective standard of a marked departure from the standard of a reasonable person. This is, in fact, a higher standard of fault than simple objective foreseeability.
The Constitutional Requirement of Fault

This question is not answered. Instead, Lamer C.J.C. again compares the challenged offences to that of subsection 229(a) and states that "the fundamental principle of a morally based system of law that those causing harm intentionally be punished more severely than those causing harm unintentionally" is violated.70

The real question is whether someone who commits the acts set out in subsections 229(c) and 230(a), (b), and (c) deserves greater punishment than someone who is guilty of criminal negligence causing death. Further, it must be satisfied that this extra punishment serves some deterrent effect. This is the basis of L'Heureux-Dubé J.'s dissent:

This [the concentration on stigma] appears to me to confuse some very fundamental principles of criminal law and ignores the pivotal contributions of actus reus to the definition and appropriate response to proscribed criminal offences....The whole correlation between the consequences of a criminal act and its retributive repercussions would become obscured by a stringent and exclusive examination of the accused's own asserted intentions.

Whatever the competing arguments may be with respect to deterring the merely negligent, here we are dealing with those who have already expressly acted with the intent to commit at least two underlying serious crimes. If deterrence is ever to have any application to the criminal law, and in my view it should, this is the place.71

This reading of the case law sees the Motor Vehicle Reference, Wholesale Travel, and Arkell as the key decisions identifying the two relevant principles legitimately protected as a matter of constitutional law. The leading decisions of Vaillancourt and Martineau are inconsistent with these decisions to the extent that they go beyond stating a minimum level of fault for criminal offences and in that they focus exclusively on fault in assessing the rationality of increased labelling and punishment. These cases can be made consistent with the two principles submitted if the rationality of the increased labelling and punishment is approached from the perspective of the actus reus and the consequences flowing from the guilty act. This analysis will be given at the end of the paper. The task now is to determine the content of the two principles given.

IV. THE PRINCIPLE OF A MINIMUM LEVEL OF FAULT

A. As Expressed in the Case Law

So far this paper has submitted that the doctrine in Vaillancourt and Martineau, insofar as it identifies "some offences" as requiring subjective fault, is a doctrine based on policy, not principle, and therefore trenches upon a policy-making function that is legitimately the exclusive province of Parliament. It has been argued that a principled

70 Supra, note 3 at 360.
71 Ibid. at 375 & 387.
approach to this issue demands that the Court, as it did in Wholesale Travel, set a constitutionally required minimum fault level; that is, the Court must explicitly address the degree of fault required for "true crimes". The answer to this question will be found in the basic tenets of our legal system.

The resolution of this question can have profound effects on the current scope of the Code. Specifically, if a fault standard of intent or recklessness is insisted upon, then criminal negligence\(^7\) and dangerous driving\(^3\) will either be found to be in violation of section 7 of the Charter or will have to be redefined to include advertence to the risk involved. Further, the proposed law on sexual assault may be found to be a violation of section 7.\(^7\)

Prior to the Charter, courts had no power to define the elements of offences. They did presume a need for subjective intent where the Code was silent\(^7\) but were powerless to alter the clear words of an offence demanding only objective liability. The Charter and the decision in the Motor Vehicle Reference signalled a change of course. Nonetheless, the Supreme Court has been tentative in approaching this question when dealing with criminal offences. In Vaillancourt Lamer J. stated that the demand for subjective intent would be relatively rare:

[T]here are, though very few in number, certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a mens rea reflecting the particular nature of that crime. Such is theft, where, in my view, a conviction requires proof of some dishonesty. Murder is another such offence.\(^7\) [Emphasis added]

Similarly, in Logan\(^7\) Lamer C.J.C. stated that there are "few offences for which the Constitution requires subjective intent." At the same time there have been obiter comments by Lamer C.J.C. to the effect that subjective culpability may always be required. In Martineau he stated that:

\(^7\) Bill C-49: "s. 273.2. It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where (a) the accused’s belief arose from the accused’s (i) self-induced intoxication, or (ii) recklessness or wilful blindness; or (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting."
\(^7\) Supra, note 2 at 134.
\(^7\) Supra, note 6 at 403.
The rationale underlying the principle that subjective foresight of death is required before a person is labelled and punished as a murderer is linked to the more general principle that criminal liability for a particular result is not justified except where the actor possesses a culpable mental state in respect of that result.\textsuperscript{78}

Further, in \textit{Wholesale Travel}, Lamer C.J.C. writing for four members of the Court, stated that "an aware state of mind may well be the most appropriate minimum standard of fault for imprisonment or for any offence included in the \textit{Criminal Code}."\textsuperscript{79} Interestingly, Lamer C.J.C. states that when imprisonment is imposed, the differences between regulatory offences and true crimes are only theoretical:

In my view, whether this offence (or the Act generally) is better characterized as "criminal" or "regulatory" is not the issue. The focus of the analysis in \textit{Reference re: s. 94(2) of Motor Vehicle Act} and \textit{R. v. Vaillancourt}, was on the use of imprisonment to enforce the prohibition of certain behaviour or activity. A person whose liberty has been restricted by way of imprisonment has lost no \textit{less} liberty because he or she is being punished for the commission of a regulatory offence as opposed to a criminal offence. Jail is jail, whatever the reason for it. In my view, it is the fact that the state has resorted to the restriction of liberty through imprisonment for enforcement purposes which is determinative of the principles of fundamental justice.\textsuperscript{80} [Emphasis in original]

This suggests that since the consequences of conviction for regulatory offences and true crimes are equally grave, the same minimum fault level should govern. This leads, then, to a minimum standard of fault for true crimes or simple negligence or carelessness.

In contrast, Cory J. saw an inherent difference between regulatory and criminal offences. For true crimes he advocates a subjective standard of fault:

Criminal law is rooted in the concepts of individual autonomy and free will and the corollary that each individual is responsible for his or her conduct. It assumes that all persons are free actors, at liberty to regulate their own actions in relation to others. The criminal law fixes the outer limits of acceptable conduct, constraining individual freedom to a limited degree in order to preserve the freedom of others. Thus, the basis of criminal responsibility is that the accused person has made a deliberate and conscious choice to engage in activity prohibited by the \textit{Criminal Code}. The accused person who is convicted of an offence will be held responsible for his or her actions, with the result that the opprobrium of society will attach to those acts and any punishment imposed will be considered to be deserved.\textsuperscript{81}

\textsuperscript{78} \textit{Supra}, note 3 at 360.
\textsuperscript{79} \textit{Supra}, note 5 at 213.
\textsuperscript{80} \textit{Ibid.} at 215.
\textsuperscript{81} \textit{Ibid.} at 244.
Finally, there is the Supreme Court decision in *R. v. Nguyen; R. v. Hess*. There, the former statutory rape provisions in subsection 146(1) were challenged. The offence removed the defence of due diligence as to the age of the complainant. For the majority, Wilson J. stated that at a minimum a defence of due diligence was required. If not, the state was pursuing the collective goal without respecting the rights of the accused:

Where the person's beliefs and his actions leading up to the commission of the prohibited act are treated as completely irrelevant in the face of the state's pronouncement that he must automatically be incarcerated for having done the prohibited act, that person is treated as little more than a means to an end. That person is in essence told that because of an overriding social or moral objective he must lose his freedom even though he took all reasonable precautions to ensure that no offence was committed.

This can be seen as simply importing the result in the *Motor Vehicle Reference* into the criminal sphere. The decision did not go on to address the question of what degree of fault would make the offence valid.

It is not surprising that lower courts have had difficulty implementing this doctrine. Only two offences have so far been singled out for subjective liability: murder and theft. The severity of these offences is so dissimilar as to make comparisons almost impossible; murder must now be an intentional killing and, at a minimum, leads to life imprisonment with no possibility of parole for ten years while a conviction for theft may be a shoplifting charge that merits a discharge.

Lower courts have applied *Vaillancourt* in three main areas: criminal negligence, crimes of carelessness, and crimes involving the punishment of consequential harm. Courts have upheld the constitutionality of objective standards of liability for criminal negligence. Lamer C.J.C., agreeing to the use of an objective standard in *Tutton*, specifically left this question open. The Ontario Court of Appeal addressed this issue in *Nelson* and dismissed the constitutional argument in one paragraph, stating simply that criminal negligence did not possess the required stigma or punishment to require subjective fault. The Supreme Court

---


83 *Nguyen*, ibid. at 171.

84 See Moldaver J. in *Durham*, supra, note 7 at 79: "I must confess that I have some difficulty determining just what criteria ought to be considered in deciding the nature and degree of the stigma that might flow from a conviction under s. 86(2) of the *Criminal Code*. Indeed, my uncertainty extends beyond s. 86(2) into the realm of each and every criminal offence for which the Supreme Court of Canada has not already provided guidance."


86 *Supra*, note 69 at 143.

87 Ibid. at 75. This was reaffirmed later in *R. v. Gingrich* (1991), 6 C.R. (4th) 197, 65 C.C.C. (3d) 188 (Ont. C.A.) which stated that the decisions in *Martineau* and *Logan* did not change the interpretation given in *Nelson*.
had a chance to reconsider the matter in *Anderson* but declined to resolve the objective/subjective debate as the case would be decided in the same way using either of the tests.

*Vaillancourt* has been used more successfully by defence counsel in attacking the validity of crimes based on carelessness. Specifically, subsection 86(2) of the *Code* which creates the offence of careless use of a firearm has been struck down in several jurisdictions as a violation of section 7 of the *Charter*. At the Court of Appeal level in *R. v. Finlay* and at the lower court level in *Durham* and *R. v. Stratigeas*, courts have stated that a fault level of carelessness cannot justify the stigma and imprisonment of criminal liability. These are in contrast to earlier cases which found no *Charter* violation in subsection 86(2). In *Stratigeas*, Main Prov. Div. J. stated that the offence was “[a]lmost” one of absolute liability and was concerned that law might infringe the presumption of innocence. With respect, this is difficult to understand. Carelessness or civil negligence is a level of fault; it most certainly is not absolute liability. Further, it is still incumbent upon the Crown to prove this fact beyond a reasonable doubt and thus the presumption of innocence is very much present. In *Finlay*, the Court, after citing the *Motor Vehicle Reference* and *Vaillancourt*, stated that the stigma from a conviction would be high and that “[a]n objective court watcher would generally assume that a person convicted of a criminal offence has been so convicted because he possessed a degree of fault greater than mere negligence.” The court went on to note that the person charged could be fingerprinted and would have a criminal record, and that the stigma and punishment flowing from these facts could not justify a conviction based on civil negligence.

The most careful of the three judgments is that of Moldaver J. in *Durham*. He reads the subsection as punishing careless behaviour that creates a foreseeable risk to the safety of others. Then, citing *Vaillancourt*...
court and Anderson he states that there is a division in the case law between offences that punish circumstances and those that punish consequences. Following Nguyen, he finds that those offences where the key issue is the circumstances in which the offence takes place, for example, the age of the complainant, section 7 of the Charter will demand only a fault level of simple negligence. He then states that when the consequences of an offence are central, a fault level higher than simple negligence is required.

This result is open to criticism. Is there any principled difference between fault levels required for circumstances versus those required for resulting consequences? Parliament has the power to define the conduct, circumstances, and consequences required for every offence. The presumed mental element is that the Crown must prove beyond a reasonable doubt that the accused intended to act, had knowledge of the circumstances, and intended the consequences. Parliament, however, can reduce the mental element or fault requirement for the circumstances or consequences. Moldaver J.’s judgment allows Parliament to substitute negligence for knowledge with respect to the circumstances of the offence but forbids Parliament from doing the same for consequences. In Vaillancourt, Lamer J. stated that “[i]t may well be that, as a general rule, the principles of fundamental justice require proof of a subjective mens rea with respect to the prohibited act, in order to avoid punishing the ‘morally innocent’”96. The reference is to the criminal act, in toto, not to specific parts of the actus reus. To create different standards for crimes punishing circumstances versus those punishing consequences is to inject an unnecessary artificiality into the law.

The real question is whether negligent conduct is criminal, regardless of the component of the part of the actus reus at issue. Here, Moldaver J. relies on Sopinka J.’s judgment in Anderson where it was stated:

In a civil negligence case concerned with adjustment of losses, the connection between conduct and consequences is often quite tenuous. The mythical reasonable man has been equipped with a great deal of clairvoyance in order to compensate the innocent victim. Often the defendant will not, in fact, have foreseen the consequences of his negligent acts for which he is held accountable on an objective basis. In a criminal case the connection must be more substantial.97

Moldaver J. states that this statement is “determinative” of the issue. This appears to ignore the simple fact that Anderson is a case of criminal negligence. The words of the section demand “a wanton or reckless disregard for the lives or safety of other persons.”98 This is why the “connection must be more substantial”99 in comparing the foreseeability

96 Supra, note 2 at 133.
97 Supra, note 72 at 485.
98 Criminal Code, s. 219.
99 Supra, note 72 at 485.
of harm in criminal negligence versus civil negligence. But this has no relevance in assessing the constitutional validity of a crime that explicitly calls for only simple negligence. The relevant question is whether this meets a constitutionally prescribed minimum level of fault. *Anderson* does not address the constitutionality of either simple negligence or criminal negligence. Thus, to say that it is determinative is investing the statement in *Anderson* with a value far beyond its actual worth.

The final area where the *Vaillancourt* doctrine has been used is with respect to “constructive sentencing”. This is the additional labelling and punishment that occurs when the consequences of, for example, an assault or impaired driving are greater. It is submitted that these cases are unaffected by the first principle. In each case there has been the subjective intent to engage in criminal activity. The question at issue is the legitimacy of imposing additional punishment for unforeseen consequences. This is governed by the application of the second principle, the legitimacy of increased punishment when intentions are identical, and will be considered later.

B. **What Should Be the Minimum Standard of Fault?**

The real issue that must be answered is the constitutionally required minimum fault level for true crimes. This must be addressed directly. It cannot be addressed in an offence-by-offence estimation of “stigma”; the earlier analysis has shown that this is an approach based in policy, not principle. Moldaver J.‘s comments in *Durham* are indicative of, it is submitted, a real uncertainty as to how to apply this doctrine. Further, the minimum fault requirement should not become needlessly complicated by developing separate rules for the mental elements with respect to consequences and circumstances.

How should the Court approach this task? If the collective goal being served by the criminal law is the protection of society we must find the principle that limits the pursuit of this goal. It has been submitted throughout that the relevant principle is that there must be fault before imprisonment is justified. The task now is to find the content of that principle; this will be discovered through an act of interpretation. Further, given that a constitutional right is at stake the justification of the content must be drawn “from the most philosophical reaches of political theory.”

100 Defining the content of this principle for criminal offences is beyond the scope of this paper. The question of fault in the criminal law is a subject upon which much has been written. It will be enough at this point to canvass the alternatives. There are three candidates. The first is subjective intent or recklessness. The second is to presume subjective intent but to allow a lower standard of inadvertent criminal negligence in cases of bodily harm. The third is simple negligence or carelessness.

---

100 *Supra*, note 14 at 380.
The most obvious candidate for a minimum fault level is that of intent or recklessness. It is the presumed intent in the absence of direction to the contrary from Parliament and can be considered to represent the views of the majority of judges and commentators. In fact, the two most recent Chief Justices of the Supreme Court, Justices Dickson and Lamer, are both strongly associated with the subjectivist school. In *Leary*, Dickson C.J.C. went so far as to state that “[t]he notion that a Court should not find a person guilty of an offence against the criminal law unless he has a blameworthy state of mind is common to all civilized penal systems.” The quotation of Cory J. in *Wholesale Travel*, offered above, shows that he shares this view.

This approach focuses on the conscious decision by the wrongdoer to commit the prohibited act. It is this fact that justifies the use of criminal sanction. This view was stated recently in a more sophisticated form by Alan Brudner. He states that the common law justification of the criminal sanction and imprisonment is retributivist or desert-based. Individuals are deserving of punishment if they self-consciously deny another’s right to an equal sphere of autonomy. This occurs when one decides to commit a criminal act. In doing so, the individual has made a claim to unlimited liberty and has therefore challenged “the very idea of a protected sphere of autonomy”, and becomes deserving of punishment by the state. In contrast, simple tortious acts do not deny the equal right to autonomy of others. All that is required is that the wrongdoer personally compensate the tort victim. Thus any statute, regulatory or criminal, that allows for imprisonment must demand subjective intent or recklessness.

The second alternative is to allow for objective liability only where bodily harm occurs and where the conduct is criminally negligent; that is, the conduct is “a marked departure from the norm”. It is consistent with the reading given by McIntyre J. in *Tutton* and subsequently by the Ontario Court of Appeal in *Nelson*. It is the position in the revised

---

101 See, e.g., the influential views of G.L. Williams: “To go further, and regard inadvertent negligence as a form of *mens rea*, so that the ordinary run of crimes could be committed negligently, would give a vast and unwarrantable extension to the area of criminal punishment.” in *The Mental Element in Crime* (Jerusalem: Magnes Press, 1965) at 57.


103 *Leary*, *ibid.* at 486.


107 *Anderson*, *supra*, note 72 at 485.
Criminal Code proposed by the Law Reform Commission of Canada\(^{108}\) and is supported by Don Stuart in his work on the criminal law where he argues that efforts should be made to "restrict liability for gross negligence to causing or risking serious harm like death or serious injury".\(^{109}\)

The final alternative is to set the minimum fault requirement at simple negligence or carelessness. This was rejected in Finlay and Durham. In Wholesale Travel this standard was accepted as the minimum fault requirement for regulatory offences. As noted earlier, however, Lamer C.J.C. stated that "[j]ail is jail, whatever the reason for it",\(^{110}\) suggesting that the same minimum fault requirement should be used for true crimes. It should be remembered that here we are dealing with setting minimum standards. There would still exist many good policy reasons for Parliament to limit its use of this fault requirement.

Two of the more celebrated defenders of negligence are H.L.A. Hart and George Fletcher. They point out that a failure to act reasonably when it is in the actor's powers to do so is, in fact, a form of subjective fault. Hart states that:

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. Where these capacities and opportunities are absent, as they are in different ways in the varied cases of accident, mistake, paralysis, reflex action, coercion, insanity etc., the moral protest is that it is morally wrong to punish because 'he could not have helped it' or 'he could not have done otherwise' or 'he had no real choice'. But, as we have seen, there is no reason (unless we are to reject the whole business of responsibility and punishment) always to make this protest when someone who 'just didn't think' is punished for carelessness. For in some cases at least we may say 'he could have thought about what he was doing' with just as much rational confidence as one can say of any intentional wrongdoing 'he could have done otherwise'.\(^{111}\)

\(^{108}\) Recodifying Criminal Law (Report 31) (Ottawa: Law Reform Commission of Canada, 1987). The only crimes that punish negligent behaviour are s. 6(1) Negligent Homicide, s. 7(2) Assault by Harming, s. 10(1) Endangering, and s. 10(4) Endangering by Motor Vehicle. "Negligently" is defined in s. 2(4)(b) as "A person is negligent as to conduct, circumstances or consequences if it is a marked departure from the ordinary standard of reasonable care to engage in such conduct, to take the risk (conscious or otherwise) that such consequences will result, or to take the risk (conscious or otherwise) that such circumstances obtain." See also Law Reform Commission of Canada, Omissions, Negligence and Endangering (Working Paper 46) (Ottawa: Law Reform Commission of Canada, 1985) at 21-30.


\(^{110}\) Supra, note 5 at 215.

Fletcher echoes this approach. He speaks of "moral forfeiture" — the loss of a "moral standing to complain of being subjected to sanctions." Fletcher believes this standing is lost by the act of negligence alone:

If his illegal conduct is unexcused, if he had a fair chance of avoiding the violation and did not, we are inclined to regard the state's imposing a sanction as justified. The defendant's failure to exercise a responsibility shared by all, be it a responsibility to avoid intentional violations or to avoid creating substantial and unjustified risks, provides a warrant for the state's intrusion upon his autonomy as an individual. From the viewpoint of culpability as a standard of moral forfeiture, it seems fair and consistent to regard negligence as culpable and to subject the negligent offender to criminal sanctions.113

This point of view has been supported in Canada within the academic literature.114

These are, of course, very brief sketches of the rationales for the differing fault standards. A much more involved analysis is required to determine which interpretation has the best "fit" and "value". In choosing between these three possible interpretations the Court must ask "which shows the community's structure of institutions and decisions — its public standards as a whole — in a better light from the standpoint of political morality."115 The most noteworthy aspect of these sketches is the fact that subjective fault is not the only possible principled approach to prescribing a minimum fault level. The Supreme Court may come to the conclusion that subjective intent is, provisionally, the best standard. This conclusion must be based, however, on a deeper level of analysis than that given by the Court thus far.

V. THE PRINCIPLE OF RATIONAL LABELLING

The second principle identified in the case law is that the Code must follow a system of rational labelling. Given two actors with the same intent, any increase in the severity of the label or punishment must be justified on the twin grounds of retribution (or desert) and deterrence. This justification allows for a departure from the presumption that those causing harm intentionally always be punished more severely than those causing harm unintentionally. As described earlier this principle can be found in the Supreme Court decisions in Arkell, Luxton, and Lyons.

113 Ibid. at 417-18.
115 Supra, note 14 at 256.
This principle has been applied in recent cases addressing “constructive sentencing”. Specifically, it has been used in assault and driving cases where separate offences are listed in the Code according to the harm suffered by the victim. In each of these offences the first principle of a minimum level of fault is satisfied no matter which standard is used. In each case, there is the intent to commit the underlying offence of, for example, simple assault or impaired driving. The question at issue is whether, given the intention to commit only the lesser included offence of simple assault or impaired driving, the accused can be held liable for consequences flowing from the act.

These cases address the point decided in the pre-Charter case of Smithers v. R. There, the accused was convicted of manslaughter in circumstances where the death of the victim was not objectively foreseeable. The fact that the initial assault caused the death of the victim was determinative of the finding of guilt. The question of the intent of the accused beyond that of intending the simple assault was irrelevant:

The Crown was under no burden of proving intention to cause death or injury. The only intention necessary was that of delivering the kick to Cobby. Nor was foreseeability in issue. It is no defence to a manslaughter charge that the fatality was not anticipated or that death ordinarily would not result from the unlawful act.

This approach has been challenged repeatedly in the wake of Vaillancourt and Martineau. At least two courts have found that the offence of aggravated assault requires the intent to wound, maim, disfigure, or endanger the life of the victim. In R. v. Parish, at the New Brunswick Court of Appeal, this seemed to result from a simple reading of the statute without any reference to the case law or an acknowledgement that this result was a break from well established precedent. In R. v. B.(S.), at the Ontario Provincial Court, the reasoning was more explicit. Nasmith Prov. Ct J. stated that the stigma and possibility of increased punishment for aggravated assault required “an intention that reflects the changed nature of the crime” and must therefore require “some actual foresight” of the harm sustained by the victim.

The majority of courts, however, have upheld the constitutionality of causal liability for unintended consequences. In R. v. Brooks and R. v. Scharf the British Columbia and Manitoba Courts of Appeal
upheld the validity of a fault level for aggravated assault that demands only the intent to commit a simple assault. This approach was adopted by the Ontario Court of Appeal in R. v. DeSousa124 for the offence of unlawfully causing bodily harm (s. 269).

The only guidance from the Supreme Court is given in R. v. Brown.125 This was a sentence appeal from a conviction on four counts of dangerous driving simpliciter. Two persons were killed and two injured in the accident and the trial judge took into account these facts in sentencing. The Court stated that it was improper for the trial judge to consider facts rejected by the jury. Stevenson J. then addressed the question of punishing consequences and seemed to tacitly endorse the punishment of unintended consequences:

Since Parliament has chosen to make dangerous driving a consequence related crime, the consequence of death or bodily injury must be taken to be excluded under a determination of guilt of dangerous driving, simpliciter. The Crown, here, conceded that had the accused entered a guilty plea to dangerous driving, simpliciter, it could not argue a more serious sentence based upon these consequences....There is, in my view, no valid distinction between the two situations.126

Given the fact, however, that the constitutional issue was not addressed these words are far from determinative of the issue. None of the cases discussed specifically address the analysis given in Arkell and Luxton. These two decisions provide a more principled method of deciding these cases than the policy-based stigma/punishment test given in Vaillancourt. A discussion of the approach taken in these cases will be given at the end of the paper.

A. The Content of the Principle of Rational Labelling

The two aspects of the principle of rational labelling are retribution and deterrence. These two factors are present whenever there is intent or recklessness with respect to a certain consequence. The conscious decision to bring about an illegal consequence provides the justification for punishment and the recognition by the actor of breaking the law and being subject to punishment if caught allows for deterrence to work. The key question, though, is whether retribution and deterrence operate with respect to the actor who intends some specified consequences but, in fact, unintentionally causes more serious consequences. Do retribution and deterrence still operate with respect to the unintended consequences? Moreover, do they operate to any unintended consequence or just those

126 Ibid. at 524.
that are foreseeable? Again, a very preliminary attempt will be made to answer these questions.

Do people deserve punishment for unintended consequences? The traditional answer is that they do; the person who decides to break the law has not been able to rely on the fact that their actions caused greater harm than they had anticipated. Stephen said that this was rooted in "public feeling":

If two persons are guilty of the very same act of negligence, and if one of them causes thereby a railway accident, involving the death and mutilation of many persons, whereas the other does no injury to any one, it seems to me that it would be rather pedantic than rational to say that each had committed the same offence, and should be subjected to the same punishment. In one sense each has committed an offence, but the one has had the bad luck to cause a horrible misfortune, and to attract public attention to it, and the other the good fortune to do no harm. Both certainly deserve punishment, but it gratifies a natural public feeling to choose out for punishment the one who actually has caused great harm, and the effect in the way of preventing a repetition of the offence is much the same as if both were punished.127

This public feeling is fuelled by a feeling of solidarity with the victims of crime and can be said to express a society's affirmation of the sanctity of life.128 In contrast, this kind of punishment has been criticized as undeserved as it "attributes too much importance to chance results".129

More importantly, the rationale for increased punishment for unintended consequences is that the act itself is more blameworthy. That is, a simple assault that causes a wounding is a more blameworthy act than a simple assault that is merely trifling. Similarly, in Arkell, the acts listed in subsection 231(5) coupled with the intent to kill are more serious than the intent to kill in other circumstances. This focus on the blameworthiness of the act explains the sentencing policy relating to attempts. Section 463 states that the maximum penalty for an attempt is half that of the completed offence. In both cases the level of intent is identical but the intent when coupled with the act is considered more blameworthy than the unsuccessful attempt. This too has been criticized. H.L.A. Hart has asked that in these circumstances we should control our resentment "however natural, in the interests of some deliberate forward-looking policy, much as we control our natural fears in the interest of forward-looking prudential aims".130

130 Supra, note 111 at 131.
If the retributivist justification is accepted for unintended consequences it seems irrelevant whether these consequences were foreseeable. The question of desert focuses on the fact of causation, the responsibility for every result of the criminal activity, not foreseeability.

The second aspect of the principle of rational labelling is deterrence. The additional labelling and punishment for unintended consequences must serve a deterrent effect. Here, there is a difference between unintended consequences that are foreseeable and those that are not. There is little question that general deterrence is served by the punishment of unintended but reasonably foreseeable consequences. The objection by subjectivists is that deterrence only works when one is consciously deciding whether or not to break the law; deterrence guides the person towards the path of lawful behaviour. As Hart has pointed out, this is an impoverished conception of deterrence; punishment of foreseeable consequences can force people to avert to the risk of their behaviour:

The threat of punishment is something which causes him to exert his faculties, rather than something which enters as a reason for conforming to the law when he is deliberating whether to break it or not. It is perhaps more like a goad than a guide. But there seems to me to be nothing disreputable in allowing the law to function in this way, and it is arguable that it functions in this way rather than in the rationalistic way more frequently than is generally allowed.131

This point of view has been embraced by courts, most notably in the area of impaired driving where longer sentences have been given when injury or death occurs. In R. v. McVeigh, the Ontario Court of Appeal stated that "[g]eneral deterrence in these cases should be the predominant concern."132 Similarly, in R. v. Jacobs, the Alberta Court of Appeal stated "it is inevitable that the need for public deterrence will be more strongly expressed in those cases in which tragedy has resulted from the culpable acts than when it is was luckily avoided".133 This approach has been challenged recently at the British Columbia Court of Appeal in a concurring judgment by Wood J.A. in a case of impaired driving causing death. Justice Wood stated that the "moral culpability of an offence is determined by the state of mind which accompanies the offender’s unlawful act."134

The widely accepted view as stated in McVeigh and Jacobs is compelling. People are risk averse. The fact that a lengthy period of incarceration will be incurred if injury or death results from impaired driving may deter those who would not be deterred by the possibility of a license suspension or a short term of detention. The more problematic question is whether increased punishment of unforeseeable and unin-

131 Ibid. at 134.
133 (1982), 70 C.C.C. (2d) 569 at 575, 16 M.V.R. 15 at 22 (Alta C.A.) [hereinafter Jacobs].
tended consequences serves any deterrent effect. Much less has been written on this subject. The traditional view is that this is simply absolute liability and therefore cannot be deterred. Here, however, it must be remembered that in the offences discussed thus far we are not addressing unplanned activity, but rather consequences flowing from the conscious desire to engage in criminal activity. Liability for all consequences, no matter how unforeseeable, is a factor that can be considered when one decides whether or not to commit the underlying offence. For example, persons considering a simple assault may be deterred by the knowledge that if the victim possesses a "thin skull" they will be held liable for manslaughter. Moreover, this deterrent effect may even be present when the initial act is not intended to be criminal. As Mewett states:

> It is difficult to envisage that the criminal law serves any useful purpose in inflicting criminal sanctions upon unintended acts, for if its ultimate purpose is deterrence (by whatever means this might be achieved) one is only deterred by an appreciation of the acts which are proscribed. But this, as is apparent, is an oversimplification of the problem. The punishing of acts of sexual intercourse with girls under the age of fourteen deters at least in the sense that one is aware of the risk involved in having sexual intercourse with any young girl, whether one actually knows her to be under fourteen or not. To be found guilty of selling obscene matter without knowing that the matter is obscene, at least makes one more careful in offering for sale dubious literature.\(^{135}\)

Again, these are only preliminary attempts at interpreting the content of retribution and deterrence as applied in a rational system of sentencing.

**VI. APPLYING THE PRINCIPLES**

How do these principles play out when applied to the leading cases of Vaillancourt and Martineau? In neither case is the principle of a minimum level of fault at issue. In both cases there is the intent to engage in the underlying acts of robbery or break and enter. What is at issue is the second principle; are there rational reasons to label and punish these acts as murder rather than manslaughter or criminal negligence? The appropriateness of greater retribution will depend on how one assesses the severity of acts of manslaughter as typically conceived and the act of a felony murder. If it is agreed that an unintentional killing in the course of a robbery or break and enter is a more blameworthy act than an unintentional killing arising from a simple assault then this part of the principle will have been met. There is evidence that the public holds this view.\(^{136}\) The second aspect of the principle asks if the increased label and sentence serves a deterrent effect. Undoubtedly, this is the case in Martineau where the killings were foreseeable. The acceptance of deterrence in Vaillancourt depends on whether one accepts the idea that


unforeseeable acts flowing from a conscious decision to engage in
criminal activity can be deterred. Thus, on the admittedly preliminary
reading of the principles, it appears that Martineau was wrongly decided
and that a strong argument can be made against the finding in
Vaillancourt.

This analysis supports the view that there are strong reasons to
support the validity of the various constructive sentencing provisions in
the Code. Again, on the analysis given above, there is a justification for
increased retribution. Assaults that wound are more blameworthy acts
than assaults that do not. For the impaired driving causing harm or death
provisions, the justification of deterrence will also be met. In the context
of impaired driving it seems logical to insist that death or injury is always
foreseeable. The assault provisions are more problematic. In some circum-
stances these provisions punish consequences that are unforeseeable. If
it is accepted that deterrence may operate with respect to unforeseeable
consequences given that a decision to commit a simple assault has been
made, the results in Smithers and Parish will be unaffected. If this view
of deterrence is not accepted then these offences will be interpreted to
require objective foreseeability of the consequences.

VII. CONCLUSIONS

This paper has attempted to show that the constitutionalization of
fault in Canadian criminal law, as exemplified by the Supreme Court
decisions in Vaillancourt and Martineau, is based on reasoning that is
not legitimately the province of the judiciary. It is not for courts to revise
the Criminal Code based upon differences in policy between it and
Parliament. The estimation of stigma and punishment as determinative
of the validity of provisions of the Code is a question of policy.

This mistaken approach can be corrected by relying on principles
given in such decisions in the Motor Vehicle Reference, Wholesale
Travel, and Arkell. The principles in these decisions give courts the
legitimacy to strike down provisions in the Code that pursue the collec-
tive goal of protecting society but that in doing so undermine the rights
of individuals. These principles demand that there be no liability without
fault and that any additional punishment meted out to an actor relative
to a second actor with an identical intent be justified on both retributivist
and deterrence grounds.

This paper has only very tentatively described the content of these
principles. It is a task that courts must now address explicitly. Instead
of making ad hoc estimations of “stigma” courts must now ask them-
theselves more fundamental questions. What level of fault best “fits” our
system of criminal law? What kinds of acts are deserving of greater
punishment? When does deterrence work? These questions must be
addressed directly. The right answers, even if only provisional, will be
found through acts of interpretation. It is for the courts to determine
what “story” of fault, retribution, and deterrence fits our criminal law.