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Abstract
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CRIMINAL FAULT AS *PER* THE LAMER COURT AND THE GHOST OF WILLIAM McINTYRE©

BY MICHAEL J. BRYANT*

Contrary to recent criticisms to the effect that the Supreme Court of Canada favours the rights of criminal defendants and shuns the interests of the community, the Lamer Court has in fact championed the moral requisites of the community in its constitutional jurisprudence on criminal fault. By viewing rights and responsibilities as inextricably linked, the Lamer Court implicitly borrows from natural law traditions espoused by the Dickson Court's most conspicuous dissenter on criminal fault issues—Mr. Justice William McIntyre. This article argues that the tradition or philosophy underlying criminal fault as *per* the Lamer Court contrasts with the individualist, rights-oriented tendency of the Dickson Court, and corresponds with the approach of William McIntyre. Accordingly, the controversial holding of the Court in *R.* v. *Daviault* does not signal a retreat from the present Court's distinctive approach, as exemplified by the majority opinion in the *Creighton* quartet and in *DeSousa*, *Hundal*, and *Rodriguez*.

Malgré des critiques récentes que la Cour suprême du Canada fait prevaloir les droits des accusés sur les intérêts de la communauté, la Cour Lamer, à travers de sa jurisprudence constitutionnelle en matière de faute criminelle a, en effet, appuyé les normes morales de la communauté. En considérant les droits et les responsabilités commes des notions inextricablement liées, la Cour Lamer s'inspire implicitement des traditions de droit naturel adoptées auparavant par le juge de la Cour Dickson le plus dissident en matière de faute criminelle—M. le juge McIntyre. Cet article soutient que la tradition ou la philosophie soulignant la faute criminelle, telle que définie par la Cour Lamer, s'oppose à la tendance de la Cour Dickson de mettre l'accent sur les individus et leurs droits mais s'accorde plutôt avec la perspective de M. le juge McIntyre. Par conséquent, la décision controversielle dans l'arrêt *Daviault* n'est pas une dérogation à la perspective distincte de la Cour actuelle, ce qui est évident dans les motifs de la majorité dans la quartette *Creighton* et dans *DeSousa*, *Hundal*, et *Rodriguez*.

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I. INTRODUCTION

There has been a recent spate of criticism of the Supreme Court of Canada's holdings in the area of criminal law, based primarily upon a judgment of last year involving most unpleasant facts: a drunken man committing the act of rape against a partially paralyzed elderly woman. In response to the Court's overturning of a guilty verdict in *Daviault* v. *The Queen*,[1] an unusual collection of critics—including a Quebec senator, Reform Party MPs, women's groups, and newspaper editorialists across Canada[2]—reacted with sufficient outrage to reach an international audience, and inspire a rebuke from the U.S. State Department.[3] Starting from the proposition that extreme intoxication ought not to excuse rape, some of the critics have also gone on to scold the nine judges in more general terms. A spokesperson for victims of crime charged that "[t]here is a pattern of offenders' rights winning over the rights of the victim and the protection of the public in the majority of those cases."[4] Another was concerned that "[t]he message that is sent to women and victims is that the justice system is not working for them."[5]

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1 [1994] 3 S.C.R. 63 [hereinafter *Daviault*]. The Court ordered a new trial, overturning the Quebec C.A.'s holding that extreme intoxication could substitute for the minimal intent necessary to commit the offence of sexual assault (the *Criminal Code* offence for, *inter alia*, rape). Daviault's retrial was thrown out April 27, 1995 by Mr. Justice Girouard on separate procedural grounds: L. Fitterman, "Man, 73, in 'too-drunk' rape case acquitted again" *The [Montreal] Gazette* (28 April 1995) A1.

2 See "Quebec senator moves to plug too-drunk defence loophole" *The [Montreal] Gazette* (17 November 1994) A18; J. Sheppard, "Supreme Court favoring accused, say critics" *Calgary Herald* (14 October 1994) A3; "Rights for suspects" *Macleans* (10 October 1994) 21; Editorial, "Criminal defence of drunkenness an offence to reason" *Vancouver Sun* (5 October 1994) A10; Editorial, "Drunken defence cuts no ice" *Toronto Star* (6 November 1994) C2; Editorial, "Drunks who rape and go free; Top court ruling means law should be changed" *The [Montreal] Gazette* (4 October 1994) B2.

3 For example, "U.S. Rebukes Canada Over Drunk Defence" *Toronto Star* (2 February 1995) A13; C. Trueheart, "Drunkenness Defense Wins Canada Rape Case; Women's Rights Groups Assail High Court" *The Washington Post* (12 November 1994); C.H. Farnsworth, "Women in Canada Upset by Court Rulings on Drunkenness" *New York Times* (10 November 1994) A7; "Canada: Canadian Court Under Fire Over Drunkenness Ruling" *Reuters World Service* (1 November 1994).

4 Sheppard, *supra* note 2.

5 Fitterman, *supra* note 1.

And one article summed up the criticism with similarly loaded terms: "[t]he Supreme Court of Canada has forgotten the need to punish the guilty and protect the innocent in recent controversial decisions."[6]

This view that the present Supreme Court of Canada is somehow "soft on criminals" could not be farther from the truth, however, at least compared to the jurisprudence produced by their predecessors of the 1980s—the "Dickson Court."[7] It was the latter Court that provided Canada with its first taste of criminal justice as policed by the *Canadian Charter of Rights and Freedoms*,[8] and it was a very sour taste for those in the law enforcement business.[9] The Dickson Court's enlargement of the rights of the criminally accused were viewed by some as revolutionary,[10] leading the nation's premier constitutional law scholar to remark that a "tidal wave of rights consciousness" had engulfed the country.[11] Indeed, in several decisions considering the constitutional parameters of criminal fault,[12] it is argued below, the majority of the Dickson Court more often than not upheld a distinctively rights-oriented tradition, necessarily favouring individual liberties over conflicting civic responsibilities and state duties.

Yet within the Dickson Court there stood an occasional but conspicuous dissenter in the area of criminal law. The appointment from British Columbia, William McIntyre, was made by Prime Minister Trudeau in 1979. The Honourable Mr. Justice McIntyre served his

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6 *Ibid.*

7 Reference to the "Dickson Court" might be traced to the "Dickson Legacy" Symposium organized and published by the University of Manitoba [(1991) 20 Man. L.J.] on the occasion of the retirement of Chief Justice Dickson. Thereafter, Canadian commentators borrowed from the modern American practice of categorizing Supreme Court benches by the Chief Justice's name, the Warren Court being the most famous.

8 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

9 Of particular impact were the following decisions, which either eliminated a long-standing offence or dramatically altered criminal justice administration: *R.* v. *Askov*, [1990] 2 S.C.R. 1199; *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30 [hereinafter *Morgentaler*]; *R.* v. *Vaillancourt*, [1987] 2 S.C.R. 636 [hereinafter *Vaillancourt*]; *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177 [hereinafter *Singh*].

10 See F.L. Morton, "The Charter Revolution and the Court Party" (1992) 30 Osgoode Hall L.J. 627.

11 P.W. Hogg, Address (Oral remarks at the Round-table Conference, York University, November 1991) [unpublished], cited in Morton, *ibid.* at 628.

12 Reference to "criminal fault" is typically to the requisite mental element of a criminal offence, *i.e.*, to the *mens rea*. It also raises questions as to where criminal fault may or may not attach, such as in cases involving abortion, physician-assisted suicide, and constructive murder.

tenure as Puisne Justice for precisely a decade. That his appointment would (temporarily) upset the regional distribution of the justices for the first time in the history of that Court (McIntyre J. replaced Spence J. from Ontario) perhaps foreshadowed his intellectual contribution in the area of criminal fault. For, jurisprudentially, McIntyre J. would never quite fit in with the Dickson Court, a bench known more for the civil libertarian impulses of Chief Justice Dickson, Madam Justice Wilson, and Mr. Justice Lamer (as he then was) than for the deferential, conservative stance of Mr. Justice McIntyre.[13]

Notably, in two of the most dramatic invalidations of long-standing criminal offences by the Dickson Court—the felony-murder rule and the abortion provisions—McIntyre J. dissented.[14] Indeed, at least when confronted with portentous criminal law issues, McIntyre J. was utterly disenchanted with the jurisprudence of individualism and civil libertarianism without more; he seemed out of touch with the new Canada as supervised by the *Charter*. Chief Justice Dickson himself was said to have been comforted by McIntyre J.'s presence on the Court, as he represented a sharp counterbalance to the tendencies of the majority. But happy or not, the likes of Dickson C.J., Wilson, and Lamer JJ. would have little to do with the jurisprudence of McIntyre J. on some critical issues of criminal law, nor he with them.[15]

Today, contrary to the aforementioned claims of various critics,[16] things have changed. With the sole exception of the Chief Justice himself, the Lamer Court appointments were all made by the Tory Prime Minister Brian Mulroney—an unprecedented phenomenon in Canadian history, albeit an uncontroversial one given the generally favourable reception of each appointment.[17] Yet Mulroney's appointees and their subsequent reconsideration of many criminal law issues may have unintentionally conjured up an old ghost, a figure who roamed the red-carpeted hallways of the Court throughout the 1980s with a philosophy often very different from that of the majority of his

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[13] See, for example, P.H. Russell, "The Supreme Court in the 1980s: A Commentary on the S.C.R. Statistics" (1992) 30 Osgoode Hall L.J. 771 at 791; and, generally, D.M. Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Toronto: Carswell, 1990), and M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational, 1994) at 277.

[14] See below at 12-15.

[15] Compare Russell, *supra* note 13 at 789-91.

[16] See *supra* note 2.

[17] See discussion in W. Gold, "New Supreme Court justice an excellent choice" *Calgary Herald* (21 November 1992) A5.

colleagues. Reading the major criminal law opinions of the Lamer Court today, the compulsion to double-check their authorship may be inexplicable, if not a little eerie. Is that you, Judge McIntyre?

This essay considers the general themes and traditions driving the major criminal law decisions of the 1990s, particularly concerning criminal fault as supervised by the *Charter*. The majority holdings of the present Court, in my view, reflect a contrast to the individualist, rights-oriented tendency of the Dickson Court. And if one post-*Charter* Supreme Court Justice embodied the antithesis of this rights-oriented approach, it was the Honourable William McIntyre. Perhaps ironically, his dissenting or minority judgments in the watershed cases of *Vaillancourt*, *R.* v. *Tutton*, *R.* v. *Waite*,[18] and (to a lesser extent)[19] *Morgentaler*, have *implicitly* gained majority support from the present Supreme Court of Canada. The recent ill-informed criticisms notwithstanding,[20] the majority of the present Court has, in fact, attempted to balance individual rights with duties to self, community, and state. The ghost of Mr. Justice William McIntyre[21] may very well become the unspoken muse and touchstone for contemporary Canadian criminal jurisprudence.

II. A DIFFERENCE IN PHILOSOPHY OR TRADITION

In saying that the approach of McIntyre J. diverged from the majority of the Dickson Court with regard to their treatment of criminal fault, I wish to highlight a difference in philosophy or tradition. That is to say, the majority of justices of the Dickson Court often engaged in criminal and constitutional law analysis from a different starting point than that of McIntyre J., basing their approach on different assumptions about human nature and the traditions within which the criminal law operates. The casual reader might view such talk of philosophical traditions as terribly academic and unhelpful to the bar, bench, and

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[18] *R.* v. *Tutton*, [1989] 1 S.C.R. 1392 and *R.* v. *Waite*, [1989] 1 S.C.R. 1436 [hereinafter *Tutton and Waite*] were released contemporaneously.

[19] Without entering into an analysis of *Morgentaler*, it must be disclosed at the outset that I am not contending that McIntyre J.'s denial of a constitutional right to abortion is likely to receive support of the present Court. Of greater interest is whether the traditions or assumptions driving his judgment have commonalities with the present Court's philosophical orientation.

[20] *Supra* note 2 and Section 5, below.

[21] While the ghost metaphorically roams the hallways, the real person, it should be added, is alive and well on the West Coast of Canada.

legislators. But it can also be quite helpful in pinning down the past and present orientations of the Supreme Court of Canada—one less prone to generalization than its American counterpart, making a synthesis of its predominant outlook a difficult task. What, then, are these diverging traditions or philosophies?

Generally speaking, the majority of the Dickson Court[22] borrowed from the tradition of Jeremy Bentham, John Stuart Mill, and John Locke. At least when faced with the constitutional parameters of criminal fault, the Court focussed primarily upon individual rights, with less reference to the accused's community or the obligations accompanying membership in that community. The majority of the Dickson Court's reasoning sometimes involved little more than a utilitarian calculus, determining how to achieve the greatest good for the greatest number, while avoiding determination of any universal "good" along the way.

Bentham is the philosopher most frequently associated with this concept of utilitarianism. For Bentham, humans are naturally pleasure-seeking and pain-avoiding, and have no natural inclination for selfless duties.[23] With his focus on individualism, Mill also belongs, in part, to this tradition. For Mill, individuals are free to pursue any of their desires that cause no harm to fellow human beings.[24] Accordingly, Mill was interested in "find[ing] the limit [of] legitimate interference of collective opinion with individual independence," on the presumption that individual rights necessarily transcended duties to self and state.[25] The corollary of this individualist approach was the Lockean-inspired jurisprudence that developed in the United States around privacy rights,[26] resulting in what Justice Louis Brandeis described as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[27]

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22 That is, the "Dickson Court" as led principally by Dickson C.J., Wilson, and Lamer JJ., who wrote the most individualist majority decisions of that Court. See also *supra* note 7.

23 "Nature has placed mankind under the governance of two sovereign masters, *pain* and *pleasure*": J. Bentham, *Introduction to the Principles of Morals and Legislation* (1789), J.H. Burns & H.L.A. Hart, eds. (London: Athlone Press, 1970) at 11 [emphasis in original].

24 J.S. Mill, "On Liberty" (1859), reprinted in S. Cahn, ed., *Classics of Western Philosophy* (Indianapolis: Hackett, 1977) at 934.

25 *Ibid.* at 947. Mill is less known for his acknowledgement that "there are many positive acts for the benefit of others which [anyone] may rightfully be compelled to perform": *ibid.* at 958.

26 See Glendon, *infra* note 28, c. 3.

27 *Olmstead* v. *U.S.*, 277 U.S. 438 at 478 (1928). See generally, S.D. Warren & L.D. Brandeis, "The Right to Privacy" (1890-91) 4 Harv. L. Rev. 193.

Today, this tradition is associated with what Professor Mary Ann Glendon refers to as "rights talk," which emphasizes individual civil liberties without regard to corresponding duties. The focus on rights, she argues, has trickled down all the way from early American notions of property rights, through concerns over reputation and privacy, to exaggerate individualism within America. According to Glendon, these traditions have bred a "rights talk" of hyperindividualism and insularity.[28]

The tradition working at cross purposes to these individualist philosophies is difficult to single out, except to say that it rejects individualism and "rights talk" without more. It borrows substantially from natural law principles,[29] and it views rights and responsibilities as fused together. The writings of Aristotle, the Stoics, Cicero, and Thomas Aquinas are representative of this tradition,[30] as are those of such contemporary thinkers as John Finnis, Lloyd Weinreb, and Arthur Dyck.[31] For example, Harvard Professor Dyck, a Canadian, bucks the trend that selectively borrows from Mill, Bentham, Hobbes, and Locke, and argues that rights ought to be linked with responsibilities in a way that actualizes them.[32] All people, he argues, have natural inhibitions and proclivities that amount to "requisite[s] for communal life and human life itself," and these become the basis of individual relations with others.[33] Thus, "[rights] have no reality apart from them and apart from the moral responsibilities that make human relationships

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28 M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (New York: Free Press, 1991). Compare L. Weinreb, *Oedipus at Fenway Park: What Rights Are and Why There Are Any* (Cambridge: Harvard University Press, 1994). See also R.N. Bellah *et al.*, *Habits of the Heart: Individualism and Commitment in American Life* (New York: Harper & Row, 1985).

29 Reference to natural law is intended more for its association with thinkers advocating duties than for its opposition to positivism. But note, as one famous defender of natural rights put it, that "[i]t is difficult to achieve effective communication in any discussion of a term that bears as many meanings as does 'natural law'": L.L. Fuller, "Human Purpose and Natural Law" (1956) 53 J. Phil. 697 at 697.

30 See generally, Aristotle, *The Nicomachean Ethics*, trans. D. Ross (Oxford: Oxford University Press, 1984); Cicero, *De Officiis*, reprinted in M.T. Griffin & E.M. Atkins, eds., *On Duties* (Cambridge: Cambridge University Press, 1991); T. Aquinas, *Summa Theologica*, reprinted in A.C. Pegis, ed., *Basic Writings of St. Thomas Aquinas* (New York: Random House, 1945).

31 See generally, L.L. Weinreb, *Natural Law and Justice* (Cambridge, Mass.: Harvard University Press, 1987); and J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

32 A.J. Dyck, *Rethinking Rights and Responsibilities: The Moral Bonds of Community* (Cleveland: Pilgrim Press, 1994).

33 *Ibid.* at 310.

possible."[34] Similarly, British political theorist David Selbourne has recently propounded an elaborate theory of civic society, revolving chiefly around the principle of duty.[35] According to Selbourne, this tradition is rooted in Greco-Roman, as well as Judeo-Christian thought.[36] Aboriginal groups in Canada have also long maintained an emphasis upon one's responsibility to others, as Professor Mary Ellen Turpel outlines in her influential work.[37]

Of course, no past or present member of the Supreme Court of Canada fits neatly into either of these two broad philosophical categories, and the traditions themselves may not be so exactly compartmentalized. Moreover, judges rarely adopt a tradition or philosophy explicitly, instead exhibiting the *tendencies* of a particular tradition. Nevertheless, the basic assumption driving the former Benthamite philosophy is one predicated on individualism and "rights talk." The basic assumption driving the latter natural law philosophy, for lack of a better term, is one predicated on the moral requisites of community, which include both rights and responsibilities. It is submitted that the tendencies of the majority of the Dickson Court, in the area of criminal fault, were closer to the Benthamite tradition; the tendencies of Mr. Justice McIntyre were closer to the natural law tradition.[38]

In juxtaposing these two traditions, the intention is not to express a preference. If one engages in legal analysis from a different starting point, the reasoning will necessarily produce different answers. My concern is only to highlight these differences, which will become clearer as we consider the diverging criminal fault jurisprudence of the Dickson Court majority and McIntyre J., and then bolster that contrast with the recent criminal law decisions of the Lamer Court. In so doing, one sees the crux of the difference between the old and new (post-*Charter*) criminal law jurisprudence of the Supreme Court of Canada. The recent

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[34] *Ibid.* at 390.

[35] D. Selbourne, *The Principle of Duty: An Essay on the Foundations of the Civic Order* (London: Sinclair-Stevenson, 1994) at 148.

[36] *Ibid.*, c. 1.

[37] "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989-90) 6 C.H.R.Y.B. 3.

[38] That said, it is also true that by the end of his tenure as Chief Justice of Canada, Brian Dickson had softened his individualist stance, trumpeting the virtues of both rights and "the responsibilities which must be shared by all for those rights to become meaningful": Remarks by the Right Honourable Brian Dickson at Ashbury College's Closing Ceremonies, 10 June 1989, quoted in Iacobucci, *infra* note 96 at 19.

case law coming out of the Court represents, to some extent, a reaction to the results of individualistic and rights-oriented jurisprudence. Or at least it has more in common with the philosophy at work in the criminal law judgments of Mr. Justice McIntyre.

However, it does not follow that McIntyre J. is somehow the variable explaining why or how the criminal jurisprudence of the Court has unfolded since his retirement. The presence of this ghost is more ironic than causal, worthy of belated recognition, though not the linchpin in the shift of traditions discussed herein. The juxtaposition should, therefore, not be mistaken for a cause-and-effect argument, but as illustrative of the different starting points of the Dickson and Lamer Courts in the area of criminal fault. Like the ghost in *Hamlet*, the ghost of Justice McIntyre does not play a leading role, though he may end up stealing the show by the final curtain call.

III. THE DISSENTS OF WILLIAM MCINTYRE

As it turns out, William McIntyre's *magnum opus* may not have been one of his famous dissents as McIntyre J., but rather one written while serving on the British Columbia Court of Appeal. It was in 1975 that McIntyre J.A. wrote what may have been the most thorough and rigorous judgment rejecting the death penalty in Canada, *R.* v. *Miller and Cockriell*.[39] In what would become a pattern for much of his criminal law jurisprudence, the opinion represented the future of the criminal law (the death penalty provision being repealed the next year,[40] and eventually ruled contrary to the *Charter* by a plurality of the Supreme Court[41]), but was a dissenting judgment at the time.

Indeed, there would be many dissents. Statistically, McIntyre J. dissented more than most of his contemporaries on the Supreme Court in the 1980s.[42] However, the statistics do not reveal the extent to which the philosophy of William McIntyre, at least regarding criminal fault, diverged from that of the majority of the Dickson Court. Having said

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[39] (1976), 63 D.L.R. (3d) 193 (B.C. C.A.), aff'd [1977] 2 S.C.R. 680 [hereinafter *Miller and Cockriell*].

[40] *Criminal Law Amendment Act (No. 2), 1976*, S.C. 1974-75-76, c. 105.

[41] In *Kindler* v. *Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, the majority did not consider whether capital punishment was cruel and unusual punishment contrary to section 12 of the *Charter*, the case turning on jurisdiction instead. But Cory and Sopinka JJ. (with whom Lamer C.J. concurred) held that capital punishment was cruel and unusual.

[42] See Russell, *supra* note 13 at 790.

that, the case can no doubt be made that McIntyre J. could be just as much a judicial activist[43] as he was deferential to Parliament.[44] But that argument would miss my point, which is far less ambitious than an exhaustive statement on the jurisprudence of Mr. Justice McIntyre. Rather, it is submitted here that where the majority of the Dickson Court was generally of one metaphysical or philosophical position, McIntyre J. generally belonged in another. And it is the latter which has prevailed under the present Court.

If it is at all possible to identify these two distinguishable traditions, they are best revealed by the three watershed decisions of *Morgentaler*, *Vaillancourt*, and *Tutton*. In those decisions, McIntyre J. distinguished himself, either writing alone or in the minority, by taking a view of section 7 of the *Charter*[45] which left room not only for accused's rights, but also for duties or responsibilities—of the individual to others, and of the state to its citizens. In contrast, the rest of the Court typically engaged in a utilitarian analysis that necessarily tipped the balance in favour of individualism, and practically ignored the responsibilities of individuals to others.

But before looking at those cases, it may be instructive to revisit the earlier dissent of McIntyre J.A. in *Miller and Cockriell*.[46] In that case, the appellants were convicted of murder punishable by death for shooting a police officer. The majority of the British Columbia Court of Appeal rejected the claim that, *inter alia*, the death penalty amounted to cruel and unusual punishment contrary to section 2 of the *Canadian Bill of Rights*.[47] Although that holding was unanimously upheld by the Supreme Court of Canada, the death penalty issue had become moot since the relevant provisions were repealed prior to the release of the

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[43] For a most telling example, see his dissent in *Miller and Cockriell, supra* note 39, and his concurrence with Beetz J. in *Singh, supra* note 9 and with Dickson C.J. in *Hunter* v. *Southam Inc.*, [1984] 2 S.C.R. 145.

[44] See *Vaillancourt* and *Morgentaler, supra* note 9, and *Tutton* and *Waite, supra* note 18. For a shrewd disassembling of the "activist" tag, see G. Marshall, *Constitutional Theory* (Oxford: Oxford University Press, 1971) c. 4.

[45] Section 7 is the procedural and substantive due process provision under the *Charter*. See P.W. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992) c. 44.

[46] *Supra* note 39.

[47] S.C. 1960, c. 44.

judgment.[48] Regardless, McIntyre J.A. remained the lone appellate justice finding the death penalty to be cruel and unusual punishment.

His dissent in that case represents a model for his more renowned criminal law jurisprudence on the Supreme Court, in that McIntyre J.A. was as concerned with the community as he was with the individual. Drawing on traditional conceptions of criminal law aims, McIntyre J.A. tested capital punishment against the purposes of deterrence, reformation, and retribution. And in setting out these "standards by which the punishment of death may be judged," he viewed the issue through the lens of society as well as the individual:

> It would not be permissible to impose a punishment which has no value *in the sense that it does not protect society* by deterring criminal behaviour or serve some other social purpose. ... Capital punishment makes no pretence at reformation or rehabilitation and its only purposes must then be deterrent and retributive. While there can be no doubt of its effect on the person who suffers the punishment, *to have a social purpose in the broader sense* it would have to have a deterrent effect on people generally and thus tend to reduce the incidence of violent crime. ... Furthermore, even assuming some deterrent value, I am of the opinion it would be cruel and unusual if it is not in accord *with public standards of decency and propriety*, if it is unnecessary because of the existence of adequate alternatives, if it cannot be applied upon a rational basis in accordance with ascertained or ascertainable standards, and if it is excessive and out of proportion to the crimes it seeks to restrain.[49]

Note that the approach does not turn on individual interests alone (such as an absolute right to life) or strict utilitarianism (the deterrent issue without more), but on a combination of individual and social considerations.[50] This philosophy is tacitly associated with the natural law tradition discussed previously,[51] and it figures prominently in McIntyre J.'s minority judgments on the Supreme Court of Canada.

The philosophical tradition that Justice McIntyre borrows from recognizes individuals in the context of the larger community—individuals are seen as connected to one another by both rights and responsibilities. The tradition views even murderers as members of a community. Thus, in *Miller and Cockriell*, having exhaustively cited the evidence refuting the death penalty's deterrent and retributive value,

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48 For this reason, as well as the general disregard afforded the *Canadian Bill of Rights* by the Supreme Court of Canada, the death penalty holding in *Miller and Cockriell* "is not a reliable guide to the likely outcome of a Charter challenge": Hogg, *supra* note 45 at 1137.

49 *Miller and Cockriell*, *supra* note 39 at 260 [emphasis added].

50 By "social considerations," I mean those apart from individual rights, if it be possible to so dissect rights and responsibilities. Such considerations might be viewed as either individual responsibilities to the community or community requisites met by *and for* individuals.

51 *Supra* note 29 and accompanying text.

McIntyre J.A. invokes the inextricable link between individual and community by citing Brennan J. of the U.S. Supreme Court:

> The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. ... A prisoner remains a member of the human family. ... An executed person [unlike the prisoner] has indeed "lost the right to have rights." As one 19th century proponent of punishing criminals by death declared, "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.' "[52]

This passage underscores Justice McIntyre's philosophy that, to paraphrase John Donne, "no person is an island, entire of itself;" that bonds exist amongst individuals within a community that ought never be severed. Apparently, McIntyre J.A. rejected outright the terminal ending of relations with members of his human community.

Such a tradition goes both ways, however, placing as onerous a responsibility on an individual *to* society as that individual may demand *from* society. In this sense, it should not be surprising that William McIntyre, once Justice of the Supreme Court of Canada, should construe the *Charter* with continued emphasis on both society and individual, and on both rights and responsibilities.

Thus, in *Vaillancourt*, McIntyre J. returns to the question of societal interests in deterring the possession and use of weapons. In that case, the Court considered the bugbear of many criminal law scholars, the felony-murder (or constructive murder) rule. The rule had remained intact in the *Criminal Code*[53] under section 213(d), with liability for murder attaching if death ensued as a consequence of the use or possession of a weapon. The majority of the Dickson Court joined the chorus of academics[54] in rejecting the felony-murder rule as violative of the criminal law principles of correspondence and fair dealing; that is, the idea that conviction will follow only where the *mens rea* corresponds with the *actus reus* in a manner that fairly reflects criminal liability for culpable acts.[55]

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[52] *Miller and Cockriell, supra* note 39 at 272-73, citing *Furman* v. *State of Georgia*, 408 U.S. 238 at 290 (1972) [footnote omitted].

[53] R.S.C. 1985, c. C-46.

[54] See the discussion in D. Stuart, *Canadian Criminal Law: A Treatise*, 2d ed. (Toronto: Carswell, 1987).

[55] See generally, A.J. Ashworth, *Principles of Criminal Law* (Oxford: Clarendon, 1992) c. 1 and 3; D. Stuart & R.J. Delisle, *Learning Canadian Criminal Law*, 4th ed. (Toronto: Carswell, 1993) at 443-71.

The Court in *Vaillancourt* struck down section 213(d), with McIntyre J. dissenting. Although strewn with the language of judicial deference,[56] the core of McIntyre J.'s analysis is his consideration of deterrence. Empirically, he may have erred in his finding that the felony-murder rule serves an important deterrent purpose. But his approach was much broader than that of the majority, as *per* Lamer J. (as he then was), which focussed on individual rights and the effect of stigmatizing the accused as a murderer. In contrast, McIntyre J. assessed both the accused's rights *and* his corresponding responsibility, as enforced by the state, to "bear the risk" of conviction of murder when joining in the common purpose to commit robbery in which death resulted from an accomplice's actions.[57] He was not impressed by the "principal complaint" of the majority that "Parliament should not have chosen to call [the relevant offence] 'murder.' "[58] Indeed, such an individualist outlook was inconsistent with his approach to criminal law, for it left out one-half of the equation.

Therefore, when the occasion arose two years later, it was natural for McIntyre J. to interpret the offence of criminal negligence causing death in a manner that held individuals accountable not only for thinking wrongly (subjective fault), but for failing to think at all (objective fault). In *Tutton* and *Waite*,[59] where the Court split 3-3, McIntyre J. wrote the minority judgments for both appeals, interpreting the fault element of section 219 of the *Criminal Code* as established on an objective standard, showing a marked and substantial departure from the care that a reasonable person would have exercised in the circumstances.

Contrary to Wilson J.'s view, subjective awareness of the risk involved was necessary to convict. Indeed, the subjectivist approach to criminal fault may have been the *raison d'être* of the Dickson Court majority's contribution to criminal fault.[60] However, in *Tutton* and *Waite*, McIntyre J. viewed the subjectivist approach as permitting the non-thinking to avoid responsibility in circumstances where their actions resulted in homicide. The subjectivist approach, of course, emphasizes the subject—the individual, his view of the circumstances, and any

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56 See *Vaillancourt, supra* note 9 at 637, 639.

57 *Ibid.* at 664-65, citing *R.* v. *Munro and Munro* (1983), 8 C.C.C. (3d) 260 at 301.

58 *Vaillancourt, ibid.* at 663.

59 *Supra* note 18.

60 See M.A. Stalker, "Chief Justice Dickson's Principles of Criminal Law" (1991) 20 Man. L.J. 308 at 313.

stigma attaching to his conviction. The approach of McIntyre J., on the other hand, emphasized the state's need to require individuals engaged in life-threatening activities, such as dangerous driving (*Waite*) or failure to provide parental necessities (*Tutton*), to fulfill the requisites of community, as enforced by the criminal law. Marked departures from that standard resulting in death of the victim would thus trigger a manslaughter conviction for the perpetrator.

This divergence of traditions came to a head in *Morgentaler*. In that now famous case, a majority of the Court[61] struck down the abortion provisions of the *Criminal Code* on the basis that they imposed unjust procedural burdens on the pregnant woman seeking an abortion. Madam Justice Wilson, in a separate opinion, invalidated the provisions for substantive, not procedural reasons. What is significant for our purposes, however, is that all five of the seven justices allowing the appeal concentrated primarily on the effects of the *Criminal Code* upon the individual. The most austere formulation of this individualism came from Madam Justice Wilson: "the rights guaranteed in the *Charter* erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass."[62] Viewed in such terms, the *Charter* represented the antithesis to the adage that "no person is an island;" on Wilson J.'s reasoning, every one was an island unto oneself, with high fences to keep out the meddlesome, paternalistic state.

In the midst of this high mark of individualist language and reasoning of the Dickson Court, the opinion of McIntyre J. might be seen as terribly narrow and insensitive, with more concern for judicial deference than for hypothetical breaches of the *Charter*. Indeed, the essence of his judgment is an originalist approach to constitutional law, whereby without an actual abortion right identified under the *Charter*, there could be no invalidation of Parliament's abortion law. As one commentator pointed out, the flaw in this reasoning lies in the "frozen rights approach"[63] that has proved unworkable with the passage of time and untenable in light of the Court's role as interpreter of the *Constitution*. To be sure, resort to the originalist approach and rhetoric about judicial deference rarely stand the test of time.

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[61] *Per* Dickson C.J., Lamer J. concurring; *per* Beetz J., Estey J. concurring: *supra* note 9.

[62] *Morgentaler, ibid.* at 164. But see *Perka* v. *R.* [1984] 2 S.C.R. 232 at 268ff., where Wilson J. seems to distance herself from hyperindividualism. Nonetheless, such acknowledgement of individual duties is less representative of her juridical philosophy than *Morgentaler*, which is surely her most paradigmatic judgment.

[63] D. Pothier, "Developments in Constitutional Law: The 1987-88 Term" (1989) 11 Supreme Court L.R. 41 at 48.

But setting aside the methodology, McIntyre J.'s substantive approach is more interestingly consistent with his position in *Miller and Cockriell*. In both cases there is an emphasis on holding the state to rigorous examination for its endangerment of life (or potential life). The state may so interfere with individual rights where the needs of the community are held paramount over individual rights. In *Morgentaler*, McIntyre J. thus held that the state could properly prohibit, in some circumstances, what three-fifths of Canadians viewed as "socially undesirable conduct" (the other two-fifths falling evenly into the absolute anti- and pro-abortion camps).[64] Was there an infringement of a section 7 right?[65] "The evidence reveals that much of the anguish associated with abortion is inherent and unavoidable and that there is really no psychologically painless way to cope with an unwanted pregnancy."[66] Without claiming a personal opinion regarding the validity of abortion as a right, McIntyre J. concluded with much reference to "social policy" considerations and an unwillingness to be moved by individual harm occasioned by unwanted pregnancies.[67]

The point of this explication is not to discuss the merits either of *Morgentaler*, or of criminalizing abortion. Rather, this case highlights the insistence of McIntyre J. to focus equally upon community interests, individual responsibilities, and, on no higher footing, civil liberties. Whether such an approach be balanced or skewed, the tradition from which McIntyre J. was operating (and I am not speaking of any position regarding abortion itself) more closely resembled a natural law position than it did the individualist, rights-oriented one exemplified by the majority of the Dickson Court.

IV. THE GHOST GAINS A MAJORITY

If McIntyre J.'s opinions in the major criminal fault cases garnered little support from his colleagues in the mid-1980s, today many have attained majority status. As of the 1993 decision in *R.* v. *Hundal*,[68] his judgments in *Tutton* and *Waite* have explicitly prevailed over those of

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[64] *Supra* note 9 at 136.

[65] In answering whether abortion was a constitutional right, McIntyre J. first asserted that a breach of section 7 requires "more than an interference with priorities and aspirations," such interferences being in the nature of life in the modern regulatory state: *ibid.* at 143.

[66] *Ibid.* at 148.

[67] *Ibid.* at 155-56.

[68] [1993] 1 S.C.R. 867 [hereinafter *Hundal*].

Dickson C.J., La Forest, and Wilson JJ. Later that year, in *R.* v. *Creighton*,[69] the reasoning in McIntyre J.'s judgment in *Vaillancourt* arguably received indirect support, in addition to the specific affirmation of his reasoning in *Tutton* and *Waite*. And in *Rodriguez* v. *British Columbia (A.G.)*,[70] a majority of the Court came down on the side of the tradition espoused by McIntyre J. in *Morgentaler*, assessing the issue of physician-assisted suicide with an emphasis on both rights and duties, and permitting the state to interfere most gravely with individual aspirations in the name of life and the protection of community.

But other than the explicit affirmations (namely, in *Hundal* and *Creighton*), it goes without saying that the dissents of McIntyre J. discussed herein do not represent good law. What is more interesting today is that the philosophical traditions underlying his criminal fault judgments are no longer in the minority, where they languished for much of the last decade. Today the Court has articulated this tradition more openly than the circumspect McIntyre J. would have dreamed, again through watershed decisions involving life and death.

The most vivid illustration of the shift in judicial philosophies is provided by the *Creighton* quartet. The full bench took its cue from the majority findings in *R.* v. *DeSousa*[71] and *Hundal* to the effect that, for certain offences, a criminal fault test of objective foreseeability would suffice. This test was viewed as a necessary exception to the criminal law principles of correspondence and fair dealing,[72] and consistent with principles of fundamental justice pursuant to section 7 of the *Charter*. What ruffled commentators was that an objective standard, as opposed to a subjective one, could operate in the realm of serious criminal offences (cases of the *Creighton* quartet dealt with different circumstances of unlawful act manslaughter, careless storage of firearms, and failure to provide necessities). Indeed, it is ironic that the Court would be lambasted for allegedly being "soft on criminals,"[73] as such criticism came in the wake of severe academic castigation for being

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[69] *R.* v. *Creighton*, [1993] 3 S.C.R. 3; *R.* v. *Gossett*, [1993] 3 S.C.R. 76; *R.* v. *Finlay*, [1993] 3 S.C.R. 103; *R.* v. *Naglik*, [1993] 3 S.C.R. 122. The four decisions were released contemporaneously and disposed of by reasons in *R.* v. *Creighton* [hereinafter *Creighton*].

[70] [1993] 3 S.C.R. 519 [hereinafter *Rodriguez*].

[71] [1992] 2 S.C.R. 944 [hereinafter *DeSousa*].

[72] See *supra* note 55 and accompanying text.

[73] See *supra* note 2 and accompanying text.

violative of accused's rights.[74] Perhaps the better view lies in the middle way.

Thus, imperceptibly, did the ghost of William McIntyre arrive. Like McIntyre J., the present Court started from the presumption that the criminal law may properly enforce not only "the right not to be harmed" pursuant to a Millian view of justice,[75] but may also enforce objectively determined duties upon individuals to meet the moral requisites of community, at least in circumstances endangering life. Recall that, in *Miller and Cockriell*, McIntyre J.A. was vitally concerned that Canada's criminal law invoke duties protecting "society," as well as individuals. He assessed "social purpose[s] in the broader sense," rather than the narrow, individualist sense, and he found a place in criminal law for "public standards of decency and propriety."[76] So too does the present Court view criminal fault as not necessarily hamstrung by the *Charter* in its efforts to enforce the most austere requisites of community.

Therefore, the majority in *Creighton* upheld the "thin-skull" principle (that one takes one's victim as one finds him or her) as a permissible means of holding individuals accountable for their actions.[77] It was on this point that the case turned, since the thin-skull rule is incompatible with a subjective test. The minority view, although stating its preference for an objective test for liability, was nonetheless unwilling to accept all the harsh results that the thin-skull rule countenanced. Rather, an individualist approach was preferred in the minority decisions of the *Creighton* quartet, fittingly authored by one of the individualist school's most prominent voices of the Dickson Court—Chief Justice Lamer. In his view, nurture eclipses nature in a manner that permits an accused's particular perceptions and

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74 See the vitriolic attack of Professor Donald Stuart in "Continuing Inconsistency But Also Now Insensitivity That Won't Work" (1993) 23 C.R. (4th) 240. For a more balanced but highly critical comment, see A.D. Gold, "Constructive Manslaughter Should Not Have Survived" (1993) 23 C.R. (4th) 262; see also, P. Healy, "The Creighton Quartet: Enigma Variations in a Lower Key" (1993) 23 C.R. (4th) 265.

75 See *supra* note 26 and accompanying text.

76 *Supra* note 39 at 260.

77 The rule "requires aggressors, once embarked on their dangerous course of conduct which may foreseeably injure others, to take responsibility for all the consequences that ensue, even to death": *Creighton*, *supra* note 69 at 52, *per* McLachlin J.

characteristics to be taken into account when determining fault,[78] arguably making the minority test an objective one in name only.[79]

Like the tradition espoused by Justice McIntyre, the majority in *Creighton* seemed concerned with deterring socially unacceptable acts that threaten the community.[80] Accordingly, the Court embraced a broader role for the state than that envisioned by Wilson J.'s aforementioned "fencing in" of the individual.[81] As McLachlin J. put it, "[t]he criminal law must reflect not only the concerns of the accused, but the concerns of the victim and, where the victim is killed, the concerns of society for the victim's fate. Both go into the equation of justice."[82] Thus, instead of starting with the individual and building fences around him or her, the Court today views an accused in the context of his or her community, thereby permitting society, through the state's criminal law, to enforce both rights and responsibilities in a manner that "is necessary to the general welfare."[83]

This shift of traditions or philosophical perspectives from the Dickson Court to the present Court became complete with the majority judgment in *Rodriguez*. In that case, the Court considered the constitutional validity of the physician-assisted suicide offence in the *Criminal Code*. As with *Morgentaler*, the *Rodriguez* case left no room for justices to hide their metaphysical stripes. If one believed that the individual had the right to do whatever she wanted, provided it did not harm others, then one would view the state as wrongfully interfering with the late Susan Rodriguez's assisted suicide. It would follow that no

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78 The test set out by the Chief Justice assesses "the reasonable person who possesses all of the accused's limitations," or the "reasonable person with the accused's make-up": *ibid.* at 31.

79 The majority addresses the effects of Lamer C.J.'s objective test by way of example. Under the minority's test, McLachlin J. asserts that "an inexperienced, uneducated, young person, like the accused in *R. v. Naglik* ... could be acquitted, even though she does not meet the standard of the reasonable person ... . On the other hand, a person with special experience, like Mr. Creighton in this case, or the appellant police officer in *R. v. Gossett* ... will be held to a higher standard than the ordinary reasonable person": *ibid.* at 61.

80 *Ibid.* at 56: "To tell people that if they embark on dangerous conduct which foreseeably may cause bodily harm which is neither trivial or transient, and which in fact results in death, they will not be held responsible for the death but only for aggravated assault, is less likely to deter such conduct than a message that they will be held responsible for the death, albeit under manslaughter not murder." See also *ibid.* at 65-66.

81 See *supra* note 62 and accompanying text.

82 *Creighton, supra* note 69 at 57.

83 *Ibid.* at 63, citing O.W. Holmes, *The Common Law* (Boston: Little, Brown, 1881) at 108: "[W]hen men live in society, a certain average of conduct, a sacrifice of individual peculiarities going beyond a certain point, is necessary to the general welfare."

criminal fault attached to aiding or abetting suicide, or at least such criminalization would be contrary to section 7 of the *Charter*. This is the individualist, Millian position most clearly advocated by MacEachern C.J. in his dissenting judgment in *Rodriguez*,[84] which is reminiscent of Wilson J. in *Morgentaler*. If one believed, on the other hand, that the state could rightfully limit individual liberties for the sake of the victim and the welfare of the community, then a different reasoning would follow. Starting with the philosophical position that life ought to be nurtured and preserved in the face of individual wishes, one would uphold the criminal offence of physician-assisted suicide.[85] This position, implicit throughout the criminal jurisprudence of McIntyre J., was forcefully adopted by the majority of the Court in *Rodriguez*.

For instance, just as McIntyre J.A. expressed the concern in *Miller and Cockriell* that capital punishment threatened "by its very nature, a denial of the executed person's humanity,"[86] so does Sopinka J., for the majority of the Court in *Rodriguez*, organize his reasons around the "intrinsic value of human life and on the inherent dignity of every human being," thereby acknowledging the "generally held and deeply rooted belief in our society that human life is sacred or inviolable."[87] Sopinka J. juxtaposes "rights talk" (the "right to terminate" life) with the language of morality ("intrinsic concern[ ]... with the well-being of the living person ... [which is] sacred or inviolable"),[88] indirectly eschewing the tradition or philosophy of individualism.

In sum, the majority in *Rodriguez* rejected the notion that the principles of fundamental justice turn upon individual-based principles of privacy,[89] or "justice in the eye of the beholder *only*."[90] Similar to Justice McIntyre's broad, inclusive approach to the principles of fundamental justice, Sopinka J. reasons that "respect for human dignity and autonomy" is but one component of justice "upon which our society

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84 (1993), 79 C.C.C. (3d) 1 (B.C.C.A.) at 20: "[section 7 of the *Charter*] was enacted for the purpose of ensuring human dignity and individual control, so long as it harms no one else."

85 Compare Dyck, *supra* note 32, c. 9 for his metaphysical analysis of American "right to life" case law.

86 See *supra* note 52 at 272 and accompanying text.

87 *Rodriguez*, *supra* note 70 at 585.

88 *Ibid.*

89 *Ibid.* at 589-90, citing L.H. Tribe, *American Constitutional Law*, 2d ed. (Mineola, N.Y.: Foundation Press, 1988) at 1370-71.

90 *Ibid.* at 590 [emphasis in original].

is based."[91] So the majority held in *Rodriguez* that the principles of fundamental justice, *inter alia*, embody the requisites of the community: "The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society."[92]

And society's interests, the Court held in *Rodriguez*, permitted the *Criminal Code* to reach over the metaphorical fence built around the individual, in order to vindicate those societal beliefs.[93] Such thinking closely resembles the refusal of Justice McIntyre to "end our relations" with any member of the human community, viewing all peoples as "fit for this world" at all times.[94] In short, *Rodriguez* borrows from a tradition associated more with natural law than with individualism, the majority focussing upon society and joining the tradition of Calvin, whereby humans are social beings who "realize their nature with communal support."[95]

The vitality of this tradition is further evinced by a lecture given by Mr. Justice Iacobucci in 1992, in which he made a straightforward case for the balancing of rights with corresponding duties.[96] Having put forward an account of classical, religious, and modern contributions to the contemporary understanding of human rights, Iacobucci J. made a statement that may best sum up the present Court's philosophical perspective: "the only way in which we can properly claim and exercise our constitutionally entrenched rights is to do so in a manner consistent with the obligations we owe to one another as equal citizens and human beings."[97] While this is obviously not a judicial statement,[98] but a scholarly one harkening back to his days as a law professor, it reflects the

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[91] *Ibid.* at 592.

[92] *Ibid.* at 593-94 citing *Cunningham* v. *Canada*, [1993] 2 S.C.R. 143 at 151-52.

[93] "In upholding the respect for life, [the assisted suicide offence] may discourage those who consider that life is unbearable at a particular moment, or who perceive themselves to be a burden upon others, from committing suicide": *Rodriguez, ibid.* at 608.

[94] See *supra* note 52 and accompanying text.

[95] Dyck, *supra* note 32 at 277. Note, however, that Sopinka J. explicitly avoids theological sources, making the parenthetical comment that his reference to "sacred" is used "in the non-religious sense ... to mean that human life is seen to have a deep intrinsic value of its own": *Rodriguez, supra* note 70 at 585.

[96] The Honourable Mr. Justice Frank Iacobucci, "The Evolution of Constitutional Rights and Corresponding Duties: The Leon Ladner Lecture" (1992) 26 U.B.C. L. Rev. 1.

[97] *Ibid.* at 13.

[98] Nevertheless, query whether his later musings do not describe the present Court's view of the "principles of fundamental justice" under section 7 of the *Charter*: see *ibid.* at 14, 17.

shift in traditions from the Dickson Court's individualism to a broader view of rights and responsibilities under the Lamer Court.

V. *DAVIAULT*: DRAWING A LINE AROUND CRIMINAL FAULT

All of which brings us to the controversial rape case referred to at the beginning of this article. The already infamous facts of *Daviault*[99] are, indeed, quite horrendous, and one cannot imagine a case more susceptible to judicial empathy for the victim and disdain for the accused. Rightly or wrongly, however, the Supreme Court of Canada did not confirm the axiom that hard cases make bad law. Rather, they stated what surely any criminal lawyer views as trite law: sexual assault requires both an *actus reus* and a *mens rea* of some form, depending on the terms of the statute or common law. Those accused who are literally mindless, so incapacitated that they are akin to automatons, cannot be said to have the requisite *mens rea* for an offence requiring intent or recklessness. Barring an offence for putting oneself into a mindless state, an accused cannot be convicted in the absence of the requisite elements of sexual assault. But there is no such offence for mindlessness, nor was there a finding at trial that all elements for sexual assault were met, and so a new trial was ordered.[100]

Accordingly, the *ratio decidendi* of *Daviault* was far from controversial and, in a characteristic judgment of Mr. Justice Cory, may be simply put: "the requisite mental element [for sexual assault] is simply an intention to commit the sexual assault or recklessness as to whether the actions will constitute an assault." This holding does not present a problem. Rather, the facts themselves were horrible and lacking an air of reality: how could a near-automaton commit the act of non-consensual intercourse?

If circumstances exculpating the accused do exist, they must be rare indeed, bordering on, but not quite achieving, the impossible. Indeed, Justice Minister Allan Rock has argued before a House of Commons committee that there is no scientific evidence proving that extreme drunkenness causes people to act in a state akin to automatism.[101] In any event, the overwhelming majority of accused rapists will have no such defense, since it is too physiologically

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99 *Supra* note 1 and accompanying text.

100 The defendant was eventually acquitted on separate procedural grounds: *ibid.*

101 D. Vienneau, "Rock rejects drunk defence" *Toronto Star* (8 April 1995) A10. Compare the approach of McIntyre J. in *R.* v. *Bernard*, [1988] 2 S.C.R. 833 [hereinafter *Bernard*].

anomalous to be so intoxicated as to both achieve a state akin to automatism (thus risking death) *and* commit the *actus reus* of sexual assault. But, arguably, it may be physiologically possible to do so, as it is apparently possible to commit homicide while "sleepwalking."[102] That such *prima facie* unbelievable acts of humankind are *de facto* possible does not underscore their status as most improbable circumstances. Therefore, the outraged critics might have misdirected their wrath upon the Court, instead leveling more apt criticism at the perpetrator and at legislators for leaving such an appalling *lacuna* in the criminal law.

But does it also follow, as suggested in the dissenting judgment of Sopinka J., that the majority decision in *Daviault* runs counter to the Supreme Court's recent holdings on criminal fault? On the one hand, Sopinka J. is quite right to characterize those judgments, and particularly the *Creighton* quartet, as focussing on concepts of moral innocence and individual responsibility.[103] On the other hand, it would be wrong to suggest that *Creighton* stands for the proposition that no *mens rea* need be established to convict as long as some moral blameworthiness may be plucked willy-nilly from the facts. McLachlin J. could not have said it any clearer in *Creighton*: "No person can be sent to prison without *mens rea*, or a guilty mind ... ."[104] Thus, when the majority goes on to assert in *Creighton* that a conviction is constitutionally valid "[p]rovided an element of mental fault or moral culpability is present,"[105] they are not talking about some random element of mental fault, but the requisite mental fault under the offence. If that offence is construed as criminal negligence, as in *Creighton*, then that *mens rea* of an objectively culpable mental element is constitutionally sufficient. This is very different from permitting conviction for virtually *any* presence of culpability, regardless of its relation to the offence.

In sum, Sopinka J.'s dissent in *Daviault* captured the essence of criminal fault as *per* the Lamer Court, consistent with his judgments in *DeSousa* and *Rodriguez*, while differing with the majority only on his common law assessment of whether extreme voluntary intoxication was an exculpatory circumstance for sexual assault. The majority in *Daviault* were permitted to circumscribe their departure from the criminal principles of correspondence and fair dealing, as set out in recent decisions beginning with *DeSousa* and triumphing in *Creighton*. Without

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[102] See *R. v. Parks*, [1992] 2 S.C.R. 871.

[103] *Daviault*, *supra* note 1 at 117-19, *per* Sopinka J.

[104] *Creighton*, *supra* note 69 at 54, cited in *Daviault*, *ibid.* at 117, *per* Sopinka J.

[105] *Creighton*, *ibid.* at 54; cited in *Daviault*, *ibid.* at 117, *per* Sopinka J.

an offence of dangerous intoxication, there can be no responsibility or accountability of the accused, and thus no criminal liability, where the accused is totally incapacitated or mindless as a result of extreme intoxication.

If there was a shortcoming in the majority judgment in *Daviault*, it was the failure to state the extent to which such cases were "rare."[106] The direction of Cory J. may have been mild to a fault, although it was clearly "obvious" to the Court that cases such as *Daviault* were exceptional.[107] Nevertheless, trial judges, not to mention the general public, should have been less subtly treated to direction from the Court. With the aid of hindsight, it is respectfully submitted that appellate courts might more forcefully state the rarity of such cases in the future.[108]

VI. CONCLUSION

[Ghosts] are a way of exemplifying something which you know to be true but which is very hard to give substance to.

Robertson Davies[109]

The ghost of William McIntyre appears to be haunting some of the watershed decisions of the Dickson Court, undercutting if not reversing the individualist, rights-oriented tendencies of that early post-*Charter* jurisprudence on criminal fault. By employing a dual focus on rights and responsibilities, and orienting criminal fault, in part, upon the moral requisites of community, the Supreme Court of Canada has ended up implicitly adopting the philosophical perspective espoused by Mr. Justice McIntyre throughout his judicial career. It does not follow, however, that the Lamer Court should be typecast as "conservative" or

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106 *Daviault*, *ibid.* at 100, *per* Cory J.

107 Cory J. devoted a single sentence by way of direction: "It is obvious that it will only be on rare occasions that evidence of such an extreme state of intoxication can be advanced and perhaps only on still rarer occasions is it likely to be successful": *ibid.*

108 Appellate courts might consider the statement of McIntyre J. in *Bernard*, *supra* note 101 at 879: "As Fauteux J. observed in *R. v. George* ..., it is almost metaphysically inconceivable for a person to be so drunk as to be incapable of forming the minimal intent to apply force." Note that the Court in *Daviault* neither followed nor overruled the judgment of McIntyre J. in *Bernard*.

109 Quoted in M. Gussow, " 'A Moralist Possessed by Humor': A Conversation with Robertson Davies" *The New York Times Book Review* (5 February 1995) at 25.

generally deferential to Parliament, as was Justice McIntyre's reputation.[110] Nor has the Lamer Court explicitly endorsed McIntyre J. as its touchstone for reconstructing criminal fault with both rights and responsibilities in mind. But their philosophical starting points are similar, and represent a contrast to the individualist approach wielded by a majority of the Dickson Court for much of the 1980s.

Those who criticize the Lamer Court as favouring an accused's rights while ignoring the interests of victims and of society are thus wide off the mark; the critics may be killing the messenger when they attack the Court for the inhuman treatment of the victim in *Daviault*. The *ratio decidendi* in *Daviault* should not shock lawyers, however, nor does it signal a retreat from the *Creighton* quartet. To be sure, this decision is informative for legislators and litigators alike.

What is the lesson to be taken by legislators? The Court's reference to legislative opportunities for a crime of intoxication is as blunt as they get,[111] and the Justice Minister has responded with Bill C-72,[112] tabled in February of this year. The Court affirmed in *Daviault* that it does not like being cornered between bad facts and a legislative *lacuna*.[113] Indeed, this Court will not pale in response to hard cases, believing it preferable to state the judicial response as it sees it, even if the result is, in fact, regrettable. On the other hand, nor will this Court tinker with imperfect but hard-won legislative attempts to redress injustices.[114] Rights may be limited and duties enforced as long as, *inter alia*, some rational, minimal fault requirements exist for a criminal offence.

What is the lesson to be taken by litigators? *Daviault* is not so much a signal of retreat as an insistence upon avoiding dogmatism. A minimal level of fault is required for a conviction under *Creighton*, but it does not follow that no *mens rea* whatsoever will suffice. Thus, if the dissent of Sopinka J. summarily restated the criminal fault philosophy adopted by the Lamer Court today, the majority carefully drew a line around it.

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[110] See *supra* note 13.

[111] *Daviault*, *supra* note 1 at 100, *per* Cory J.: "it is always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk."

[112] *An Act to amend the Criminal Code (self-induced intoxication)*, 1st Sess., 35th Parl., 1994-95 (passed by the House of Commons 22 June 1995).

[113] Compare *R.* v. *Zundel*, [1992] 2 S.C.R. 731, where the Court struck down a centuries-old offence, despite the worst of facts (anti-Semitic literature) and the worst of defendants (Ernst Zundel).

[114] *Creighton*, *supra* note 69 at 55-57; *Desousa*, *supra* note 71 at 612.

And what of this philosophy? For those who detect a whiff of radical populism or neoconservatism from all this McIntyresque talk of society, duties, and moral bonds, I suggest a less skeptical conclusion. There is a vast difference between populist or conservative ideologies, on the one hand, and progressive amendments to individualist interpretations of the *Charter*, on the other. Like the dissents of Mr. Justice McIntyre, the present Court is no more given to flights of populist fancy than the Dickson Court viewed itself as the sole harbinger of civil libertarianism in Canada. If the current judicial trend is to demand more responsibility of those charged with criminal offences, the jurisprudence will, one hopes, neither retreat from its bold stance, nor devolve into an *over*reaction to the "rights talk" of the Dickson Court. The Court could do worse than to follow the imperfect but balanced approach pursued by the Honourable William McIntyre during his days as judicial dissenter and prophet.