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## Trusting to a Fault: Criminal Negligence and Faith Healing Deaths

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Graduate Program in Philosophy

A thesis submitted in partial fulfillment of the requirements for the degree in Doctor of  
Philosophy

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TRUSTING TO A FAULT:  
CRIMINAL NEGLIGENCE AND FAITH HEALING DEATHS

by

Kenneth M. Nickel

Graduate Program in Philosophy

A thesis submitted in partial fulfillment  
of the requirements for the degree of  
Doctor of Philosophy

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## Abstract

Faith healing deaths occur infrequently in Canada, but when they do they pose a considerable challenge for criminal justice. Similar to caregivers who absent-mindedly and fatally forget a child in a hot vehicle, faith healers do not intentionally harm their children. It can seem legally excessive and unjust to prosecute achingly bereaved parents. But unlike 'hot-car' deaths, faith healing parents are not absent minded in the deaths they cause. Rather, significant deliberation and strength of will is necessary to treat their child's ailment with faith alone. Two different *Criminal Code* provisions can be brought to bear upon these deaths, namely, s. 215 'Failing to provide the necessaries of life' and s. 219 'Criminal negligence'. From a public, medical, and scientific perspective treating potentially fatal ailments with 'faith' and 'prayer' seems like reckless endangerment, giving apparent justification to the more serious criminal negligence charge. But, the fault element in the criminal negligence offence continues to be a vexing issue in Canadian jurisprudence. People accused of negligence-based offences are commonly held to the standard of what a reasonable person might predictably have done in similar circumstances. While it is unnecessary for the impartial trier of fact to conceive of faith healing as 'reasonable', it is an open question whether faith healers are sufficiently *unreasonable* to warrant serious criminal condemnation and possible incarceration when their course of action causes death. Is it justifiable to think of faith healers who cause death as criminally unreasonable? That is, do they depart markedly *enough* from the standard that criminal negligence is rightly attributed to them? Public attitudes toward religion, religious fundamentalism, and healthcare must be considered when trying to discern what a reasonable person does when treating an ailing child at risk of death.

**Key Words:** faith healing, criminal negligence, objective standard, reasonable person, fault, *mens rea*, unreasonable belief

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Lastly, I'm grateful to my family: to my beautiful and talented wife, Dr. Jodi Nickel, and to our amazing sons, Aidan and Walker. Thanks for ensuring that our household is always a sanctuary of honest, reasoned, and caring conversation.

I dedicate this work to the memory of Christopher Tutton, Calahan Shippy, and all other children lost to failed faith healing attempts, and, indeed, to the memory of all children whose lives are cut short by over-zealous, unreasonable adults.

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## Chapter 1: Introduction

### *Preamble*

In April, 1979 Arthur and Carol Tutton learned that their three-year-old son, Christopher, suffered from diabetes.<sup>1</sup> Apprised of their son's condition by the attending family physician, the Tuttons immediately began a regimen of insulin injections. In July of that year, Carol took part in a juvenile diabetes clinic hoping to acquire competence to deal with and better understand her son's disorder. As devout Christians believing in the healing power of God, the couple was confident of a "spiritual cure" and they expressed this hope to the doctors. In November, 1979, a diabetic specialist from Sick Children's Hospital in Toronto reminded the Tuttons that Christopher's condition was permanent and that they should never discontinue insulin treatments. Less than a year later on October 2, 1980, the Tuttons stopped administering insulin and within two days they rushed Christopher to a hospital emergency ward where physicians treated him for severe diabetic acidosis, a serious and often fatal condition resulting from a lack of insulin. The Tuttons were clearly told again that diabetes has no known cure, is a permanent condition, but is easily treatable. Again they were admonished not to suspend insulin injections. The Tuttons assured the physicians that they understood and would be compliant.

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<sup>1</sup> The following narrative is constructed from the facts reported in *R. v Tutton* [1989] 1 S.C.R. 1392. [Hereafter *Tutton*]

In October, 1981, Carol believed that she received a revelation from God. In a written statement provided to police shortly after Christopher's death, Carol Tutton claimed:

Complete faith in Jesus and obedience to the word of God is the reason for our decision to cease giving Chris insulin. Since I have accepted Jesus as my personal Saviour and Lord [*sic*]. He has revealed himself to me in vision and spoke in words of his own that Christopher is healed and further that complete faith in Him not man's doctrine or shall I say the world's teachings will bring forth the manifestation of his healing.<sup>2</sup>

Believing continued insulin treatment to be a sign of unfaithfulness, thus jeopardizing God's miraculous provision, Carol stopped administering insulin on Wednesday, October 14. The next day Christopher seemed to function normally but by Thursday evening, roughly a day later, he reported feeling ill. Though Carol kept him home from school on Friday, no medical advice was sought. On Saturday Christopher's condition was not improving and much to the horror of his parents, Christopher stopped breathing at around 1:00 Saturday afternoon. Arthur administered artificial respiration until police and ambulance services arrived. Christopher was quickly transported to hospital where he was pronounced dead on arrival. The official cause of death was the complications from diabetic hyperglycaemia.

The Tuttons were charged with criminal negligence manslaughter and failing to provide the necessities of life, originally resulting in manslaughter convictions. The convictions were overturned on appeal and new trials were ordered. The Ontario Court of Appeal ruled that the trial judge erred in instructing jurors "that no

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<sup>2</sup> Tutton, 1398.

*mens rea* was required for manslaughter by means of criminal negligence.”<sup>3</sup> The Supreme Court of Canada took the Crown’s appeal by leave. Only six Justices ruled on the case, returning a unanimous decision to deny the Crown’s appeal and order new trials. They held that the *mens rea* (or the fault element) most certainly needed to be proved by the Crown, but unfortunately the Court was evenly divided on nature of fault required for criminal negligence. New trials never eventuated, allowing the Tuttons to fade into judicial history.

Sadly, a similar series of events took place in Rimbey, Alberta in December, 1998. After two weeks of illness, Calahan Shippy, fourteen-year-old son of Steven and Ruth Shippy, died of the same diabetic complications that claimed the life of Christopher Tutton. The parents were charged with criminal negligence manslaughter and failing to provide the necessaries of life, but were convicted only of the latter.<sup>4</sup> After seeing autopsy photographs of Calahan, the presiding Judge, Douglas Sirrs, compared the boy to a holocaust victim. Sirrs J said the parents showed “wilful blindness on medical matters.”<sup>5</sup> Crown Prosecutor, Ian Fraser, reminded the Judge at the sentencing hearing that a virtually identical case, *R v. Goetz*, involving relatives of the Shippy’s from the same small town, took place fourteen years prior. A young girl died of pneumonia and her parents were also convicted of failing to provide the necessaries. Addressing the Court prior to sentencing, Ruth Shippy had this to say:

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<sup>3</sup> *Tutton*, 1399.

<sup>4</sup> *R. v Shippy & Shippy* (2000). [Hereafter *Shippy*]

<sup>5</sup> Appendix: *Shippy* Sentencing Hearing, 2. [Hereafter Appendix]



My children are my life. I did everything I possibly could with Calahan. I mean I live for my kids. I live for my family. All I want to do is protect them, make sure they're well.<sup>6</sup>

Also at the sentencing hearing, Judge Sirrs asked Steven Shippy to clarify his comment to reporters following his trial that he “wouldn’t change a thing.”<sup>7</sup> Shippy replied:

No, that is my religious belief. But as far as -- it’s an awful hard thing to lose a son and to say if something like that happened again I don’t know. All I can say my religious beliefs I would like to say if something come up like that again I don’t know what I’d do. (*sic.*)<sup>8</sup>

Sirrs J handed down a suspended sentence with three years’ probation. A portion of the sentencing hearing is transcribed as follows:

I have found you guilty as the parents of Calahan, who was under the age of 16 years, in failing to provide for him the necessaries of life in that you refused to seek out the medical aid that was necessary to ensure that his health was not endangered permanently.

I have in all other aspects determined that you are loving and caring parents. It is your position that it is your devout faith which I understand does not permit the intervention of doctors or nurses to assist in providing medical treatment that justifies your actions in the eyes of God. You have a problem in Canada. The laws that presently exist in Canada is that you may believe and worship as you please provided that you are 16 years of age.

At age 16 Calahan would have been able and been deemed to be on his own. He would, as a matter of right, be able to accept all your beliefs. But until he is 16 years of age you, as his parents, do not have the unfettered right to do with him as your faith would teach you to do.

The law of Canada does not permit you to deny Calahan medical treatment because of your religious beliefs. In Canada we have one of the most comprehensive social, medical and hospital plans in the world. Our

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<sup>6</sup> Appendix, 9.

<sup>7</sup> The local newspaper reported Shippy’s response following the announcement of the verdict and it was repeated in Court: “After the verdict the boy’s father said that he believes he has the right not to seek medical help for his eight children. ‘I wouldn’t change a thing,’ Steven Shippy said. He added that he thinks Calahan would have died even if they had taken him to a hospital. ‘I believe that God takes someone for a purpose.’” (Appendix, 3.)

<sup>8</sup> Appendix, 8.

society has collectively decided that we do not want children to suffer because of their parent's inability to pay for medical treatment. As much as you might try to reject the values of Canadian society, your individual rights under the Canadian *Charter of Rights and Freedoms* do not give you the right to reject medical treatment for your children when there is a danger to the permanent health of those children.

The government authorities did not intervene with your decision not to correct Calahan's cleft palate although the doctor in the trial gave evidence that this problem could have been routinely corrected with minor surgery. This problem did not endanger Calahan's long term health. However, when you refused medical treatment for Calahan when he was obviously very ill and you were treating him for the flu, I have found that you purposely endangered Calahan's life and you tried to justify it by your religious beliefs.

In this situation you should and can expect the authorities to intervene in your lives. The law is clear that you cannot endanger the life of a child because of your religious beliefs and until a child is 16 years of age, they cannot decide such issues for themselves. Mr. and Mrs. Shippy, you are both mature adults. By all respects except for your failure to seek medical help for Calahan you appear to be loving, caring, responsible parents. The crime for which you have been convicted, as has been pointed out by the Crown, calls for a maximum sentence of two years imprisonment.

The aggravating factor in this offence is that both of you are in a position of trust to Calahan. Calahan relied on your experience and knowledge to decide what was best for him. Your decision for him that it was God's will that he die smacks of Darwinism in that he believed that for the good of the human race only the strong should survive. Our Canadian law rejects his theories.

In your favour I have considered the following, you have no previous convictions. You are otherwise of good character. You would appear to have good work records in that both of you are hardworking contributors to society. And I have seen visible displays of your remorse for what happened to Calahan.

As first offenders, I believe it to be enough punishment that both of you will now have criminal records. That is, you are criminals in Canadian society.<sup>9</sup>

Thankfully, faith healing deaths occur infrequently, especially in Canada, but the same cannot be said about our more religious neighbours to the south. On March 28, 2008 in Oregon, Carl and Raylene Worthington were indicted on charges of manslaughter and criminal mistreatment in the death of their fifteen-month-old

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<sup>9</sup> Appendix, 9-10.

daughter, Eva. She died on March 2 of bronchial pneumonia and a blood infection—conditions easily treatable with antibiotics. In keeping with their deep religious convictions, the Worthingtons were committed to treating Eva's illness with prayer alone.<sup>10</sup> On July 23, 2009, an Oregon jury acquitted both parents of the more serious manslaughter charges. On July 31, however, the jury found the father guilty of second degree criminal mistreatment and Judge Steven L. Maurer sentenced Carl Worthington to two months in a Clackamas County Jail, and five years' probation.<sup>11</sup>

Dale and Leilani Neumann of Weston, Wisconsin were charged on April 28, 2008 with second degree reckless homicide in the death of their eleven-year-old daughter, Madeline.<sup>12</sup> She died on March 23 from an undiagnosed diabetic condition. Believing Madeline to be suffering from a spiritual attack, the parents elected to pray for her rather than seek medical care. She was ill for approximately two weeks before she quietly stopped breathing in the family home. In separate trials in 2009 both parents were found guilty and on October 7, 2009 both parents were sentenced to thirty days in jail during each of the next six years.<sup>13</sup> They were

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<sup>10</sup> "Parents indicted on Faith-healing death", Oregon City, Oregon, March 31 2008, The Associated Press, accessed, April 1, 2008, <http://abcnews.go.com/US/wireStory?id=4557821>

<sup>11</sup> Tom Wolfe, "Worthington Gets Jail Time in Faith Healing Death," accessed July 31, 2009, [http://www.oregonlive.com/clackamascounty/index.ssf/2009/07/worthington\\_gets\\_jail\\_time\\_in.ht](http://www.oregonlive.com/clackamascounty/index.ssf/2009/07/worthington_gets_jail_time_in.ht) [ml](http://www.oregonlive.com/clackamascounty/index.ssf/2009/07/worthington_gets_jail_time_in.ht) ; The Worthington case in Clackamas, Oregon has become the focus on an entire book. See Cameron Stauth, *In the Name of God: The True Story to Save Children from Faith-Healing Homicide* (New York, NY: St. Martin's Press, 2013).

<sup>12</sup> "Parents charged," accessed April 28, 2008, <http://www.cnn.com/2008/CRIME/04/28/prayer.death.ap/index.html>

<sup>13</sup> Emma Graves Fitzsimmons, "Wisconsin Couple Sentenced in Death of Their Sick Child," *New York Times*, October 8, 2009, accessed October 8, 2009, <http://www.nytimes.com/2009/10/08/us/08sentence.html>

also given ten years' probation and ordered to ensure regular medical examinations for their remaining children.

### ***Purpose***

As we can see from the preamble, jurisdictions in both the US and Canada seek to confront the oddity of these kinds of tragic deaths, but independently of the law there is another story afoot. For many centuries Christianity has been regarded by its world-wide faithful as a wonder working religion. Its greatest wonder and core doctrinal feature is that Jesus Christ has reconciled fallen humanity to God through his death and resurrection. Triumph over decay, disease, and ultimately death, is at the core of the Christian faith. The four gospels of the Christian New Testament are replete with stories of miraculous healings that often forestall the (apparent) inevitability of physical death. Jesus and his disciples were proclaimed as wonder workers and sacred Christian texts promise that if future disciples have sufficient faith they too can continue the ministry of healing and renewal that Jesus initiated. Consider two of the most prominent scriptural declarations of the healing power and the physical invulnerability of the faithful:

And these signs will accompany those who believe: In my name they will drive out demons; they will speak in new tongues; they will pick up snakes with their hands; and when they drink deadly poison, it will not hurt them at all; they will place their hands on sick people, and they will get well.<sup>14</sup>

Is anyone among you in trouble? Let them pray. Is anyone happy? Let them sing songs of praise. Is anyone among you sick? Let them call the elders of the church to pray over them and anoint them with oil in the name of the Lord. And the prayer offered in faith will make the sick person well; the Lord will

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<sup>14</sup> Mark 16:17,18 (*New International Version*; hereafter *NIV*).

raise them up. If they have sinned, they will be forgiven. Therefore confess your sins to each other and pray for each other so that you may be healed. The prayer of a righteous person is powerful and effective.<sup>15</sup>

Christians all over the world and down through the centuries have generally affirmed that theirs is a religion of ‘healing’, but people are often surprised to learn that even the fine point about snake handling and poison consumption is taken seriously by some. Ritual snake handling and deliberate poison consumption are, in fact, features of worship in some Pentecostal churches in places like Kentucky, Tennessee, West Virginia, etc.<sup>16</sup> State jurisdictions in which snake handling fatalities have occurred most frequently have made the practice illegal.<sup>17</sup> The public policy concern, it seems, is that something so predictably deadly shouldn’t be allowed even where the free exercise of religion is highly prized. And, when we learn of children who die needlessly at the hands of believers who take the Bible at least as seriously as snake handlers, we’re often confronted with a similar intuition. It seems legally inexcusable, indeed criminal, when a child’s death occurs because people genuinely *trust*, not just in an ancient text, but in a course of action that is predictably, if not certainly deadly. These faith healing deaths seem, even to most *religious* people,

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<sup>15</sup> James 5:13-16 (*NIV*).

<sup>16</sup> Julia Duin, "Death of Snake Handling Preacher Shines Light on Lethal Appalachian Tradition," accessed June 2, 2015, [http://religion.blogs.cnn.com/2012/06/01/death-of-snake-handling-preacher-shines-light-on-lethal-appalachian-tradition/?hpt=hp\\_c3](http://religion.blogs.cnn.com/2012/06/01/death-of-snake-handling-preacher-shines-light-on-lethal-appalachian-tradition/?hpt=hp_c3)

<sup>17</sup> In the *Kentucky Revised Statutes* – Title XL - Chapter 437 - Crimes against public peace, the law states, “Any person who displays, handles or uses any kind of reptile in connection with any religious service or gathering shall be fined not less than \$50, nor more than \$100.” 437.060 (accessed June 15<sup>th</sup>, 2012, <http://162.114.4.35/statutes/index.aspx>). In Tennessee *Code* 39-17-101 provides: “It is an offense for a person to display, exhibit, handle, or use a poisonous or dangerous snake or reptile in a manner that endangers the life or health of any person.” (accessed June 15, 2012, [http://www.lawserver.com/law/state/tennessee/tn-code/tennessee\\_code\\_39-17-101](http://www.lawserver.com/law/state/tennessee/tn-code/tennessee_code_39-17-101))

completely unnecessary and even absurd. Alvin Plantinga, arguably the preeminent Evangelical Christian philosopher of the last few decades, has attributed the following view about faith healing to at least some sensible Christians and obliquely to himself: "it can't be done, but even it could, it shouldn't be."<sup>18</sup> If it's so obvious that faith healing is dangerous, how do reasonable believers interpret those scriptural declarations? The standard interpretation related to divine healing is that God *does* promise to heal people in a general sense but he is not committed to a particular method, nor is he committed to *physical* healing in every instance. It's entirely plausible, the trope continues, to think God has equipped modern generations with medical science, making the pronounced and sensational miracles of the past unnecessary. So, the contemporary believer can affirm that God *does* still 'heal' people, but he does it indirectly, as it were, and with less fanfare.

A significant study from 2008 found that 34% of Americans, and 54% of American evangelical Christians, believe they have personally experienced or witnessed some kind of divine healing. Nothing about the data, however, indicates that respondents relied on God to the exclusion of medical support and intervention.<sup>19</sup> Doubtless, people who claim to have witnessed or to have been the recipient of divine healing are employing the best available medical technology and treatment. 'Miracles' and 'healings' are the words believers often use to describe and explain perhaps unlikely occurrences for which they are profoundly grateful. In her

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<sup>18</sup> Alvin Plantinga, "The Reformed Objection to Natural Theology," *The Christian Scholar's Review* 11, no. 3 (1982): 187.

<sup>19</sup> Pew Forum on Religion and Public Life, "US Religious Landscape Survey: Religious Beliefs and Practices," (Pew Research Centre, 2008), 54., accessed June 1, 2015, <http://religions.pewforum.org/pdf/report2religious-landscape-study-chapter-1.pdf>

book, *Medical Miracles*, Canadian medical historian, Jacalyn Duffin, recounts an event early in her medical career as a haematologist. She was asked to give a blind review of a patient's bone marrow slides for what she assumed was a law suit.<sup>20</sup> The samples were taken over eighteen months and they indicated transitions from severe acute leukaemia to remission, to a relapse, and to yet another remission.

Duffin reported:

Only much later did I learn to my great surprise, that the patient was (and still is) alive. She had accepted aggressive chemotherapy in a university hospital, but she attributed her cure to the intercession of a Montreal woman, Marie d'Youville, who had been dead for two hundred years. This case became the capstone in the 'cause' for Youville's canonization as the first Canadian-born saint.<sup>21</sup>

Duffin's story is instructive for a variety of reasons. First, Roman Catholicism, Christianity's largest global denomination, requires, amongst other things, 'proof' of miracles to elevate its most venerated figures to sainthood. It should not be surprising then to *hear* testimony of miracles reported by the faithful from within the Church.<sup>22</sup> Second, and most importantly for us, nowhere does the Roman Catholic Church—an institution reliant upon 'miracles'—endorse the refusal of medical and scientific assistance in the pursuit of healing.<sup>23</sup>

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<sup>20</sup> Jacalyn Duffin, *Medical Miracles: Doctors, Saints, and Healing in the Modern World* (New York, NY: Oxford University Press, 2008).

<sup>21</sup> *Ibid.*, 1.

<sup>22</sup> David Hume said that testimony of the "extraordinary and the marvelous" is to be entirely expected among the religious. David Hume, "Of Miracles," in *Essays: Moral, Political and Literary* (Oxford: Oxford University Press, 1963/1748), 523.

<sup>23</sup> Nowhere in Duffin's two hundred page exposition of medical miracles, many used as evidence for sainthood, does she discuss faith healing independent of scientifically based medical assistance.

When confronted with a serious and perhaps life threatening medical diagnosis, no one could be faulted for desperately wishing for a miracle; it does seem, however, patently unreasonable—and unreasonable even to most Christians—to *refuse* available and reliable treatment in favour of relying on one. It's like going out of one's way to risk being bitten by a rattlesnake. It is not surprising that the criminal law would be brought to bear upon those parents who, in the eyes of the law, "purposely endanger" their children by opting for the miraculous over the reasonable. To the medical professionals who warned the Tuttons about the risks of failing to give Christopher insulin, the child's death was entirely predictable. One suspects they felt vindicated on Christopher's behalf by the criminal charges brought against the parents. From a dispassionate, let's call it objective, legal point of view, faith healers who risk their children's lives must be either (temporarily) delusional or exceedingly reckless. They need treatment or deserve punishment—or perhaps both. But, when we indulge this intuition a bit further and seriously consider holding loving, 'innocent' people *criminally* liable for such tragedies it seems legally excessive and morally untoward. It goes without saying these parents bear no ill will toward their children—if they did they would certainly be murderers! They, like any parent, want what is best for their children. So, holding such parents criminally liable may only multiply absurdities and exacerbate an already tragic sequence of events.

The purpose of this dissertation is to provide a clear examination of these conflicted legal and moral intuitions. We will consider the nature of the offences that best capture what faith healers do. Primary attention in the Canadian *Criminal Code*



must be given to s. 215, “failing to provide the necessaries of life”, and s. 219, “criminal negligence.” I will argue that faith healing deaths can be wrongful under criminal negligence. But, they are not *obviously* wrongful, or at least not as wrongful as many might prefer. Consequently, I will also argue that the trajectory of Canadian Jurisprudence since *Tutton* in 1989 has made criminal negligence prosecutions and convictions less likely. We need to consider both descriptive and normative elements as they relate to law and we need to consider both descriptive and normative elements as they relate to fundamentalist Christian religious beliefs. We need to understand the recent legal history of fault in criminal negligence and we need to understand how fault is understood in *Charter*-era jurisprudence, particularly from the perspective of the Supreme Court of Canada. And, lastly, we must acquire a keener appreciation of why criminal negligence manslaughter is such a vexing offence for triers of fact. The offence demands a great deal of interpretation and invariably it gets interpreted by people with conflicting and conflicted values.<sup>24</sup> Some of these tensions relate to what the law *is* and some to what people think it *ought* to be; and some of these tensions relate to how morality *is* understood and how people think it *ought* to be understood. Often the facts in a criminal negligence case are beyond the dispute of either prosecution or defence; how to think about the fault or culpability that apparently caused the unnecessary and avoidable death is up for grabs. To that end, a variety of arguments favouring both conviction and acquittal of faith healers will be explored. Not all faith healing

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<sup>24</sup> Individual triers of fact may not be aware that they have conflicting values. Others may fully acknowledge which of their values are in tension.

deaths should be prosecuted under criminal negligence, but I will argue that some meeting certain criteria *ought* to be. I predict that some meeting those criteria may be tried but *won't* be convicted—and they won't be for some socially and morally justifiable reasons.

My general purpose in writing is to clarify what faith healers actually do as it relates primarily to the offence of criminal negligence causing death. Not every death caused by another warrants prolonged criminal scrutiny. An unsuspecting, law-abiding motorist, who fatally hits a child who has darted into the path of her car, has in some clear sense caused another's death; but, nothing about that death warrants criminal liability. The criminal law must, however, be brought to bear upon unnecessary but predictable deaths caused by an otherwise innocent, well-meaning religious belief. What this dissertation promises to expose is the collision of two important social realities: the publically justifiable institution of law and the privately inscrutable value of religious belief. Law must take a dim view of deliberate behaviours that predictably cause death. Similarly, society must be cautious in the constraint of individual freedom and seek to avoid condemning moral innocence. Finally, my hope is for the dissertation to have predictive and practical utility. That is, I hope it makes an accurate prediction of how future faith healing deaths could play out in Canadian courts, and as such, I hope the arguments presented would be useful to triers of fact and legal practitioners tasked with considering these kinds of cases. And if no more children in Canada die this way—an unlikely, but hopeful prospect—this research will not have been in vain. Unfortunately, people die all too frequently because of the carelessness and

unreasonableness of others. Discerning whether someone is criminally at fault when these tragic events occur is a difficult task and hopefully this study makes that task clearer, if not easier.

## Chapter 2: Getting Wrongful Deaths Right

Let us begin with a rather colloquial question and ask what is wrong with faith healing in the first place? We might say there is nothing wrong with faith healing in itself, just as we would surely say there is nothing legally wrong or problematic with going to Mass, celebrating Passover, or observing Ramadan. But not all well-meaning religious rites are immune from legal and moral controversy. We should recall from the Introduction that ritual snake handling among some American Christian fundamentalists has caused law makers from some States to draft legislation prohibiting the practice. Not every time someone picks up a rattlesnake in some rustic back country church is that person bitten, but law makers know that the risk of very serious harm is so high the public prohibition is warranted. While law makers are certainly concerned about the safety of the public, we should acknowledge that the risks of snake handling are borne primarily by the person intrepid enough to hold the snake in the first place. People of a more libertarian persuasion may think such legal prohibitions violate religious freedom. The 'Harm principle' famously expressed by John Stuart Mill (1806-1873) is that there can be no justification for prohibiting people from actions having only personal and private implications—no matter how outrageous the actions or beliefs may appear to others. Perhaps if a person is courageous enough to pick up a live rattlesnake in the name of god, they're courageous enough to die as well—and so be it. There is an obvious contrast with faith healing. While both practices must certainly take a great deal of courage, faith healing exposes *another* person—not

oneself—to grave danger. The child’s life, *not* the parent’s, is at risk. We don’t need additional laws to deal with this practice. We just need to enforce the laws we currently have—those laws that prohibit and condemn risking and causing another’s death. Like snake handling, faith healing does not always have tragic results. But the tragic results are predictable enough that the criminal law should have an obvious response to them. Well, maybe not *obvious*.

Let us examine for a moment the two statutory heads in the *Criminal Code of Canada* under which faith healing deaths have been and could continue to be prosecuted. The less serious of the two is s. 215, which imposes the positive duty upon parents to provide the necessities of life to their dependents. As in indictable offence the sentence provides for a maximum of five years and as a summary offence, the maximum sentence is eighteen months. The range gives discretion to the Crown to proceed on the basis of the presumed culpability or blameworthiness of the accused’s actions.<sup>25</sup> The provision gives no explicit guidance about what constitutes ‘the necessities’ of life, but it does offer the following in s. 215(2)(a)(ii): “the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.” Knowingly withholding insulin from a diabetic child would fall rather clearly under this criminal provision.

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<sup>25</sup> The range between indictable offence and summary offence also gives the accused the choice between being tried in a provincial Magistrate’s Court by a judge alone or in a Superior Court of Court of Queen’s Bench by a jury. See Kent Roach, *Criminal Law*, 3rd ed., Essentials of Canadian Law (Toronto, ON: Irwin Law, 2004), 25.

The more serious charge of criminal negligence is a kind of mixed duty, both positive and negative. It provides that:

- s. 219 (1) Every one is criminally negligent who  
 (a) in doing anything, or  
 (b) in omitting to do anything that it is his duty to do,  
 shows wanton or reckless disregard for the lives or safety of other persons.

The severity of this charge is understood in part by the fact that the Crown can only proceed by indictment and that the maximum sentence in causing death is life imprisonment, or in causing injury, ten years. People accused of criminal negligence are entitled to trial by jury but they can still elect to be tried by a judge alone. The justification for the offence is highly complex, but just in terms of the wrong it seeks to deter or prohibit, the explanation is rather straightforward. All of us have a negative right not to be injured or physically endangered by another's wanton or reckless disregard. We hold this right *in rem*, or against the world at large. Consequently, the world at large owes a correlative duty to everyone else not to put lives or safety at risk. We can all discharge this correlative negative duty toward everyone else simply by minding our own business and making sure that 'our business' (e.g., driving a vehicle, walking our dog, swinging a golf club) does not threaten the life or endanger the safety of others. Inasmuch as an omission to discharge a lawful positive duty also shows a wanton or reckless disregard for those owed these duties of care, we can also be guilty of criminal negligence. Combined, we can see that children rightfully owed the necessities of life are owed the additional duty of being cared for in a manner lacking wanton or reckless disregard. It is difficult to know if, say, the Shippys showed wanton or reckless disregard for Calahan's life by withholding insulin (i.e., the necessities of *his* life). One could

sensibly ask why or how would wanton or reckless disregard make withholding the necessities of life worse? The withholding just *is* wanton or reckless! Faith healing parents must know they're putting their children's lives at risk. How is this not acting with wanton or reckless disregard for a child's life or safety? We should notice the statute provides for inclusive disjunctions. One needn't be both wanton *and* reckless. One's disregard needn't be for both life *and* safety. If one is reckless about another's safety and that person's death ensues, this should suffice for criminal liability under criminal negligence.

According to s. 222(2) of the *Criminal Code*, homicide is culpable or not culpable. Following s. 222(3), homicide that is not culpable is not an offence. Manslaughter in Canada is constructed negatively insofar as s. 234 of the *Code* states, "Culpable homicide that is not murder or infanticide is manslaughter." One can cause death by criminal negligence and thereby be guilty of criminal negligence causing death (s. 220) or criminal negligence manslaughter (s. 222 (5) (b)). 'Criminal negligence manslaughter' and 'criminal negligence causing death' are separate offences but have identical fault elements. So, what we know about manslaughter is what it is *not*; it's neither murder nor infanticide. As such, manslaughter confronts us with the pitfalls that accompany all negatively defined concepts or entities, namely, how are we to understand or discern this 'thing'? How are we to discern this genuinely wrongful death that is neither murder nor infanticide? We want to discern whether faith healing *deaths* are wrongful. The Shippys show us that faith healers can be blamed for failing to provide the necessities of life, that is, for *not* doing something. But can faith healers like the

Shippys or the Tuttons also be found liable for *doing* something, namely, causing the death of their child? Both sets of parents deliberately withheld something they knew or ought to have known was necessary to keep their child alive. How is this *not* wrong in precisely the way that s. 219 provides? Let's begin to answer this question by considering some non-faith healing examples that illustrate the difficulties more vividly.

On June 26, 2013, fifty-one-year-old, Leslie MacDonald, of Milton, Ontario was picking up her grandson, Maximus Huyskens, as a favour to her daughter and dropping him off at his day care. On the morning of the twenty-sixth, she buckled the boy into his car seat at her daughter's home and drove away. MacDonald was tired from working the night before and she drove home to go to sleep—forgetting that Max was still in the car. At 5:00 PM, fulfilling the favour to her daughter, MacDonald responsibly got into her vehicle and drove to Max's day care where she learned from the staff that he had not arrived that day. Only then did MacDonald realize what she had done. She returned to her vehicle to find Max not breathing. She drove to her daughter's house, where they called paramedics, but Max could not be revived. He was pronounced dead with the cause of death being hyperthermia, or heat exhaustion. MacDonald was charged with criminal negligence manslaughter and failing to provide the necessities of life.<sup>26</sup>

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<sup>26</sup> "Milton Grandmother Charged in Toddler's Car Death Due Back Sept. 9," CTV Toronto, accessed June 2, 2015, <http://www.ctvnews.ca/canada/milton-grandmother-charged-in-toddler-s-car-death-due-back-sept-9-1.1410199#ixzz3D20s3wii>.  
"Grandmother Charged in Death of Milton Boy inside Hot Car." CBC News, accessed June 2, 2015, <http://www.cbc.ca/news/canada/toronto/grandmother-charged-in-death-of-milton-boy-inside-hot-car-1.1373515>.



Similar events took place in the summer of 2003 when Dominic Martin of Verdun, Quebec was intending to do something he and his wife did prior to work every day—drop off their twenty three month old daughter, Audrey, at day care.<sup>27</sup> Their routine was to drop Audrey off together and then Martin would drop off his wife, but this day saw a small alteration. Martin's wife was in a hurry to get to work, so they agreed she would get dropped off first and then Martin would proceed to Audrey's day care. That was the plan, but after dropping off his wife he simply drove, without thinking and in routine fashion, to his usual park'n ride location and embarked on his transit commute to downtown Montreal. With his daughter sleeping soundly in the backseat, strapped responsibly in her child restraint, he just forgot to take her to day care. At the end of the day he returned to find his daughter unconscious. He rushed her to hospital but she died hours later of heat exhaustion. After a brief police investigation Martin was charged with criminal negligence manslaughter to which he pled not guilty. The Crown dropped the charges in April of 2004 before Martin ever stood trial, citing not enough evidence to sustain the criminal charge.<sup>28</sup>

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"Milton Grandma Sentenced for Grandson's Death after Being Left for a Day in a Sweltering Car," The Canadian Press, accessed June 2, 2015, [http://www.thestar.com/news/crime/2013/11/27/milton\\_grandma\\_sentenced\\_for\\_grandsons\\_death\\_after\\_being\\_left\\_for\\_a\\_day\\_in\\_a\\_sweltering\\_car.html](http://www.thestar.com/news/crime/2013/11/27/milton_grandma_sentenced_for_grandsons_death_after_being_left_for_a_day_in_a_sweltering_car.html).

<sup>27</sup> "Father Charged in Baby's Death," CBC News, accessed July 18, 2003, [http://montreal.cbc.ca/regional/servlet/View?filename=qc\\_babydeath20030718](http://montreal.cbc.ca/regional/servlet/View?filename=qc_babydeath20030718).

<sup>28</sup> I am indebted to Ms. Deborah Dean, Research Librarian for the Faculty of Law, University of Calgary, for confirming details on the *Martin* case.

Leslie MacDonald faced a different legal fate than that of Dominic Martin. She pled guilty to the lesser offence of failing to provide the necessaries of life, and the more serious manslaughter charge against her was dropped. MacDonald received a suspended sentence and two years probation. MacDonald is a criminal for failing to provide the necessaries of life, but not for positively committing a culpable homicide. In this sense, neither MacDonald nor Martin was convicted of a wrongful death.

Notwithstanding MacDonald's criminal conviction, the wrongfulness of the deaths she and Martin caused is sufficiently vague. Let's then consider a crystal clear example of a wrongful death—*deaths*, actually. Late in the afternoon on December 7, 2007, Daniel Tschetter, driving a cement truck on a highway south of Calgary city limits, failed not just to slow down as he approached a red light on the outskirts of town, but failed even to brake.<sup>29</sup> The speed limit was 80 km/h and witnesses reported that Tschetter had been driving erratically and passing vehicles prior to reaching the controlled intersection. He rear-ended a vehicle stopped ahead of him at a red light, killing all five passengers in the car. Accident reconstruction experts determined that Tschetter's speed at the time of the collision was in excess of 100 kilometres per hour. Following the collision witnesses reported seeing the driver take a few sips from a vodka bottle and then dispose of it in the churning drum of the cement mixer prior to the arrival of police. Tschetter's blood alcohol content was below the legal limit, so intoxication was not regarded as a contributing factor. Establishing, as well, that the truck suffered no mechanical failures, Tschetter's

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<sup>29</sup> *R. v. Tschetter* [2009] A.J. No. 542. [Hereafter *Tschetter*]

criminal conduct was never really in question. The question facing prosecutors and the Court was with what crime should he be charged and found guilty? Five counts of manslaughter, five counts of criminal negligence causing death, and one count of obstruction of justice (for disposing of the vodka bottle) were brought against the accused. In his ruling, Judge Fraser wrote, “Whether specific conduct should be categorized as criminal negligence is one of the most difficult and uncertain areas in the criminal law.”<sup>30</sup> He spoke of the wide variety of offences to which Tschetter could be liable:

The accused is not charged with dangerous driving causing death. However, by virtue of Section 662(5) of the Criminal Code, dangerous driving causing death is an included offence of both manslaughter and criminal negligence causing death. Therefore, as a result of the deaths caused by the accused, and the offences charged in the Information, the following alternative offences can be considered by the court: (1) Manslaughter by criminal negligence. (2) Manslaughter by an unlawful act (dangerous driving). (3) Criminal negligence causing death. (4) Dangerous driving causing death.”<sup>31</sup>

In addition to the one count of obstruction of justice, Tschetter was found guilty of five counts of manslaughter and five counts of criminal negligence causing death. Because of the redundancy of the manslaughter and criminal negligence counts, Judge Fraser entered conditional judicial stays on the latter.

The moral wrongness of Tschetter’s actions is unambiguous. Though not technically a murder, it seems to make precious little difference that he didn’t actually mean to kill anyone. He hardly could have done more harm if he had been trying. We might be inclined to ask him, with more than a hint outrage, “what *the*

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<sup>30</sup> *Tschetter*, para 10.

<sup>31</sup> *Tschetter*, para 8.

*hell were you thinking?"* We shall find in the chapters that follow, asking someone charged with criminal negligence manslaughter what he or she was thinking is not necessarily relevant to the accused's guilt. As it turns out, there are very good reasons for this, but Tschetter's guilt hinges on what he ought to have *done* differently rather than what he *was* thinking. In virtue of what he ought to have done so very differently, his guilt was never really in doubt. But, if Tschetter's guilt supposedly hinged on what he ought not have done, then returning to the hot-car deaths, one might wonder about Martin and MacDonald. They were charged originally with one of the same crimes as Tschetter and surely they ought to have acted differently as well.

To some at least, Martin and MacDonald may not be good examples of non-culpable homicides. The question could be asked, with some righteous indignation left over from *Tschetter*, what additional evidence would be needed to prosecute and secure convictions for criminal negligence causing death? Stunningly careless acts like these resulting in the completely avoidable loss of life *are* surely culpable homicides. This is not merely 'withholding the necessities of life'; it's far worse. Even very careful people can forget leaving their cell phones in restaurants, but not even the so-called 'absent-minded' forget leaving *children* in the back seats of automobiles—for an entire day! Must every charge of criminal negligence manslaughter be as conclusively and consummately wrongful as *Tschetter*?

With some calm reflection, though, we seem to know well enough what additional evidence would be needed to justify the more serious criminal charge and make the children's deaths wrongful. In the language of the *Criminal Code*, Leslie

MacDonald's "disregard" for her grandson needed to be *more* wanton or *more* reckless. We need her behaviour to be *more* worthy of blame, *more* culpable, *more* unforgiveable, more of *something* on the emotional register—like that found in *Tschetter*. Short of that sort of finding, common humanity seems to tell us that a serious criminal charge is undeserved and makes a bad situation worse. After all, we already have a dead child and achingly bereaved family members. No purpose is served in compounding a family's tragedy by making a regretful caregiver a criminal as well.

Let's consider one more case of criminal negligence causing death that will perhaps split the difference between Tschetter on the one hand and Martin and MacDonald on the other. Early in the evening of June 27, 2010, near Candiac, Quebec, twenty-one-year-old, Emma Czornobaj—a business student at Concordia University—stopped her Honda Civic in the passing lane of a four-lane highway separated by a large concrete median. She was not changing a flat tire. She did not have other mechanical issues. She didn't pull over to use her cell phone. She stopped abruptly in the passing lane to usher some apparently orphaned ducklings off the highway and out of harm's way. Both Czornobaj and the ducklings were safely on the side of the road when fifty-year-old, André Roy, and his sixteen-year-old daughter, Jessie, came around the curve on a Harley Davidson motorcycle. Roy could not brake in time and his motorcycle collided violently into the back of Czornobaj's car, killing both Roy and his daughter instantly. Czornobaj was subsequently charged with two counts of criminal negligence causing death (s. 220) and two

counts of dangerous operation of a motor vehicle causing death (s. 249).<sup>32</sup> A jury found her guilty on all four counts and she has received a ninety-day jail sentence and a ten-year driving ban.<sup>33</sup> She is currently appealing her sentence.<sup>34</sup>

If Daniel Tschetter inspires no sympathy but people like Dominic Martin or Leslie MacDonald do, Emma Czornobaj leaves us feeling rather uneasy and maybe more equivocal. Far from showing monstrous indifference like Daniel Tschetter, Emma Czornobaj went out of her way to rescue some defenceless and imperilled wildlife. It's interesting to note that if no one had been killed, Czornobaj could still have been ticketed in violation of s. 384 of the *Quebec Highway Safety Code* which prohibits vehicles from stopping in the middle of any roadway with a speed limit 70 km/h or higher.<sup>35</sup> We can imagine a very different news headline had that happened and no one was harmed in the process: "Woman ticketed while helping to save ducklings." The moral blame from the public in that instance might have been on the overly zealous patrol officer, proving the old adage that no good deed goes

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<sup>32</sup> Tu Thanh Ha, "Braking to Save Ducks Leads to Highway Carnage and Criminal Trial," *Globe and Mail*, accessed September 6, 2013, <http://www.theglobeandmail.com/news/national/trial-date-set-for-woman-involved-in-duck-highway-tragedy/article14165920/>.

<sup>33</sup> Graeme Hamilton, "Emma Czornobaj Found Guilty for Causing Deaths of Two Bikers When She Stopped to Save Ducks on Highway," *National Post*, accessed June 20, 2014, <http://news.nationalpost.com/2014/06/20/jury-finds-woman-guilty-for-causing-deaths-of-two-bikers-when-she-stopped-to-save-ducks-on-highway/>.

<sup>34</sup> "Emma Czornobaj, who stopped for ducks causing 2 deaths, appeals sentence," CBC News-Montreal, accessed January 9, 2015, <http://www.cbc.ca/news/canada/montreal/emma-czornobaj-who-stopped-for-ducks-causing-2-deaths-appeals-sentence-1.2896005>

<sup>35</sup> Section 384 of the *Quebec Highway Safety Code*, provides that "No person may stop a road vehicle on the roadway of a public highway where the maximum speed allowed is 70 km/h or more, unless in a case of necessity or when authorized to do so by signs or signals." Czornobaj could have been found in violation even if no one had been injured. The deaths turned her actions into a federal crime and not merely a Provincial regulatory offence.

unpunished. No doubt, though, the Quebec legislators had in mind something like the actual outcome of Czornobaj's actions when they drafted and passed that regulatory provision. The compelling argument to the jury was obviously that Czornobaj herself ought to have better anticipated the risks she was creating for the lives and safety of fellow motorists. The triers of fact in Czornobaj's case agreed that her actions sufficiently showed reckless disregard for the lives of André and Jessie Roy. But her case, and indeed the verdict has sparked a great deal of public controversy.<sup>36</sup> It's simply not obvious to everyone that she should be guilty of a crime that warrants incarceration. In this sense, Emma Czornobaj bears some resemblance to Dominic Martin and Leslie MacDonald.

We want to discern whether or not accidentally caused deaths are criminally wrongful deaths. To be wrongful from a legal point of view the deaths must have been caused by culpable conduct. When murderers, rapists, paedophiles, and brutish cement truck drivers are prosecuted and convicted our moral sentiments are often satisfied and our moral intuitions confirmed. But in the vast majority of wrongful death-type cases, only a few of which have been represented here, there is quite simply very little in the way of moral satisfaction or confirmation. We are horrified by the result of needless and senseless death, but we may lack the stomach to call these careless people 'criminals'. We can appreciate more clearly why, even in a case as clear and as satisfying as *Tschetter*, Fraser J would admit that criminal

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<sup>36</sup> Geoffrey Vendeville, "Online Petition Seeks Leniency for Duck-Saving Driver Emma Czornobaj," *Montreal Gazette*, accessed July 15, 2014, <http://www.montrealgazette.com/news/Online+petition+seeks+leniency+duck+saving+driver+Emma/10031277/story.html>

negligence is an exceedingly troublesome area of law to make sense of. It's troublesome, because, unlike murder, the moral or voluntary flaw we intuitively seek in the accused isn't as obvious as we'd like it to be—and with our twenty-first century moral, legal, and political sensibilities, we're loathe, as we should be, to stigmatize and condemn otherwise innocent people.

Discussion about the relationship between law and morality can quickly draw us into some of the most foundational and intractable debates in jurisprudence, but the goal here is not to resolve long-suffering debates among legal positivists, legal realists, and natural lawyers. The goal is simply to assess whether faith healing deaths *can* and *should* lead to guilty verdicts in Canadian courtrooms, and most specifically, guilty verdicts of the more serious charge of criminal negligence causing death. I want to emphasize, again, the need for a mix of descriptive and normative considerations. We must consider legal principles and legal reasoning that have been at work in relatively recent judicial history, but we need to be aware of some of the legal and political facts that may well strain principle in shaping verdicts. To understand the criminal claims I want to make we need to make peace with the conflicted moral intuitions the cases we've surveyed so far leave us with. Criminal negligence is a vexing fault element and it is possible—it *should* be possible—to be guilty of criminal negligence causing death or criminal negligence manslaughter without being as *obviously* guilty as, say, Daniel Tschetter. Proof beyond reasonable doubt that an accused is guilty of criminal negligence should not require sentimental certainty. Convictions need to be morally and legally



*justifiable*, but they need not be characterized by moral *certainty*. Moral certainty is a luxury that is rarely afforded by cases involving criminal negligence.

### Chapter 3: Sketching the Fault Lines in *Tutton*

Having considered some of the challenges of discerning from a moral point of view a culpable homicide, we can turn our attention to something about which no similar ambiguity or vagueness should be acceptable, namely, the required fault element or *mens rea* that must be met to establish criminal liability for such deaths. I do not mean that there hasn't been misunderstanding, disagreement, confusion, and contradiction over this issue in the past. *Tutton* is paradigmatic of all of this. But, if triers of fact are required to discern fault in the evidence provided they need to know what precisely they're looking for and what precisely fault *is*. To make an accurate prediction of how future faith healing deaths might be adjudicated some relevant judicial and legal history needs to be considered. And there's no better place to start than with *Tutton* itself. Of course, the fault debate didn't begin with *Tutton*, but *Tutton* serves as an interesting place to begin because it's in the middle, as it were. From a jurisprudential perspective *Tutton* finds the Supreme Court of Canada trying to decide how to reason about *mens rea* in cases of unintended or 'accidental' harm-doing. But it's not like they had never done this before. The novelty in 1989 was that the SCC was in the midst of trying to reconcile laws and legal doctrine created and developed in a pre-*Charter* era with the new political ethos of *Charter* sensitivity. Laws and judicial reasoning were being revisited and scrutinized to ensure compliance with *Charter* values. *Tutton* is also in the middle inasmuch as the Court was evenly divided on what *mens rea* threshold needed to be met in negligence-based offences like manslaughter and dangerous driving. Don

Stuart referred to the outcome of *Tutton* as exemplifying “deadlock and confusion.”<sup>37</sup> In what follows, we will examine the explanations and justifications of fault in *Tutton* and examine the basic theoretical underpinnings that anchor the two sides of the debate. As we’ll see, the ‘fault line’ is not always a solid line.

### *I*

Many of the important details of *Tutton* were recounted in the preamble, so I won’t rehearse them all here. We know that Christopher Tutton, a diabetic child, died when he was five years old in October, 1981 for lack of insulin. His parents had known he suffered from diabetes for quite some time. When he was first diagnosed in April, 1979 doctors kept him hospitalized for a couple of weeks monitoring the young boy’s condition.<sup>38</sup> Arthur and Carol educated themselves about the implications of diabetes and they tried to understand Christopher’s disorder as accurately as possible. Interestingly, they never withheld any other form of medical care from Christopher in any other noteworthy or evidentiary regard, but they believed in relation to this diabetic condition God was going to intervene.<sup>39</sup> It took about a year and half after the initial diagnosis before they would act on that belief.

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<sup>37</sup> Don Stuart, "Criminal Negligence: Deadlock and Confusion in the Supreme Court," *Criminal Reports* 69, no. 3 (1989).

<sup>38</sup> *Tutton*, 1421, reports Dr. Love was as the presiding physician and indicates that Christopher was kept in hospital “for some weeks.”

<sup>39</sup> This is a legally salient point. It would be probative *if* the Tutttons could provide evidence at trial of numerous other times in which Christopher was ill and they withheld medical treatment in favour of prayer or trust and he recovered in a way that bespoke healing. It would be additionally probative to provide evidence of regular reliance on medical care for other ailments Christopher might have had.

In October, 1980 they deliberately suspended Christopher's insulin injections, but within two days Christopher's downturn was sufficiently alarming that they rushed him to hospital and doctors were able to stabilize him. Arthur and Carol were sternly admonished never to suspend insulin treatments again. They were reminded in no uncertain terms that Christopher's condition was permanent—at any rate, no one had any good reason to think there was a medical cure anywhere on the scientific horizon. While Arthur and Carol educated themselves further on the nature of diabetes, their faith in a divine, *supernatural* cure went undeterred. One year after the first dramatic withdrawal, Carol decided, with apparent inspiration from God, that it was time to trust again in his healing power.<sup>40</sup> There would be no third time, not for Christopher. Christopher died on Saturday, October 17, 1981, four days after his last insulin injection and considerable evidence that his condition worsened after the withdrawal. Both parents were charged with failing to provide the necessaries of life (then s. 197) and with criminal negligence manslaughter (then s. 202).

The Tuttons were convicted at trial, but their convictions were overturned on appeal. Dubin JA, writing for the majority of the Ontario Court of Appeal, held that inaccurate jury instructions were given by the trial judge. According to Dubin JA, the trial judge did not adequately disambiguate the two offences with which the Tuttons were charged, namely, failing to provide the necessaries and criminal negligence manslaughter. The primary confusion, the Appeal Court held, was

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<sup>40</sup> Arthur was not part of the decision to withdraw insulin the second time but when Carol informed her husband about her decision he consented to the course of action she chose.

generated by combining the fault elements for the two offences in the indictment. The Court of Appeal held that the trial judge's instructions created the impression in the minds of jurors that successfully proving the former was, in turn, sufficient evidence of the latter. McIntyre J in *Tutton*, quoted the trial judge's instructions as they were recounted by Ontario Court of Appeal:

“To succeed on this indictment therefore the Crown must satisfy you, beyond a reasonable doubt, of each and every one of these following elements:--

That it was the duty of the Tuttons to provide Christopher with the necessities of life;

*That they omitted to do so without lawful excuse;*

That in omitting to do so they showed wanton or reckless disregard for the life or safety of Christopher;

and that it was that omission or failure which did cause his death.”

and, further, he said:

“Another element which the Crown must establish is that the accused omitted to provide Christopher with insulin and timely medical assistance without lawful excuse. Excuse of course means excuse in law. A lawful excuse might be that the person does not have the money to purchase insulin or that because of some personal or physical incapacity he is unable to obtain the insulin or that he or she did not know how to administer it. It is not a lawful excuse for a person to have religious beliefs that say it is wrong to give insulin or that God has told them that it is not necessary to give insulin to a child. The law of this country is paramount and must be obeyed by everyone without exception. *To sum up then. To succeed on this indictment the Crown must satisfy you, beyond a reasonable doubt. Firstly, that it was the duty of the Tuttons to provide Christopher with the necessities of life, namely his daily injections of insulin and timely medical assistance. That they failed to do so without lawful excuse. That in omitting to do so they showed wanton or reckless disregard for his life or safety. That it was that omission or failure which caused his death.*” [Emphasis in original]<sup>41</sup>

Looking carefully at the instructions it's not difficult to see why the jury returned guilty verdicts. The trial judge essentially foreclosed on the possibility that a lawful

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<sup>41</sup> *Tutton*, 1425.

excuse could be found for withholding Christopher's insulin. Because it was obvious that the withdrawal caused Christopher's death and no lawful excuse for the withdrawal was available, the logical conclusion for the jury was that the Tuttons were guilty as charged.

The Crown appealed to the SCC and the appeal was taken by leave. All six SCC Justices voted to deny the appeal. All favoured new trials for the Tuttons with clearer, more accurate instructions to the jury with regard to the required *mens rea*. All six Justices also agreed that Dubin JA's ruling was not without its own confusion. Dubin JA held that an objective test for criminal negligence was improper in this instance, but he did not affirm that a subjective test for criminal negligence was proper in all instances of criminal negligence. Dubin JA drew the distinction between acts of commission and acts of omission. Positive acts *qua* commissions that constituted wanton or reckless disregard for another's life or safety could be evaluated based on an objective standard, but acts *qua* omissions like those of the Tuttons could only be blameworthy if some subjective test was satisfied. That is, unless the omission discernibly resulted from something subjective, like an awareness of risk or wilful blindness to a harmful risk, fault could not be found. A bit of reflection shows what concerned the SCC, namely, that Christopher's death can be equally well explained either by reference to something his parents did (but ought not have done) or to something his parents didn't do (but ought to have done).<sup>42</sup> Not seeing the distinction the Court of Appeal drew, no one on the SCC was persuaded

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<sup>42</sup> Obviously enough this same reflection can be applied to Daniel Tschetter. Did his actions result in deaths or did his failure to act as he might have or should have result in deaths?

that the offence required two distinct tests.<sup>43</sup> Unfortunately, the Court was evenly divided upon what test *was* required and therefore, upon what advice a jury should be given relating to the *mens rea*.

Let's now focus on the primary disagreement—the deadlock, if not the confusion—that divided the SCC. Dickson CJ and Wilson and La Forest JJ favoured a subjective test for the criminal negligence offence, while McIntyre, L'Heureux-Dubé, and Lamer JJ favoured an objective test. Wilson J described the interpretive challenge thusly:

Section 202 (now s. 219) of the *Code* is, in my view, notorious in its ambiguity. Since its enactment in its present form in the 1955 Amendments to the *Criminal Code* it has bedevilled both courts and commentators who have sought out its meaning. The interpretation put upon it usually depends upon which words are emphasized. On the one hand, my colleague's judgment demonstrates that emphasizing the use of the words "shows" and "negligence" can lead to the conclusion that an objective standard of liability was intended and that proof of unreasonable conduct alone will suffice. On the other hand, if the words "wanton or reckless disregard for the lives or safety of other persons" are stressed along with the fact that what is prohibited is not negligence *simpliciter* but "criminal" negligence, one might conclude that Parliament intended some degree of advertence to the risk to the lives or safety of others to be an essential element of the offence. When faced with such fundamental ambiguity, it would be my view that the court should give the provision the interpretation most consonant, not only with the text and purpose of the provision, but also, where possible, with the broader concepts and principles of the law.<sup>44</sup>

While Wilson J believed the statute was ambiguous she was confident that, in fact, Parliament did intend some degree of advertence to be shown by an accused and

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<sup>43</sup> Christopher's death undoubtedly resulted from the absence of insulin. The omission to give Christopher insulin caused his death. But this is an "ordinary language" gesture at the criminal negligence statute. While it may be obvious that in omitting to do something that was their duty to do, the Tutton's caused Christopher's death, it's not obvious that "wanton or reckless disregard" should have two distinct fault tests.

<sup>44</sup> *Tutton*, 1403-04.

that the broader concepts and principles of law supported a more subjective approach to fault in criminal negligence. Nevertheless, she could see why the ambiguity inspired alternative interpretations and, even why the trial judge held the opinion “that no *mens rea* was required for manslaughter by means of criminal negligence.”<sup>45</sup> Wilson J, defending the view that some subjective element was necessary for conviction, was not blind to the fact that the newly introduced *Charter* might create potential tensions and discontinuities with established doctrine and longstanding precedent. Nevertheless, she denied it was the Court’s responsibility to imagine problems that weren’t there or for Judges to do work that that was not theirs to do. She wrote:

It is my view that the jurisprudence of this Court to date establishes that the criminal negligence prohibited under s. 202 is advertent negligence. I would not hesitate to depart from these precedents for solid reasons but I cannot, with due respect for those who think otherwise, agree that the case for the adoption of an objective standard of liability has been made out to the extent required to justify a departure from this Court’s previous decisions. ... The adoption of an objective standard also creates, in my view, both the potential for a *Charter* violation and uncertainty as to the relevance of factors subjective to the accused under the new objective standard.<sup>46</sup>

She went on:

Should social protection require adoption of an objective standard it is open to Parliament to enact a law which clearly adopts such a standard. In my respectful view this Court should not do it for them.<sup>47</sup>

Wilson J also did not deny that an objective standard *of a sort* would be necessary to discern the subjective element of “advertent negligence.” She took advertent

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<sup>45</sup> Ibid., 1399.

<sup>46</sup> Ibid., 1410-11.

<sup>47</sup> Ibid., 1414.



negligence to consist of a minimal awareness of the endangering risks to others. She referred to the jurisprudential work of Glanville Williams who defended the “important evidentiary use of objective standards in determining the mental state of mind.”<sup>48</sup> Clearly, the point Wilson J seeks to draw out is that legally relevant mental states are indeed *internal* to a subject and, therefore, must be inferred from something more observable, in a word, more ‘objective’. This kind of explanation can be easily seen by considering the words of (then) Justice Dickson in the benchmark 1978 ruling, *Sault Ste. Marie*, where the SCC made valuable clarifications to various offences and their fault requirements:<sup>49</sup>

Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an *inference from the nature of the act committed*, or by additional evidence.<sup>50</sup> (emphasis added)

A positive state of mind can be lawfully ascribed or attributed to an accused in virtue of “the nature of the act committed.” That is, *mens rea* consisting of a mental state (a subjective and invisible thing) is inferred from a variety of contextual,

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<sup>48</sup> Quoted in *Tutton*, 1411.

<sup>49</sup> *R. v. City of Sault Ste. Marie* [1978] 2 S.C.R. 1299. [Hereafter, *Sault Ste. Marie*] The reverberations of this pre-*Charter* ruling have been substantial. In it, Dickson J outlined the fault elements for offences described as true crimes, strict liability offences, and absolute liability offences. True crimes require sufficient evidence of action done intentionally, knowingly, or recklessly. The ruling helped cement the traditional view that only positive states of mind could suffice as *mens rea*. Dickson J created the space for future disagreement and debate, however, by saying of public welfare offences that they are “not subject to the presumption of full *mens rea*.” (1327) This opens the door to a theory of *mens rea* that does not presume or necessarily include only positive states of mind. Professor Stuart admits of *Sault Ste-Marie* that it has “serious weaknesses”, but he adds, “it deserves the highest commendation as one of the most comprehensive and comprehensible efforts in any jurisdiction to arrive at an integrated and principled approach to a difficult problem.” Don Stuart, *Canadian Criminal Law: A Treatise*, 5th ed. (Scarborough, ON: Thomson Carswell, 2007), 181.

<sup>50</sup> *Sault Ste. Marie*, 1325.

observable, and otherwise behavioural features (objective things). This doesn't mean the *mens rea* (the fault element) is exclusively inferred from the *actus reus* (the conduct element), but the *actus reus* seen in the context of observable and public social interactions, speech, and other available features of the offending act, are the basis upon which mental states are ascribed or attributed to an accused.

Opposing Wilson J et al., was the objectivist wing led by McIntyre and Lamer JJ. McIntyre J concedes that normally, consideration of subjective features (mental states) is necessary for the attribution of fault, but negligence is both a different species of mental state and also a different basis for fault. He writes:

Our concept of criminal liability relies primarily upon consideration of the mental state which accompanies or initiates the wrongful act, and the attribution of criminal liability without proof of such a blameworthy mental state raises serious concerns. Nonetheless, negligence has become accepted as a factor which may lead to criminal liability and strong arguments can be raised in its favour.<sup>51</sup>

The criminal negligence statute provides a perfect example of the kind of exception that is justifiably and lawfully made. McIntyre J continues:

... it must be observed at once that what is made criminal is negligence. Negligence connotes the opposite of thought-directed action. In other words, its existence precludes the element of positive intent to achieve a given result. This leads to the conclusion that what is sought to be restrained by punishment under s. 202 of the *Code* is conduct, and its results. What is punished, in other words, is not the state of mind, but the consequence of mindless action. ... In criminal negligence, the act which exhibits the requisite degree of negligence is punished. If this distinction is not kept clear, the dividing line between the traditional *mens rea* offence and the offence of criminal negligence becomes blurred.<sup>52</sup>

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<sup>51</sup> *Tutton*, 1429.

<sup>52</sup> *Ibid.*, 1430.

He goes on:

The test is that of reasonableness, and proof of conduct which reveals a marked and substantial departure from the standard which could be expected of a reasonably prudent person in the circumstances will justify a conviction of criminal negligence.<sup>53</sup>

McIntyre J agreed in part with the trial judge's reasoning, but only with his approach to the defence of mistake of fact. The Tutttons argued at trial that they believed that Christopher was healed, explaining as an excuse their decision not to provide insulin. Had they been right Christopher would still be alive and no charges would have been brought. Their mistake about the facts of the matter was sincerely made. However, the trial judge instructed the jury that the sincere belief that Christopher had been healed would not be sufficient to exculpate the parents. The sincerely mistaken belief would need to have been *reasonably* held as well—and recall the trial judge made it perfectly clear how unreasonable *he* took their belief to be. McIntyre J held, “The jury”—*not the judge*—“would have to consider whether such belief was honest and whether it was reasonable. In this they would be required to consider the whole background of the case.”<sup>54</sup> In other words, the trier of fact is responsible to determine the reasonableness of a belief. It is not for a judge to *tell* a jury an accused's belief is unreasonable or otherwise.<sup>55</sup> Additionally, proper application of the objective test would entail a full assessment, including both the

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<sup>53</sup> Ibid., 1431.

<sup>54</sup> Ibid., 1433.

<sup>55</sup> Recall the words of the trial judge: “It is not a lawful excuse for a person to have religious beliefs that say it is wrong to give insulin or that God has told them that it is not necessary to give insulin to a child.”

reasonableness of the accused in the circumstances and the reasonableness of the specific belief that caused the harm.

Lamer J largely agreed with McIntyre J in endorsing an objective test for criminal negligence. Interestingly, he reads the statute very differently from Wilson J and presumes rather definitively that Parliament intends an objective test be applied to s. 202 and, further, when the Parliamentary intention is being applied, “a generous allowance” must be made “for factors which are particular to the accused, such as youth, mental development, education.”<sup>56</sup> As we shall see in the following chapter, Lamer J’s concession about “generous allowances” to the application of the objective standard will become one of the most frequently quoted and most disputed features of the evolving objective standard. What contribution such “allowances” should make in assessing the fault of the accused is not obvious. In spite of Lamer J’s confidence that an objective test is evident in the wording of the statute, some legal scholars evidently agree that Wilson J is closer to the mark, at least as she assesses Parliament’s intentions. Regarding the absence of clear legislative definitions, Kent Roach writes:

In Canada, confusion about *mens rea* continues because Parliament has not clearly and consistently defined fault elements such as ‘purposely,’ ‘knowingly,’ ‘recklessly,’ or ‘negligently’ or specified what particular fault element applies for each offence. ... As a result, the fault element must still be inferred from the legislative definition of each separate offence.<sup>57</sup>

Similarly, Don Stuart writes:

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<sup>56</sup> Ibid., 1434.

<sup>57</sup> Roach, *Criminal Law*: 142-43.

In the Canadian context, given that there is a constitutional requirement of fault for any offence threatening the liberty interest, the only real issue is what the fault requirement actually entails. Jurisprudence on fault, both as a matter of common law and *Charter* interpretation, is still in a state of flux. There is considerable ambiguity and confusion about definition. A central issue continues to be whether the approach is subjective or objective.<sup>58</sup>

In a tidy bit of irony, Lamer J would conclude his opinion in *Tutton* with the claim that in instances of criminal negligence the standard will be roughly the same, regardless of what designation it's given in application. He writes:

... When this is done, [viz., generous allowances are made for particularities of the accused] as we are considering conduct which is likely to cause death, that is a high risk conduct, the adoption of a subjective or of an objective test will, in practice, nearly if not always produce the same result.<sup>59</sup>

So, the battle lines are drawn, and not without a great deal of qualification.

Should negligence-based offences consider primarily what the *accused* was *thinking* and *doing* or what the accused *ought* to have been thinking and doing? The subjectivist wing of the Court believed that a *necessary condition* of the *Tutton*'s criminal culpability was some advertence to the ways in which they were jeopardizing Christopher's life and safety. That is, wanton or reckless disregard for Christopher's life or safety would somehow *need* to be provably found 'in' the psychological dispositions of the parents. The objectivist wing of the Court believed that a *sufficient condition* for meeting the requirement of *mens rea* was proof of a marked and substantial departure from an objective standard of reasonableness. Beyond a psychological capacity to have conformed one's conduct to this external

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<sup>58</sup> Stuart, *Canadian Criminal Law: A Treatise*: 164.

<sup>59</sup> *Tutton*, 1434.

standard, no additional subjective criminal elements need be proven.<sup>60</sup> Provided it could be shown that the Tuttons markedly failed to behave as reasonable people would in similar circumstances, then wanton or reckless disregard for Christopher's life or safety would, with lawful satisfaction, be shown.

## II

Someone less familiar with the long tradition of doctrinal disagreement could wonder how highly educated women and men arrive at such incongruous views about such a crucial dimension of criminality. With the potential criminalization and incarceration at stake, people charged with these types of offences (viz., negligence-based offences) rightfully deserve to know precisely what they have done wrong and why the Crown thinks their alleged wrongdoing is indeed culpable. People like

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<sup>60</sup> This is an important proviso and the Court acknowledged it by referencing the work of H.L.A. Hart. See H.L.A. Hart, "Negligence, *Mens Rea* and Criminal Responsibility," in *Oxford Essays in Jurisprudence*, ed. A.G. Guest (Oxford, UK: Clarendon Press, 1961). Suppose faith healing parents were found to be mentally deficient or otherwise not mentally capable of distinguishing between belief and reality. These subjective considerations could be completely exculpatory. Alan Brudner claims it's important when dealing with religious harm doers to distinguish between varieties of hallucination. We could easily be persuaded that Carol Tutton was "hallucinating" when she thought God was talking with her about Christopher's healing. The hallucination might have been beyond her control, making it wrong to attribute criminal liability for a harm caused *while* hallucinating. But, one could reasonably ask if she was hallucinating for the full four days leading up to Christopher's death or just when she heard God's voice. If she experienced some serious psychotic break evidence by her belief that God was really talking to her, she would still be morally responsible for her actions after the strong hallucination had lifted. Brudner writes: "... there may be a way of distinguishing the psychotic who knowingly commits a wrong in obedience to a divine voice he 'hears' from the fanatic who subordinates public rights of agency to private religious inspiration. If the defendant's disorder is of a kind (a matter of expert evidence) that deprives him of the ability to distinguish between private inspiration or dictate of conscience and a public command from the sovereign of sovereigns, then he is in the same position as the man who kills in the insane belief he is the King's public executioner." Alan Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice* (Oxford, UK: Oxford University Press, 2009), 85. Carol Tutton would obviously believe that she is being asked to obey and that the obedience is hers to freely give or refuse. If she withholds obedience and continues to give Christopher insulin she will feel the guilt of not being a good Christian. She'll believe she could have done otherwise. The truly delusional person, without the rational capacity to choose otherwise is the person who can't distinguish between a private belief and a public voice. God's voice is truly not different from voice of some other awe-inspiring authority.

the Tuttons, and even Dominic Martin and Leslie MacDonald, know that the criminal law seeks to hold them to account in the deaths of their dependents. Their uniform opening defence might be that hindsight obviously shows they acted in a way that caused the death of their loved one, but they would insist their actions shouldn't warrant criminal liability. The very last thing they meant to do was harm anyone, let alone *kill* anyone. In short, the result itself—tragic as it may be—should not be the only determinant of fault. Criminalization, intuition tells us, ought to capture a particular kind of moral wrongfulness from which it seems accidental and unintentional deaths are excluded. They are excluded because they don't have that special ingredient that often marks the border between private or tort wrongs and more serious and public criminal wrongs. We could call this ingredient, 'mindfulness'. Surely, no one should face serious criminalization without a sufficient measure of criminal mindfulness—and faith healers would argue they don't have it. Faith healers, along with people like Dominic Martin, will concede that their actions make them *causally* responsible for a death, but without proof of something more criminally mindful, no liability should attach.

This intuition finds expression in the venerable Latin maxim, *actus non facit reus nisi mens sit rea*, ('there is no guilty act where there is no guilty mind'). No doubt, this is one of the "broader concepts and principles of the law" that Wilson J and her subjectivist colleagues thought should inform an understanding of the *mens rea* of criminal negligence. Jeremy Horder says of the maxim, it "is rightly regarded as one of the most important common law principles of criminal liability. It is, however, a highly abstract principle. Beyond saying that a man's mind must be

guilty if he is to be criminally liable for his conduct, the principle does not go.”<sup>61</sup> Don Stuart says even less optimistically of the maxim that it is “time honoured but not necessarily helpful.”<sup>62</sup> This ambivalence mirrors well the controversy especially evident in negligence-based offences. The important and time honoured principle invites the belief that something somehow ‘in the mind’ of the accused is necessary for any serious or true criminal conviction. This doctrinal commitment to mind-related evidence has created problems and disagreements in jurisprudence generally, but they’re particularly problematic in the context of negligence-based offences because few people have thought that the concept of negligence positively describes a state of mind. If the doctrine is going to be applied faithfully, then the implications are quite stark. For example, at least two legal theorists have argued to keep negligent *qua* careless harm-doing out of the criminal realm completely.

Renown jurist, J.W.C Turner wrote in 1936:

'Intention' describes the state of mind of the man who not only foresaw, but also desired the possible' consequences of his conduct. 'Recklessness ' describes the state of his mind if he foresaw those consequences, although there is no evidence that he desired them; he may have been indifferent to their ensuing, or he may even have hoped that they would not ensue, but he knowingly took the risk of their ensuing. 'Negligence' indicates the state of mind of the man who acts without adverting to the possible consequences of his conduct; he does not foresee those consequences. The word further indicates that he is in some measure in fault, and that we should expect an ordinary, reasonable, man to foresee the possibility of the consequences and to, have regulated his conduct so as to avoid them. It is, however, submitted with emphasis that although this negligence may be blameworthy and may

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<sup>61</sup> Jeremy Horder, "Two Histories and Four Hidden Principles of Mens Rea," *Law Quarterly Review* 113(1997): 95.

<sup>62</sup> Stuart, *Canadian Criminal Law: A Treatise*: 1.



ground civil liability, it is at the present day not sufficient to amount to *mens rea* in crimes at common law.<sup>63</sup>

In addition, Jerome Hall published in 1963 a similarly seminal article, *Negligent Behavior Should Be Excluded from Penal Liability*.<sup>64</sup> Hall's worry, shared by Turner, was that imposing liability for negligently (i.e., inadvertently) caused harms is akin to strict liability—something justifiable in civil law but morally unacceptable to modern criminal law.<sup>65</sup> We'll call this the classical subjectivist position; i.e., the position that demands a rather literal reading of the venerable Latin maxim. *Mens rea* must pick out a culpable mental state that is causally responsible for the *actus reus* and if insufficient proof can be discerned of this mindful state then no conviction is justifiable. Echoing very similar legal and moral concerns, Wilson J in *Tutton* said she thought criminal negligence required sufficient evidence of advertence to the risk of harm. Let's be reminded. Wilson J held:

I do not, however, agree with my colleagues' conclusion that criminal negligence under (then) s. 202 of the Criminal Code, R.S.C. 1970, c. C-34, consists only of conduct in breach of an objective standard and does not require the Crown to prove that the accused had any degree of guilty knowledge.<sup>66</sup>

There is more to parse in Wilson J's comment than might first appear. She could be saying that the fault standard makes breach of an objective standard *necessary* but

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<sup>63</sup> J.W.C. Turner, "The Mental Element in Crimes at Common Law," *Cambridge Law Journal* 6, no. 1 (1936): 39.

<sup>64</sup> Jerome Hall, "Negligent Behavior Should Be Excluded from Penal Liability," *Columbia Law Review* 63(1963).

<sup>65</sup> Hall's defence of Turner came shortly after H.L.A. Hart's critique of Turner and his subsequent defence of criminal negligence in Hart, "Negligence, *Mens Rea* and Criminal Responsibility."

<sup>66</sup> *Tutton*, 1401.

not *sufficient* for liability. In addition to an objective breach, she might be saying that proof of “guilty knowledge” is needed. She could also be saying that breach of an objective standard is irrelevant and that “guilty knowledge” alone will suffice for establishing *mens rea*. Some clarification is provided in what followed:

By concluding that (the criminal negligence offence) prohibits conduct and the consequences of mindless action absent any blameworthy state of mind, they have, in effect, held that the crime of criminal negligence is an absolute liability offence. Conviction follows upon proof of conduct which reveals a marked and substantial departure from the standard expected of a reasonably prudent person in the circumstances regardless of what was actually in the accused's mind at the time the act was committed.<sup>67</sup>

Here is the less ambiguous expression of her subjectivist interpretation of criminal negligence—a view that is consistent with the theoretical views of Turner and Hall. In other words, she is saying that if an objective breach is sufficient for culpability then the statute certainly does turn into an absolute liability offence. The general worry of classical subjectivists like Turner and Hall is that criminal punishment should only be visited upon those who, in some robust sense, psychologically authorized the harm they caused. Negligently *qua* inadvertently caused harm is not sufficiently authorized. Considering Dominic Martin once again, we might hear him capture this intuition by saying, “I authorized something that fateful day, namely, going to work on time. But, I didn’t authorize the risk to which I exposed my daughter.” To punish such a person for his harm-doing would be to punish an innocent person, to punish a person for results he was in no way committed to.

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<sup>67</sup> Ibid.

Jurists who demand subjective fault for serious crimes feel they have fixed upon the fault criterion that most scrupulously protects innocent people against false convictions and most faithfully upholds the venerable Latin maxim. A corollary of this concern about protecting innocence would also ensure that people could not be punished solely because society or some political authority thought the mere causation of a particularly bad result deserved it. On this classical rendering of fault, the only way to merit punishment is to have done a prohibited act with a correspondingly *faulty* mental state.<sup>68</sup>

This commitment to a subjective test of fault in criminal negligence is still defended by some in contemporary jurisprudence. Claire Finklestein agrees with the classical view espoused by Turner and Hall that negligence *qua* inadvertence “is incompatible with traditional principles of criminal responsibility.”<sup>69</sup> She concedes:

Turner’s position is no longer seriously defended. Most criminal commentators now seem to accept liability for negligence in at least some form. In my view, however, Turner had the better position, even if he lacked compelling arguments for it.<sup>70</sup>

Alan Brudner is a staunch defender of crucial elements of subjectivism, although the subjectivism he claims to defend is “moderate.”<sup>71</sup> The view that he puts forward covers all serious crimes and along with Finklestein, Hall, and Turner, he too denies

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<sup>68</sup> I would like to use the word “corresponding” in a nontechnical sense, but it is important to acknowledge that Jeremy Horder (in *Two Histories*) critiques Turner’s subjectivism for, amongst other things, employing an unjustifiable “correspondence principle”; that is, the principle that makes correspondence between *actus reus* and (subjective) *mens rea* essential to criminal liability.

<sup>69</sup> Claire Finklestein, “Responsibility for Unintended Consequences,” *Ohio State Journal of Criminal Law* 2, no. 2 (2005): 581.

<sup>70</sup> *Ibid.*, 580.

<sup>71</sup> Brudner, *Punishment and Freedom: A Liberal Theory of Penal Justice*: 59.

criminal liability for inadvertent harms. Expressing his subjectivist credentials, he holds:

A punishable wrongdoer must have intentionally interfered with another agent's freedom of choice or knowingly risked such an interference; inadvertent interferences are insufficient.<sup>72</sup>

So, let's be perfectly clear. On this more literal understanding of the venerable Latin maxim, penalizing inadvertent harm-doing is always unjustifiable. There may be justification for statutes variously referred to as "criminal negligence" or "gross negligence", but the standard of fault is something more than mere inadvertence and something more than a simple failure to act in a way that society would prefer. As Wilson J indicates, there must be some advertence to the risk being taken, something akin to recklessness or wilful blindness. And, as (then) Dickson J said just prior to *Charter*-era jurisprudence in *Sault Ste. Marie*, this advertence "must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence."<sup>73</sup> In other words, classical subjectivists are undaunted by what they take to be an unrealistic and unnecessary obligation to 'show' the un-showable, namely, an invisible mental state. Subjectivists, especially like Dickson and Wilson JJ, needn't be shackled with the now age-old criticisms against metaphysical dualism—even if it is the case that some classical subjectivists, like many in a bygone era, may have been Cartesian dualists themselves. Subjectivism needn't be rejected just because few people these days believe in a Descartes' immaterial soul or *res cogitans*, and thereby think it unverifiable. Hard-

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<sup>72</sup> Ibid.

<sup>73</sup> *Sault Ste. Marie*, 1325.

bitten physicalists believe that mental states (i.e., beliefs, desires, emotions, etc.) are explained, or *explainable* in theory, in terms of neurophysiological brain states.

From a more pragmatic legal point of view, people can avail themselves of this kind of physicalism or they could likewise contend that justifiable evidence of mental states is inferable from behaviour. There are a wide variety of scientifically robust options open to the jurist to justify his or her commitment to subjective tests for fault.

### III

There is obviously a great deal more that could be said in defence of the subjectivist rendering of the venerable Latin maxim, but let's turn our attention to the plausible theoretical underpinnings of the objectivist wing of the Court in *Tutton*. We'll press into service George Fletcher's *Basic Concepts of Criminal Law* to provide the theoretical foil to subjectivism.<sup>74</sup> Fletcher does not just deny that criminal negligence should have a subjective test for fault; he argues that there is something generally amiss with thinking of any *mens rea* exclusively in terms of something 'mindful'. In common legal idiom, an accused can be 'found' guilty or 'found' not guilty, but that common idiom can be misleading. Rather than thinking of guilt or culpability as something dependent upon a guilty mind, Fletcher defends a broader conception of 'finding fault'. We actually 'attribute' or ascribe fault to an accused through criminal proceedings. He describes it this way:

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<sup>74</sup> George P. Fletcher, *Basic Concepts of Criminal Law* (New York, NY: Oxford University Press, 1998).

The ‘attribution’ captures the idea of bringing home the crime to the offender and holding the offender responsible for the crime. *Attribution* signifies an active social and legal process. Attributing or imputing the wrongdoing to a suspect means that we hold him or her accountable, answerable, liable, and punishable for a particular instance of wrongdoing.<sup>75</sup>

Subjectivist adherents to the venerable Latin maxim may not quarrel with what Fletcher says here about attribution, but they also want to emphasize the essential role that culpable mental states play in attributing wrongdoing. Liability, the subjectivist insists, requires proof that the offending wrong was done with a correspondingly culpable mental state. On Fletcher’s account, though, this is a gross over-simplification. The venerable Latin maxim both says too much and too little—as, perhaps, most maxims do.

According to Fletcher, attribution entails three legs of criminal inquiry: (1) Was there an offending *action* attributable to a person?; (2) Did the accused *cause* the harm that grounds the offence?; (3) Can blame or *culpability* be attributed to the accused in virtue of his or her actions? Fletcher’s third leg of inquiry addresses issues already raised by the previous two: “whether the action producing harm can be attributed to the suspect as a culpable or blameworthy action.”<sup>76</sup> He writes:

Two broadly different approaches have emerged to solve the last and most difficult inquiry about attribution. Each of these two approaches gives a different twist to the terms ‘culpability,’ ‘blameworthiness,’ and ‘mens rea.’ The interpretations are radically different, to be sure, but they are masked by a single set of terms to describe the question they pose and the solutions they offer. I shall refer to these as the ‘psychological’ and the ‘moral’ theories of attribution.<sup>77</sup>

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<sup>75</sup> Ibid., 81.

<sup>76</sup> Ibid., 82.

<sup>77</sup> Ibid.

The psychological theory is most closely aligned with the subjectivist view. In reference to this conventional psychological approach, Fletcher writes:

The theory of attribution at work here seems to be that if the crime is mirrored in the consciousness of the actor, then he is accountable or responsible for that which his actions produce. . . . The suspect's state of mind, therefore is the key to attribution. The terms 'culpability' and 'mens rea' are interpreted accordingly to imply that if the actor has the appropriate mental state, he can be held accountable for his action or the 'actus rea.'<sup>78</sup>

So, here we see the psychological approach at the heart of why Turner, *et al* cannot justify condemning the harmful actions of the merely inadvertent. Though two legs of criminal attribution can almost always be satisfied in cases of negligent harm-doing, the final leg cannot. If the crime is *not* mirrored in the mind of the accused then there can be no offence. While this psychological approach might conform well to some of our intuitions and might enjoy support from a numerous jurists, Fletcher believes it is mistaken. He prefers the alternative approach—*his* alternative approach, at any rate—what he calls the 'moral' approach, to attribution. Fletcher writes:

The question is not whether the crime is mirrored in the mind of the actor, but whether, regardless of the images that transpire in the actor's consciousness, he or she can be fairly blamed for committing the wrongful act. The approach is not descriptive but evaluative. Attribution of the wrongful act is not posited solely on the basis of particular facts but on the basis of social and legal evaluation of all the facts bearing on whether the actor can be properly blamed for the crime.<sup>79</sup>

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<sup>78</sup> *Ibid.*, 82.

<sup>79</sup> *Ibid.*, 83.

This approach to culpability considers far more than what the harm-doer was thinking but attempts to evaluate those and other facts in a broader social and moral context. One immediate advantage of Fletcher's more holistic, more objective approach in terms of assessing culpability for unintentional deaths is that the trier of fact is not restricted to looking at the direct evidence (behavioural or otherwise) of the accused's psychological states. In Fletcher's words, there can be fault in *not* knowing, in *not* having positive mental states toward potentially harmful actions.<sup>80</sup> If, following the appropriate social and legal evaluation, it is decided that the accused ought to have acted otherwise, then criminal fault can be justifiably attributed to the negligent *qua* careless wrong-doer. With some confidence, I think, we can say this is the theoretical basis that motivated the objectivist wing in *Tutton*.

Analysing whether or not the psychological approach to the attribution of criminal fault is as wholly deficient as Fletcher argues is beyond the scope of this study. In this chapter we are concerned with why intelligent, informed jurists would choose to reject or revise the more traditional approach to the venerable Latin maxim, particularly as it relates to the criminal negligence statute. From this alternative perspective the offence of criminal negligence entails no necessary connection to positive criminal mental states like recklessness or wilful blindness. Furthermore, it sees nothing fundamentally unjust in punishing a person because society discerned that more (or better) could have been expected from him in the circumstances in which he caused harm. A person's harmful actions may be justly punished if, all things considered, they represent a sufficiently substantial departure

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<sup>80</sup> "Fault of Not Knowing," *Theoretical Inquiries in Law* 3, no. 2 (2002).



from a fair and lawful standard. The objectivist, or following Fletcher, the 'moralist', with respect to criminal negligence says that punishment is justified when the causation of harm is something beyond the pale in terms of what a reasonable, normal person does.

## Chapter 4: Modifications to the Objective Standard

Our abiding question is whether criminal fault of a rather serious sort can be attributed to faith healers when their religious beliefs result in the death of a loved-one. This chapter will examine the details of five additional Supreme Court rulings from 1989 to 2008 to get a clearer sense of the evolution of judicial reasoning on fault in negligence-based offences. We will see the SCC wrestle with many of the theoretical and doctrinal concerns expressed in the previous chapter. As well, we'll see the SCC at pains, in the bright light of *Charter*-era scrutiny, to protect an accused from the potential insensitivity of objective standards of fault. The first ruling we'll look at was handed down concurrently with *Tutton*.

### ***R. v. Waite, [1989]***

On the afternoon and early evening of September 4, 1984, Michael Waite and some friends had been drinking beer together at a Fair in a rural Ontario town.<sup>81</sup> At about 8:20 that evening, the Bethel Mennonite Church commenced a hayride for approximately forty to fifty of its young people, with three wagons each pulled by a farm tractor along a paved public road. Waite, still drinking beer in his vehicle with his friends, followed the hayride for a while and then elected to pass the three wagons in the left lane. While it was reported that some participants of the hayride were walking alongside the wagons moving freely from wagon to wagon, neither

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<sup>81</sup> R. v. Waite, [1989] 1 S.C.R. 1436. [Hereafter *Waite*] The following narrative is constructed from the facts reported in *Waite*, 1439-40.

Waite nor any of his companions reported seeing anyone walking anywhere on the road. Waite proceeded down the highway some distance before turning around to head back in the direction of the hay ride. He would later confess to saying to his buddies, "Let's see how close we can get." A friend reported that Waite said, "Let's play chicken." The sun was sufficiently set to require headlights but fog lights alone were operating at the time of the incident. Driving in the left hand lane straight toward the oncoming hayride, Waite admitted that he was probably travelling about 70 miles per hour—20 miles per hour faster than the posted 50 mph limit. Evidence gathered from the crash site indicated that Waite may have been travelling as fast as 90 mile per hour. At a distance of about 150 feet, Waite swerved his vehicle back into the proper right hand lane where he struck five participants who had been running alongside the hay wagons, killing four of them instantly, injuring another. Immediately following the collision, Waite stopped his vehicle to get rid of a cooler of beer being kept in the trunk. His blood alcohol content (BAC) was reported to be about .110 to .112—a little more than 20% higher than the .08 legal limit. He insisted that he was unaware of any pedestrians in *his* lane—the lane in which his vehicle was travelling when he struck the victims.

Michael Waite was charged with four counts of causing death by criminal negligence and one count of causing harm by criminal negligence. Before the jury rendered its verdict they wanted to be very clear about the difference between criminal negligence and the lesser offence available to them, namely, dangerous

driving.<sup>82</sup> The trial judge instructed the jury the *mens rea* required for dangerous driving was objective, while the *mens rea* for criminal negligence was subjective. The subjective test entailed the “deliberate and wilful assumption of risk.”<sup>83</sup>

Waite was acquitted of all criminal negligence charges but found guilty of five counts of the less serious regulatory offence of dangerous driving. The Crown successfully appealed to the Ontario Court of Appeal on the grounds that the trial judge’s instructions misrepresented the subjective element and that an objective standard ought to have been applied in any event. New trials were ordered. Waite subsequently appealed to the Supreme Court of Canada arguing that the Court of Appeal erred in holding that an objective test was sufficient for criminal negligence. The SCC dismissed Waite’s appeal.

That the SCC would elect to rule on both *Tutton* and *Waite* together is not surprising as the questions before the Court were virtually identical. Just as in *Tutton*, Dixon CJ, Wilson, and La Forrest JJ took a primarily subjective approach to criminal negligence, while McIntyre, L’Heureux-Dubé, and Lamer JJ thought the test was objective. In *Waite*, the Justices were unanimous, however, in disagreeing with the trial judge’s instruction to identify criminal negligence with the “deliberate and wilful assumption of risk.” One might take a more subjective approach to criminal

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<sup>82</sup> Specifically the relevant portions of the *Criminal Code* read as follows: s. 233. (1) Every one commits an offence who operates (a) a motor vehicle on a street, road, highway or other public place in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place; 233. (4) Every one who commits an offence under subsection (1) and thereby causes the death of any other person is guilty of an indictable offence and is liable to imprisonment for a term not exceeding fourteen years.

<sup>83</sup> *Waite*, 1442-43.

negligence (i.e., prefer some degree of advertence) but deny that the necessary mental element is “a deliberate and wilful assumption of risk.” Wilson J held:

Although I believe there is a subjective element to criminal negligence, the judge in this case placed much too high an onus on the Crown to prove elements of deliberation and wilfulness. For the reasons I gave in *R. v. Tutton* I am of the view that the mental element in criminal negligence is the minimal intent of awareness of the prohibited risk or wilful blindness to the risk.<sup>84</sup>

McIntyre J argued that there would have been no problem with the trial judge’s instructions had he stopped short of saying that the *mens rea* was the “deliberate and wilful assumption of risk.” McIntyre J conceded there is a minimal mental element involved in the test for criminal negligence, but the crucial hurdle is the objectivity of the marked and substantial departure from the behaviour of a reasonable person. He wrote:

[the trial judge] was telling the jury that the *mens rea* required for proof of the commission of the offence could be found in the conduct of the accused. He did not mention specifically the test which has become accepted in this and most appellate courts in Canada, to the effect that criminal negligence is shown where the Crown proves conduct on the part of the accused which shows a marked and substantial departure from the standard of behaviour expected of a reasonably prudent person in the circumstances.<sup>85</sup>

### ***R. v. Hundal, [1993]***

On a wet and drizzly Vancouver afternoon Surinder Hundal was driving a dump truck east bound on Nelson Street. Traffic lights governed every intersection along the way on this busy downtown corridor and congestion was increasing on

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<sup>84</sup> Ibid., 1438.

<sup>85</sup> Ibid., 1442.

the verge of rush hour. An observer who had been coincidentally following Hundal for about twelve blocks reported that the truck had already gone through one intersection as a light was turning red. When Hundal approached the intersection at Cambie Street he believed the traffic light had turned yellow, but that he did not have time to stop the large vehicle carrying a heavy load. Instead he sounded his truck horn and without braking proceeded through the intersection at a speed of 50 to 60 kilometres per hour. A southbound vehicle on Cambie had already proceeded well into the intersection on what all witnesses agreed was a green light, where it was broadsided by Hundal's truck, killing the driver instantly. Witnesses testified, contrary to Hundal's claim, that the light governing the flow of traffic on Nelson had been red for about a second before Hundal entered the intersection.<sup>86</sup>

Hundal was charged with and convicted of dangerous driving causing death, a violation of s. 233 (now s. 249) of the *Criminal Code*—the same offence Michael Waite had been convicted of years earlier. The trial judge, after considering all the surrounding conditions, found Hundal's behaviour "represented a gross departure from the standard of care to be expected from a prudent driver."<sup>87</sup> Hundal appealed to the BC Court of Appeal on the grounds that the offence of dangerous driving required the Crown to prove that the accused *knew*, under all the circumstances, his driving to be dangerous. Hundal insisted that he perceived the light to be yellow, not red, and that he believed he could not stop his heavy vehicle under the wet road

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<sup>86</sup> R. v. *Hundal*, [1993] 1 S.C.R. 867. [hereafter *Hundal* ] The preceding narrative was constructed from the facts reported in *Hundal* at 876-877.

<sup>87</sup> *Ibid.*, 878.

conditions. He had no choice but to proceed through the intersection. While he knew his driving was not ideally safe, he certainly did not think his driving was dangerous. And he certainly did not anticipate killing anyone. These were the thoughts that governed his actions, so he claimed.

Hundal was unsuccessful in his appeal to the BC Supreme Court. Two Justices of the three-member appeal court found that “proof of a marked departure from the norm was sufficient to sustain a conviction for dangerous driving without any express finding of advertent negligence.”<sup>88</sup> In other words, the majority held that it did not matter what Hundal was thinking or believed as he drove through the intersection. What mattered was how Hundal’s driving compared to the reasonably prudent driver in similar circumstances. Hundal appealed to the SCC and the Court agreed in large measure with the BC Court of Appeal’s ruling and unanimously dismissed Hundal’s appeal. Cory J wrote for the majority, and McLachlin and La Forrest JJ each gave concurring opinions.<sup>89</sup> Two concerns occupied the Court. As in *Tutton and Waite* four years earlier, the crucial issue was “whether there is a subjective element in the requisite *mens rea* which must be established by the Crown.”<sup>90</sup> The SCC also addressed a constitutional concern. Hundal claimed that if the Crown was not required to prove a subjective element to secure a conviction then the prison sentence associated with the offence would violate his s. 7 *Charter*

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<sup>88</sup> *Ibid.*, 878.

<sup>89</sup> Interestingly, it was Cory JA, (as he was then), who wrote the opinion for the Ontario Court of Appeal in *Waite*.

<sup>90</sup> *Hundal*, 876.

rights. In a Reference case in 1985, a BC law providing for imprisonment for violation of an absolute liability offence, was held to have no force or effect because it was inconsistent with s. 7 *Charter* rights.<sup>91</sup> Cory J *et al* were not persuaded Hundal's rights were similarly threatened. He wrote:

Certainly every crime requires proof of an act or failure to act, coupled with an element of fault which is termed the *mens rea*. This Court has made it clear that s. 7 of the *Canadian Charter of Rights and Freedoms* prohibits the imposition of imprisonment in the absence of proof of that element of fault. ... Depending on the provisions of the particular section and the context in which it appears, the constitutional requirement of *mens rea* may be satisfied in different ways. ... In the appropriate context, negligence can be an acceptable basis of liability which meets the fault requirement of s. 7 of the *Charter*.<sup>92</sup>

*Hundal's* other considerable contribution to the discussion of negligence-based offences is found in the Court's reference to "modified objective test." Cory J clearly had a positive view of such a notion as evidenced by his claim that "an objective test, or more specifically a modified objective test, is particularly appropriate to apply to dangerous driving."<sup>93</sup> Under closer scrutiny it is difficult to see a clear distinction between the objective test defended by half the Court in *Tutton* and its modified form elucidated in *Hundal*. In application to the offence of criminal negligence, McIntyre J said in *Tutton* that the objective test should not be

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<sup>91</sup> Writing for the majority, Lamer J held that in Canada's *Charter* era there would need to be greater sensitivity to legislation having the potential to deprive people of life, liberty, and security of the person. Lamer J was keen to see the *Charter* as having continuity with time-honoured principles of justice. He wrote: "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*." (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 513)

<sup>92</sup> *Hundal*, 882.

<sup>93</sup> *Ibid.*, 883-84.



“made in a vacuum.” Lamer J said the test should make “generous allowances” for personal factors. According to the objectivist wing in *Tutton*, the objective test, properly construed and applied, would necessarily be sensitive to a variety of considerations. McIntyre J explained in *Tutton*:

Events occur within the framework of other events and actions and when deciding on the nature of the questioned conduct surrounding circumstances must be considered. The decision must be made on a consideration of the facts existing at the time and in relation to the accused's perception of those facts. Since the test is objective, the accused's perception of the facts is not to be considered for the purpose of assessing malice or intention on the accused's part but only to form a basis for a conclusion as to whether or not the accused's conduct, in view of his perception of those facts, was reasonable. . . . If an accused under s. 202 (now s.219) has an honest and reasonably held belief in the existence of certain facts, it may be a relevant consideration in assessing the reasonableness of his conduct.<sup>94</sup>

This is all part of what McIntyre J took to be the proper application of the objective standard. Interestingly, four years later Cory J describes this as the *modified* form, saying that a “modified objective test was aptly described by McIntyre J.”<sup>95</sup> It seems that Cory J believed that there was an objective test available to the Court in *Tutton* and *Waite*, and McIntyre J’s caution about applying the test “in a vacuum” demonstrated an objective test’s fundamental inadequacy. Cory J said of the objective test:

There is no need to establish the intention of the particular accused. The question to be answered under the objective test concerns what the accused "should" have known. The potential harshness of the objective standard may be lessened by the consideration of certain personal factors as well as the consideration of a defence of mistake of fact.<sup>96</sup>

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<sup>94</sup> *Tutton*, 1432.

<sup>95</sup> *Hundal*, 887.

<sup>96</sup> *Ibid.*, 883.

Cory's obvious concern with the objective test *per se* was its resemblance to absolute liability. That is, no one's liberty rights should be violated for an absolute liability offence where there is, in effect, no measure of flexibility and no allowance for defence. We can see why Hundal would think this avenue worth exploring on appeal. If there's a moral worry about offences that punish without fault, then he would want to ensure that he is not being punished without due consideration of where fault ought to be found. In turn, it's clear why the *Hundal* Court would want to ensure, with very specific language, that fault is fully accounted for with an objective test. The language of the modified objective test was intended, it seems, to inspire confidence that Hundal's *Charter* rights were thoroughly vindicated. Emphasizing the role of exculpatory defences, like the sincere and reasonable mistake of fact, goes some distance in addressing the more traditional subjective concerns. This is particularly evident in the concurring opinion written by (then) Justice McLachlin. She sought a more nuanced understanding of the modified objective test; indeed, it was her sole purpose in writing a concurring opinion in *Hundal*. She wrote:

The label "modified objective test" might be taken to suggest an amalgam of objective and subjective factors; a test that looks at what ought to have been in the accused's mind, but goes on to consider what was actually there or not there.<sup>97</sup>

She continues:

Consideration of the context in which the term has been used suggests that the phrase "modified objective test" was introduced in an effort to ensure that jurists applying the objective test take into account all relevant circumstances in the events surrounding the alleged offence and give the

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<sup>97</sup> *Ibid.*, 874.

accused an opportunity to raise a reasonable doubt as to what a reasonable person would have thought in the particular situation in which the accused found himself or herself.<sup>98</sup>

McLachlin J agrees with Cory J, that McIntyre J was in fact advocating a modified objective test in *Tutton*, though not referring to it as such. Furthermore, she agreed with McIntyre J's claim in *Tutton* that an accused's honest and reasonable belief could exculpate. We will now turn to two rulings, *Creighton* and *Niglak*, handed down concurrently in 1993, that illustrate very well the challenges in establishing the reasonableness of certain beliefs resulting in harm.

### ***R. v. Creighton, [1993]***

On October 26, 1989, Marc Creighton, Frank Cadeddu, and Kimberly Martin were gathered in a private residence consuming substantial quantities of drugs and alcohol.<sup>99</sup> The party persisted through the evening and into the next day. At around 3:00 PM on the twenty-seventh shortly after allowing Creighton to inject her once again with cocaine, Martin experienced a severe reaction; she began to convulse, she soon lost consciousness, and stopped breathing. Though Creighton and Cadeddu tried unsuccessfully to revive Martin, Creighton stubbornly refused to let Cadeddu call for emergency medical assistance. In fact, he threatened him not to. Creighton instead persuaded Cadeddu to help him put Martin's still convulsing body on her bed and clean the room of incriminating evidence. Together they left the premises,

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<sup>98</sup> *Hundal*, 874.

<sup>99</sup> *R. v. Creighton* [1993] 3 S.C.R. 3 [hereafter *Creighton*] The following narrative is constructed from facts reported in *Creighton* at 4, 12-13.

but later that evening Caddedu returned alone with the hope that Martin somehow recovered. Finding her dead, he called authorities. Though Martin suffered a cardiac arrest from the large quantity of cocaine in her system, experts testified that the cause of death was asphyxiation from choking on her own vomit.

Creighton was charged under s. 222(5)(a) and (b) of the *Criminal Code*,<sup>100</sup> manslaughter provisions for causing death by means of an unlawful act and by means of criminal negligence.<sup>101</sup> The trial judge employed an objective standard to establish fault for the unlawful act provision, requiring that a reasonable person should know the inherent dangers and risks involved in the illegal use of a prohibited narcotic.<sup>102</sup> Fully aware of the divided court in *Tutton*, the trial judge elected to apply an objective standard but was confident that the accused knew he was injecting another person with a risky, dangerous, and volatile substance.<sup>103</sup> Conclusive evidence of this foreknowledge offered at trial was Creighton's admission to investigators immediately upon hearing of his friend's death: "You know better than I that that stuff kills a lot of people. I hear lots of things about

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<sup>100</sup> The relevant *Criminal Code* provisions read: s. 222(5) A person commits culpable homicide when he causes the death of a human being, (a) by means of an unlawful act; (b) by means of criminal negligence.

<sup>101</sup> The defense conceded that Creighton was in violation of s. 4(1) of the *Narcotic Control Act*, R.S.C., 1985, c. N-1.

<sup>102</sup> *Creighton*, 15.

<sup>103</sup> *Ibid.*, 16.

people dying of drug overdoses but I don't know them so I don't care.”<sup>104</sup> Creighton was found guilty under both provisions and was sentenced to four years in prison.

Creighton appealed to the Ontario Court of Appeal on the grounds that unlawful act manslaughter violated his s. 7 liberty rights. Specifically, his complaint was that an objective test for discerning foreseeability of danger was insufficiently sensitive to an absence of subjective fault. The Court of Appeal took the concern to be interesting but denied that this particular case was the right vehicle for such a challenge. The Court of Appeal held that Creighton’s guilt was established by the trial judge under both objective *and* subjective tests. It saw ample sensitivity to Creighton’s subjective fault, finding that the obvious inference that he *did* know the injection could kill the deceased followed clearly from his admission that drug overdoses frequently kill people. They dismissed the appeal and upheld both conviction and sentencing.

Creighton subsequently appealed to the SCC where 5-4 majority upheld the conviction and, more significantly for Canadian jurisprudence, further entrenched the constitutionality of employing an objective standard for a serious criminal offence. *Creighton* is regarded as a landmark ruling in further clarifying confusions about *mens rea* in the relatively new era of *Charter* sensitivity. I will focus on only a few of the critical advancements.

First, the *Creighton* Court was roughly divided on the constitutionality of the long standing common law tradition of manslaughter—a serious criminal offence for a clearly unintentional death. Then Chief Justice Lamer was concerned that the

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<sup>104</sup> Ibid., 35.

common law tradition was not compatible with fundamental principles of justice that are foundational to the *Charter*. Justice McLachlin (as she was then), writing for the majority, distilled two closely related concerns from Lamer CJ's dissenting opinion: one, that an exceedingly negative social stigma attaches to a conviction of manslaughter but that this stigma is undeserved by one who, as the tradition dictated, only foresaw *harm*, not death. Second, there is no symmetry between the required *mens rea* (foreseeability of harm) and the corresponding result (death). McLachlin J brought a historical perspective to Lamer CJ's objection that manslaughter in Canada is unconstitutional:

We are here concerned with a common law offence virtually as old as our system of criminal law. It has been applied in innumerable cases around the world. And it has been honed and refined over the centuries. Because of its residual nature, it may lack the logical symmetry of more modern statutory offences, but it has stood the practical test of time. Could all this be the case, one asks, if the law violates our fundamental notions of justice, themselves grounded in the history of the common law? Perhaps. Nevertheless, it must be with considerable caution that a twentieth century court approaches the invitation which has been put before us: to strike out, or alternatively, rewrite, the offence of manslaughter on the ground that this is necessary to bring the law into conformity with the principles of fundamental justice.<sup>105</sup>

McLachlin J would go on to address Lamer CJ's concern about stigma by arguing that Canadian society understands the distinction between murder and manslaughter well enough. Murder is the more serious crime, carrying with it the more negative social stigma—and so it should, in keeping with the long standing principle that intentional harms are more deserving of punishment than unintentional harms. Lamer CJ did not dispute that manslaughter is stigmatized less than murder. His

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<sup>105</sup> *Ibid.*, 45.

concern was not even that people who knowingly, but unintentionally, risk death would be punished for manslaughter. His concern was that the offence made it unnecessary for the accused to have foreseen and risked *death*. Manslaughter seems to punish people for unfortunate results, the risk of which they did *not* take nor foresee. McLachlin J responds in part by pointing out a more negative implication of Lamer CJ's view:

It would shock the public's conscience to think that a person could be convicted of manslaughter absent any moral fault based on foreseeability of harm. Conversely, it might well shock the public's conscience to convict a person who has killed another only of aggravated assault -- the result of requiring foreseeability of death -- on the sole basis that the risk of death was not reasonably foreseeable. The terrible consequence of death demands more. In short, the *mens rea* requirement which the common law has adopted -- foreseeability of harm -- is entirely appropriate to the stigma associated with the offence of manslaughter. To change the *mens rea* requirement would be to risk the very disparity between *mens rea* and the stigma of which the appellant complains.<sup>106</sup>

McLachlin J concedes that manslaughter faces a public perception problem. People run the risk of being convicted of a serious offence without a perfectly symmetrical blameworthy *mens rea*. But this is to be preferred to being morally guilty of taking another's life and being blamed for a comparatively trivial offence. McLachlin J explained:

The accused who asserts that the risk of death was not foreseeable is in effect asserting that a normal person would not have died in these circumstances, and that he could not foresee the peculiar vulnerability of the victim. Therefore, he says, he should be convicted only of assault causing bodily harm or some lesser offence. This is to abrogate the thin-skull rule that requires that the wrong-doer take his victim as he finds him. Conversely, to combine the test of reasonable foreseeability of bodily harm with the thin-skull rule is to mandate that in some cases, foreseeability of the risk of bodily harm alone will properly result in a conviction for manslaughter. What the

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<sup>106</sup> Ibid., 48.

appellant asks us to do, then, is to abandon the "thin-skull" rule. It is this rule which, on analysis, is alleged to be unjust. Such a conclusion I cannot accept. The law has consistently set its face against such a policy.<sup>107</sup>

Furthermore, McLachlin J claimed that it would jeopardize important policy concerns that Parliament intended for manslaughter and criminal negligence legislation. There are reasons that objective standards are employed in negligence-based criminal settings. While it is often impossible to accurately discern a person's mental dispositions (e.g., Michael Waite or Surinder Hundal), it is nevertheless important to Parliament that law protect society against harms resulting from carelessness—harms that could have been reasonably avoided. A very practical way of supporting this social policy is by establishing minimal standards of conduct with which, in the vernacular, any normal person can comply. McLachlin J writes:

Given the finality of death and the absolute unacceptability of killing another human being, it is not amiss to preserve the test which promises the greatest measure of deterrence, provided the penal consequences of the offence are not disproportionate. This is achieved by retaining the test of foreseeability of bodily harm in the offence of manslaughter.<sup>108</sup>

McLachlin J believed that practical benefits followed, as well, from establishing the test of objective foreseeability of harm, not death as Lamer CJ preferred. This simpler test would relieve finders of fact from trying to distinguish between the foreseeability of death and the foreseeability of bodily injury—"a distinction" she claimed earlier, "reduces to a formalistic technicality when put in the context of the

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<sup>107</sup> Ibid., 50.

<sup>108</sup> Ibid., 64.



thin-skull rule and the fact that death has in fact been inflicted by the accused's dangerous act."<sup>109</sup>

In my view, considerations of principle and policy dictate the maintenance of a single, uniform legal standard of care for such offences, subject to one exception: incapacity to appreciate the nature of the risk which the activity in question entails.<sup>110</sup>

Capacity and incapacity would be the primary concern in the case to follow.

### ***R. v. Naglik, [1993]***

In 1987, Christine Naglik, a teenaged mother, took her eleven-week-old son to a local hospital.<sup>111</sup> The infant was suffering from, among other things, a broken collarbone, at least fifteen fractured ribs, a fractured vertebra, two separate skull fractures, haemorrhaging in the brain, and a detached retina. Medical authorities determined that the injuries had been sustained over a four week period. Naglik offered 'innocent' explanations to medical authorities and later to police of how her tiny son came to be in such a traumatized state but the evidence overwhelmingly contradicted her story. Seeking the most severe punishment the relevant offences could afford, the Crown proceeded by indictment charging Naglik and her common law husband, Peter Pople, with aggravated assault and failure to provide necessities

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<sup>109</sup> Ibid., 57.

<sup>110</sup> Ibid., 61.

<sup>111</sup> *R. v. Naglik*, [1993] 3 S.C.R. 122. [Hereafter *Naglik*] The following narrative is constructed from *Naglik*, 128, 129, and 147.

of life.<sup>112</sup> With regard to discerning fault for failing to provide necessities, the trial judge instructed the jury to employ an objective test. If the jury concluded that the parent “knew, or ought to have known, the seriousness of the child’s condition and that it required medical attention” then a guilty verdict should be rendered. Naglik and Pople were convicted on both counts and sentenced to four and half years for aggravated assault and two years for failure to provide necessities, to be served concurrently. The infant survived but suffered permanent physical damage.

Naglik successfully appealed her s. 215 conviction to the Ontario Court of Appeal and a new trial ordered. Morden ACJO, writing for the majority, held that the objective test used to convict Naglik on the s. 215 offence was out of step with “authoritative precedent”. The Attorney General of Ontario subsequently appealed to the SCC on the Appeal Court’s approach to *mens rea* for s. 215.<sup>113</sup> Lamer CJ quoted Morden ACJO:

... the offence in question requires actual knowledge of (which would include wilful blindness with respect to) the circumstances which make the failure to perform the duty to provide necessities an offence. It is an offence which may be committed intentionally or recklessly. It is not an offence of mere negligence, where an honest belief in circumstances which do not require the performance of the duty must be based on reasonable grounds.<sup>114</sup>

The central concern of the Court of Appeal was that Naglik seemed to have been genuinely unaware that she was neglecting the welfare of her son. Inasmuch as she

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<sup>112</sup> Naglik was charged under ss. 197(2)(a)(ii) and 197(3), now ss. 215(2)(a)(ii) and 215(3)) of the *Criminal Code*.

<sup>113</sup> Naglik also appealed to the SCC, claiming that errors were made in the trial judge’s decision to allow a certain testimony from the co-accused, Pople. Our focus on the *Naglik* judgement will be confined to what the Supreme Court had to say about *mens rea*.

<sup>114</sup> *Naglik*, 134.

was caring for him, she also seemed to be unaware that her manner of treating her infant son's needs was in fact injurious to him. Most charitably, one might think of her situation as analogous to a small child's treatment of a pet; sometimes children are unaware that their physical interactions are too rough for the welfare of their puppy or their kitten. Again, most charitably, Naglik seemed to be unaware that her methods of trying to stop the infant from crying were profoundly inappropriate and harmful to the infant. In sum, there was a great deal that she did not know about providing the necessities of life. Due to this genuine absence of knowledge and awareness—an absence the trial judge deemed largely irrelevant—the Court of Appeal set aside the conviction and ordered a new trial.

Lamer CJ held that the wording of s. 215, specifically “everyone is under a legal duty as a parent...” entails an objective standard and there was no need for Parliament to have included in the statute anything as explicit as the person under the duty “ought to know” or “ought to have known” his or her failure would result in harm. Lamer CJ claimed:

The policy goals of the provision support this interpretation. Section 215 is aimed at establishing a uniform minimum level of care to be provided for those to whom it applies, and this can only be achieved if those under the duty are held to a societal, rather than a personal, standard of conduct.<sup>115</sup>

Consistent with his approach in *Creighton*, Lamer CJ's conception of the objective standard is a great deal more accommodating to personal factors than the test endorsed by McLachlin J. He was quick to add that although the objective standard was the correct vehicle for assigning fault, ...

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<sup>115</sup> Ibid., 141.

... the reasonableness of the accused's conduct is not to be assessed in the abstract, but with reference to the circumstances of the accused and the offence, to avoid punishing the morally innocent who could not have acted other than they did in the circumstances.<sup>116</sup>

Lamer CJ's proviso regarding the correct application of the objective test bears a striking resemblance to Justice Dickson's proviso in *Tutton*, namely, that it not be "applied in a vacuum". Lamer CJ seems to be saying that an abstract description of Naglik's "reasonableness" would wrongly lack context and relevance—considerations that should not be excluded by the objective test. That the test can be applied too abstractly is not a weakness of the objective test *per se*. Rather, we should read both Lamer CJ and Dickson CJ (as he was in *Tutton*) as giving a warning about its incorrect application. Furthermore, Lamer CJ's concern for the correct application speaks to his ultimate concern that one cannot be held legally or morally responsible for things they were incapable of avoiding. There are a number of important considerations in this regard. Lamer CJ wanted to know if "it was possible for Naglik to control or compensate for her incapacities in the circumstances."<sup>117</sup> He went on:

For example, the evidence indicates that the services of a Public Health Nurse were made available to Naglik to help her with the adjustment to caring for the child, given her age, education and lack of experience with children. Naglik apparently resisted these attempts to assist her with the care of the baby.<sup>118</sup>

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<sup>116</sup> Ibid., 142.

<sup>117</sup> Ibid., 142-43.

<sup>118</sup> Ibid., 143.

Lamer CJ did not comment on whether he took Naglik's refusal to be culpable or exculpatory. Would the allowances of age, education, and lack of experience, provide evidence that she was not blameworthy in rejecting assistance and not blameworthy for her treatment of her child? Lamer CJ is saying she should be judged by what a reasonable young mother with her age, intelligence, and *inexperience* normally knows about child care. Given these particularities, could she have been expected to act other than she did? If these particularities are part of the objective standard against which she is being compared, perhaps she *was* incapable of providing the necessities of life to her infant son. On the other hand, Lamer CJ could be asserting her culpability. If Naglik was deemed responsible enough to refuse assistance from a public health nurse, then she must be responsible for the consequences of that refusal. She voluntarily accepted the risks of *not knowing enough*. But, again, given her particularities as accommodated by the objective standard, what risks should she have been able to anticipate? Should she have known, for example, she might not be a very capable mother? One can easily imagine that even the most ideally situated new mother—someone far from the circumstances of Naglik—feels at some level incompetent, overwhelmed, and possibly not quite up to the challenge of caring for her new offspring. Section 215(2) indicates that the offence is committed whenever a person fails, without lawful excuse, in his or her duty to provide the necessities to the relevant rights holder. The failure is made evident by endangering the person's life, causing or being likely to cause the health of a person to be either endangered or injured permanently. Naglik claimed that her lawful excuse for failing to meet her parental duties was her

*subjective* innocence; i.e., her lack of awareness that she was doing anything wrong in terms of caring for her child. The Ontario Court of Appeal agreed, not that she didn't do anything harmful to her child—far from it—but that she wasn't sufficiently *aware* that she was harming her child and this is what mattered for criminal liability. Lamer CJ, and indeed the entire SCC, disagreed. They had no difficulty in agreeing that Naglik's subjective ignorance *would* be exculpatory *if* the test of fault was subjective. But Lamer CJ does open the door to at least some confusion by, in a word, relativizing the objective standard to accommodate for particularities. This is the worry that Lamer CJ's opinion generated for McLachlin J. She stated:

I respectfully disagree with the Chief Justice's conclusion that when considering what the accused "ought to have known" under an objective standard, one should have regard to Ms. Naglik's "youth, experience, [and] education" ... For the reasons discussed in *R. v Creighton*, [1993] ... it is my view that in determining what Ms. Naglik "ought to have known", the trier of fact must determine the conduct of the reasonable person when engaging in the particular activity of the accused in the specific circumstances that prevailed. These circumstances do not include the personal characteristics of the accused, short of characteristics which deprived her of the capacity to appreciate the risk. Youth, inexperience, and lack of education were not suggested on the evidence to deprive Ms. Naglik of the capacity to appreciate the risk associated with neglecting her child. Therefore, she must be held to the standard of the reasonably prudent person.<sup>119</sup>

Lamer CJ and McLachlin J interestingly juxtapose two different conceptions of the objective standard. Lamer CJ thinks it appropriate, indeed necessary, for the moral justification of objective fault to relativize or tailor the standard to the relevant particularities of the accused, while McLachlin J thinks the only relevant moral consideration for applying the uniform standard is the capacity of the

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<sup>119</sup> Ibid., 148.

accused. She clearly doesn't think that youth, inexperience, etc., exculpate bad parenting, whereas on Lamer CJ's account it's *not* entirely obvious that these things *couldn't* exculpate. His point is that any fair application of the objective standard must show due consideration to a variety of factors relevant to the accused.

The exchanges between Lamer CJ and McLachlin J in both *Creighton* and *Naglik* are highly instructive in terms trying to understand the construction of the objective standard. Lamer CJ sees the standard more in terms of an ordinary person functioning in similar circumstances to the accused, while McLachlin J understands the "reasonable person" in more abstract terms—less of a person and more of an abstract principle to which the accused is compared. While this issue gets resolved in 1993 in McLachlin's favour, we'll see it challenged and in a sense overturned in the case that follows some fifteen years later.

### ***R. v. Beatty, [2008]***

On a hot, sunny afternoon on July 23, 2003, Justin Beatty was eastbound in his pickup truck on the Trans-Canada Highway about fourteen kilometres west of Chase, British Columbia.<sup>120</sup> At approximately 2:00 PM, Justin's vehicle veered across the centre line into the westbound lane and collided head on with a small car killing its three occupants. Beatty had not been drinking and he was not otherwise distracted or incapacitated. By his own admission, he must have momentarily lost consciousness or perhaps fell asleep. Witnesses to Beatty's driving for the short time

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<sup>120</sup> *R. v. Beatty, [2008] 1 SCR 49. [hereafter *Beatty* ]* The following narrative is constructed from the facts reported in *Beatty* at paras 10-11.

prior to the collision reported no erratic or otherwise unsafe driving. Experts who investigated and reconstructed the collision determined a number of important details: first, that the truck had only veered a half a metre into the westbound lane when it struck the victim's car; second, neither driver took evasive action; third, both vehicles were travelling at or around the posted 90 km speed limit, indicating that excessive speed was not a factor; fourth, no mechanical failure could be found in either vehicle. Though Beatty was able to walk away from his vehicle, he was reportedly dazed and not altogether comprehending. He told a police officer that he had been working in the sun all day and that maybe he had heat stroke. An ambulance driver reported him saying he didn't know what happened and that he must have fallen asleep.

Justin Beatty was subsequently charged under s. 249(4) of the criminal code, dangerous driving causing death, the same offence of which both Michael Waite and Surinder Hundal had been convicted. While the trial judge relied particularly on the *Hundal* ruling to inform her decision, she saw more contrast with *Hundal* than similarity as evidenced by her concluding remarks at trial:

The circumstances in this case are different. Here there is no evidence of any improper driving by Mr. Beatty before his truck veered into the westbound lane and into the oncoming vehicle. While that act of driving was clearly negligent it occurred within a matter of seconds. Moreover, there was no evidence of any evasive measures or evidence of any obstruction in the eastbound lane that might have caused him to veer into the westbound lane. In my view, the only reasonable inference to be drawn in these circumstances, of Mr. Beatty's manner of driving, was that he experienced a loss of awareness, whether that was caused by him nodding off or for some other reason. That loss of awareness resulted in him continuing to drive straight instead of following the curve in the road and thereby cross the double solid line. These few seconds of clearly negligent driving, which had devastating consequences, are the only evidence of Mr. Beatty's manner of driving. In my view, *Hundal* requires something more than a few seconds of



lapsed attention to establish objectively dangerous driving. Criminal culpability cannot be found, beyond a reasonable doubt, on such a paucity of evidence.<sup>121</sup>

Beatty was acquitted on all criminal charges, though the trial judge was very clear that civil law could regard the issue of liability very differently.<sup>122</sup> She went on to describe why exactly Beatty's driving did not meet the objective standard for criminal liability:

... in assessing criminal culpability it is not the consequences of a negligent act of driving that determines whether an accused's manner of driving is objectively dangerous. It is the driving itself that must be examined. In my view, Mr. Beatty's few seconds of negligent driving, in the absence of something more, is insufficient evidence to support a finding of a *marked* departure from the standard of care of a prudent driver.<sup>123</sup>

The Crown successfully appealed on the grounds that the trial judge failed to apply the right standard of fault. The argument was not that the standard should be subjective, but rather that the objective standard was not described accurately. In large measure, we see disagreement over what stands as a marked departure from reasonable conduct in the circumstances—the same disagreement that occupied the SCC in *Creighton* and *Naglik*. Finch BCJA, writing for the BC Court of Appeal, held:

Viewed objectively, the respondent's failure to confine his vehicle to its own lane of travel was in "all the circumstances" highly dangerous to other persons lawfully using the highway, and in particular those approaching in a westerly direction on their own side of the road.

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<sup>121</sup> Quoted in *Beatty*, para 13.

<sup>122</sup> "As contemplated by *Hundal* Mr. Beatty's negligent driving undoubtedly falls within the continuum of negligence that is certain to attract considerable civil liability. It is in that forum that redress for his actions will be found." [*Beatty*, para. 14]

<sup>123</sup> *Beatty*, para 14.

The trial judge addressed her attention to the respondent's "momentary lack of attention" and his "few seconds of lapsed attention". She held that such a momentary lapse should not be characterized as dangerous driving.

In my respectful opinion the learned trial judge asked the wrong question. The right question was whether crossing the centre line into the path of oncoming traffic at 90 kilometres per hour, on a well-travelled highway was objectively dangerous. I think that question could only be answered in the affirmative. Driving in that way is clearly a "marked departure" from the standard of care a reasonable person would observe in the accused's situation.<sup>124</sup>

Crossing the median is, according to the Court of Appeal, highly dangerous and a marked departure precisely because it *can* quite reasonably and predictably result in the events that transpired. Had the trial judge focussed properly on the objectively dangerous driving and not on the brief moment of subjective inadvertence, she would have known to consider whether a reasonable person in similar circumstances would have been aware of such risks. If Beatty's explanation showed that he could not have been aware of those risks, then and only then should he have been acquitted. Because the trial judge did not derive this important consideration the BC Court of Appeal set aside the acquittals and ordered a new trial.

The judgment of the Court of Appeal is not without intuitive attraction. Clearly, crossing the median on two-lane highway at 90 kilometres per hour *is* dangerous, which is why it must be done with the greatest of care. Even if it is granted that driving motor vehicles in our society is inherently risky, no one can deny that the risks increase exponentially when one drives in the wrong lane. Beatty's victims were using the road lawfully and, still, they were harmed. One can

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<sup>124</sup> Quoted in *Beatty*, para 16.

easily imagine that this is precisely the sort of catastrophe that law makers have in mind when drafting rules of the road, perhaps especially criminal offences like s. 249. Now, the fact that many drivers experience similar lapses of attention without the tragic consequences does not minimize the inherent danger of those lapses. Momentary lapses of attention are a common and predictable feature of human experience, even behind the wheel of a car, but predicting when such lapses will occur is very difficult. But, this is why vigilance and care are necessary characteristics, indeed necessary virtues, of anyone licensed to drive an automobile. We should be reminded that in *Hundal* Cory J argued that criminal sanctions for negligent driving may well serve the purpose of promoting such vigilance.

Beatty appealed to the SCC on the grounds that BC Court of Appeal, in rejecting the reasoning of the trial judge, created a presumption of guilt for anyone who causes an accident of the sort that Beatty caused. The only exculpatory explanations would be ones that included mechanical failure or some kind of unanticipated medical condition. In the absence of such explanation, the *presumption*, but not a *finding*, Beatty claimed, was “dangerous driving.” In other words, the presumption relieved the Crown of proving the offence. It was the Court of Appeal’s reasoning that was mistaken, not the trial judge’s, and Beatty wanted this recognized and his acquittals restored.

The SCC was unanimous in allowing Beatty’s appeal and restoring the acquittals on the three dangerous driving charges. Charron J wrote for the majority, while McLachlin CJ and Fish J provided partially concurring opinions, disagreeing with Justice Charron’s derivation.

We have already seen that punishment of the morally innocent is a primary concern in *Charter*-era criminal jurisprudence. Rulings on *Tutton* and *Hundal* have explicitly addressed the need to distance negligence-based offences from absolute liability offences. I have already argued that some of the concerns that turned the objective test into the modified objective test were generated by *Charter* intolerance to penal consequences for no-fault offences. I contend that one of the main outcomes from *Beatty* is a subtle rebalancing of the hard won ‘uniform’ standard in *Creighton* with certain subjectivist considerations. We see this in the following claim from Charron J, writing for the majority:

The distinction between a mere departure and a marked departure is a question of degree. It is only when the conduct meets the higher threshold that the court may find, on the basis of that conduct alone, a blameworthy state of mind.<sup>125</sup>

One shouldn’t infer that a marked departure entails correspondence to some subjective fault element like recklessness or wilful blindness. Charron J is, however, referring to the mental state variously thought of as either carelessness, or being distracted, or unaware. But, the accused must have had the capacity at the time of the offence to have been aware or *more* aware of the risk. Charron J continues:

The degree of negligence is the determinative question because criminal fault must be based on conduct that merits punishment.<sup>126</sup>

This is a difficult assertion to parse, but it becomes lynch pin to understanding the majority’s position on fault in negligence. This issue will occupy the rest of our analysis of *Beatty*.

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<sup>125</sup> *Beatty*, para 7.

<sup>126</sup> *Ibid*.

What could be meant by the ‘degree of negligence’? What is the degree of marked departure? Of what is it constituted? Let us consider the possibility that ‘degrees of negligence’ is determined by assessing what occurs during the interval of carelessness. While this may seem obvious what is not obvious is precisely what to include in the description of the “occurrence” that could distinguish a non-culpable “occurrence” from a culpable one. Put more plainly, it is difficult to know what is relevant to the commission of the offence. If we look at the actual legislation for clues we will find little that inspires agreement.

s. 249. (1) Every one commits an offence who operates (a) a motor vehicle in a manner that is dangerous to the public, having regard to all the circumstances, including the nature, condition and use of the place at which the motor vehicle is being operated and the amount of traffic that at the time is or might reasonably be expected to be at that place.

How is the prohibited ‘manner’ to be discerned? What is a ‘manner’ that is dangerous to the public”? If degree of negligence is going to be understood in terms of ‘something more’ then these questions will need to be addressed. One thing is clear; Charron J is committed to discerning degrees of negligence *without* reference to consequences. She makes this explicit:

As the words of the provision make plain, it is the *manner* in which the motor vehicle was operated that is at issue [in determining the *actus reus*], not the consequence of the driving. The consequence, as here where death was caused, may make the offence a more serious one under s. 249(4), but it has no bearing on the question whether the offence of dangerous operation of a motor vehicle has been made out or not. Again, this is also an important distinction. If the focus is improperly placed on the consequence, it almost begs the question to then ask whether an act that killed someone was dangerous. The court must not leap to its conclusion about the manner of driving based on the consequence.<sup>127</sup>

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<sup>127</sup> Ibid., para 46.

Whatever Justin Beatty did, killing three people was neither necessary nor sufficient in discerning his degree of negligence. What occurred that July afternoon needed something more to warrant a dangerous driving conviction, but not apparently more deaths or more harm. The majority held that the offence of dangerous driving needed to differentiate very clearly between the *actus reus* of the offence and its *mens rea*. It felt that the *actus reus* had been clearly and tragically made out, but that this was not evidence of *mens rea*. The *mens rea*, being objective, would need to be understood in terms of normative 'care'. As an operator of a vehicle, Justin Beatty's lack of care was not a sufficient departure from the way normal people drive.

Recall that no Justice dissented; no Justice held that the appeal should be set aside. McLachlin CJ's partially concurring opinion disagreed with the majority of the Court's opinion on two contentious issues: first, that Beatty's driving alone was sufficient to establish the *actus reus* of the offence, and second, that the *mens rea* is to be understood in terms of a marked departure *of care*. A minority view of the Court, written by McLachlin CJ, and supported by Binnie and Lebel JJ, was that Beatty's driving *did not* reach the standard of a marked and substantial departure from the driving of a reasonable person under the conditions. As a result, *they* (the minority) did not infer sufficient objective *mens rea*. In terms of the disagreement with Justice Charron and the majority, McLachlin CJ writes:

... my colleague describes the *actus reus* in terms of dangerous operation of a motor vehicle and the *mens rea* in terms of a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. In discussing the *actus reus*, my colleague observes that

“[n]othing is gained by adding to the words of s. 249 at this stage of the analysis”. With respect, I take a different view.<sup>128</sup>

The Chief Justice continues:

The jurisprudence of this Court offers assistance on what constitutes the *actus reus* and *mens rea* of dangerous driving and how the two elements of the offence should be described. *Hundal*, [1993], confirmed in *Creighton*, [1993], indicates that the characterization of “marked departure” from the norm applies to the *actus reus* of the offence, and that the *mens rea* of the offence flows by inference from that finding, absent an excuse casting a reasonable doubt on the accused’s capacity.<sup>129</sup>

Given McLachlin CJ’s, disagreement with Charron J’s approach to the *mens rea* of the offence, there is good reason to believe that Charron J, above, conceived of the fault element with subjective considerations, and consequently, in a fashion quite removed from the modified objective test conceived of in *Creighton* and *Hundal*. Additionally, there is no good reason to think that Charron J inferred an absence of fault by looking to the *actus reus* in itself. When Charron J said, “[t]he lack of care must be serious enough to merit punishment” we should take her at her word. She means that a *serious lack of care* is sufficient for *mens rea*. She may be referring to an “objective standard” of carelessness, but this would be objective in the same sense as using visible anger and a verbal threat, ‘I will kill you’, as evidence

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<sup>128</sup> Ibid., paras 57-58. Charron J acknowledges the disagreement with McLachlin CJ in para 43: “I respectfully disagree with the Chief Justice that the test for the *actus reus* is defined in terms of a marked departure from the normal manner of driving (para 67). The *actus reus* must be defined, rather, by the words of the enactment. Of course, conduct that is found to depart markedly from the norm remains necessary to make out the offence because nothing less will support the conclusion that the accused acted with sufficient blameworthiness, in other words with the requisite *mens rea*, to warrant conviction. In addition, it may be useful to keep in mind that while the modified objective test calls for an objective assessment of the accused’s manner of driving, evidence about the accused’s actual state of mind, if any, may also be relevant in determining the presence of *sufficient mens rea*.”

<sup>129</sup> Ibid., para 58.

of *mens rea* for a murder. It may be objective inasmuch as it is objectively observed, but it's not the same as the objective test.<sup>130</sup>

We are now in a better position to see that the majority's desire for "something more" to secure convictions for dangerous driving is, in the final analysis, a desire for more subjective fault—something that could be inferred from Waite, Hundal, and, of course, Daniel Tschetter. Charron J is not looking for more harmful consequences, but simply more subjective "carelessness." More carelessness would manifest itself in either longer intervals of carelessness or more frequently repeated departures from normal "careful" driving.

We will turn our attention to McLachlin CJ's account of the "something more" that will meet the requirement of the criminal "degree of negligence." McLachlin CJ summarizes what is at stake in *Beatty* in the following way:

The problem at the heart of this case is whether acts of momentary lapse of attention can constitute the offence of dangerous driving. The accused was driving in an entirely normal manner until his vehicle suddenly swerved over the centre line of the road, for reasons that remain unclear. Clearly there was momentary lapse of attention. The issue is whether this is capable of

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<sup>130</sup> There should be no confusion here. Charron J explicitly claims to be applying the modified objective test. My contention is that in her search for criminal *mens rea* she looks for culpable mental states that are closer to recklessness than mere inadvertence. Evidence of this is found in para 43: "In determining the question of *mens rea*, the court should consider the totality of the evidence, including evidence, if any, about the accused's actual state of mind. As discussed at length above, the *mens rea* requirement for the offence of dangerous driving will be satisfied by applying a modified objective test. This means that, unlike offences that can only be committed if the accused possesses a subjective form of *mens rea*, it is not necessary for the Crown to prove that the accused had a positive state of mind, such as intent, recklessness or wilful blindness. Of course, this does not mean that the actual state of mind of the accused is irrelevant. For example, if proof is made that a driver purposely drove into the path of an oncoming vehicle in an intentionally dangerous manner for the purpose of scaring the passengers of that vehicle or impressing someone in his own vehicle with his bravado, the requirement of *mens rea* will easily be met. One way of looking at it is to say that the subjective *mens rea* of intentionally creating a danger for other users of the highway within the meaning of s. 249 of the *Criminal Code* constitutes a "marked departure" from the standard expected of a reasonably prudent driver."



establishing the *actus reus* and *mens rea* of the offence. In my view, momentary lapse of attention without more cannot establish the *actus reus* or *mens rea* of the offence of dangerous driving.<sup>131</sup>

A casual read of this comment may yield the conclusion that there is less that divides the Chief Justice from the majority than I have so far argued for, but we should not ignore two important details in the above comment. First, McLachlin CJ will emphasize acts or conduct that must constitute the offence, while Charron J emphasizes carelessness. Secondly, the Chief Justice will look to one thing to signify both *actus reus* and the *mens rea*. The one thing in this instance ends up being the act of crossing the median. If the *actus reus* cannot be made out by *that* act then neither can the *mens rea*. McLachlin CJ states:

Additional inquiry into the accused's actual state of mind is unnecessary. If the only evidence is of momentary lapse of attention, the *actus reus* is not established and the Crown's case fails, making further inquiry unnecessary. On the other hand, if the accused is driving in a manner that constitutes a marked departure from the norm, the inference will be that he lacked the requisite mental state of care of a reasonable person, absent an excuse, such as a sudden and unexpected onset of illness.<sup>132</sup>

McLachlin CJ's emphasis on careless conduct faces the challenge of drawing limits around what the accused actually did and did not do in relation to culpability. The objective standard is, ultimately, a conception of what a reasonable person would do or not do under similar circumstances faced by the accused. But, to have such a conception one must know how to divide off what the accused did from what the

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<sup>131</sup> Ibid., paras 68-69.

<sup>132</sup> Ibid., para 78.

circumstances contributed to the episode. McLachlin CJ's summation of Beatty's conduct is as follows:

The only evidence adduced by the Crown in the case at bar was evidence of a momentary lapse of attention that caused the accused's vehicle to cross the centre line of the highway. In all other respects, the accused's driving was, on the evidence, entirely normal. It follows that all that has been established is momentary lapse of attention. The marked departure required for the offence of dangerous operation of a motor vehicle has not been made out. The Crown did not succeed in proving that the accused's manner of driving, viewed as a whole, constituted a marked departure from the standard of care of a reasonably prudent driver. It follows that it did not prove the *actus reus* of the offence, and its case must fail.<sup>133</sup>

Charron J agreed with the trial judge in believing that when a driver experiences a momentary lapse of attention, even if this momentary lapse results in another's death, there is insufficient ground for liability. Upon this view it is not a marked departure. It was held an unjustified presumption to assume that just because someone crosses a line and kills people he or she is guilty of a crime. Now though, the presumption is turned on its head. Courts following *Beatty* may now presume that momentary carelessness can occur without fault on Canadian highways. If in one of those moments people are killed we will stoically take this to be a tragic and unfortunate result, but no one's *criminal doing*. These are unintended results for which civil damages may be recovered, but they are results that demand no moral response from the state. Charron J, echoing the Chief Justice, wrote:

Even the most able and prudent driver will from time to time suffer from momentary lapses of attention. These lapses may well result in conduct that, when viewed objectively, falls below the standard expected of a reasonably prudent driver. Such automatic and reflexive conduct may even pose a danger to other users of the highway. Indeed, the facts in this case provide a

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<sup>133</sup> Ibid., paras 80-81.

graphic example. ... The fact that the danger may be the product of little conscious thought becomes of concern because, as McLachlin J. (as she then was) aptly put it in *R. v. Creighton*, [1993] 3 S.C.R. 3, at p. 59: “The law does not lightly brand a person as a criminal.”<sup>134</sup>

Here again, we see the Court’s deep subjective bias even at the heart of an objective test for liability. When and where there is “little conscious thought” to examine, as in *Beatty*, there is little to which triers of fact are able to attach blame. In those cases where exclusively careless harm has occurred we should be particularly concerned about a rush to judgement. Charron J concludes:

If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy. Such an approach risks violating the principle of fundamental justice that the morally innocent not be deprived of liberty.<sup>135</sup>

As we conclude our examination of *Beatty* it bears emphasis: the modified objective test still seeks out marked and substantial departures from a norm. But the refreshed ‘norm’ established by the majority and contested by the Chief Justice is a standard of genuine care and attentiveness. Both the majority and the Chief Justice agree that one instance of unlawful “line crossing” does not a criminal make, regardless of the catastrophic consequences. Both agree that one instance of unlawful line crossing is not sufficient to establish the *mens rea*. But there is unmistakable disagreement about what fundamentally constitutes *mens rea*. According to the majority the lapse of attention (a consideration of mental states) is not, “without something more” sufficient for so-called objective *mens rea*. This kind

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<sup>134</sup> Ibid., para 34.

<sup>135</sup> Ibid.

of lapse does not depart markedly enough from a reasonable standard. Though, McLachlin CJ may have preferred to focus the modified objective test on more instances of *authorized* line crossing (i.e., unexcused and objectively dangerous driving) with less emphasis upon ‘care’, even her conception would not ignore the indefensible and inexcusable voluntary considerations that could authorize an instance of line crossing. The modified objective test is, after all, sensitive to issues of capacity and if it were known that Beatty’s incapacity to remain attentive and confine his vehicle to his lane had been the result of something he authorized (e.g., ignoring physician’s orders or taking sleep medication) then the marked and substantial departure would have been established.

Collectively, the SCC seems to be saying that Justin Beatty is not guilty of the offence because, perhaps just as in the case of Dominic Martin, this tragedy could have happened to any of us. Any licenced driver in Canada is capable of momentary carelessness and unlawful line crossing. Every loving parent in Canada is capable of momentary carelessness that could cross a line into earth shattering regret. The fact that people tragically, but predictably, die in the course of normal living shouldn’t create a presumption of criminal guilt. But let’s consider once again a compelling statement of *obiter dicta* from Justice McLachlin (as she was then) in *Creighton*:

Given the finality of death and the absolute unacceptability of killing another human being, it is not amiss to preserve the test which promises the greatest measure of deterrence, provided the penal consequences of the offence are not disproportionate.<sup>136</sup>

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<sup>136</sup> *Creighton*, 59.

Perhaps it's not unsurprising to hear this stronger, less forgiving tone in a case like *Creighton*, a case that fails to inspire a great deal of sympathy or empathy, neither for the victim, nor certainly for the accused. In *Creighton* there is arguably enough moral fault to go around that the legal handwringing that can often accompany criminal negligence cases is lessened here. In Marc Creighton we see another Daniel Tschetter. There wouldn't be much public disagreement about branding Marc Creighton a criminal. *Beatty*, in stark contrast, can yield considerable empathy from reasonable people. Three innocent and unsuspecting people lost their lives because of Justin Beatty's miniscule failure to comply with the law. Should it matter that he only broke it 'momentarily' when the consequences are so profoundly devastating? The BC Court of Appeal, in overturning Beatty's original acquittals could very well have been considering the words of the Justice McLachlin quoted above. It does not seem like the greatest possible deterrent to fail to punish someone for breaking a law whose public policy goal is to protect lives and property and promote safe social coordination. Perhaps it would be callous to remind 2008-McLachlin CJ of what 1993-McLachlin J wrote fifteen years prior with respect to the "absolute unacceptability of killing another human being."

### ***Implications***

We began this chapter with the goal of seeing how the SCC would resolve their disagreement about fault in cases of negligent harm-doing. As we saw, these cases include a variety of scenarios including but not limited to driving offences, failing to provide the necessaries, and manslaughter. Following *Tutton*, some

Justices thought fault for those types of offences required a subjective test proving that the harm (the *actus reus*) resulted from recklessness or wilful blindness—i.e., some mental state indicating minimal advertence to the risk of harm. Others believed no such psychological scrutiny, beyond the assessment of capacity, was necessary, and that only a marked departure from an established norm was sufficient for liability. The difficulty facing those favouring the objective standard was to determine what or who belonged in the “established norm”. After all, one could argue that it’s a marked departure from a norm to drive and kill five people or three people or two people—or one person! One could argue that it’s a marked departure from a norm to fail to see that one is not sufficiently caring for one’s badly battered infant. One could argue that it’s a marked departure from a norm to inject another human being with cocaine and then expect the law to turn a blind eye when that other human being dies. In other words, there’s nothing obvious about the application of an objective standard that could prevent it from making certain kinds of harmful *consequences* the criterion by which an accused is judged. The standard could end up being quite harsh, quite unforgiving, quite absolute. On the other hand, if the objective standard is to consist of normal human traits like reason, thought, and care it’s difficult, independent of results, to determine precisely what that standard looks like. Obviously the offences for which objective standards are needed seek to discourage, deter, and prohibit certain kinds of behaviours and their predictable consequences. Critics of subjectivism often refer to the profound challenge of discerning mental states and relevant correspondence to the offending action or harm. But a bit of reflection on objective standards of criminal fault shows

that they don't fare much better in terms of insuring that we get the attribution of fault "just right."

What we observed in the five SCC rulings was an explicit and definitive shift toward the objective standard of fault for negligence-based offences. A large part of the shift was devoted to ensuring the application of the standard met the moral demands of the *Charter*. We observed in the progression from *Waite* to *Beatty* certain subjective characteristics more willingly accommodated within the construction of the objective standard. By this I mean that the SCC moved their own reasoning about the objective standard away from observable behaviours and consequences, away from disembodied conceptions of reason, towards a more robustly humanized standard. Certainly reason or rationality can be thought of as a subjective property; reason goes on in a person in the same way that emotions and desires do. What we saw defended by Lamer J in *Tutton* and *Waite*, by Lamer CJ in *Naglik* and *Creighton*, and also Charron J in *Beatty* was a more fully personified objective standard of rationality. One could think about "it" (the objective standard) as being relativized to certain circumstances. Reductively, this could mean that reason *simpliciter* ought to be understood contextually. But that doesn't capture what the Court increasingly has come to say about applying the objective standard—and this, I think, is true even of McLachlin CJ in *Beatty*. The reasonable person, is after all, a *person*. The objective standard is not really an 'object'; and if the standard is really 'out there' then what the standard consists of is not a Platonic form, but something of *our* making. The reasonable person bears the marks of an imperfect *human* being.

When triers of fact construct a reasonable person in *their* minds, Canada's Supreme Court expects them to construct this person with a variety of human mindful qualities, not just practical reason. When applying the objective standard the trier of fact is not looking 'inside' the accused, performing some psychological inventory akin to traditional subjectivism. Rather, it seems the SCC expects the trier of fact to look carefully *at* the accused and ask if this person was somewhere in the vicinity of what a *real* person would have done in those circumstances. Of course, triers of fact are responsible to decide for themselves what qualities a real person would have in particular circumstances. Triers of fact, equipped by law with this formal shell, have an enormous amount of legal and moral influence in Canadian society. If one doubts this, we could consider again the jury's verdict in the Emma Czornobaj case. It's not for a trial judge to tell triers of fact what a reasonable person does, thinks, or values. It's open to lawyers to influence how triers of fact will embody and enliven that formal shell, but ultimately that process is left in the hands of jurors or magistrates. These people also possess varying degrees of reasonableness, along with varying degrees of other things (e.g., religious beliefs) relevant to their judgments.



## Chapter 5: Facts and Values for a ‘Reasonable Person’

Chapter 4 leaves us with a form of the reasonable person by which faith healers will need to be judged if they cause the death of dependent. The content of that form needs to be filled out in relation to faith healing deaths with at least as much detail as we found in *Beatty's* relation to dangerous driving. Punishing a tragic moment of line crossing did not sit well with the SCC, and as argued in chapter 2, criminalizing faith healers for the deaths they cause need not sit well with ordinary Canadians either. There is simply no clear sense of what justice demands in these kinds of cases. This, by the way, would still be true of *Beatty*. Just because the SCC held that a fatal momentary lapse of attention on a highway does not constitute the offence of dangerous driving does not mean all Canadians *ought* to agree that justice is served by their ruling. The Court's ruling on *Beatty* can still leave ordinary Canadians with a significant degree of ambivalence. In the last chapter, we discussed the importance of what is dubbed the venerable Latin maxim; but here's an even more ancient maxim with even more universal appeal: *justitia suum cuique distribuit*. "Justice gives to all their due."<sup>137</sup> Giving to each his or her due is often surprisingly difficult, perhaps especially with negligence-based offences, because our intellectual, emotional, and moral resources pull us in a variety of directions. Chapter 4 enabled us to anchor the fault element of at least some negligence-based offences—the kind under which faith healing deaths will fall—in the breach of an

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<sup>137</sup> The idiom can be interpreted from a variety of ancient sources including Plato and Aristotle, but it is formally expressed by Marcus Tullius Cicero (107-44 BCE) in *De Legibus* Book I, § 15.

objective standard.<sup>138</sup> What this means is that if faith healers are prosecuted fault will have less to do with a psychological description of the accused and more to do with something that we think *ought* to have characterized the accused's actions. Triers of fact are really being asked to consider, among other things, a counterfactual: namely, if the accused had acted more like a reasonable person would the offending harm have still as likely occurred? Chapter 4 looked at the shifting justification of the objective standard from the point of view of the SCC. After years of conscientious handwringing about absolute liability, inflexibility, and punishing the morally innocent, Canadian jurisprudence has found a way, at least in some contexts, to encourage the construction of the reasonable person with sufficient sensitivity to the way real people function in the everyday world. This humanizing of the objective standard seems to express our refined scruples about what is genuinely due someone accused with this kind of crime.

Anxiety about attributing fault to faith healers or anyone else charged with offences of unintended or negligent harm-doing will no doubt persist, and it *should* persist. In virtually every instance in which the charge of criminal negligence is laid, there is really no question that the accused performed the action that resulted in the offending harm. In this sense, there is simply no mystery for jurors or judges to

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<sup>138</sup> It is important to emphasize 'some' negligence-based offences entail breaches of objective standards. Recently, in *R. v. A.D.H.*, 2013 SCC 28, the Court held that child abandonment required a subjective test. The accused in this case was a young mother who gave birth in the washroom of a retail store. She claimed she did not know she was pregnant before expelling her infant into the toilet. Believing the infant was dead, she left the body in the toilet and vacated the premises. The infant was found alive a short time later and transported to hospital. Pursuant to s. 218, the accused was charged with unlawfully abandoning a child under the age of 10 years old and thereby endangering its life. The accused was acquitted on the grounds that the Crown did not prove subjective *mens rea*. The acquittal was upheld by the Court of Appeal of Saskatchewan and the Crown's appeal to the SCC was dismissed.

solve. The crucial question for the trier of fact is simply one of fault. Is this person *justly* blamed and deserving of the punishment for the harm he or she caused? Mayo Moran, in *Rethinking the Reasonable Person*, explains that some of the tension we experience in these types of offences results from the uncontroversial fact that they straddle the line between true crimes and civil wrongs. She writes:

Negligence is the thinnest form of criminal culpability and is in that respect most closely related to its civilian counterpart. Thus, to connect the reasonable person in his civil and in his criminal contexts is to link civil and criminal law at their point of closest relation.<sup>139</sup>

The close relation bespeaks, Moran claims, the importance of ongoing discussion and analysis of the always contentious reasonable person standard. “After all”, she says, “it is the very conceptual and normative proximity between civil and criminal law here that makes the reasonable person so controversial as a basis of criminal culpability and generates the important scholarly discussion concerning the exact nature of culpability in negligence.”<sup>140</sup> In other words, we shouldn’t expect the handwringing to stop. It needn’t stop at the theoretical level—the level at which this study is engaged. And it ought not stop at the practical level where triers of fact do their work and contribute to the ongoing social evaluation in attributing fault. This ongoing reflective assessment is the last line of defence against precipitously and perhaps callously punishing people for causing results we either don’t like or want to see avoided.

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<sup>139</sup> Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford, UK: Oxford University Press, 2003), 4.

<sup>140</sup> Ibid.

The trier of fact in criminal negligence cases plays a crucial role in the constructing the standard of the reasonable person and then in determining whether the accused sufficiently departed from that standard. Ostensibly, this study hopes to make claims with regard to the potential criminal liability of faith healers, but those claims are presumptuous in certain respects. Even though we have spent a great deal of time trying to get an accurate sense of how the SCC has reasoned its way through the related issues, obviously enough it's not the SCC who decides the overwhelming majority of particular cases. Supreme Court rulings inform judicial instructions, and once clear judicial instructions are given to jurors at trial it is for them to decide if a particular accused sufficiently breached the standard to warrant criminal liability.<sup>141</sup> In *Dimensions of Negligence in Criminal and Tort Law*, Kenneth Simons describes the responsibility of triers of fact in terms of three main

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<sup>141</sup> People accused of criminal negligence can elect to be tried either by jury or by a judge. The Tutttons chose to be tried by a jury. So did Daniel Tschetter. So did Emma Czornobaj. Judges decide what evidence is admissible at trial. Prosecutors will largely determine the offence to which the accused is answerable. The Judge is responsible to make clear to the jury the statute(s) in question and the standards that must be met for guilty verdicts to be rendered. But, of course, the Judge cannot tell the jury what the facts of the case are or how they should think about them. It is the responsibility of the advocating attorneys to present the facts to be considered. They are also free to encourage the jury to think about the facts in ways that suit the interests of their clients. Lawyers can tell a jury, "A reasonable person in this circumstance thinks or does X", but it is up to individual jurors to decide for themselves and, then in jury deliberations, to try to persuade others what they think a reasonable person would have done or not have done. When the trier of fact is the magistrate or judge alone, the attorneys are directing their arguments vis-à-vis the facts and their perspective on the reasonable person, to the Judge herself. There is a great deal of calculation that goes in the decision to be tried either by Judge or by jury. In the 2014 trial of Emma Czornobaj, *The National Post* reported the following: "Emma Czornobaj decided to take her chances with a jury and her gamble failed." (Graeme Hamilton, "Emma Czornobaj Found Guilty for Causing Deaths of Two Bikers When She Stopped to Save Ducks on Highway" accessed June 20, 2014, <http://news.nationalpost.com/news/canada/jury-finds-woman-guilty-for-causing-deaths-of-two-bikers-when-she-stopped-to-save-ducks-on-highway>) An accused will try to discern whether his or her case will be more sympathetically heard by a jury of peers or by a single trial judge.

considerations.<sup>142</sup> First, triers of fact in the criminal setting are expected to employ a normative standard that is by nature more vague than if they could simply apply a rule.<sup>143</sup> Secondly, the trier of fact is obligated to “anthropomorphize” or “personify” the standard and this ironically entails challenges to the impartiality that is supposed to be a hallmark of the criminal justice system. In keeping with the first consideration, there is no rule, according to Simons, by which this personifying process must be undertaken. The likelihood of creating the reasonable person in one’s own image, as it were, becomes a considerable temptation, if not a cynical reality. Thirdly, Simons argues, “the standard effectively results in the delegation of law making power to the trier of fact.”<sup>144</sup> What this means is that triers of fact are granted official authority to make lawful or unlawful certain types of behaviour that, of course, could never be captured in a negligence-based statute. For example the statute prohibiting dangerous driving must be sufficiently general to capture a wide variety of instances, obviously not alike in detail. *Wait, Hundal, Tschetter, and Beatty* are all evidence of this. Triers of fact can render certain fact patterns either lawful or unlawful. The triers of fact in the *Czornibaj* verdict have announced that drivers who cause the loss of human life in order to save non-human animal life are guilty of

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<sup>142</sup> Kenneth W. Simons, "Dimensions of Negligence in Criminal and Tort Law," *Theoretical Inquiries in Law* 3, no. 2 (2002).

<sup>143</sup> Simons refers to the “Hand Rule” often used in civil cases. Learned Hand (1872-1961), an American Judge after whom the test is named, presided over a now famous civil case in which an unsecured barge in New York Harbour caused the sinking of an adjacent vessel. The test Hand devised consists of a simple mathematical formula by which negligence can be calculated. It involves the probability of loss, costs of actual loss, and the burdens of prevention. No similar kind of rule functions in the criminal context.

<sup>144</sup> Simons, "Dimensions of Negligence in Criminal and Tort Law," 315.

serious crimes. They do this obviously without any help from a statute that says anything about ducks. Triers of fact in faith healing deaths would enjoy the same delegated power to pronounce upon religiously motivated health care treatments. In summary, then, of Simon's three elements, the reasonable person used by jurors in criminal negligence cases is whatever they agree he or she is. In the absence of an over-arching criminal negligence rule the likelihood of legal disagreement is considerable.

What particular facts and values are possessed by individual triers of fact will, in large measure, determine whether they think faith healers are rightly convicted of criminal negligence. Of course, some of these facts and values will be influenced by precedent and established judicial reasoning. Let's consider a small sampling of what may be gleaned from some of the negligence-based cases that could be informative to the trier of fact in a faith healing case. From *Creighton* one might be persuaded that an "absolute prohibition" against causing another's death must be tempered by the caution against too quickly branding people criminals. From *Beatty*, we learn more explicitly (and more in the order of *ratio decidendi*) that causing some deaths in the course of the everyday is an unfortunate but predictable reality on Canadian highways. Causing the death of another is amongst the very worst things anybody can ever do, but not always is it beyond what can be imagined from an ordinary person in certain circumstances. But, from *Czornobaj* we learn that stopping in the middle of the road to usher helpless wildlife across a busy highway is not "everyday" operation of a motor vehicle. Leslie MacDonald's actions, one learns, were beyond the standard thought appropriate for s. 215. That is, she failed,

in a marked and substantial fashion, to provide the necessities of life to her grandson. Steven and Ruth Shippy similarly failed to provide the necessities of life to their son, Calahan. But, neither Leslie MacDonald nor the Shippys were found guilty of criminal negligence causing death (s. 220) or criminal negligence manslaughter (s. 222(5)(b))—the more serious charges. Relative to these more serious offences their actions were not, apparently, a sufficiently egregious departure to announce that wanton or reckless disregard for life or safety was shown. Criminal negligence is a more serious offence than failing to provide the necessities because someone found guilty of the former is more severely punished and more negatively stigmatized than someone found guilty of the latter. These are just a few considerations mixing description with evaluation that could influence the thinking of a trier of fact. In what follows, we will give clearer content to the relevant facts and values bearing upon liability for faith healers in criminal negligence. We want, after all, faith healers who cause death to receive their legal due: certainly not more, but hopefully for the sake of needlessly dead children, not less either. We will concede, trivially I believe, that faith healers culpably “fail to provide the necessities of life” and that they depart markedly from the standard in that regard. The far more significant legal hurdle to clear is in regards to the charge of criminal negligence. Do the actions of faith healers *objectively* show wanton or reckless disregard for the lives and safety of their children? Rather more straightforwardly: are faith healers who cause death in Canada *criminally* unreasonable?

Discerning criminal unreasonableness requires asking what an accused could have done or should have done to have avoided the harm he or she caused. I argued

at the close of the last chapter that at least with respect to the dangerous driving offence the SCC wanted the objective standard to show more sensitivity to some subjective considerations, most specifically to the care expected in relation to the harm-doing. By this I meant that the reasonable person with regard to the dangerous driving offence does not function as an automaton, or more appropriately, an auto-pilot. The reasonable driver, the SCC argued, is not perfectly programmed to flawlessly and unerringly navigate his or her vehicle along Canadian road ways.<sup>145</sup> Such an auto-pilot, of course, would never cause any deaths with fault. Some other human driver or pedestrian might collide with an auto-pilot resulting in his own death, but it wouldn't be the fault of the ever-dependable auto-pilot. But the ordinary driver in Canada suffers from things perfectly programmed auto-pilots do not; he or she suffers from, amongst other things, inattention and momentary carelessness. In short, the reasonable driver is an *ordinarily* careful driver. The ordinary driver is not like Michael Waite or Surinder Hundal, nor apparently like Emma Czornobaj. But he or she *is* like Justin Beatty. The ordinary driver is psychologically normal, which is to say such drivers are well suited for safety on public roads, but they are neither failsafe nor foolproof. The concern of the SCC in *Beatty*, and going right back to *Tutton*, is that use of an objective standard can run the risk of becoming an absolute standard, that is, a standard demanding liability *absolutely* if and when bad consequences result from human causation. If we have a

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<sup>145</sup> There's no reason to believe driving will become flawless and deaths will be eliminated with the growing trend toward self-driving cars. For example, cars will need to be programmed to make decisions between running over careless pedestrians or swerving to avoid them, thus risking the lives of the occupants. See Patrick Lin, "The Ethics of Autonomous Cars," *The Atlantic*, October 8, 2013, accessed June 4, 2015, <http://www.theatlantic.com/technology/archive/2013/10/the-ethics-of-autonomous-cars/280360/>



standard that included no human frailties, no human imperfections, no genuine human psychology then in a sense every objective standard we create would become, in Simon's language, a "superpersonified" standard, or an auto-pilot, as it were.<sup>146</sup> And of course, super-persons never make mistakes. If the standard by which people are judged never makes mistakes then criminal liability ensues every time the undesired results of the offence occur. But to avoid the worry that an objective standard entails the creation of an absolute liability offence, some capacity for causing bad results must be provided for in the design of the reasonable person. If the subjective test entails *looking* for certain faulty psychological markers in the mind of the accused, then the objective test entails *seeing* a certain degree of normal human imperfection already *in* the ordinary, non-super-person. This is how the SCC expects the trier of fact to personify the objective standard, at least in regards to dangerous driving. In *Beatty*, it was granted that driving an automobile is inherently risky. Everyone who operates a motor vehicle knows this and necessarily consents to certain risks whenever we get behind the wheel of a car. We all know, along with Justin Beatty, that anyone of us could end up on either end of one of those traffic fatalities, either as the careless driver or the victim of another's carelessness. The objective standard must reflect these social and psychological realities. We do not, apparently, consent to the risks of sharing the road with brutish cement truck drivers or hyper-vigilant animal lovers. These are marked and substantial departures, at least according to some triers of fact.

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<sup>146</sup> Simons, "Dimensions of Negligence in Criminal and Tort Law," 313. Simons argues it's a misguided effort to "superpersonify" the reasonable person.

What about the objective standard vis-à-vis criminal negligence? Our study has discussed two people guilty of this crime and, coincidentally, they've been found guilty of dangerous driving as well. Daniel Tschetter, the brutish cement truck driver who killed five people, is unambiguously guilty of criminal negligence manslaughter. Emma Czornobaj, the hyper-vigilant animal lover, was found guilty of criminal negligence causing death, but her convictions are open to wide swaths of disagreement. Recall in chapter 2, I argued that not every verdict of criminal guilt need be as uniformly satisfying as *Tschetter*. It is possible to breach a standard in a marked and substantial way, and still not satisfy everyone's moral intuitions or even reconcile each person's competing moral intuitions. This simply means that everyone must acknowledge some degree of dissonance between the objective standard and one's personal sense of justice. In part, of course, this is what makes the standard, after all, 'objective'. Not only is the standard outside of the accused, it is indeed outside of each trier of fact too—or so it should be! Each trier of fact must somehow embrace a personification that is potentially different from oneself. In the case of Daniel Tschetter, there is a likely a deep sense of confidence in the trier of fact that his actions departed markedly from *any* conceivable reasonable person in his circumstances. We simply don't have that same sense of collective moral clarity when it comes to Emma Czornobaj. I suspect many triers of fact would feel deeply ambivalent about what people like the Tuttons and the Shippys have done as well.

In the context of holding religious beliefs that bear upon care for one's child, what does the reasonable person think and do? Recall that in *Beatty*, the entire Court agreed that momentary carelessness "without something more" cannot

amount to a violation of the objective standard in dangerous driving. What is the 'something more' that could be identified by the trier of fact as a marked and substantial departure? In considering whether faith healers are criminally unreasonable, it's important not to lose sight of the central feature that makes the question meaningful, namely, that their actions resulted in a child's death. It's easy in the normal course of speech to think the question gestures at the idea that believing in faith healing is so astonishingly foolish as to warrant the adjective 'criminal'. We should have no gripe with people who want to believe astonishingly foolish things, but we should be legally, politically, and morally concerned when certain *beliefs* result in clearly avoidable deaths. We learned from *Beatty* that causing avoidable deaths with less than entirely careful driving does not meet a criminal threshold. Oddly speaking, dangerous driving does not amount to *criminally* dangerous driving. By parity of reasoning we can see why criminal negligence liability may not attach to people like Dominic Martin and Leslie MacDonald. Their mistake, in the non-legal sense at any rate, was also just ordinary carelessness. Emma Czornobaj's 'mistake' was not like Beatty's or Martin's. So, how should one think about the deaths caused by faith healers? Do they resemble careless and non-culpable deaths in any relevant way? Let's consider.

The careless deaths of Audrey Martin and Max Huyskens resulted from rather normal, everyday human behaviour, but Christopher Tutton and Callahan Shippy died far more directly from the intentional exercise of *beliefs* and *values*. One might object by saying that religious belief is part of normal, everyday human behaviour too. This may be true. Even ardent atheist, Dan Dennett, is content to

describe religious belief as rather normal.<sup>147</sup> Religious belief is not just normal; it's *natural!*<sup>148</sup> The protestations of still other hard-bitten atheists notwithstanding, I think we should say that today most religious belief, whether normal or natural, is quite harmless—just like *most* driving. But surely it's not reasonable to think that there are inherent risks in the religious life akin to those of driving. We've arrived at a place in Canadian jurisprudence where we accept that in some contexts the loss of human life will predictably occur and in such circumstances justice demands that no one need be branded a criminal. But is the exercise of religion one of those contexts where society must stoically accept the reality of accidental death? Faith healing deaths don't seem to bear the marks of anything 'accidental'. It's not an accident that Christopher Tutton and Calahan Shippy died. Given the course of action *valued* and *chosen* by the parents, reasonable people would have predicted their deaths. Indeed, in Christopher's case, after the first failed 'attempt' the parents were warned again of the dire consequences of withholding insulin. While we might predict deaths will occur in a general sense on Canadian highways, there was no way to predict when Justin Beatty got into his truck that fateful day that his actions would result in innocent deaths. Perhaps even more tragically, while we might predict that some children every year will die because of a caregiver's (ironic) carelessness, there was very little that one could observe from the outside to warrant a prediction that

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<sup>147</sup> Daniel Dennett, *Breaking the Spell: Religion as a Natural Phenomenon* (New York, NY: Viking Penguin, 2006).

<sup>148</sup> Dennett believes religion could disappear just as "naturally." As a species we became "religious" by having an intentional stance to our surroundings. A now more highly evolved intentional stance would make religion unnecessary to cope with our surroundings—so thinks Dennett.

Dominic Martin’s child was gravely at risk.<sup>149</sup> These deaths serve as cautionary tales for all of us everywhere: “when you think you’re being careful, be *more* careful!” But the cautionary tale related to faith healing deaths is surely very different. If one had opportunity to talk with the Tutton’s prior to their decision to withhold insulin, certainly no reasonable person would have said, “be careful.” If there is a cautionary tale related to the Tuttos or the Shippys, it is pointedly this: “when you think you’re being reasonable, *think* again!” Because faith healing deaths so obviously result from voluntary, cognitively well-orchestrated courses of action, courses of action others know are deadly, it makes perfectly good sense to see at least the beginnings of marked and substantial departure—at least from *ordinary* careless people like Justin Beatty or Dominic Martin.

Another preliminary objection to the claim that faith healers depart markedly from reasonable people or otherwise act well beyond the bounds of the ordinary is to consider that reasonable parents are all capable of making mistaken health related judgements jeopardizing a child’s life.<sup>150</sup> Well-meaning parents can make these kinds of errors. A defence attorney could agree that the faith healer made an error in judgement—it happens! The point isn’t to show that faith healers are themselves consummately reasonable in their health related judgements; they

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<sup>149</sup> Tragically, these types of deaths continue to occur and 2014 saw some high profile American instances. A common theme in the causal story is a rushed change of routine. Dominic Martin and Leslie MacDonald meet this fact pattern. It has been dubbed “the forgotten baby syndrome. Gene Weingarten, “The last word: Forgotten baby syndrome,” (March 26, 2009), accessed March 30, 2009, <http://theweek.com/article/index/9471>.

<sup>150</sup> A controversial topic is the issue of mandatory child vaccinations. Some high-profile celebrities and political figures in the US have resisted such policies, claiming some vaccinations cause autism or other harms greater than what the vaccinations are meant to prevent. Of course, not receiving the vaccinations puts not just the child at risk; it contributes to a larger public health risk.

simply cannot depart so markedly from the judgements of a reasonable parent that wanton or reckless disregard for another's life or safety becomes the legal description of their actions. So, the objection goes, maybe faith healers aren't careless in a 'Justin Beatty' sense, but departing markedly from the other mistakes that parents can make will require a great deal more argument or evidence. If the SCC agreed that normal automobile drivers are not perfect automatons, maybe triers of fact should agree that reasonable parents aren't perfect parents either.

Fair enough. Before one can know, though, if the departure is marked, one must first know *what* one is departing from. In the abstract, we've agreed that faith healing parents shouldn't be measured against perfect parents. If Justin Beatty bears some resemblance to the reasonably imperfect driver, what might a reasonably imperfect parent look like? What does the reasonably imperfect person do or think in these health-related circumstances? To get a clearer sense of who the faith healer could be compared to, we need first consider some preliminary issues confronting any trier of fact attempting to grasp 'reasonableness'. To set a standard some alternative conceptions must be held in mind; the trier of fact wouldn't need to set a standard if, as a substantive legal matter, it was given to him or her by a judge or even by the statute itself. The reasonable person necessary for legal and social evaluation does not exist *a priori*, and if it did only discussion, argument, and communication would disclose it. No doubt this could explain almost metaphysically what a jury seeks to do in its deliberations, namely, to sift the evidence and consider what a truly reasonable person would have done under the same circumstances. Perhaps there exists amongst some jurists a kind of Platonic or maybe Kantian hope

that men and women of practical reason, in dialogue with one another, will converge on the right conception of reason and, thereby, the right verdict.<sup>151</sup> Two concerns must be faced by this metaphysically ambitious view of what juries or even judges do. The first is that there is simply too much evidence that courts make mistakes. For all their conscientious hopes that they will be guided by reason and a concern of justice, the history of failure in this regard is overwhelming. The second and more practical concern is this. Let's grant that by careful deliberations a conception of what a reasonable person *would* or *would not* do is somehow accurately derived. This is not half of the practical legal battle. What awaits the triers of fact is an assessment of the *gap* between what their reasonable person would have done and what, in fact, the accused did. The gap (i.e., the departure) between 'is' and 'ought' must be sufficiently substantial for liability to follow.

Frequent reference to 'reasonable' has already been made, but we should acknowledge we've played fast and loose with presumed synonyms like 'ordinary' and 'normal'. As one begins to personify 'reasonableness', how might any of these terms help inform that evaluative process? Two basic approaches commend themselves. Either we can personify the standard simply by reference to psychological and sociological norms derived from observation or statistical analysis, or we can employ some aspirational or qualitative characteristic we think *should* define the standard. The first approach considers human and social reality

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<sup>151</sup> Oliver Wendell Holmes, Jr., expresses his disdain for formal legal reasoning prevalent in his day: "I once heard a very eminent judge say that he never let a decision go until he was absolutely sure that it was right. So judicial dissent often is blamed, as if it meant simply that one side or the other were not doing their sums right, and if they would take more trouble, agreement inevitably would come." Oliver Wendell Holmes, "The Path of Law," in *Classical Readings and Canadian Cases in the Philosophy of Law*, ed. Susan Dimock (Toronto, ON: Prentice Hall, 1897/2002), 71.

from a rather descriptive point view, while the second approach is more conventionally normative in the sense it describes from a more objective, maybe even universal, perspective what a person—*any* person—*ought* to do or think. Considering these two conceptual anchor points, one should be immediately struck with the perennial ‘fact/value’ or ‘is/ought’ distinction. This distinction has been and continues to be notoriously thorny. David Hume’s famous challenge cautions (in particular the religious person) against too quickly leaping from ‘is’ to ‘ought’, or deriving a judgment about the way things ought to be from observing the way things are. The general Humean objection is not that values can have no justification, but that deriving values from facts can never be justified *by* logic or reason. No one should make the mistake that somehow values cannot be sufficiently explained.

Let’s consider how the fact/value distinction comes to bear on the conception of the objective standard again in *Beatty*, for example. The SCC determined that it’s a simple social fact, unfortunately descriptive of the unavoidable risks of operating a vehicle on Canadian highways, that normal human beings will have lapses of attention and kill other motorists. This is nothing to aspire to! Nobody thinks the loss of life on Canadian highways *ought* to happen in anything like an obligatory sense found in law or morals. One might think it ‘ought’ to happen if one considers human nature, mechanical engineering, and the laws of physics, but this sense of ought has nothing to do with obliging the reasonable person. Appeal to the simple facts as they currently exist constrains what might be aspired to or what might be realistically hoped for. In essence, the SCC says the following: “As law makers and as adjudicators of law, we can and should aspire to make road ways



safer but in the course of operating vehicles some people will be causally responsible for the deaths of others. It's just a fact." Given this fact, it's not justifiable to hold people like Justin Beatty criminally responsible for the deaths they cause. Punishment and public condemnation will never eliminate these kinds of unfortunate but inevitable events.

But, here comes the thorny part. It's also just a fact that some people like Michael Waite, Surinder Hundal, and even Marc Creighton are going to show more than normal carelessness and also be causally responsible for loss of life. To them and others like them Canadian society says something very different than it says to Justin Beatty: "You *ought not* behave *that* way; you should have been more attentive to the risks your course of action was generating." But notice, it's still entirely predictable that the Waites, Hundals, and Creightons of the world won't behave as they should and, barring some astronomical criminal law reform, no accommodation for this 'fact' will be provided. We tell them, figuratively with a criminal verdict, "You ought to have aspired to more." It's one thing to take the risk of getting behind the wheel of a vehicle and driving it otherwise lawfully—that is, carefully, but for a split second—and another thing entirely to speed, to run yellow lights, to drive under the influence, or to stop in the middle of highways to usher ducklings across the road.

Even though it's entirely predictable that otherwise law abiding people will use narcotics, the law would like to discourage people from doing so, and also from injecting their friends with dangerous amounts of cocaine. Though drug use is common or 'ordinary' in some sense, Canadian jurisprudence expects triers of fact

to personify a standard whereby the 'reasonable person' either aspires not to use drugs or aspires to use them more safely—at any rate, far more safely than Marc Creighton did. When things go badly, as they did for Kimberly Martin—Creighton's unfortunate friend—triers of fact are entitled to say that Creighton departed markedly from what we hoped he would do. This hope, though, did not spring from the facts of his background or the sociological facts of drug use in Canada. These facts could help triers of fact predict what he *would* do. In this sense, Creighton may not have departed one hint from what society expected of someone like him *in his circumstances*. Indeed, a sociologist might have bet on it. But, the trier of fact is not supposed to personify the objective standard so descriptively, at least not in these circumstances. Sometimes and for *some* contexts triers of fact are entitled to expect more than the factually predictable. From a more general moral perspective we all feel entitled to expect more from people like Creighton or Hundal and maybe even Czornobaj, not because the facts tell us we should, but rather because we simply value the expectation more than the stoically descriptive alternative. We value a world in which fewer people speed, fewer people recklessly disobey traffic laws, fewer people engage in dangerous drug use, fewer people do astonishingly foolish things, etc. And because we value this world—a world that doesn't exist, but a world we feel justified in trying to realize—law enables triers of fact to expect more from people in some contexts than others. It seems Canadian jurisprudence has progressed to the place where some worlds are worth aspiring to but others, sadly, are not. At the very least, society may concede that our collective hopes couldn't be realized with threats of criminal punishment. We can't expect Justin Beatty to be

*super*-human, but triers of fact are entitled to expect more from Marc Creighton, more from Daniel Tschetter, and maybe even more from Emma Czornobaj.

What should triers of fact be willing to tell people like the Tuttons or the Shippys? What ‘facts’ and ‘values’ should come to bear upon the construction of a reasonable person in this regard? When objective standards are legitimized as they have been so comprehensively in Canadian jurisprudence, an enormous amount of responsibility and authority is placed in the hands of triers of fact. Concerns about ‘judicial activism’ are frequently debated amongst philosophers of law and political scientists, but a bit of reflection about what triers of fact must do when presented with a negligence-based offences shows clearly that they are also positioned to be ‘law makers’ in similarly controversial ways. The worry about judicial activism is that unelected judges do the work of elected legislators; i.e., these judges ‘legislate from the bench’. Jurors, in effect, do the same things—or so the objection goes.<sup>152</sup> While they will certainly hear lawyers encouraging them to imbue the reasonable person with certain virtues and not others, ultimately the assessment of whether the accused departed markedly from their norm lies with them. Ideally, the good trier of fact should have a capacity for some degree of objectivity and impartiality. It’s one thing to agree in principle that a standard of fault is objective, and another entirely to be ‘objective’ in constructing it. A judge who cannot see past his own bias would make for a very weak trial judge. While jurors cannot realistically be

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<sup>152</sup> The American organization “*Fully Informed Jury Association*” has a website with the explicit goal of educating prospective jurors of their rights as triers of fact. It also hopes to educate the public generally about the value of “activist juries.” Some of the slogans on their web page are as follows: “You cannot be required to check your conscience at the courthouse door.”; “When justice requires it, you have the right and responsibility to set aside unjust or unjustly applied law.”; “If there is no victim, there is no crime.” See [fija.org](http://fija.org).

expected to possess the same level of impartiality as a judge, their own biases and pre-reflective judgments should be acknowledged. Criminal negligence (and other negligence-based offences) pose particular challenges for jurors because they are not often being asked to decide what factually happened—as they might in a more stereotypical criminal case involving, say, circumstantial evidence. Rather the trier of fact is being asked to decide what, as a matter of *value*, ought to have happened, and then to decide if the accused was sufficiently out of step with this evaluative judgement. Every potential juror should be capable of acknowledging that one's *own* values need not be the *only* values imposed on every other Canadian and certainly need not be the exact values that determine what the 'reasonable person' does. Again to use biblical imagery, no trier of fact should be in the business of creating the reasonable person in one's own image!

Some jurisprudential contrast will help to illustrate where Canadian triers of fact could find themselves, particularly with respect to assessing criminal negligence in a faith healing death. Given the demonstrably greater religiosity of American society, the concern over jury bias takes on added complexity in US Courts. A recent study by American legal sociologists, Brian Bornstein and Monica Miller, entitled *God in the Courtroom: Religion's Role at Trial*, reveals that some judges encourage jurors to use and rely on their religious beliefs when deliberating over a case.<sup>153</sup> This is particularly evident when jury's must agonize over the death penalty.

Bornstein and Miller write:

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<sup>153</sup> Brian H. Bornstein and Monica K. Miller, *God in the Courtroom: Religion's Role at Trial* (New York, NY: Oxford University Press, 2009).

For instance, one judge said, ‘the court in no way means to suggest that the jurors cannot rely on their personal faith and deeply held beliefs when facing the awesome decision of whether to impose the sentence of death on a fellow citizen’ (*Jones v. Kemp*, 1989). Another judge wrote, ‘Prayer is almost certainly a part of the personal decision-making process of many people, a process that is employed when serving on a jury’ (*State v. De Mille*, 1988); another stated that: ‘We do not find it surprising that conscientious people who are faced with a life and death decision resort to their religious scruples in reaching such a decision. Such deep introspection neither violates principles of justice nor prejudices the defendant’ (*Young v. State*, 2000, quoting *Bieghler v. State*, 1997).<sup>154</sup>

Thankfully, Canadian court rooms no longer have to decide Capital offences. But they still need to consider the facts of each case with an open mind. Most frequently this entails the moral obligation to see facts as they are and not as a trier of fact wants them to be. But this is precisely the inescapable challenge for triers of fact in the potential faith healing trials. In a sense the facts are clear; religious parents acted in a way virtually no normal Canadian acts—and a child predictably dies. While it is highly unlikely any Canadian jury in a criminal case involving faith healing would ever be given the religiously sympathetic advice reported by Bornstein and Miller (and enunciated above), some instruction must be given vis-à-vis the objective standard. While they would certainly be told that impartiality is a virtue their reasonable person should have, and that this person does not discriminate on the basis of race, ethnicity, sex, or religion, it is *not* for law or judges to *prescribe* to the trier of fact how a reasonable person should think about faith healing or stopping for ducks. That dialectic will likely be provided by lawyers, but even if it weren’t it would still be left to the trier of fact to decide if faith healers depart criminally from their evaluative judgment. Our next step is to consider what

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<sup>154</sup> Ibid., 68-69.

this virtue of impartiality could mean for the construction of the reasonable person against whom a faith healer would be compared.

## Chapter 6: Pre-empting the 'Mistake of Fact' Defence

Thus far we have sought to explain the (current) state of Canadian criminal jurisprudence with respect to unintentionally caused deaths. We have sought to analyze the salient judicial history along with certain procedural norms relevant to the trier of fact to help us better appreciate what is at stake in the criminalization of faith healing deaths. With the legitimization of objective standards in negligence-based offences we can better understand the significant responsibility that falls to the trier of fact in such cases. Two closely related questions will occupy the attention of triers of fact in a wrongful death case involving faith healers. First, is the Crown presenting evidence that shows the accused acted with wanton or reckless disregard for the life or safety of the deceased? This evidence need not be of a personal psychological nature. No psychologist, no psychiatrist, no clergy, no spouse need be called as a witness to help inform the jury of what precisely the accused was thinking while he or she was refusing to provide conventional medical care to the child.<sup>155</sup> Rather, what the trier of fact will be looking for and what the Crown is obligated to provide is evidence that the accused failed to act in a way that society could expect from a reasonable parent in similar circumstances. Secondly, does the evidence show beyond a reasonable doubt that the objective standard has been breached in a marked and substantial way? The trier of fact might be persuaded in the affirmative with respect to the first question, but remain unpersuaded on the second. That is, there may be undeniable evidence that, objectively speaking, the

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<sup>155</sup> Of course they could be. Character witnesses were called *in defence* at the trials of Steven and Ruth Shippy. The point is that proving the charges does not entail proving very much about the positive mental states of the accused.

accused acted in a wanton or reckless fashion, but the trier of fact may deny that the departure from the standard he or she has conceived is not sufficient to ground criminal liability. The properly instructed juror in this case must be looking for more than a difference of opinion between the reasonable person and the faith healer. Rather, to ensure that the faith healer's legal rights are protected the difference between what the faith healer has done and what could be expected of a reasonable person must be considerable. If the Crown can satisfy the jury with respect to these two questions then guilty verdicts under criminal negligence can be returned and the faith healer can be properly branded a criminal—specifically, for more than simply failing to provide the necessities of life. Recall from the sentencing hearing of Steven and Ruth Shippy, Judge Sirrs declared “you are criminals in Canadian society”—guilty of s. 215.<sup>156</sup> When the Tuttons were originally tried, a jury rendered a similar pronouncement with respect to the criminal negligence offence. Judicial history reveals that for a wide variety of reasons those guilty verdicts did not stand up on appeal. Far more legal clarity exists today and Crown prosecutors could very well proceed with criminal negligence charges, confident at least that earlier questions regarding the requisite fault element are sufficiently settled.

I will concede quickly that the *Tutton* or *Shippy* fact patterns in no way exhaust all the various ways in which faith healers could end up causing the death of a child. In Shawn Peters' book, *When Prayer Fails*, a horrifying litany of cases is surveyed, only some of which are similar to the deaths of Christopher and

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<sup>156</sup> Appendix, 11.



Calahan.<sup>157</sup> Of course not all involve failures to treat permanent ailments like diabetes. Examples include untreated skin lesions and tumours, bowel or intestinal blockages, appendicitis, intestinal infections. Some involve untreated injuries like insect bites, animal bites, etc. The point I want to make very clear is that I concede that no two faith healing scenarios are identical in all respects. Even *Tutton* and *Shippy*, though both involve consenting parents and two diabetic children, are different inasmuch as Christopher was barely of school age, while Calahan was fourteen-years-old.<sup>158</sup> Certainly facts about the child are going to be relevant. Facts about the length of the medically untreated ailment are going to be relevant. Though the standard for criminal fault is objective, still, facts about what the parents actually knew about the child's ailment are going to be relevant. It would be open to the trier of fact to conclude that *some* parents, but maybe not others, ought to have known better. What medical authorities advised or didn't advise parents or caregivers to do or not do regarding treatment is going to be relevant. Proximity to care, availability of care, etc., is *all* going to be relevant. While I am going to argue that people like the Tuttons can be and should be found liable for criminal negligence, I will not argue that every faith healing death should result in a conviction of criminal negligence. I mean only to argue that given the near absolute

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<sup>157</sup> Shawn Francis Peters, *When Prayer Fails: Faith Healing, Children and the Law* (New York, NY: Oxford University Press, 2008).

<sup>158</sup> The age of the deceased is or could be relevant given the standing of the 'mature minor' doctrine in Canada. In 2009 the SCC ruled on a case involving a fifteen-year-old Jehovah's Witness who wanted to refuse blood transfusions to treat her chronic Crohns Disease. The Court held that if an assessment identified that a minor had sufficiently mature character she should have a right to determine her own medical future. In *A.C.'s* particular case, the SCC held that her rights had not been violated by the provisions. See *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] 2 S.C.R. 181.

prohibition against causing death in *certain ways* it would not be unjust to call faith healers criminals in a more serious sense than did Judge Sirrs.

We will turn to making the case against faith healers and, for the sake of argument, I will assume we are prosecuting people like the Tuttons. They have caused death by deliberately withholding medical treatment known to be necessary. This may sound as though the fault lies somewhere in their minds, but make no mistake; they are being accused of showing wanton or reckless disregard for Christopher's life or safety and their fault lies in the evidence that no reasonable person acts this way. What exactly is this evidence? What could a prosecutor provide to the trier of fact highlighting the parent's fault? We have a needlessly dead boy for starters. But the existence of a needlessly dead boy is hardly *res ipsa loquitur* (i.e., it's *not* a 'thing that speaks for itself'). The loss of life in *Beatty* did not speak for itself. Indeed, the three innocent victims occupying the other vehicle were figuratively barred from speaking *at all*. Recall how very clear Charron J was in disallowing results or consequences from playing a role in the determination of fault. Granted, the loss of life in *Beatty* resulted from something the SCC took to be the predictable consequences of normal people engaged in a socially valuable, but otherwise inherently risky social practice. Choices *per se* were not really part of the causal story, whereas faith healing deaths are the direct result of deliberation, choices, and will. Consequently, the bare result of Christopher's death should figuratively speak more loudly than the loss of life in *Beatty*. Nevertheless, we can grant that the loss of life does not constitute sufficient proof of the offence. What other evidence can be provided?

The next line of evidential support is found in considering the nature of the parent's refusal to provide insulin. The nature of the refusal is so important because it could potentially be evidence of something more sinister than criminal negligence.<sup>159</sup> Any parent who knowingly withholds insulin from his or her diabetic child might easily be accused of murder. In doing so, a parent could mean to cause the death or bodily harm of a child and be reckless whether death ensues or not.<sup>160</sup> But of course, genuine faith healers never 'mean' to kill their children. Therefore, the Tuttons would deny that they refused Christopher anything, including insulin. Let's suppose they claim they 'refused' nothing. To the contrary, they might argue that they provided Christopher with everything he needed every step of the way. They simply believed that insulin was no longer necessary. They didn't mean to withhold insulin from someone who needed it; they meant to stop giving it to someone who didn't. The defence will argue that far from showing disregard for Christopher's life or safety, nothing concerned the parents more.

Let's consider more carefully this denial that they refused Christopher any necessities of life. They did not stop providing Christopher with food, water, and shelter. If they failed to provide Christopher with the necessities of life, if they failed to do what was their lawful duty to do and satisfy their son's positive rights, they did

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<sup>159</sup> This study has relied on the probative comparisons to toddler deaths in hot cars. We've assumed the two Canadian cases have resulted from something similar to the deaths in *Beatty*, namely, momentary carelessness. An American case involving a toddler death is receiving a great deal of media scrutiny precisely because of the concern that an intentional murder can easily masquerade as tragic accident. See Elliott McLaughlin, Ralph Ellis, "Tragic Accident or Murder in Hot-Car Toddler Death?" CNN, <http://www.cnn.com/2014/06/25/justice/georgia-toddler-death/index.html?iref=allsearch>

<sup>160</sup> This wording is drawn from one way a culpable homicide could be defined as murder in the *Criminal Code* at s. 229 (a)(i)(ii).

so by an honest and sincere mistake. And if psychology is all that mattered or if a subjective test alone was all that applied then proving beyond a reasonable doubt that the parents were wanton or reckless in withholding insulin would be difficult. No one doubts the parents are sincere. But, should reasonable people simply accept what amounts to the 'mistake of fact' defence? From a charitable perspective, and one that doesn't want to take the illiberal posture of criticizing religious beliefs, it seems simpler to take faith healers at their word. But, let's recall that for mistakes to be exculpatory they must be more than sincerely held. They must be sincerely and *reasonably* held.<sup>161</sup>

Before we consider the reasonableness of faith healing beliefs in a more general sense, let's consider the factual content of beliefs as they relate to faith healing. That is, let's consider the obvious and uncomplicated claim that people like the Tuttons sincerely, but mistakenly, *believed* their child no longer needed insulin. In religious parlance, Christopher was believed to be 'healed' but perhaps the defence will want to appeal to a more common sense notion of having been *cured*. Parents believe this of their children quite frequently and sometimes they're mistaken. Well, the Tuttons were mistaken too—or so the defence may want to argue. Is this an unreasonable thing to accept? Should a trier of fact believe this claim? Notice, we're not here assessing whether it was reasonable for them to think Christopher was divinely healed. We're asking whether it's reasonable to believe

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<sup>161</sup> Professor Stuart writes: "Where the fault requirement is the external standard of objective negligence, it would make no logical sense to allow a mistaken belief defence to absolve unless a reasonable person would have made that mistake. The mistake would have to be both honest and reasonable." Stuart, *Canadian Criminal Law: A Treatise.*, 287.

that they *really* believed Christopher was *cured*. Recall the distinction we just made between the failure to provide insulin to someone who needed it and stopping the provision for someone who didn't. Assessing whether the Tuttons really believed Christopher was cured is not different from any other assessment triers of fact would be asked to make about the content of an accused's claim or testimony. Recall Surinder Hundal. The court didn't believe his claim that he was not aware the light was red or that he believed the light to be yellow. In the well-known rape case, *Pappajohn*, the trial judge refused to allow the 'mistake of fact' defence to be considered by the jury because he did not believe the accused's claim that he thought his victim was consenting.<sup>162</sup> The trier of fact doesn't have to consider the mistake of fact defence if the putative mistaken belief does not have, as McIntyre J called it in *Pappajohn*, the "air of reality."<sup>163</sup> I am certainly not calling the Tuttons liars in the sense intimated in *Pappajohn*. But, our question here is nevertheless probative: were the parents *really* thinking that Christopher was genuinely cured when they suspended his insulin?

Let's set up a paradigmatic case of a parent believing a child is cured of an ailment and let's call it Mistake 1. A child suffers from an accurately diagnosed ailment for which she is prescribed, let's say, a regimen of medication to be

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<sup>162</sup> *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120. The case is well known for its contributions to the "mistake of fact" defence. The trial judge would not allow the mistake of fact defence to be considered by the jury because the accused's account of the events was not believable.

<sup>163</sup> McIntyre J actually only used the phrase once in his judgement and that in reference to another case where, "the facts established at least an air of reality to [the accused's] defence" (*Pappajohn*, 133). His general claim, however, was that in considering all the evidence there was no sufficient reason for the trial judge to have believed George Pappajohn's version of the events. In the absence of a believable story, there would be no reason for a jury to consider a 'mistake of fact' defence.

administered at home by the parents. After only a few days the child's symptoms are gone and her normal state of health is restored; that is, the child appears 'cured' and so the parents stop administering the medication even though both the physician reminded them to continue use until the medication was gone. Though the child appears stable and no change occurs to indicate a relapse, 72 hours after the medication was suspended the child suddenly takes a turn for the worse and dies in the midst of the parents' frantic efforts to summon medical assistance. Let's suppose the mother, believing the child was cured, said she stopped thinking about her child's ailment and the unused medication within 24 hours of her child's initial recovery. That the child died was a complete, utter, and catastrophic surprise—not different than if the child had been hit by a car that very same day. Let's also grant that the cause of death is directly attributable to the absence of the necessary medication. If we're simply consulting what the parent was thinking then it certainly appears that the parent acted as though she long since stopped believing her child was ill. She believed the child was cured. She ended up making a sincere mistake of fact.

Is it not possible for a faith healing parent, say Carol Tutton, to be given a similar description? This is actually a more difficult argument to make than first appears. In the paradigm case, Mistake 1, we have parents whose child has a non-permanent condition for which medical treatment was prescribed. The parents stopped giving the medication after they thought the child no longer needed it. In the faith healing case—call it Mistake 2—we have parents whose child has a presumably permanent condition for which medication has long been used for long

term successful treatment. The parents withhold the medication because, allegedly, they believe the child's condition has been cured. Are these two accounts not just two different instances of one sort of mistake, namely, a general mistake about a child's health? Consider what a mistaken belief in this second context would consist of from the perspective of a reasonable person. Most everyone in our society has experience taking medicine and being 'cured' because of it. That is, a change for the better has occurred. We have a headache and taking pain relief medicine relieves or moderates the pain. We have a toothache and we go to a dentist; the source of the discomfort is treated, and lo and behold, our toothache goes away. Why is medical science so successful at relieving our discomforts and treating our ailments? Because medical researchers better understand the causes of certain discomforts and ailments, and subsequently have become better at counteracting those causes and *causing* something else more desirable, or at least less undesirable. Are these causes always perfectly or even clearly understood? Not always, but even so, researchers can concede that sometimes the most we can hope to achieve is some kind of correlative understanding between two kinds of conditions: a treatment and a symptom. Perhaps with certain ailments we will need to be content to treat symptoms until we can better understand causes. In any case, parents in Mistake 1 know that the medication they used to treat their child was designed to cause the ailment to go away. They, like millions of parents, have learned to trust in the very same sequence of events—because the sequence happens, with the help of medical science, all the time. The Tuttons, parents in Mistake 2, would be completely familiar

with this sequence. Indeed, they were relying on it right up to the moment they decided to withhold insulin.

Let's consider the following narratives expressing the reasoning in each scenario. The parent in Mistake 1:

“My child has an ailment the cause of which is unknown to me, but I trust is better understood by medical professionals. Medical professionals prescribe a medication the application of which will relieve the symptoms of the ailment and allegedly cure the ailment, making continued use of the medication unnecessary. Millions of children just like mine have been cured by treatments just like this. I have received no warnings from medical professionals that my child's ailment is permanent, so it is altogether reasonable to think this ailment will not get worse and will go away if I follow the advice of the doctors. When my child's symptoms improved and, indeed, went away, I assumed the medication had done its job and that my child had been cured. I never gave my child's life and safety another thought. Had I thought for even a moment my child's life was still in danger I would have immediately resumed treatment and sought further medical attention. What better reason could I have for believing my child was cured than that her physical signs improved?”

This can't sound anything like the reasoning that goes on in the typical faith healer. We know that about a year earlier, the Tuttons 'believed' that Christopher's diabetic condition had been divinely healed. Following the suspension of insulin injections he was quickly hospitalized and Christopher's life was saved. The Tuttons were



sternly warned not to suspend insulin injections again. They were told *again* that Christopher's condition was permanent, but that many diabetics just like Christopher could lead normal lives with routine insulin injections. The narrative reasoning in Mistake 2 could go as follows:

“My child has an ailment the cause of which is unknown to me, but is presumably better understood by medical professionals. Medical professionals prescribe a medication the application of which will allow my child to live normally, making continued use of the medication presumably necessary. Many people just like my child suffer from this ailment and live normal lives with the prescribed treatment. I have received warnings from medical professionals that my child's ailment is permanent, so it is presumably unreasonable to think this ailment will ever go away. Nevertheless, I suspended treatment not because of anything I saw or observed about my child, but because of something I *believed* about God and the Bible. I immediately observed my child's symptoms return and I kept him home from school. I did not believe that continued insulin use would harm my child but I did believe that continued insulin use would reveal my own lack of faith and thereby frustrate God's desire to do the miraculous. Though my child's condition worsened I held a deep conviction God wanted to cure my son and vindicate my faith. I believed I was being asked to trust him and this trust was, I also believed, incompatible with continued use of insulin. What better reason would anyone have for believing my son was healed than that, as a diabetic, he could live without insulin?”

There is nothing in this account that faith healers could find disagreeable or objectionable. But notice, it would be entirely incredible to hear a parent in Mistake 2 express the claim that concluded Mistake 1: “I never gave my child’s life and safety another thought.” This would be unreasonable to believe as a matter of fact. One might hear the exact phrase said, not as a matter of fact, but as a hopeful declaration of faith. Consider the famous Psalm 23: “Yea, though I walk through the valley of the shadow of death, I will fear no evil; for thou art with me.”<sup>164</sup> As a matter of fact, the people who take existential comfort in this verse typically have good reason to fear *something*. That’s what reasonable or otherwise normal people do in the “valleys” of trouble. They *declare* their faith; they *aspire* to have courage. They *want* to believe they are not alone. If faith healing parents can’t say what parents in Mistake 1 say, then it’s patently obvious they didn’t really believe, as a matter of fact, that their children were “healed”, past tense. If they’re going to rely on a mistake of fact defence to rebut the charge of criminal negligence, they’re going to need *a fact* they really believed and were plausibly mistaken about.

Perhaps faith healers will object and say they believed *something* false, and provided they believed something false, the mistake of fact defence is still available to them. Let’s consider this. First, we need to get clear on the ‘something’ believed that turned out to be false. We might be tempted to simplify their mistake and say they sincerely believed *that* “withholding insulin would not harm my son.” If they hadn’t believed this or they had been right about their belief then Christopher would not have died and no offence would have taken place. But that cannot be the

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<sup>164</sup> Psalm 23:4 (*King James Version*)

exculpating mistake either. Suppose the neighbour's daughter, Sally, suffered from precisely the same form of diabetes that Christopher did and Sally received insulin just as Christopher did. Would the Tutttons believe that no harm would come to Sally if insulin is withheld from her? No. They would believe it would result in her death in the same way that snake handlers know that unbelievers who are bitten by rattlesnakes typically die. Why would withholding insulin from Sally result in harm? A variety of explanations would be presented by the faith healer. Perhaps God had not decided to heal her. Perhaps the parents needed first to trust in God. The only reason the faith healer can have the belief that "withholding insulin won't harm *my* child" is if he or she has the prior, more fundamental belief that "God *wills* to heal *my* child." This is a different belief from "God *has* healed my child" or "withholding insulin won't harm *my* child."

Why shouldn't we concede that the Tutton's false belief was that "God has *healed* Christopher"? If we look at this closely, again, we don't see the sincere, genuine belief that Christopher was (past tense) healed. No doubt they were hoping beyond hope that he would live and that they would be able to exalt in God's power, proclaiming it to an unbelieving world. But they did not suspend insulin because they believed Christopher was *healed*; they suspended insulin because they believed continued use would make Christopher's healing unknowable. The only epistemic justification for believing God had healed Christopher would be *ex post facto*. Only *after* they proved to God they trusted enough to withhold insulin would God then do the thing scripture promises he'll do, namely, heal people. Faith healers like the

Tuttons and the Shippys believe they have no epistemic right to claim belief in God's healing power unless they act in a way that relies on it in a particular sort of way.

The sort of belief endorsed here could also be captured with the Latin distinction *de re / de dicto*.<sup>165</sup> That is, one can believe something 'of the thing' or something 'of the word(s)'.<sup>166</sup> Faith healers know that it's possible to pay lip service to religious doctrine and that many people who claim to be believers are not *real* believers. It's simply not good enough to affirm a general belief that "God can heal people." To believe this *de dicto* and yet refuse to believe *de re* that "God can heal *my* son" is a sign of insufficient faith! The complaint of many a fundamentalist (regardless of religion) is that too many adherents to 'the faith' are merely nominal; they are believers 'in name only' because they're superficial believers. They pay a cheap kind of lip service to 'true' doctrine; they believe *de dicto* what true believers think should be accepted in crucial instances *de re*. In other words, nominal believers believe pragmatically *in belief*, in appearing to believe, but *real* believers know this kind of vacuous faith does not please God.<sup>167</sup>

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<sup>165</sup> W.V. Quine helped drew a great deal of attention to the *de re/de dicto* distinction from twentieth-century analytic philosophers. Quine himself was dubious of the distinction, as he was famously about the analytic/synthetic distinction. See W.V. Quine, "Quantifiers and Propositional Attitudes," *Journal of Philosophy* 53, no. 5 (1956).

<sup>166</sup> A standard example of the distinction can be expressed by the ambiguous sentence, "Smith believes someone is a terrorist." Smith's belief could mean two very different things depending upon the distinction. For example, Smith could believe someone (*de re*) is a terrorist, in which case authorities might like to talk to Smith and find out what she knows about this particular person. Or Smith could believe, as most of us do, that someone (*de dicto*) is a terrorist. Of course, Smith and the rest of us are completely useless to authorities because we have no clue who the terrorists in the world might be. We know they exist somewhere. The latter claim is vaguely empirical, but it wouldn't need to be put to the test.

<sup>167</sup> Conservative Christians will know full well that not everyone who uses Christian lingo necessarily commit their lives in the ways God expects. This suspicion is captured in the following biblical

Atheists, like Bertrand Russell, see through this with the same clarity as the fundamentalist. The nominal, half-hearted religious person believes what is convenient and pragmatic for him or her to believe. It is comforting to believe generally that God can heal people. And if no miraculous healing occurs, none the worse for that, God's grace will manifest itself in some other mysterious way. But no fool would actually believe that 'God has healed my child' when there's not the slightest bit of evidence for it! This kind of approach to religious faith, Russell penetratingly wrote:

... causes him [i.e., the pragmatic theist, e.g., William James] to substitute belief in God for God, and to pretend that this will do just as well. But this is only a form of the subjectivistic madness which is characteristic of most of modern philosophy.<sup>168</sup>

Russell's complaint was that pragmatic and idealist conceptions of truth and reality encouraged especially Christian believers to relax within one's own intellectual scruples and not take seriously the fact of an external world capable of impressing itself upon an alert mind. This external world would obviously not impress belief in God upon an alert mind—not according to Russell. Conversely, the pragmatic religious believer could avoid the more absurd doctrines of one's faith by simply

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passage: "Not everyone who says to me, 'Lord, Lord,' will enter the kingdom of heaven, but only the one who does the will of my Father who is in heaven. Many will say to me on that day, 'Lord, Lord, did we not prophesy in your name and in your name drive out demons and in your name perform many miracles?' Then I will tell them plainly, 'I never knew you. Away from me, you evildoers!'" (Matthew 7:21-23 *NIV*).

<sup>168</sup> Bertrand Russell, *History of Western Philosophy* (London, UK: George Allen & Unwin, 1946), 772-73. Russell not only disagreed with American pragmatists, he also had longstanding disagreements with the British Idealists such as F.H. Bradley.

rationalizing them away through some hermeneutical contortion.<sup>169</sup> Instead of soberly considering radical doctrines or immoral claims as evidence of a system's overall unintelligibility, more liberal religious believers reinterpret what is distasteful—say, perhaps about slavery, violence, or women—and accept the parts of Christian teaching that fit more congenially with their existential needs and their modern moral impulses—say, about, love, peace, self-sacrifice, etc.<sup>170</sup>

Fundamentalists like the Tuttons would share Russell's complaint, but disagree sharply with the atheist who says there's no good reason to believe God is really 'out there'. Faith healers (to say little of snake handlers) are prepared to act, to *reify* their beliefs, and thereby prove that both atheists and nominalists are wrong. Atheists, fundamentalists will say, are wrong because God *is* really out there and willing to act in the world in ways that *only* God could. He can be trusted and should be trusted, in exactly the same way any real person could be trusted to act and keep promises.

And fundamentalists will say that religious nominalists or pragmatists are wrong

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<sup>169</sup> An example of this can be found in the various theological accounts that assist the Christian to rationalize beliefs about the Eucharist. Various Christian traditions endorse the idea that when adherents participate in the Eucharist or Communion or the Lord's table (as it is variously known) Christ's body and blood become or are made present in the elements of bread and wine. Realists like Russell—to say nothing of Dawkins, *et al*—would encourage Christians to reflect more sensibly on the content of that doctrinal commitment. Everyone who eats human flesh or drinks human blood engages in cannibalism; i.e., they are acting as a real cannibal. Of course, no Christians believe they engage in real cannibalism when they participate in their ancient sacrament. They believe something else *about the words*, "This is my body, which is for you; ... This cup is the new covenant in my blood." (I Corinthians 11:23-24 *NIV*).

<sup>170</sup> In addition to the doctrines related to the Eucharist and Christ's penal substitution for human sin (a kind of metaphysical honour killing), other standard examples of distasteful claims come explicitly from Christian scripture: "Slaves, obey your earthly masters with respect and fear, and with sincerity of heart, just as you would obey Christ." (Ephesians 5: 23 *NIV*); "Slaves, in reverent fear of God submit yourselves to your masters, not only to those who are good and considerate, but also to those who are harsh. For it is commendable if someone bears up under the pain of unjust suffering because they are conscious of God." (1 Peter 2:18,19 *NIV*); "I do not permit a woman to teach or to assume authority over a man; she must be quiet." (I Tim 2:12 *NIV*).

too, because they trust in only in their belief, in their articles of faith, but not “in the things” to which their beliefs bear witness.

In spite of their best efforts to believe that Christopher had been healed or was being healed or that the withdrawal of insulin would not harm him, the evidence to the contrary can be found in Carol’s decision to keep him home from school and to monitor him as closely as she did. These are not the behaviours of a parent who, like in Mistake 1, thinks her child *is* cured; they might be the behaviours of a parent who is *trying* to believe her child is healed—and this *trying* makes all the difference in terms of holding genuine and reasonable beliefs.

In search of another potential candidate for a mistake of fact, what about the sincere belief that “God *wills* to heal my child”? Well, no doubt this proposition was sincerely believed. Indeed, nothing else can explain the courage it would take to withhold insulin in such a case. Christian scripture tells the believer that “faith is confidence in what we hope for and assurance about what we do not see.”<sup>171</sup> Additionally, believers are told they “live by faith, not by sight.”<sup>172</sup> Faith healers would certainly be encouraged by these biblical pronouncements. But, a belief about what one *hopes* to be the case cannot be exculpatory. By sight, as it were, it looks to all the world that the child is in peril; but, by faith, there is hope in something that cannot be seen. Scripture also reminds the faith healer: “For our struggle is not against flesh and blood, but against the rulers, against the authorities, against the

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<sup>171</sup> Hebrews 11:1 (NIV).

<sup>172</sup> II Corinthians 5:7 (NIV).

powers of this dark world and against the spiritual forces of evil in the heavenly realms.”<sup>173</sup> In other words, true believers try to believe that their struggle isn’t really with the world as it appears. The true believer realizes that one’s perceptions often cannot be trusted because there are more sinister and malevolent forces obscuring one’s ‘real’ vision. This is where the genuine battle for belief is being waged. Instead of allowing the empirical world to foster doubt—as people like Russell would say it *ought*—the true believer strives to disavow those perceptions.

Such an orientation to so-called ‘reality’ is entirely acceptable as a private epistemic posture. People are free to believe in all manner of personal superstition. Unfortunately, beliefs issuing from this other-worldly perspective and beliefs based on hope cannot possibly be candidates for excusing mistakes of fact. On the contrary, in the public realm of law such beliefs would provide better evidence for the Crown of wilful blindness. The fault in wilful blindness is customarily referred to as a culpable failure to make appropriate inquiries about the alleged wrong. Sometimes the circumstances in question are such that a reasonable person would doubt their appearance. To fail to make appropriate inquiries is to fail in the circumstances to exercise a reasonable degree of incredulity, to wilfully blind oneself to the possibility of error. The trier of fact should be able to see very clearly that wilful blindness is the most accurate legal description of what a faith healer does. Unlike perhaps typical examples of wilful blindness where the accused presumably benefits from ignoring reality, faith healers are, granted, not *as* morally blameworthy. But, there’s still no debate that faith healers blind themselves *to a*

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<sup>173</sup> Ephesians 6:12 (NIV).



*reality* that is evident to virtually all other observers—and a child dies as a result. It should hardly matter that faith healers are not buying stolen goods from the trunk of someone’s car; the results are worse—and there’s no debate that they blinded themselves to these tragic but predictable results.

A related difficulty with the presumed mistaken belief that “God wills to heal my child” is that there are no conditions under which it could be falsified or proved *mistaken*. It could always be the case that God wills or desires to heal a particular person, but for a variety of perfectly inscrutable reasons, perhaps unknowable to sinful mortals, God’s healing power cannot be manifested in that instance. Beliefs about the intentions, beliefs, and desires of a deity are the kind of thing about which the religious adherent cannot possibly be proven wrong. Believing that “God wills to heal my child” is epistemically on par with the belief that “Allah is dishonoured by my daughter’s secular behaviour” or “God’s justice is vindicated in the killing of abortion doctors” or “God hates fags.” The honour killer cannot be proven factually wrong. How could anyone possibly know that Allah or the Islamic religion generally *is not* particularly dishonoured by the secular behaviour of women?<sup>174</sup> How can anyone possibly know that God *is not* outraged by abortion, so much so that he seeks out mercenaries to combat the scourge with unlawful violence? And of course, how can anyone possibly know that homosexuality *is not* an abomination—as stated

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<sup>174</sup> “But those who disobey Allah and His Messenger and transgress His limits will be admitted to a Fire, to abide therein: And they shall have a humiliating punishment. If any of your women are guilty of lewdness, Take the evidence of four (Reliable) witnesses from amongst you against them; and if they testify, confine them to houses until death do claim them, or Allah ordain for them some (other) way. If two men among you are guilty of lewdness, punish them both. If they repent and amend, Leave them alone; for Allah is Oft-returning, Most Merciful.” Quran - Book IV *An-Nisa* “Women” v.14-16.

clearly in Leviticus 18:22. Nothing about reality or the world as *we* know it could verifiably disconfirm these beliefs *about beliefs*. After all, the belief isn't about anything *in* the world; it's rather about a presumed *divine* mental state. It takes little imagination to see that if human mental states are difficult or controversial to discern, then "the mind of God" permissibly remains perfectly mysterious.<sup>175</sup>

We should quickly add that nothing about believing in divine mental states could possibly exculpate the honour killer, or the violent anti-abortionist, or the faith healer. The honour killer intends, for no good reason understood by law, to kill his daughter. The sincere belief that the offending daughter is wholly dishonourable and deserving of an ignominious death is of no legal relevance. When the violent anti-abortionist sets up his sniper rifle, he means for no good reason understood by law, to kill the abortion doctor across the street. And the faith healing parent longs to exalt in the "reality" of God's supernatural power, if only "it" would show up as promised. Of course, the *intention* of the faith healer won't satisfy the *mens rea* requirement of criminal negligence; there's nothing criminally faulty about hoping to luxuriate in the reality of God's miraculous powers. It's interesting, however, that all three could easily be examples of people genuinely and sincerely obeying the presumed "will of God." No one would ever dream of considering the defence of

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<sup>175</sup> There are some philosophers critical of this line of reasoning. The objection is that there is nothing metaphysically impossible or epistemically incoherent about the idea of a God communicating publically and verifiably with humans in this world. If humans can communicate in this way, the challenge shouldn't be that great for an omnipotent God. He could, after all, "show up" at any minute in ways that everyone in India, Japan, South America, etc., could not reasonably deny. It's only special pleading that encourages people to simply assume that the divine mind is inscrutable. The claim must either be that God currently refuses to communicate with humans or no God capable of communication exists. This argument is developed by American philosopher of science, Norwood Russell Hanson, in *What I Do Not Believe and Other Essays*, ed. Stephen Toulmin and H. Woolf (New York, NY: Springer, 1971).

mistake of fact for the first two, so why should a trier of fact be more willing to consider the mistake of fact for faith healers? Likely, of course, because the mistake vaguely admitted to (viz., “God wills to heal my child”) is seen by the sympathetic trier of fact to mean less about God’s desires and more about a parent’s hopes. As we have seen though, when those beliefs are scrutinized it’s difficult to find sincere mistake of fact. Faith healers do not genuinely believe that God has healed (past tense); at best they are *hoping* he will heal or is healing—and hopes are not candidates for mistakes of fact.<sup>176</sup>

Perhaps in a last ditch effort to salvage the mistake of fact defence, the faith healer might say, “Look, we were trying to be obedient Christians. We were hoping to see our son healed. Even though ‘the world’ told us it was unreasonable, we were convinced that he was *going to be* healed. We really didn’t think the child would die. He did die. We’re very sorry we were mistaken.” Now, frankly such claims are rarely made in the wake of faith healing deaths. As an empirical fact, while many faith healers are naturally saddened by the loss of a child, they are frequently resolute in the course of action they chose. Following their guilty verdict, Steven Shippy stood on court house steps and said to reporters, “I wouldn’t change a thing” and “I believe that God takes someone for a reason.”<sup>177</sup> But, be that as it may; suppose the defence took the more conciliatory route asserted above. Doesn’t the claim, “we were

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<sup>176</sup> I do not dispute that faith healers believe in the testimony of fellow faith healers. Nor do I dispute that a faith healer can attribute divine causation to past *cures*. I’m quite sure that virtually all faith healers can give a long list of instances where they prayed for some remedy to, say, a headache or the flu, and the hoped-for relief eventuated. No reasonable person would be obliged to attribute divine causation to events that happen quite naturally with startling regularity.

<sup>177</sup> Appendix, 3.

mistaken” sound more like a confession than an exculpatory pronouncement of mistake of fact? To issue the statement above and conclude, “we were mistaken” entails an admission that they were aware of the risks to their child, but in an effort to vindicate their faith they chose to disregard those risks and trust God in the face of all the evidence. This is not admitting one was wrong about some particular fact that, had he *not* been, none of this would have happened and no offence would have occurred. This is an admission that things didn’t turn out as hoped for. The defence might stubbornly object, saying the accused *was* mistaken about a particular fact that, had he been right about, no offence would have occurred. The Tutttons were wrong, the defence could insist, about God having healed Christopher. Had they been right, none of ‘this’ would have happened!

But, ‘this’ is very fuzzy. To now belabour the point, they didn’t believe, *as a matter of fact*, God had healed Christopher; they *wanted* to believe God healed Christopher; they *hoped* that God would heal Christopher. But let’s suppose for the sake of argument that the impossible had occurred and Christopher’s diabetes ‘just went away.’ Not only would he have become a world famous medical example, of course the Tutttons would never have been charged with a crime. Their deepest fantasy would have come true. But, that’s precisely why the “mistake of fact” cannot be available to them. Their belief “If God had only instantaneously made it such that Christopher could live without insulin” is on par with other outlandish beliefs. For example: “If Joe Pesci had only instantaneously made it such that Christopher could

live without insulin” the parents would never have been charged with a crime.<sup>178</sup> Here’s another: “I thought Mary was a mermaid. If I had been right about this, she wouldn’t have drowned when I threw her in the lake, and no offence would have occurred.” Of course it’s possible that Christopher might not have died in the midst of the faith healing episode. Perhaps he could have been revived by emergency medical personnel like he had been once before. But it is impossible, given his condition, that he could have survived long without insulin. The mistake the Tuttons made—irrelevant as a defence—was believing in the first place Christopher could *possibly* be healed. This might be a mistake about what facts *are*, but this is not a ‘mistake of fact.’ They could not possibly have been right about this—and they had been repeatedly told as much.

Consider a standard mistake of fact story of a non-sexual variety. Aidan tells Ben to come over to his new apartment and make himself at home—the key will be under the mat. Aidan will join Ben in a few hours. Ben does as Aidan says but goes to the wrong apartment. Casey, who also leaves a key under his mat, is out for the day. Casey returns and can see through the window a stranger roaming around in his apartment. Casey calls the police and Ben is arrested for break and enter. Ben made a mistake. Had he gone to the right apartment, no offence would have occurred. Ben did unlawfully enter Casey’s apartment; that is, he committed the *actus reus*. But the exculpating mistake was done sincerely *and* reasonably. Even Casey, and of course the police, can see that Ben *could* have been right. The problem, of course, with the

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<sup>178</sup> George Carlin, American comedian, said, “You know who I pray to? Joe Pesci.”, accessed February 1, 2015, <https://www.youtube.com/watch?v=gPOfurmrjxo> at 6:50.

Tuttons and the Shippys dealing with diabetic children is that it is (currently) physically impossible for them to have been right. Without this possibility, no mistake of fact is a reasonable defence.<sup>179</sup>

Giving evidence that faith healers hope in something other-worldly—things frequently but not always fatal—should sufficiently rebut the mistake of fact defence, but certainly more can be said, and must be said, to mount a positive case against the faith healer. Some evidence in the form of argument has been provided to show that a better explanation of the faith healers actions is wilful blindness rather than mistake of fact, but more in terms of positive evidence must be given if a marked and substantial departure from reasonableness is going to be sufficiently proven. It bears repeating, the only burden on the defence is obviously enough to mount a defence *against* the evidence. Professor Stuart writes:

As a matter of logic and principle, an accused's defence of ignorance or mistake of fact will often amount to a plea that the Crown has not proved the applicable fault requirement. In such cases it is misleading to speak of a "defence" of mistake of fact, since that language may be wrongly interpreted as having specific substantive requirements or somehow affecting the onus of proof.<sup>180</sup>

So, the burden of proof continues to lie squarely with the Crown, but in addressing the presumed "mistake of fact" the impartial trier of fact should agree that a reasonable person would have, at the very least, made inquiries into both the status

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<sup>179</sup> Shawn Peters recounts one of the many American cases in which diabetic children died at the hands of faith-healing parents. In this instance he is referring to Shannon Nixon, a 16 year old victim who died in the summer of 1995. He writes: "There is little hope for victims of [diabetic ketoacidosis] who do not receive this relatively cheap treatment [regular insulin injections]; diabetes experts say that their survival rate is zero. The decision not to seek medical treatment for Shannon thus sealed her fate." Peters, *When Prayer Fails: Faith Healing, Children and the Law*: 147.

<sup>180</sup> Stuart, *Canadian Criminal Law: A Treatise*: 287.

of deceased's health and the effectiveness of the trusted treatment. Let's now turn our attention to the positive evidence that faith healing parents like the Tuttons or the Shippys show wanton or reckless disregard in the objective sense.

## Chapter 7: Faith Healers Culpably Get 'Reality' Wrong

Over the course of the next two chapters we're going to consider the reasonable person in two different forms in an effort to persuade the trier of fact that faith healers are liable in criminal negligence causing death. We should recall Ken Simons' claim that triers of fact in negligence-based criminal cases are not being asked to apply a specific rule, but rather create in their own minds a personified norm of reasonableness against which they will compare the accused.<sup>181</sup> There will be two levels of discourse in each chapter. One will be more theoretical and, while yawningly irrelevant to a juror, should be of interest to philosophers of law, litigators, and trial judges considering the relationship between faith healing and criminal negligence. The second will be less theoretical and more dialectical, intended to be of practical use, certainly to philosophers, but also to prosecutors and jurors trying to reason their way through the idiosyncrasies of faith healing and the criminal negligence offence. We shall assume, as well, that all the material facts of the case have been presented. What is left is for litigators to offer interpretations of those material facts and for triers of fact to frame a conception of the reasonable person. Each personified standard—indeed, virtually any possible reasonable standard—will not have behaved as faith healing parents do. This is not a controversial claim. The crucial question is this: by this *particular* personified standard are the faith healing parents who kill their children guilty of the offence?

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<sup>181</sup> Simons, "Dimensions of Negligence in Criminal and Tort Law."



The first perspective of reasonableness will derive in a jurisprudential sense from the work of American Legal Realist, Oliver Wendell Holmes, Jr.<sup>182</sup> I will simply refer to it as common-sense objectivity or the common sense view. In historical perspective, Holmes was critical of what he took to be an outmoded preoccupation with abstract morality over and against more practical legal concerns. Unlike another famous critic of abstract morality, Jeremy Bentham (1748-1832), Holmes was not interested in finding a better, more scientific *moral* foundation for criminal law. Holmes was interested in justifying criminal law with unvarnished observations of the way individuals genuinely relate to one another, absent any grand teleological speculations. Holmes wrote, "For the most part, the purpose of the criminal law is only to induce external conformity to rule. All law is directed to conditions of things manifest to the senses."<sup>183</sup> The function of criminal law is simply to prevent certain observably, sensibly negative and unwanted occurrences: "if those things are not done," says Holmes, "the law forbidding them is equally satisfied, whatever the motive."<sup>184</sup> Criminal law exists to provide incentives and disincentives according to the kinds of behaviours we can all live with and those we cannot. Criminal law doesn't care why we choose not to harm one another; it doesn't care whether we're afraid of eternal damnation, or some worldly punishment or disapproval. Whatever motive (moral or otherwise) a person has not to violate the law is perfectly acceptable from a legal perspective. Criminal law functions most

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<sup>182</sup> Oliver Wendell Holmes, "Lecture II: The Criminal Law," in *The Common Law* (Cambridge, MA: Harvard University Press, 2009/1881).

<sup>183</sup> *Ibid.*, 49.

<sup>184</sup> *Ibid.*

efficiently and most justifiably when it refrains from imposing moral motives for action or inaction, but seeks, where necessary, to provide sensible motives to constrain human interaction.

Now, let's consider a longer quotation from Holmes's work on criminal law where we get a distinct flavour of his straightforward approach to fault and the simple function that criminal law fulfills.

Ignorance of a fact and inability to foresee a consequence have the same effect on blameworthiness. If a consequence cannot be foreseen, it cannot be avoided. But there is this practical difference, that whereas, in most cases, the question of knowledge is a question of the actual condition of the defendant's consciousness, the question of what he might have foreseen is determined by the standard of the prudent man, that is, by general experience. For it is to be remembered that *the object of the law is to prevent human life being endangered or taken*; and that, although it so far considers blameworthiness in punishing as not to hold a man responsible for consequences which no one, or only some exceptional specialist, could have foreseen, still the reason for this limitation is simply to make a rule which is not too hard for the average member of the community. As the purpose is to compel men to abstain from dangerous conduct, and not merely to restrain them from evil inclinations, *the law requires them at their peril to know the teachings of common experience*, just as it requires them to know the law. Subject to these explanations, it may be said that the test of murder is the degree of danger to life attending the act under the known circumstances of the case.<sup>185</sup>  
(emphasis added)

There is a great deal to be mined from this quotation. In it we see a simple pronouncement that criminal law needs no higher rationale or justification than to simply prevent and deter the loss of life or its endangerment. Also, from the extended quote above, we see a similarly parsimonious justification for criminal punishment. If a prudent man, familiar with the teachings of common experience, would have foreseen the loss or the endangerment caused by the person's actions

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<sup>185</sup> Ibid., 56-57.

then punishment is justified. More normatively stated, if this “average member of the community” could have foreseen the loss or endangerment (a question of fact) then the accused *ought* to have foreseen it and is justly blamed and punished for his failure. Holmes has a prototypically “objective” view of fault, which is even more evident in the following:

If the known present state of things is such that the act done will very certainly cause death, and the probability is a matter of common knowledge, one who does the act, knowing the present state of things, is guilty of murder, and the law will not inquire whether he did actually foresee the consequences or not. The test of foresight is not what this very criminal foresaw, but what a man of reasonable prudence would have foreseen. All acts, taken apart from their surrounding circumstances, are indifferent to the law.<sup>186</sup>

Holmes sounds in agreement with much of Fletcher’s rejection of the psychological approach to fault attribution and also Fletcher’s preferred ‘moral approach’ to attributing fault, inasmuch as Holmes also wants to see the presumed illegal act understood in its broader social and legal context. Our legal norms derive from this broader context and their attention to ‘surrounding circumstances’. We are all a part of society, answerable to common sense, required to know the teachings of common experience. These features unite us all and from the virtues of common sense the objective reasonable person is, thus, conceived.

Let’s now return to the prosecution of faith healing deaths. Suppose the trier of fact is persuaded to conceive of the reasonable person with these kinds of impartial, objective, and ordinary sensibilities. How might faith healers accused of criminal negligence manslaughter stand up against the reasonable person obligated

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<sup>186</sup> Ibid., 53-54.

by a commitment to common sense objectivity? Perhaps the obvious answer is “not very well!” There is a large inventory of objective considerations that impugn the ‘reasonableness’ of faith healing, making it a great deal easier to describe their conduct as wanton or reckless disregard for another’s life or safety. The teachings of common experience scarcely incline people to believe in miracles—at least not miracles of the sort faith healers hope for. It may well not be just miracles that person of common sense would be suspicious of; rather, this reasonable person might be suspicious of lots of fanciful, wildly improbable stories.<sup>187</sup> The person of ordinary intelligence or prudence would find it unimaginable to treat a gravely ill child with prayer or trust alone in God—to the exclusion of scientifically reliable medical treatment. One can easily envision a time long before the age of medical science, when the conventional wisdom meant combining some primitive organic remedy with incantations of the local Shaman. To the person of common sense, even this makes better sense than doing nothing. Anything physical—known to the senses—would be preferable to remaining within the confines of one’s own mind. It would hardly matter what one called it: e.g., belief, hope, prayer, or positive thinking. In any case, it would have been a choice to *do* nothing. Someone might object and say that lots of religious mental states intended to communicate and motivate God to action are accompanied by physical actions. Christian scripture entreats people to anoint the sick with oil, to lay hands on them. Many Catholics

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<sup>187</sup> A good example of a court rejecting a culturally “outlandish story” is the 1897 Ontario case of *Machekequonabe*. A First Nations man is guarding his community at night. He sees vaguely in the shadows something that looks like an evil spirit. Frightened, the accused shoots his rifle at the “spirit” resulting in the death of a family member. The accused is convicted of manslaughter. “Rex v. Machekequonabe, Ontario Court of Appeal (1897) 28 O.R. 309,” in *Canadian Cases in the Philosophy of Law*, ed. J.E. Bickenbach (Peterborough, ON: Broadview Press, 2007), 245-46.

around the world will manipulate rosary beads and light candles. Outside of Christendom there is all manner of combining physical actions and rituals with religious mental states. The impartial person of common sense could easily reply that we don't blame people *a thousand years ago* for relying on the conventional wisdom that included some ritualistic remedy. If a thousand years ago people thought health or life was dependent upon summoning spirits or keeping demons at bay by chanting around a fire, who could have blamed them? Conventional wisdom *today* means the same as it did one thousand or ten thousand years ago, namely, relying on the *best* remedies known to the community at the time. A prosecuting lawyer might say to the trier of fact, "Rubbing oil on a diabetic child *today* is not the same thing as chanting around a fire a thousand years ago. Every culture at every time in history would have known the difference between doing something and doing nothing. Our culture, of which the accused is a part, enjoying the indisputable benefits of medical science, says the accused did *nothing*. He might want you to think it was *something*, but common sense says it was nothing."<sup>188</sup>

When faced with an apparently incurable disease, hoping for a miracle is perfectly understandable. No one would blame a person in those dire circumstances for praying and hoping for a miracle. Indeed, it would be the height of insensitivity for a "reasonable person" to remind people in those dire circumstances that, in fact, medical miracles rarely happen. In stark contrast, when faced with a condition that

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<sup>188</sup> If the accused chose to testify in his or her own defence, the Crown prosecutor would then have opportunity to question the accused and direct this comment to them personally. Of course, the accused has a right not to speak at one's trial. Under s. 11 of the *Charter*, "Any person charged with an offence has the right, (c) not to be compelled to be a witness in proceedings against that person in respect of the offence."

only became life threatening because available and reliable treatment was neglected or ignored, exclusive trust in a metaphysical cure seems the very definition of unreasonable. When there's nothing to do but pray, then prayer becomes a harmless and justifiable 'nothing'. But when something can be done and in favour of prayer it is not, this is no longer harmless and it's not justifiable.

From an objective point of view it may be astonishingly unreasonable for a mature adult (who wants to preserve one's life) to refuse life-saving medical care for oneself in favour of religious trust. But, no one is saying this course of action is criminally unreasonable. But when a mature adult makes this decision for a child a line is certainly crossed. Now one is being wanton and reckless with the life and safety of another—another who is owed a duty of care! While both courses of action are astonishingly unreasonable from a common sense perspective, the former is certainly not criminal but the latter surely should be. Holmes would no doubt have agreed with *Prince v. Massachusetts*, one of the most frequently quoted US Supreme Court rulings on freedom of religion.<sup>189</sup> The primary public policy concerns at stake

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<sup>189</sup> *Prince V. Massachusetts*, 321 U.S. 158 (1943). The details are as follows. On the night of December 18, 1941, Sarah Prince, took her nine-year old niece, Betty, of whom she was legal guardian, to an urban downtown street corner to assist her missionary work. Sarah and Betty were both "ministers" of the Jehovah's Witness religion and Betty was, by all accounts, a very willing participant and a capable servant in the "the Lord's work." However, Massachusetts State labour laws prohibited boys under 12 and girls under 18 from, amongst other things, publicly distributing any kind of literature. Section 69 of Massachusetts Comprehensive Child Labour Law read: "No boy under twelve and no girl under eighteen shall sell, expose or offer for sale any newspapers, magazines, periodicals or any other articles of merchandise of any description, or exercise the trade of bootblack or scavenger, or any other trade, in any street or public place." Section 80 read: "Whoever furnishes or sells to any minor any article of any description with the knowledge that the minor intends to sell such article in violation of any provision of s. 69... or knowingly procures or encourages any minor to violate any provisions of said section, shall be punished by a fine of not less than ten nor more than two hundred dollars or by imprisonment for not more than two months, or both." Cited from *Prince*, 160-161.

in the case were the “economic exploitation” and “potential degradation” of children.

Justice Rutledge stated famously:

Acting to guard the general interest in youth’s well being, the state as *parens patriae* may restrict the parent’s control by requiring school attendance, regulating or prohibiting the child’s labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child’s course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.<sup>190</sup> ... Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves.<sup>191</sup>

Believing in a religion—even a startlingly radical one—is a matter of personal conscience. It may, in fact, define one’s conception of the good life, and certainly the state exists, in part, to protect the free pursuit of religious belief. But it protects religious belief not because any of it is true or even might be true. The state protects religious belief for the same reason it protects freedom of any thought, belief, opinion, and expression. Together these things, plus a few others, make life worth living, even if none of what we’re committed to is true. Unfortunately, sometimes freedom of belief can make life worth dying for as well. But, nobody reliant on the deliverances of common sense could think it reasonable for religious freedom of an individual to spill over and jeopardize the life and safety of a child who has yet to exercise his or her own positive rights and freedoms. Accordingly, the trier of fact should, on this account of the reasonable person, see the risk of martyrdom imposed

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<sup>190</sup> *Prince*, 166-167.

<sup>191</sup> *Prince*, 170.

by faith healing as something beyond the pale, as something criminally unreasonable. The fact that faith healers like the Tutttons and the Shippys disregard common sense in favour of their death-defying supernatural hope is indefensible in the world in which we all live. For someone not trying to kill another, it is as marked a departure from common sense as one could possibly imagine!

Objections from the defence could proceed on a variety of fronts. The defence would want to remind the trier of fact that he or she need not *themselves* be persuaded about the reasonableness of faith healing. Everyone could agree that what the parents did was abnormal to many Canadians, and indeed to many *Christians*. But 'abnormal' is not necessarily the marked and substantial departure needed for a criminal conviction. Is it really so unreasonable to consider alternative approaches to the medical establishment? Surely, many reasonable people mistrust medical science in different ways. And the rejoinder could be that anyone who so comprehensively ignores (almost welcomes!) the possibility of death is well beyond embracing 'alternative medicine.' This isn't about the freedom to explore alternatives to the medical conventions; it's about being wilfully blind to the prospects of death.

But, is it really so obvious that the common sense objectivist would have foreseen the death of his or her child? Can the claim be made that no one with common sense relies on faith when science is not in doubt? The trier of fact may well be interested in empirical evidence speaking to efficacy of at least some of the relevantly similar alternatives to conventional medicine. The 'alternative' being considered is 'faith' or 'prayer'—or what the person of common sense might not so



charitably call 'nothing'. Is there any evidence for the reasonable person to think of prayer or faith as better or more useful than doing nothing?

Contemporary society acknowledges that that science, as much as law, is a discipline in which impartiality and objectivity are cherished values. No one needs to ascribe to the fiction that scientists are perfectly objective or perfectly impartial, but none the worse for that, the social and public discipline of science is practiced with sufficient impartiality and objectivity to promote considerable confidence in its findings. If one was going to conceive of the reasonable person to whom a faith healer should be compared, one could easily envision a parent committed to epistemic norms that favour reliance on the public, empirical world, over and against the world of private intuition or superstition. The impartial, objective, 'common sense' person shouldn't be impartial about evidence; she should be *partial* toward good evidence and discriminatory and prejudiced against bad evidence. How might a reasonable person, capable of being persuaded by empirical evidence, be expected to act in the Tutton's circumstances? One of the crucial facts to be considered is this: the Tuttons and other faith healers like them are deeply committed to the belief that 'prayer works'. Again, the reasonable person needn't share this belief, but she does need to make an assessment of the reasonableness of that belief. We shouldn't forget, this belief is directly responsible for the death of a human being. How might someone partial toward good evidence think about the faith healer's course of action?

First, their 'course of action' needs careful description, particularly in relation to their belief that prayer works. Some might want to point to the

sociological facts that billions of people around the world and throughout history have lived with something like the belief that ‘prayer works’. In this way, people like the Tuttons or the Shippys are indistinguishable from most of world’s population. Shouldn’t this be enough to cast sufficient doubt on the crucial claim that they are criminally unreasonable? Here again, we do well to consider the distinction between the descriptive and the evaluative. It is a simple fact that people from all over the globe, belonging to all manner of religious tradition, routinely engage in something like prayer or meditation. Prayer is hardly a marked departure from normal human behaviour. Even a non-religious trier of fact in a Holmesian mood should concede that prayer brings inner tranquility and equanimity to billions. Bertrand Russell would agree! This desire for existential solace is, after all, a part of our common human experience. As such, there’s nothing wrong with this. But, of course it is not prayer as a general human phenomenon that should be of concern to the trier of fact in cases like *Tutton* or *Shippy*. Rather, the type of prayer—indeed, the type of religious practice—should be the sensible unit of investigation. The reasonable person in this situation should not be willing to give all prayer the same harmless gloss. The Tuttons, after all, engaged in something very few people around the globe would endorse. Conversely, faith healers endorse a type of religious orientation they know few religious people engage in. The faith healer—to say little of the Pentecostal snake handler—would quote the following passage from the Epistle of James:

So faith by itself, if it has no works, is dead. But someone will say, “You have faith and I have works.” Show me your faith apart from your works, and I by my works will show you my faith. (James 2:17-18 *NIV*).

What really distinguishes true believers from the great unwashed is the willingness to, rather colloquially, put their money where their mouth is. The evidentiary point to be drawn out is that faith healers are prepared to *act* in ways the rest of the religious world will only pay lip service to. This rather more nominal faith (explained in the previous chapter) is ‘dead’ because it consists merely in the expression of words. The actions that accompany nominal faith are typically ones that are not overly onerous or inconvenient to the believer. True believers prove their faith by their works and they know their works are extraordinary in comparison to their more moderate, more nominal ‘brethren’. Faith healers attempt to reify beliefs or concepts other religious believers will only ascent to nominally.<sup>192</sup> Many religious people make propositional claims about their faith, but their lives—their actions—with minor exceptions, are indistinguishable from those of unbelievers.<sup>193</sup> And this is precisely the complaint amongst fundamentalists. “Show me your faith apart from your works, and I by my works will show you my faith.”

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<sup>192</sup> A particularly vivid example of the claim I’m making can be drawn from John M. Duffey, *Lessons Learned: The Anneliese Michel Exorcism* (Eugene, OR: Wipf & Stock Publishers, 2011). Michel was a twenty-three-year old German woman who died in 1976 from complications related to a series of botched exorcisms. She died, apparently, from malnutrition and dehydration. Her parents and the officiating priest were convicted of negligent homicide in Germany. Duffy argues in the book that she suffered from mental illness and her malady was misidentified as demonic possession when she first suffered an epileptic seizure at the age of sixteen. Many North American Christians would claim to believe in evil. Some would reify that belief and claim to believe in the existence of a *real* Satan and *real* demons. Tragically, people are killed in exorcism rituals by people holding the belief that ‘evil’ can be extracted as though it were a tumour. They believe in demons the way reasonable people believe in viruses. See also Faith Karimi and Joe Sutton, “Police: Maryland Mom kills two of her children during attempted exorcism,” CNN, accessed June 1, 2015, <http://www.cnn.com/2014/01/19/justice/maryland-exorcism-deaths/>. Zakieya Avery, twenty-eight years old, stabbed her four children with a knife, claiming to be removing demons. The two youngest died, while the two older children survived their injuries.

<sup>193</sup> Scripture contains many requirements and prohibitions that most Christians ignore and explain away. I Corinthians 6 prohibits lawsuits amongst believers. St. Paul asks, “Why not rather be wronged? Why not rather be cheated?” (1 Cor 6:7) There’s really no evidence that Christians are less

This is not, parenthetically, a criticism of moderate or nominally religious believers, as if to accuse them of some deep hypocrisy. Of course, fundamentalists think moderates or nominalists *are* hypocrites, but that's not the point either. Let's accept that all religious belief is *prima facie* sincere. The fact that there are religious hypocrites in the world in no way should impugn the sincerity of all. Religious people have sincere beliefs about reality and these beliefs are every bit as sincere as those of naturalists, atheists, or agnostics. Everyone who has beliefs about the world think their beliefs are in the neighbourhood of true. This isn't interesting. But, the vast majority of religious believers, and of course common sense objectivists, do not have *de re* beliefs about prayer's ability to heal a deadly disease independent of medical science. On the contrary, most non-fundamentalists have *de re* beliefs *about* medical science. Real medicine has publically observable physical properties and as such it is perceived by reasonable people. The fact that people can hold mistaken beliefs about particular medications does not count against this claim. It doesn't matter, either, that some people mistake sugar (or placebo) for medicine or one pill for another. The point is that medicine is perceivable and impressionable

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litigious than any other group of people. Divorce in most circumstances is forbidden and re-marriage is always forbidden except when a spouse dies (Matthew 19:3-9). Nevertheless, divorce rates and remarriage rates within Christendom are not appreciably different from secular benchmarks. This distinction is not foreign to the Muslim world either. Take the very controversial issue of Jihad. Literally, Jihad means "to struggle" or "to resist". Many within the Muslim community accept that the 'call to Jihad' is a call to inner, spiritual struggle, to align one's life with the dictates of Islam and the will of Allah. Others believe that Jihad entails actually taking up arms and literally struggling against and showing resistance to infidels. Jihad in this instance is reified in ways that alienates many Muslims. Moderate Muslims who believe in the 'inner struggle' of Jihad alone believe sincerely enough in what they think is the *real* Jihad. The point is that fundamentalists try to reify beliefs in ways that moderates will not. This can lead to the criticism that moderates believe only in words, not in actions, because their words are indistinguishable from *inaction* and *unbelief*.

*simpliciter*.<sup>194</sup> The person of common sense thinks faith healers have unwarranted *de re* beliefs. The faith healer might as well believe he or she can consume or ingest the number '7'. Many religious people 'have faith' in prayer in a general, nominal sense, but they're not confused about the distinction between their belief in prayer and their belief in medicine. For the vast majority of religious people it is not a choice between the 'red pill' on the one hand, and the 'blue pill' on the other. Most religious people would be happy to take both 'pills', as it were, believing that one doesn't undermine the other. But faith healers are not 'most' religious people. They trust prayer and they trust their faith in the way that most others trust a pill—or at least they *try* to. Most people think this approach to health care violates common sense.

But does common sense betray us here? Might there be actual reasons to think that the faith healer's *de re* beliefs about prayer are justified? Let's consider prayer more closely. Petitionary or intercessory prayer is practiced intentionally in the mind of a believer.<sup>195</sup> This sort of prayer petitions God for something.<sup>196</sup> The

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<sup>194</sup> Someone could go to a psychologist for counselling and have her *physical* health, not just mental health improve as a result. But the patient wouldn't be confused about what the psychologist offered. The counsel may have worked as 'good' as medicine, but counsel was not medicine. The psychologist offered words, ideas that the patient was able to voluntarily internalize. Perception has nothing to do with this process, except trivially in terms of "hearing" or "seeing" the counsellor. Conversely, no patient who takes medicine needs to understand anything about how or why this physical property interacts with the body for the medicine to be effective. John Locke (1632-1704) famously distinguished between "qualities" and "ideas". Objects in the physical world have primary and secondary qualities, i.e., powers in things that make them real and perceivable. Ideas don't have these 'powers'; ideas are the result of these qualities.

<sup>195</sup> There is a technical distinction between petitionary prayer and intercessory prayer. Petitionary prayer, in contrast to worship, asks or petitions God for some particular outcome of interest to the petitioner. The petitioner might pray for some personal need, say, to be cured of cancer. Intercessory prayer also involves petitioners, but the petitioner is asking for God to act on behalf of someone else. One does not technically intercede for oneself; one intercedes on behalf of others.

words express a desire, a hope, an expectation for some particular thing or outcome. Is there any reason to think that people who pray get the thing or the outcome they asked for? If empirical research seemed to support the efficacy of intercessory prayer then there would be reasonable doubt that medical science was the only game in town. Our study so far has assumed that faith healing often ends in disaster, primarily because we're looking at the legal fallout of the fatalities it causes. No one doubts though, that there may well be occasions in which very devout people pray—and maybe *only* pray—and no one dies. If there was some evidence or some empirical studies showing that intercessory prayer actually had some positive correlation with desired health outcomes perhaps the reasonable person need not take such a dim view of the prayer-only 'pill' that faith healers take. Let's consider some of the evidence available.

A *Mayo Clinic* study published in 2001, followed 799 coronary surgery patients for twenty six weeks following their discharge from hospital.<sup>197</sup> The control group was not prayed for while each member of the experimental group was prayed for at least once a week by five different intercessors. The intercessors didn't know the patients and the patients didn't know the intercessors. Further, the patients did not know they were being prayed for. The operationalized end-points were death, cardiac arrest, and rehospitalisation for related symptoms, etc. No measureable

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<sup>196</sup> The request is analogous to going to a psychologist and looking to improve one's over-all health. The improved health could be discerned *de re*. The big difference is that petitionary prayer is like going to a psychologist and privately asking the professional to improve the health of someone not in the room.

<sup>197</sup> J.M. Aviles, S.E. Whelan, and D.A. Hernke, "Intercessory prayer and cardiovascular disease progression in a coronary care unit population: A randomized controlled trial," *Mayo Clinic Proceedings* 76, no. 12 (2001).

difference was found between the control group and the experimental group, leading to the obvious conclusion that "intercessory prayer had no significant effect on medical outcomes after hospitalization in a coronary care unit."

In 2006, after a larger, more refined study, Harvard researchers, Herbert Benson and Jeffrey Dusek, published the results of a multi-year study they led on the recovery results in 1,802 heart bypass patients. Their research question asked specifically if "intercessory prayer or knowledge of receiving it would influence recovery after heart bypass surgery." The patients were divided roughly into three equal sized groups. One group (G1) was told they may or may not receive prayer and *did* receive prayer; the second group (G2) was told they may or may not receive prayer but did *not* receive prayer; the third group (G3) was told they would receive prayer and did receive prayer. The prayer participants (i.e., intercessors) were solicited from two Roman Catholic groups and one Protestant, and all intercessors were asked to commit to the duration of the multi-year study. Intercessors used only first names and last initial for patients and no photographs were supplied. In terms of the content of the prayer, intercessors were encouraged to pray in their own manner but were instructed to explicitly include the following phrase: "for a successful surgery with a quick, healthy recovery and no complications." Operationalized end-points included thirty-day mortality, major complications, rehospitalisation, etc. Results that fit the operational descriptors occurred in 52% of those who received prayer (G1), 51% of those who did not receive it (G2), and 59% of patients who knew they would receive prayers (G3). The G3 results were given competing explanations. Maybe the patients suffered a kind of 'performance

anxiety’—the additional stress that comes from a sense of being watched. Or, perhaps a ‘nocebo effect’ had taken place—the opposite of a placebo effect—wherein participants suffer negative results from what is, in reality, no active stimulus.<sup>198</sup> In other words, perhaps the patients found it unnerving to know they were being prayed for, as if to infer they must truly be vulnerable to complications. While this slightly negative finding captured the delightful attention of vocal atheists like Richard Dawkins<sup>199</sup> and Michael Shermer<sup>200</sup>, the more scientific and more banal finding shouldn’t be ignored: namely, that intercessory prayer did not seem to have any positive influence on physical health. If one advanced the scientific hypothesis that taking the religious ‘pill’ was just like taking no pill at all, the study would have done nothing to falsify it.

Two independent meta-analyses of intercessory prayer are also worthy of mention. A 2006 meta-analysis looked at fourteen scientific, peer reviewed studies of the effects of intercessory prayer in medical settings and this rather blunt conclusion was drawn by the three researchers:

There is no scientifically discernible effect for IP (intercessory prayer) as assessed in controlled studies. Given that the IP literature lacks a theoretical or theological base and has failed to produce significant findings in controlled

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<sup>198</sup> Herbert Benson, Jeffrey A. Dusek, and et al, "Study of the Therapeutic Effects of Intercessory Prayer (STEP) in cardiac bypass patients: a multicenter randomized trial of uncertainty and certainty of receiving intercessory prayer," *American Heart Journal* 151, no. 4 (2006).

<sup>199</sup> Richard Dawkins, *The God Delusion* (New York, NY: Houghton Mifflin, 2006), 87-88.

<sup>200</sup> Michael Shermer, "Prayer & Healing: The Verdict is in and the Results are Null," *ESkeptic*(2006)., accessed June 1, 2015, <http://www.skeptic.com/eskeptic/06-04-05/>



trials, we recommend that further resources not be allocated to this line of research.<sup>201</sup>

David Hodge in his 2007 meta-analysis is slightly more conciliatory and provisional, but no more optimistic that studying prayer will yield positive results. He concludes:

Thus, at this junction in time, the results might be considered inconclusive. Indeed, perhaps the most certain result stemming from this study is the following: the findings are unlikely to satisfy either proponents or opponents of intercessory prayer."<sup>202</sup>

Hodge seems somewhat dubious of the American Psychological Association's designation of intercessory prayer as an experimental intervention. It bespeaks a kind of entity that is in no way comparable to other medical and health related interventions. Like faith healers, the APA considers faith healing as a kind of "thing" too. At any rate, prayer is defined clearly enough for some in the scientific community to think it possible to study. But on that account, one would also have to include voodoo, witchcraft, astrology, etc. The APA is in no way endorsing any of these experimental interventions, but they clearly *are* saying they're within the realm of scientific investigation.<sup>203</sup>

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<sup>201</sup> K.S. Masters, G.I. Spielsman, and J.T. Goodson, "Are There Demonstrable Effects of Distant Intercessory Prayer? A Meta-analytic Review," *Annals of Behaviourial Medicine* 32, no. 1 (2006): 26.

<sup>202</sup> David R. Hodge, "A Systematic Review of the Empirical Literature on Intercessory Prayer " *Research on Social Work Practice* 17, no. 2 (2007): 185.

<sup>203</sup> There are many—and even some atheists—who deny that prayer is amenable to genuine scientific investigation, especially with randomized clinical trials. See Hector Avalos, "Can Science Prove that Prayer Works?," *Free Inquiry* 17(1997). There is simply no way of controlling for the 'contaminating' presence of other prayer. Churches and individual Christians routinely pray for the world's sick in both general and specific ways. In this sense, prayer cannot possibly function as a testable experimental intervention. While this objection makes perfectly good sense from a methodological perspective, an obvious point shouldn't be ignored. If prayer is the thing being studied, and we assume that prayer has a kind of ubiquitous presence in the world, then entirely 'natural' and science-dependent results should indicate even more clearly that intercessory prayer has no observable causal effect on the world. The theistic response to this claim might be that we

A prosecuting attorney might present these studies as evidence of what a reasonable person could think about the potential utility or efficacy of prayer. Obviously faith healers couldn't be faulted for not knowing the results of scientific studies like these, but this is the kind of evidence that might be appealing to certain triers of fact who think a reasonable person should care about how the world seems to work. These kinds of studies could confirm the intuitions of some triers of fact that think an objective person takes an *objective* view of the world. Again, most triers of fact would already be roundly dubious of faith healing for themselves and their loved ones, but these kinds of studies can highlight the profound risks of trusting in something for which there is not a shred of objectively available evidence.<sup>204</sup>

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have no idea how much the world benefits from the intercessory prayer that already occurs. Perhaps more ominously, neither do we know what evils may await if humans *stopped* praying. These are logical possibilities—and they couldn't be tested, nor could they be falsified. Nevertheless, this line of reasoning falls under the thesis of "sceptical theism" and it is becoming all the rage amongst Christian apologists defending the rationality of belief in an omni-benevolent deity against the countervailing evidence of presumed suffering. See Michael Bergmann, "Skeptical Theism and Rowe's New Evidential Argument from Evil," *Nous* 35, no. 2 (2001); Ian Wilks, "Skeptical Theism and Empirical Unfalsifiability," *Faith and Philosophy* 26, no. 1 (2009).

<sup>204</sup> There are many studies indicating positive effects that prayer has on the person praying. When a person prays for anything, a person's *own* sense of wellbeing improves in psychological and even some physical respects. (See Luciano Bernardi et al., "Effect of rosary prayer and yoga mantras on autonomic cardiovascular rhythms: Comparative study," *British Medical Journal* 323, no. 7327 (2001).; See also, Leslie Francis et al., "Prayer and psychological health: A study among sixth-form pupils attending Catholic and Protestant schools in Northern Ireland," *Mental Health, Religion and Culture* 11, no. 1 (2008).) The conclusion that prayer or meditation has some measurable positive effect on the person praying is hardly surprising. Few reasonable people today doubt that 'self-talk' and one's psychological disposition has some determinative influence on the perceived quality of one's life. It's easy to see why the overwhelming subjective benefits of first-person prayer experienced throughout human history would encourage the general human belief that prayer can effect changes to things *outside* of ourselves as well. A bit of contemporary common sense, partial to careful observations about how the world works, could warrant a different conclusion: "knowing that I'm talking to myself and perceiving its benefits shouldn't be confused with believing that I'm talking to someone external to me and thinking this person will do as I ask." Of course, religious people of even nominal standing hold out hope that prayer somehow mysteriously goes some distance in

The trier of fact might conclude that holding religious beliefs in one's mind need not be a matter of public consideration, until that is, private beliefs show up in the real world with catastrophic results. Then they're no longer merely private or a merely a matter of private interest. When there's no risk of harm, say, when the Catholic participates in the Eucharist, then believing religion to be 'real' will be perfectly acceptable and constitutionally protected. Indeed, reasonable people might all agree, *pace* Christopher Hitchens, that wide-spread religious belief is highly beneficial.<sup>205</sup> But, if one has a public duty to protect the life and safety of another and there are proven means for doing this then it seems consummately unreasonable to rely on something that looks for all the world like "you have done nothing."

Let's consider one last time the two studies involving coronary patients. While everyone wants the patients to recover well and experience no complications, they were not offered a choice between *real* medicine with pharmaceutical properties and *real* religion consisting only of prayer. Every patient was given the best science had to offer. Of course, no reasonable person would consent to a randomized clinical trial promising much less than every known medical advantage. Some patients were given the religious "advantage" in addition. Researchers—themselves, reasonable people—would trust that offering prayer would do no harm, but neither would withholding it. If patients suffered complications from not

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getting outside the self, making metaphysical contact with the "Other" or the nameless "Ground of Being."

<sup>205</sup> Hitchens was not prepared to believe that religion served any good public or private function that couldn't be equally well-secured with sober atheistic reflection. See Christopher Hitchens, *God is Not Great: How Religion Poisons Everything* (Toronto, ON: McLelland & Stewart, 2007).

receiving prayer, no sensible person (e.g., no one in G3) would blame prayer. The difficulties arise if people hope and expect to avoid complications and people choose ‘nothing’ or something as reliable as ‘nothing’. No sensible person would choose ‘nothing’, and not even the most reckless researcher would encourage it. If the medical world would have no business taking these kinds of obscene risks with a patient’s life and well-being, it should be difficult for a reasonable person to see why it could be any more permissible for a parent to do so with his or her own child.<sup>206</sup> If the trier of fact thinks the reasonable person has some familiarity with the moral obligations of the public healthcare system, then it is rather easy to see that the faith healers like the Tutttons or the Shippys quite objectively “show wanton or reckless disregard for another’s life or safety.” If a trier of fact says to herself that we should get our objective standard of reasonableness from the objective context of public health, where no one would ever dream of taking unnecessary death-defying risks with people to whom duties of care are owed, then it’s not unreasonable to conclude that people who *do* take these risks depart markedly from what a reasonable *parent* does in similar circumstances.

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<sup>206</sup> In bioethics literature the principle being referred to is “equipose”. Though there are controversies and disagreements about the ethical implications, the central concern is over the permissibility of offering to patients in a randomized clinical trial (RCT) an experimental intervention that the researcher has reason to believe is less effective or entails higher risk than an alternative. Some think that the physician *qua* researcher has epistemic responsibilities to the medical community to promote knowledge and understanding of human well-being and that this responsibility must include some minimal risks to individual patient care. On the other hand, those who think the physician *qua* caregiver owes the highest duty to her patient, believe experimentation beyond a certain level of equipose (i.e., clinical uncertainty or doubt) is never justified. Once evidence is decisive that a treatment or intervention is less effective or imposes greater risks to patients, it is believed that the RCT should be discontinued before harm or less benefit results. See Don Marquis, "How to Resolve an Ethical Dilemma Concerning Randomized Clinical Trials," *The New England Journal of Medicine* 341, no. 9 (1999). Even bioethicists who take opposing views on equipose would agree that there is more than sufficient evidence to disregard faith healing as anything resembling a reasonable experimental ‘intervention or treatment’.

In this chapter I have argued that a trier of fact could legitimately be persuaded to think of the reasonable person along the lines of what I have called the common sense objectivist. A prosecutor could encourage the trier of fact to take a neutral position on competing conceptions of the good life, but not to be neutral with respect to what Holmes called the “teachings of common experience.” The reasonable person knows that these are the epistemological commitments that must bind people in law. Additionally, evidence was provided that triers of fact could well find relevant to cases involving faith healers. While the scientific investigation of the efficacy of prayer is a controversial topic, there are really no good publically verifiable reasons for reasonable people to believe that intercessory prayer has any measurable causal effects in the world *outside themselves*. Though religious faith and prayer may be very useful and existentially meaningful to individual believers, there is no good reason for someone to ignore proven methods of healthcare in favour of relying on the deliverances of religious commitment—not when a child’s life is at stake. Consequently, a trier of fact could regard what the faith healer does as showing wanton or reckless disregard for another’s life or safety and that, furthermore, the departure from the reasonable person is marked and substantial.

## Chapter 8: Faith Healers Culpably Get Relationships Wrong

We just finished considering the view of common sense objectivity characterized by the concern a trier of fact could have to get the world or reality right, or at any rate, less harmfully wrong. On that particular view, a case was presented that faith healers show, beyond reasonable doubt, wanton or reckless disregard for their children's life or safety. The fundamental explanation for why they show disregard for their children's lives is that they show reckless, death-defying disregard for reality and for how the world predictably works. Compared to the reasonable person of common sense, faith healers get the world horribly wrong—and they get the world wrong by intentionally violating the teachings of common experience.

It's possible, however, that a trier of fact could think it misleading that faith healers are culpable because they get *reality* wrong. One might agree that faith healers seem to get the facts of the world wrong—even horribly wrong—yet disagree with the view that proof of criminal negligence follows from this. Alternatively, one could argue that being attentive to the teachings of common experience means that a reasonable person is obligated to getting one's *relationships* right and in the right priority. On this view faith healers are not found in violation of criminal negligence because they show reckless disregard for objective reality, but because they show reckless disregard for *human beings*. This explanation is, not insignificantly, a great deal closer to the actual language of the criminal negligence statute; we ought not show wanton or reckless disregard for the *lives* and safety of

*others*. The *Criminal Code* provision doesn't say anything about showing wanton or reckless disregard for science or for empiricism or for evidence. On this alternative view, then, it isn't a crime to 'get reality wrong', even if getting it wrong results in the absurd loss of life. Rather, the criminal wrongdoing is attributable to getting one's moral commitments wrong or failing to order one's relational priorities in such a way that loss of life or risk of loss of life predictably occurs. One could agree in some sense with Oliver Wendell Holmes (as discussed in chapter 7) that the teachings of common experience are still binding, but say that the teachings of common experience should orient us rightly, one to the other. Let's turn to this alternative account of what makes faith healers blameworthy in the deaths of their children. As with the previous chapter, we will begin with a theoretical explanation relevant from a jurisprudential perspective and then we'll turn to the practical implications for triers of fact.

Whereas the theoretical basis for common sense objectivity came from the now classical work of Oliver Wendell Holmes, I will employ some of the ideas of English jurist, Jeremy Horder, to animate this alternative conception of the reasonable person. Perhaps of interest to some who still think criminal negligence warrants a subjective test or more subjective consideration for fault, Horder's conception of gross negligence, the English equivalent to criminal negligence, accommodates both subjectivists and objectivists.<sup>207</sup> Horder says,

... gross negligence has always been a broad enough notion to encompass a state of mind that cannot be captured by any simplistic distinction between

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<sup>207</sup> Jeremy Horder, "Gross Negligence and Criminal Culpability," *University of Toronto Law Journal* 47(1997).

advertence or inadvertence. That state of mind is 'indifference'. Properly understood, indifference can be an attractive *mens rea* term to employ even where crimes involve actions *mala in se*.<sup>208</sup>

He goes on:

... the very fact that the notion of indifference defies categorization as purely advertence or inadvertence-based, means that its use poses a significant challenge to stalwart defenders of unadulterated subjectivism in criminal law. . . . Indifference, however, is only one conception of the form gross negligence may take... [A] more clearly inadvertence-based conception, focused on a great departure from an acceptable standard of conduct, may also be legitimately employed in a narrow range of cases.<sup>209</sup>

The narrow range of cases that Horder has in mind is, relevant to faith healing deaths, where a positive duty has been neglected. Horder elucidates case history showing the common law's longstanding reliance on two forms of penal negligence. One illustrative nineteenth-century case tells of a 'quack' medical doctor, Markuss, charged with gross negligence in the death of a patient.<sup>210</sup> Markuss, who ran an herbal remedy store, prescribed a little known seed to treat a patient suffering from a cold. The presiding trial judge, Willis J, offered to the jury two different ways in which a negligent doctor could be criminally liable:

Every person who dealt with the health of others was dealing with their lives, and every person who so dealt was bound to use reasonable care, and not to be grossly negligent. Gross negligence might be of two kinds; in one sense, where a man, for instance, went hunting and neglected his patient, who dies in consequence. Another sort of gross negligence consisted in rashness, where a person was not sufficiently skilled in dealing with dangerous medicines which should be carefully used, or the properties of which he was ignorant, or how to administer a proper dose. A person who with ignorant rashness, and without proper skill in his profession, used such a dangerous

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<sup>208</sup> Ibid., 495.

<sup>209</sup> Ibid.

<sup>210</sup> Reg v. Markuss (1864), 4 F. &F. 358. Cited in *ibid.*, 497.



medicine acted with gross negligence.... A person who took a leap in the dark in the administration of medicines was guilty of gross negligence.<sup>211</sup>

Horder agrees that contemporary criminal negligence can still come in two forms but disagrees with the way Willis J distinguished them. The first form, with which he has no disagreement, is the conception of ‘indifference’—as shown by the doctor who culpably neglects his patients when he knowingly owes a duty of care. Willis J identifies the second form of criminal negligence as ‘ignorant rashness’ of the sort shown by the sincere but otherwise incompetent doctor. Horder argues that Willis J confuses a manifestation or instance of a form with a form itself. Ignorant rashness is not, *contra* Willis J, a *form* of criminal negligence; rather, the form is a marked departure from a standard, and the confident incompetence showed by Markuss is simply one way of departing substantially from the standard.

Horder thinks Canada’s statutory use of “wanton and reckless disregard” is a serviceable conceptual analogue to indifference. Conveniently for this current study, he even weighs in on *Tutton* and argues that both forms of fault are legitimate routes to criminal liability and that Canada’s Supreme Court could have avoided some of its confusion had they interpreted ‘wanton and reckless disregard’ more in terms of his conception of indifference—presumably because it widens the scope of subjective fault from a positive mental state (presumably like recklessness) to something more broadly mindful, and thereby reduces the gap that the Supreme Court failed to bridge between a subjective and objective interpretation of the criminal negligence statute. Horder writes:

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<sup>211</sup> *Ibid.*, 498.

Had the Supreme Court understood ‘wanton and reckless disregard’ in accordance with what is submitted is its more natural meaning, indifference, then the controversy over its understanding might have been averted. For ... indifference has a necessary subjective element built into it, even when it is inferred from the conduct ... That subjective element is not actual foresight of possible harm, but a ‘couldn’t care less’ attitude to the causing of harm.’<sup>212</sup>

The culpable attitude is not reducible to some specific state of belief; if so, it would be the strong version of subjectivism that Horder has elsewhere rejected.<sup>213</sup> Rather, Horder says

The subjective element in indifference lies, then, not in any necessary advertence to possible harmful consequences, but ... in an uncaring attitude towards the victim’s relevant protected interests. Indifference is thus concerned not with simple (subjective) *cognitive* state of mind, but with a complex (subjective) *affective* state of mind.<sup>214</sup>

Obviously enough, the success of Horder’s distinction between simple cognitive states and complex affective states is predicated on the distinction between beliefs and attitudes. We will want to see if it is at all conceivable that faith healers could show this attitude of indifference, but in fidelity to Horder we need first to examine how he develops indifference in more standard negative rights violations such as rape or sexual assault.

To begin, he distinguishes between weaker and stronger versions of indifference and correlates them with concern for “agent-neutral” and “agent-relative” values or interests. “The weaker view” says Horder, “centres on the notion

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<sup>212</sup> Ibid., 507.

<sup>213</sup> "Two Histories and Four Hidden Principles of Mens Rea."

<sup>214</sup> "Gross Negligence and Criminal Culpability," 501.

of ‘disrespect’ for the victim’s interests.”<sup>215</sup> The practically reasonable person is always sufficiently attentive to the agent-neutral interests of those around him, while not obviously being blind to one’s own perhaps powerful agent-relative interests and desires. The weakly indifferent person is practically unreasonable insofar as he is *not* sufficiently attentive to the agent-neutral interests of those with whom he is interacting and consequently overrides those interests in pursuit of his own agent-relative desires. On the other hand, the strongly indifferent person may or may not be aware of the agent-neutral interests of those around him—it makes no difference because he is entirely committed to his agent-relative desires.<sup>216</sup> In terms of rape, Horder presumes the weakly indifferent person might have been and could have been alerted to the agent-neutral interests of his victim had her non-consent been expressed more sharply. The way it was communicated certainly would have been obvious enough for anybody with practical reason, leaving no doubt that the accused is at fault. The strongly indifferent person, however, could not have been distracted from his agent-relative desires because of his complete indifference to agent-neutral reasons that *ought* to have deterred him.<sup>217</sup>

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<sup>215</sup> Ibid., 502.

<sup>216</sup> Horder’s precise descriptions is as follows: “So, the weakly indifferent person displays great insensitivity to the existence of agent-neutral values generating reasons against his conduct grounded in another’s interest, in circumstances where the practically reasonable person would have been more alive to the possibility of harm to those interests. ... The strongly indifferent person’s deficiency of virtue lies in appearing that he would be simply unmoved by agent-neutral values giving rise to reasons not to engage in action he wishes to perform. It follows that the strongly indifferent person would not have changed the course of his conduct, even if he had come to recognize the existence of reasons for action he knows reasonable people would regard as counting against that course of conduct.” Ibid., 504.

<sup>217</sup> Horder makes oblique reference to the famous *Morgan* rape case in the UK in which a husband persuaded three of his friends to come to his house and have sex with his ‘consenting’ wife. The

Let's now apply Horder to a Tutton-like faith healing scenario. That there is a closer relationship to liability for "quack" medical doctors is completely obvious and as such we will consider how "grossly" faith healing parents depart from the norm. For now, let's consider what possibility of finding in the faith healer a 'couldn't care less' attitude. At first blush, it's entirely implausible that faith healing parents show the kind of agent-relative indifference shown by, say, a rapist, but let's consider what scrutiny this comparison might bear. Horder describes the grossly negligent *qua* indifferent person generally as being insufficiently "alive" to the possibility that another's agent-neutral interests will be violated or are being violated by his or her agent-relative conduct. More precisely, in terms of practical reason, the indifferent person has a complex affective attitude (consisting of an amalgam of beliefs, feelings, desires, etc.) that blinds the accused to the agent-neutral reasons for not acting according to one's own interests. Let's now describe without caricature what a faith healer's complex affective attitude might be in the course of dealing with an ailing child.

The parent's first priority is certainly different from the attitudinal priority of a typical parent. Let's recall Mistake 1 and Mistake 2 from the chapter 6, with Mistake 1 being the typical case of a parent treating an ailing child and Mistake 2 being the Tutton-like experience, where treating the ailing child is a means to some other end. In Mistake 1, the parent's immediate desire—the reason for her action—

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friends were told by the husband that her expressed non-consent is part of the charade to which everyone is a party. Horder believes that the men all showed weak indifference inasmuch as they were not sufficiently attentive to the agent-neutral reasons not to act as they did and consequently showed culpable disrespect for the woman's rights and well-being.

is to restore the child's health and well-being. There really is no other end other than the restoration and flourishing of the child. But no one should be naïve here. We needn't ascribe any strong altruistic, agent-neutral motive to that end. The desire to protect one's child from harm or risk of death is unapologetically agent-relative, *too*. That is, love for a child might be in every parent, but when one's child is in danger no reasonable parent needs to consult one's agent-neutral duties or otherwise reflect on moral principle.<sup>218</sup> We do what comes naturally! In other words, we don't need to see the typical parent caring for an ailing child as a heroic altruist. The crucial point is that most parental agent-relative interests and desires are completely compatible with the child's agent-neutral interests. Some, unfortunately, are not.<sup>219</sup> The rapist's agent-relative interests are paradigmatically incompatible with those of his victim, but the faith healer's agent-relative interest in

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<sup>218</sup> David Hume discusses parental affection in terms of virtue and duty that is quite relevant here. He writes: "A virtuous motive is requisite to render an action virtuous. An action must be virtuous, before we can have a regard to its virtue. Some virtuous motive, therefore, must be antecedent to that regard. Nor is this merely a metaphysical subtilty; but enters into all our reasonings in common life, tho' perhaps we may not be able to place it in such distinct philosophical terms. We blame a father for neglecting his child. Why? because it shews a want of natural affection, which is the duty of every parent. Were not natural affection a duty, the care of children cou'd not be a duty; and 'twere impossible we cou'd have the duty in our eye in the attention we give to our offspring. In this case, therefore, all men suppose a motive to the action distinct from a sense of duty." David Hume, *A Treatise of Human Nature: Being an Attempt to Introduce the Experimental Method of Reasoning Into Moral Subject*, ed. David Fate Norton and Mary J. Norton, Oxford Philosophical Texts (Oxford, UK: Oxford University Press, 2000/1740), 478.

<sup>219</sup> In 1995, the SCC brought down a ruling [*B.(R.) v. Ontario Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.] that had considerable implications for parental rights and the rights of children of religious parents. A premature infant, born to JW parents needed blood transfusions, to which the parents would not consent. The infant was lawfully made a temporary ward of the state, saving the life of the child. The parents brought suit against the Provincial Government, impugning the legal provisions that violated their *Charter* rights, protecting religious freedom and freedom conscience. The SCC disagreed and upheld the constitutionality of such provisions, ultimately protecting the lives of vulnerable children everywhere in Canada. Parental religious belief could not justify risking the life of a child.

pursuing an other-worldly system of moral obligations can *also* be worryingly anti-social in the broad sense of that term.

Fundamentalists and radical evangelicals who find themselves wanting to rely on God's healing power *more* than or *rather* than medical science have often been brought to this "complex attitude" not by direct divine commands or explicit doctrinal edicts, as is often the case in Christian Science, Scientology, or the Jehovah's Witness sect. In those religious contexts adherents don't really have a voluntary moral choice; their belief system requires certain approaches to, say, medicine or blood transfusions. Christian fundamentalists get to faith healing more indirectly, through a commitment to the entire Bible as being the 'inerrant Word of God'.<sup>220</sup> When confronted with discrepancies or apparent contradictions in the text it is assumed that the difficulties are in fact only *apparent*; the mature believer with spiritual 'eyes to see and ears to hear' will be able to reconcile and harmonize what may seem like inconsistencies. Passages about slavery, for example, are interpreted with contemporary sensibilities to describe how, say, employees are to obey their employers. There is always some relevant contemporary application, and often the application is literal. One of the passages scandalous to the moderate, liberal mind, but would also contribute to that complex attitude related to faith healing can be found in the following words attributed to Jesus in the Gospel of Luke. Here Jesus is teaching a crowd of would-be followers who are considering discipleship:

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<sup>220</sup> "All Scripture is God-breathed and is useful for teaching, rebuking, correcting and training in righteousness, so that the servant of God may be thoroughly equipped for every good work." 2 Timothy 3:16-17 (NIV).

If anyone comes to me and does not hate father and mother, wife and children, brothers and sisters—yes, even their own life—such a person cannot be my disciple. And whoever does not carry their cross and follow me cannot be my disciple.<sup>221</sup>

The way this passage gets interpreted for contemporary sensibilities is to soften what Jesus meant by “hate.” Surely, says the careful reader of the text, it does not mean ‘hate’ in the way one might hate evil, hate turnips, or even hate one’s enemies.<sup>222</sup> If one should *not* hate one’s enemies, it surely makes no sense to think one must ‘hate’ one’s family! The true believer remembers the ancient commandment, “you shall have no other god’s before me” (Exodus 20:3) and interprets Jesus’ requirement to “hate” one’s family in the light of properly ordered relational priorities. Jesus is apparently saying that it would be wrong for true disciples to let anything—even the love of a family member—supplant their love and obligation to him. To ‘hate’ one’s family is simply to ensure that one’s overall priorities in life are indexed as they ought to be. One cannot be a true disciple and simultaneously love anything or *anyone* more than God. This interpretation of the requirement to “hate” is exemplified no more clearly than in the famous Genesis 22 story where God commands Abraham to sacrifice his son, Isaac—the obedience through which God ensures what would become Israel’s legacy.<sup>223</sup>

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<sup>221</sup> Luke 14:26 (NIV).

<sup>222</sup> Of course, Christians are called upon to love their enemies. “You have heard that it was said, ‘Love your neighbor and hate your enemy.’ But I tell you, love your enemies and pray for those who persecute you...” Matthew 5:43,44 (NIV).

<sup>223</sup> “Then God said, ‘Yes, but your wife Sarah will bear you a son, and you will call him Isaac. I will establish my covenant with him as an everlasting covenant for his descendants after him.’” (Genesis 17:19); “The angel of the Lord called to Abraham from heaven a second time and said, ‘I swear by myself, declares the Lord, that because you have done this and have not withheld your son, your only

Recall, we are looking at a variety of doctrinal teachings that lead collectively to the commitment to faith healing. Let's combine what we've seen so far about 'hating' one's family, valuing obedience to God's will at any cost, with St. Paul's very clear teaching about the epistemic priorities of the believer. It is worth reciting this passage in full:

For the message of the cross is foolishness to those who are perishing, but to us who are being saved it is the power of God. For it is written: "I will destroy the wisdom of the wise; the intelligence of the intelligent I will frustrate." Where is the wise person? Where is the teacher of the law? Where is the philosopher of this age? Has not God made foolish the wisdom of the world? For since in the wisdom of God the world through its wisdom did not know him, God was pleased through the foolishness of what was preached to save those who believe. Jews demand signs and Greeks look for wisdom, but we preach Christ crucified: a stumbling block to Jews and foolishness to Gentiles, but to those whom God has called, both Jews and Greeks, Christ the power of God and the wisdom of God. For the foolishness of God is wiser than human wisdom, and the weakness of God is stronger than human strength. Brothers and sisters, think of what you were when you were called. Not many of you were wise by human standards; not many were influential; not many were of noble birth. But God chose the foolish things of the world to shame the wise; God chose the weak things of the world to shame the strong. God chose the lowly things of this world and the despised things—and the things that are not—to nullify the things that are, so that no one may boast before him. It is because of him that you are in Christ Jesus, who has become for us wisdom from God—that is, our righteousness, holiness and redemption. Therefore, as it is written: "Let the one who boasts boast in the Lord."<sup>224</sup>

In this passage we get the clearest elucidation of the epistemological principles bearing upon the Christian mind. The Christian mind on the conservative reading of

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son, I will surely bless you and make your descendants as numerous as the stars in the sky and as the sand on the seashore. Your descendants will take possession of the cities of their enemies, and through your offspring all nations on earth will be blessed, because you have obeyed me." (Genesis 22:16-18).

<sup>224</sup> I Corinthians 1:18-31 (NIV).



fundamentalists must be autonomous from the standards of the world. St. Paul makes this claim even more succinctly in the following:

Do not conform to the pattern of this world, but be transformed by the renewing of your mind. Then you will be able to test and approve what God's will is—his good, pleasing and perfect will.<sup>225</sup>

Nowhere will the careful reader of scripture find the explicit commandment to ignore medical authorities, but if we think about them as expressing the “wisdom of the wise” or announcing the “pattern of this world” we can see why the fundamentalist would regard medical authorities as ‘Other’ and not to be trusted. Nowhere will the careful reader of scripture find the explicit commandment to sacrifice one’s child as Abraham was willing to sacrifice Isaac, but if we know that our commitment to God supersedes everything—*must* supersede everything—then we can see why fundamentalists would zealously want to prove to God they have their priorities right. If we combine the few explicit passages about physical healing with the passages we’ve considered above we see how the “complex attitude” of affected indifference to one’s child is nurtured over time.<sup>226</sup> We could summarize the cluster of beliefs leading to the affected indifference in the following way:

- 1) God’s Word is true.
- 2) The cost of being a disciple of Christ is absolute.

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<sup>225</sup> Romans 12:2 (*NIV*).

<sup>226</sup> The two clearest passages related to healing and true discipleship are the following (referred to in the Introduction): “And these signs will accompany those who believe: In my name they will drive out demons; they will speak in new tongues; they will pick up snakes with their hands; and when they drink deadly poison, it will not hurt them at all; they will place their hands on sick people, and they will get well. (Mark 16:17,18 *NIV*); “Is anyone among you sick? Let them call the elders of the church to pray over them and anoint them with oil in the name of the Lord. And the prayer offered in faith will make the sick person well; the Lord will raise them up. ... The prayer of a righteous person is powerful and effective.” (James 5:13-16 *NIV*).

- 3) Ethical norms must be subordinated to obedience to God.
- 4) Rationally understanding God's will is less important than obeying God's will.
- 5) God's will cannot be understood by outsiders.

Given this complex array of beliefs and existential commitments, we have in fundamentalist evangelicals a cognitive cocktail for death-defying, anti-social behaviour.<sup>227</sup> The vast majority of Christians around the world might pay lip service to some of these beliefs and values, but each belief would die the death of a thousand qualifications.<sup>228</sup> And this would be the complaint of fundamentalists—that everyone else compromises their Christian commitment or their religious beliefs, *except us*.

The claim that a prosecutor could make to the trier of fact is that faith healers show wanton or reckless disregard for their children's life or safety, because they show indifference to the priority their children's lives and safety ought to possess. That is, faith healing parents show profound disregard for the conventional, some might say 'natural', standards of human relationships. Out of respect for liberty Liberal societies are reluctant to place positive duties on citizens. But liberals have no difficulty in seeing and enforcing positive duties on parents, precisely because of

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<sup>228</sup> One noteworthy example of a popular figure who criticizes secularism but would be no friend of fundamentalists is the American anti-liberal polemicist, Ann Coulter. In her book, *Godless*, she writes, "The core of Judeo-Christian tradition says that we are utterly and distinctly apart from other species. We have dominion over the plants and the animals on Earth. God gave it to us, it's ours—as stated succinctly in the book of Genesis. ... Everything liberals believe is in elegant opposition to basic Biblical precepts." Ann Coulter, *Godless: The Church of Liberalism* (New York, NY: Crown Forum, 2006), 4. If you asked Coulter and millions of other Christians if people should trust in God, they would say 'yes'. Carol and Arthur Tutton would say Coulter and millions of other Christians do not truly or sincerely trust in God; they trust in themselves and in their own intellect—something "basic Biblical precepts" teach true believers not to do.

two closely related considerations. First, liberals would agree that children are often—though certainly not always—and integral part of any conception of a good life, and if people elect to have children they must also care for them. This is not an onerous duty for most reasonable *qua* ordinary parents. Second, liberals would quickly acknowledge that children are both positive and negative rights holders. That is, they are owed duties of care, typically from their parents, and they are owed negative duties of non-interference from everyone *including* their parents. When parents choose to ignore social and natural convention and put religious values above the lives of their children, the rights of children are displaced. The political and moral conventions of society serve to maintain, perhaps amongst other things, the place of children within the family unit. Now it's an open question even amongst philosophers whether or not children have a positive right to the love and affection of their parents. It's an open question because it's not obvious *anyone* has a right to love or affection and, more importantly, rights should be enforceable and who on earth could enforce the duty of love? What *can* be enforced, though, is the duty a parent has not to show wanton or reckless disregard for a child's life and safety. When a child dies and this death can be traced back to a complex attitude of affected indifference on the part of the parent then criminal negligence is certainly discernible. Faith healing practices recklessly undermine relationships that are intended to insure that children's lives and safety are, in fact, not threatened. I'm not here suggesting that faith healers intend the death of their children, but from a more objective perspective we could agree with the Kantian dictum that 'to will the end is to will the means'. The end that motivates faith healing parents more than anything

else is absolute obedience and commitment to God. Adopting this end can result, obviously enough, in one's wilful blindness towards lawful, but also natural duties. In most instances, the law can be indifferent to these completely sectarian commitments. But when dependent minors die as a result, law enforcement should take notice. No reasonable person—indeed, no reasonable parent—so wilfully blinds oneself to the duties owed to one's most precious and vulnerable relationship.

It is very important to hear precisely the criminal complaint being made against the faith healer in this regard. One might object that faith healers are being impugned on this account for simply being socially unconventional, idiosyncratic or, to use the language of the great liberal defender, John Stuart Mill (1806-1873), for engaging in a rather odd "experiment in living." I am not saying that every philosophical orientation that rejects majoritarian values, or even somehow undermines or critiques conventional social values is delusional or susceptible to criminal anti-social behaviour. This, after all, is the view that is famously held up for criticism whenever first-year philosophy students read Plato's famous *Apology*. I'm certainly not promoting censure of the next Socrates who wants to question convention or tradition. The history of philosophy is replete with thinkers who called into question canonical understandings of reason, reality, and social life, and were inspirational to a wide variety of revolutionaries. Jean-Jacques Rousseau (1712-1778) was deeply critical of 'civilization' in his famous *Discourse on the Origin of Inequality* (1755) and yearned for people to return to a simpler, more 'natural' way of life. Some might interpret St. Paul and Rousseau as simply offering differing

accounts of a similar rejection of 'civilization'. Certainly, some interesting comparisons could be drawn between St. Paul's rejection of worldly wisdom and similar philosophical critiques from thinkers as diverse as Marx, Nietzsche, Foucault, and Derrida. The point being drawn out is that liberal democracies have reason to be concerned with anyone who combines a critique or suspicion of norms that give shape to law, morality, and even social epistemology, *with* a belief that God's will is, on the contrary, not to be questioned but only obeyed. This orientation was *not* shared by Rousseau, Marx, Nietzsche, Foucault, or Derrida. It certainly was not shared by Socrates, the great founder of our critical discipline.

Admittedly, one philosopher who does explicitly resonate with the Pauline rejection of worldly wisdom is nineteenth-century Danish writer, Søren Kierkegaard (1813-1855). In his pseudonymous work, *Fear and Trembling* (1843), Kierkegaard explores, with literary genius, Abraham's willingness to sacrifice Isaac in obedience to God's will. The general interpretation of the work, seen in the context of Kierkegaard's overall literary project, is to criticize the Danish State Church (Lutheran 'in name only') for its spiritual complacency. Christian faith, according to Kierkegaard, requires a "teleological suspension of the ethical."<sup>229</sup> Very roughly, this entails transcending the conventional, the orderly, the rational, to embrace and believe that which on religious grounds is paradoxically *unbelievable*. Abraham's angst-filled journey to Mt. Moriah, the place where he would sacrifice the symbol of both civility and God's promise, is the paradigmatic journey toward

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<sup>229</sup> Søren Kierkegaard, "Fear and Trembling," ed. C. Stephen Evans and Sylvia Walsh (Cambridge University Press, 2006/1843).

becoming the true disciple—Kierkegaard’s “Knight of faith.” There is no whistling in the dark here. There is no triumphant recitation of Psalm 23. There is only the dread, the anxiety, the discomfort of embracing something little rational sense can be made of. For Kierkegaard, ease or convenience of belief is a luxury of a leisured intellectual class, someone with time to rationalize and compromise. No true Christian, he claims, contents oneself with such a stale existence.

Now, no careful interpreter of Kierkegaard would read him literally. Reading Kierkegaard literally and didactically makes as much sense as reading Nietzsche literally and didactically. It ought not be done. Kierkegaard simply—if anything he ever wrote could be taken ‘simply’—wants the Christian to ask, “how committed am I to being a genuine disciple of Christ?”<sup>230</sup> Vast numbers of Christian philosophers of religion, to say nothing of critical literary theorists, adore the work of Søren Kierkegaard. Today, being a radical existentialist Christian means possibly sacrificing a life of suburban, middle-class comforts and adopting a life of willing simplicity and ascetic values. In all the literature on Christian faith healing, not one faith healer ever reported being inspired by the work of Soren Kierkegaard. And I’m confident in saying no so-called Christian existentialist would endorse child sacrifice or encourage, say, the Tuttons in the course of action they tragically took. It’s one thing to live ‘radically’, with a counter-cultural attitude toward the putative evils of

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<sup>230</sup> For a balanced but sympathetic evangelical interpretation of Kierkegaard’s orientation to Christian faith see C. Stephen Evans, “Faith Against Reason: Kierkegaard,” in *The Phenomenon of Religious Faith*, ed. Terrence Reynolds (Upper Saddle River, NJ: Pearson-Prentice Hall, 2005).

technological, industrial, and capitalist society. It's quite another to adopt a view whereby *all* earthly commitments become necessarily supplanted by heavenly ones.

But, let's suppose vocal support for faith healing could be found from existentialist philosophers, and not just from reading the story of Abraham. Should this persuade the trier of fact to agree that reasonable people could actually envision this? Of course not! The point is not that somehow faith healers like the Tuttons should be looked at differently if we could understand them to be venerating a radical Christian philosophical tradition. Just because there have been storied historical and literary heroes of the radical Christian faith is no good reason to celebrate Christians who try to animate or reanimate those presumed heroes in the present day. Just because a thief can say he was inspired by the story of Robin Hood is no good reason to excuse his crimes. Just because a freedom-fighting terrorist can say he was inspired by the *actual* life of Che Guevara is no good reason to excuse his crimes. The big picture is that on liberal grounds we can defend the rights of people to take some radical risks with experiments in living. If people want to fantasize about being a modern day Robin Hood, or modern day Che Guevara, or even a modern day Abraham, that's entirely their business—until their fantasies encroach upon lives and safety of real people. And if the criminal law were brought to bear upon such individuals, no one could accuse the state of heavy-handed censorship of the unconventional.

So, we see that a commitment to faith healing in this disordered moral and epistemic context does not necessarily emerge from a singular doctrinal requirement. Nor is it in compliance with one simple commandment. Rather, the

propositional belief “I should trust God with my child’s life” is nested within a more general and basic belief that “my trust in God should be absolute.” Drawing the deductive inference to trust God with one’s child is a mere application of logic.<sup>231</sup> My child is not different from my finances, and my job, and my relationships. Given the internal logic of the fundamentalist, it is perfectly understandable that the true believer, such as Carol Tutton, would come to believe she was given a vision and that God spoke to her about Christopher’s ailment. If confronted with doubt or psychological dissonance, it would not be surprising that the parents would reject worldly convention and persist in their beliefs. They knew from scripture that ‘real wisdom’ looks, literally, for all the world *like foolishness*. It is entirely predictable that they would have regarded their own doubt as *a reason* to persist in their chosen course of action. Doubt is to be banished and the only way to do this is to act *as though* one believes.<sup>232</sup> And so a child dies.

Does this represent a criminal attitude of affected indifference? When this ‘other-worldly’ orientation to life results in death do we have the grounds for a

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<sup>231</sup> The syllogistic argument would go as follows: 1) I should trust God with all aspects of my life. 2) My child’s life is an aspect of my life. 3) Therefore, I should trust God with my child’s life.

<sup>232</sup> This is a form of religious praxis, made famous by Blaise Pascal (1623-1662) in his famous ‘Wager’. After all the calculations about costs and benefits of belief and unbelief, the prospective believer may still find himself unable to believe as he desires. Pascal said famously: “But understand at least your incapacity to believe, since your reason leads you to belief and yet you cannot believe. Labour then to convince yourself, not by increase of the proofs of God, but by the diminution of your passions. You would fain arrive at faith, but know not the way; you would heal yourself of unbelief, and you ask remedies for it. Learn of those who have been bound as you are, but who now stake all that they possess; these are they who know the way you would follow, who are cured of a disease of which you would be cured. Follow the way by which they began, by making believe that they believed, taking the holy water, having masses said, etc. Thus you will naturally be brought to believe, and will lose your acuteness.—But that is just what I fear.—Why? what have you to lose?” Blaise Pascal, “The Wager -- Selection from *Pensees*,” in *The Phenomenon of Religious Faith*, ed. Terence Reynolds (Upper Saddle River, NJ: Pearson Prentice Hall, 1660/2005), 143.



criminal negligence conviction? From an objective perspective, it should count for little that faith healers would claim to have the very best intentions towards their children. No doubt JW parents refusing blood transfusion for their children also having nothing less than the best intentions for their children. Those best intentions are nowhere near 'best' from the perspective of the reasonable person. As committed fundamentalists would concede, their beliefs, their general world-view is not a matter of negotiation with secular people. They have no obligations to make themselves understandable to 'Jews or Greeks' (i.e., to those who want signs or to those who want reason). By their own biblical principles, they would acknowledge an obligation to set God's will above the 'worldly' interests of their children. Furthermore, they would concede that their course of action *will look to the world* as though they disregard the life and safety of their children. That's the way it *would* appear to foolish secular society and, as St. Paul says, to the "teachers of the law." If the question is, do faith healers show the same kind of indisputably criminal disregard for another's rights as, say Daniel Tschetter or any other common criminal, the answer is unequivocally *no*. But we're not dealing here with a common crime either. There are reasons—reasons we've considered at great length—the offence of criminal negligence receives the sort of hand-wringing it does, and it has everything to do with the enigmatic nature of the fault that is required. If the question is, can certain agent-relative religious values blind a parent to his or her child's agent-neutral interests, and thereby show indifferent disregard for the child's life and safety, then the answer is *yes*. The Tuttons and the Shippys are not unique in this; in virtually all faith healing deaths it is obvious to medical staff and coroners

that there was overwhelmingly obvious evidence that the deceased child was in grave physical peril and in need of medical assistance, but the peril was ignored. Again, in the abstract, this sounds for all the world as though an accused's agent-relative commitments would not be over-ridden by *anything* including their own child's agent-neutral interest in physical survival. Is this a marked and substantial departure from the kind of attitude expected of reasonable, ordinary parents in Canadian society? The answer should be 'yes.'

This chapter considered the plausibility of a charge of criminal negligence from an alternative conception of the reasonable person. Some triers of fact might be less persuaded by the idea (considered in the previous chapter) of a common sense objectivist—someone who thinks people have epistemic responsibilities to avoid getting the world catastrophically wrong—and think that a reasonable person is someone who orders his or her moral commitments in ways that are socially responsible. A prosecutor could well try to persuade the trier of fact to see the deceased child as someone whose basic legal and moral rights were ignored with culpable indifference. A reasonable parent would know and, indeed, care for a child *differently*. A reasonable parent does not intentionally disorder one's natural affections and conventional duties in the way that faith healers do. Further to this, the prosecutor could argue that faith healers wilfully disorder the rightful place of a child in a family's home by wilfully embracing a perverse 'Abraham-complex' that wilfully blinds the parent to the dangers being created. Consequently, a trier of fact could rightly conclude that the faith healer shows wanton or reckless disregard for

another's life or safety and that, furthermore, the departure from the reasonable person is marked and substantial.

## Chapter 9: Faith Healing and Guilt Reconsidered

“Mistrust all in whom the urge to punish is powerful.”  
Friedrich Nietzsche - *Thus Spake Zarathustra*

The two previous chapters considered arguments that a prosecutor could offer and a trier of fact could consider favouring the conviction of faith healers on charges of criminal negligence causing death. The lawfully delegated task of the trier of fact is to construct a conception of a reasonable person and ask oneself where faith healers (whose actions resulted in death) stand in relation to this norm. To avoid conviction faith healers need not perfectly conform to any reasonable person standard. Indeed, the defence could concede faith healers don't conform to any plausible standard conceived by the trier of fact. Now, the defence may not want to make even that concession. Perhaps they would ambitiously prefer to contest the conceptions of reasonableness and argue that the faith healer's actions are not only *not unreasonable*, but plausibly *reasonable*. Nevertheless, to negate the charge the defence need only generate reasonable doubt in the mind of the trier of fact that the accused's departure is as substantial as the Crown argues.

Triers of fact have three options available to them in terms of justifying an acquittal. Perhaps in response to ambitious arguments from the defence, they may be persuaded that the faith healer is within the realm of *a* reasonable person or, contrary to chapter 6, that the accused made an honest but sufficiently reasonable mistake. Perhaps in response to more conciliatory arguments from the defence, they may be persuaded that the accused has not met the standard but does not depart sufficiently to warrant liability. Lastly, and most controversially, the trier of fact

could refuse to convict even while being persuaded that the faith healer has departed markedly from all conceivable standards of reasonableness. That is, the trier of fact could hold that the offence is rightly attributable to the accused but for some reason or other decide not to assign guilt. In this array of options lies the trier of fact's interesting and controversial authority with respect to criminal negligence. Again, the basic "facts" are beyond dispute: faith healers choose to discharge the duty of care owed to their children by trusting in their objectively untrustworthy religious beliefs. From the point of view of the trier of fact this misplaced trust can be regarded not simply as neglect of a positive duty but as a profound failure of common sense, practical judgment, and natural affection. It could be well thought of as an endangerment of the highest order—the highest order because it is an absurdly avoidable evil wrapped in the innocence of a hopeful religious belief. The trier of fact could agree to all this, and nevertheless decide to acquit the accused.

In part, what makes this third alternative controversial is that no triers of fact would need to admit to it. They wouldn't need to admit to their belief that, in exclusive considerations of law, faith healers are guilty, but as a matter of personal conscience they cannot hold them liable. They could simply rationalize their verdict in the second alternative that the faith healer's departure, while indisputably unreasonable, was not after all *criminally* unreasonable. Given the vagaries of applying the objective test in cases of criminal negligence there is simply no way of discerning from the outside (nor possibly from the inside) whether a trier of fact believes the accused is genuinely not guilty of the offence or just not guilty *enough*.

This penultimate chapter will consider a variety of arguments and perspectives that could explain why a trier of fact could choose to acquit the faith healer.

The unstated assumption throughout this entire dissertation has been that criminal liability must be grounded in an accused's choice or something akin to choice, such as a person's will or one's authorization of a course of action. Let's call this view choice theory. Now, the contention might be that choice theory begs the question against other legitimate theoretical grounds of criminal liability, grounds that might be more conducive to explaining a faith healer's acquittal. To get a clearer sense of the alternatives, let's first get a clearer picture of the view I've so far assumed. Choice theory can bear upon both fault and excuses.<sup>233</sup> For example, criminal liability could be grounded in the choices an accused has relevantly made. We have assumed, for example, that Daniel Tschettter is at fault and Justin Beatty is not by reference to the crucial role that choice played in the commission of the alleged offences. But liability can be considered from another way around. In terms of excuse, Michael Moore states, "one is excused for the doing of a wrongful action because and only because at the moment of such action's performance, one did not have sufficient capacity or opportunity to make the choice to do otherwise."<sup>234</sup> Clearly the choice theory of criminal liability and the more narrow choice theory of excuse are intimately linked.<sup>235</sup> We can, I think, weave fault and excuse together to

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<sup>233</sup> See R.A Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Hart, 2007).; Michael S. Moore, "Choice, Character, and Excuse," *Social Philosophy and Policy* 7, no. 7 (1990).

<sup>234</sup> "Choice, Character, and Excuse.", 29.

<sup>235</sup> Duff makes the distinction between criminal liability and criminal responsibility. One can be criminally responsible for a particular wrong or harm, but not be held liable in virtue of some excuse

say that choice theory endorses the view that a necessary condition of criminal liability is sufficient evidence that a culpable choice is attributable to the accused somewhere in the direct causal chain leading to the offending harm. H.L.A. Hart can be understood as a strong proponent of choice theory in his defence of penal negligence. To hold someone criminally liable for a harm done 'negligently' (i.e, without care) it need only be proven that the accused had fair opportunity to have *chosen* otherwise and unreasonably failed to do so.<sup>236</sup> The central thesis is that we can't blame people morally or criminally for things over which they had no capacity to control by their choices.<sup>237</sup> We can, for example, hold someone liable for a sexual assault he committed while intoxicated if he knowingly made a choice to initiate the process by which he lost his capacity to control himself.<sup>238</sup> Following the line of argument offered by both Hart and Moore, no excuse is available to him in virtue of the fact that, knowing intoxication impairs self-control, he could have chosen not to become intoxicated in the first place. So, on this view we see choice theory and control-conditions fitting hand in glove.

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or justification (i.e., "liability-negaters"). Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*: 57. Duff does not think excuses or justifications negate responsibility.

<sup>236</sup> See Hart, "Negligence, *Mens Rea* and Criminal Responsibility."

<sup>237</sup> This "control" view is well developed by Duff in *Answering for Crime*, 57-72. There may be many things over which control is difficult to discern: e.g., thoughts, beliefs, outcomes, risks, etc.

<sup>238</sup> There is a long and unfortunate story in Canadian jurisprudence to be told in this regard following the remarkable ruling, *R v Daviault* [1994] 3 S.C.R. 63. The law at the time was such that self-induced intoxication could negate *mens rea* in the offence of sexual assault. Subsequent to *Daviault*, Parliament changed the law ensuring that if an accused knew he was consuming intoxicants, *mens rea* would not be negated if, later on, his self-induced intoxication rendered him incapable of controlling his behaviour.

In case this is not already obvious, no one should understand choice theory to be in any way wedded to subjectivism.<sup>239</sup> It may be a tempting association given that choices occur in minds and subjectivism seeks to limit fault to those harms triggered by something correspondingly mindful. While some subjectivists may endorse choice theory, it need not be the exclusive domain of subjectivists or people who favour what Fletcher called a “psychological approach” to fault attribution. Recall from chapter 3, Fletcher himself rejects the psychological approach, but nevertheless agreed that the harm needed to be “attributed to the suspect as a culpable or blameworthy action.”<sup>240</sup> I have been referring to the wrong as being properly authorized, i.e., somewhere in the attribution of fault the accused needed to have sufficiently authorized the offending harm. My claim is that we ‘authorize’ harmful actions by making choices and willing certain actions. In chapter 4 we examined the developments in judicial reasoning on objective standards in negligence-based offences which made minimally authorizing choice a necessary condition of fault. Though fault depended on objective tests, authorizing choices were discernible in *Waite*, *Hundal*, *Naglik*, and *Creighton*. Authorizing choices were also evident in *Tschetter*, and most recently in *Czornobaj*. Because they acted in the ways they did, namely, substantially out of step with the reasonable person, they also authorized the results of their actions. Culpability is attributable to them, though the fault is not necessarily *in* their choices. Without that authorizing feature,

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<sup>239</sup> We might recall that Hart in his paper on negligence was actually criticizing the classical subjectivist view of W.C. Turner.

<sup>240</sup> Fletcher, *Basic Concepts of Criminal Law*: 82.



though, no blame could be attributed to them. By contrast, no choice (and nothing voluntary) could be discerned in Dominic Martin, in Leslie MacDonald, nor in Justin Beatty.<sup>241</sup> Because they authorized nothing sufficiently related to the harm, no guilt can be attributed to them.

Authorizing choices are far more evidently found in faith healing cases like *Tutton* and *Shippy* than any other of the accidental harms we've considered. The bulk of argumentation presented so far advocating fault for faith healers is premised by the claim that reasonable people don't make those kinds of choices: e.g., choices to disregard reliable medical treatment in favour of an alternative that appears to be nothing, or choices to subordinate the interests of an offspring to the presumed interests of a deity. But none of this, including the inventory of cases we've considered, necessarily means that choice theory related to fault or excuse is the only game in town. The theoretical alternatives to choice theory are action theory and character theory. Antony Duff, claims that, "criminal law should focus on wrongful *action*; it is primarily our actions (rather than for our choices or character traits, for instance) that we should be criminally responsible."<sup>242</sup> Duff is quick to concede that there is nothing about "action" *per se* that is hastily apprehensible. Action, he says, is "too wide: many kinds of wrongful action are not even in principle apt candidates for criminalization."<sup>243</sup> Jurists and philosophers of law have long

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<sup>241</sup> No discernible choice was found in Leslie MacDonald, but she was not found guilty of criminal negligence either—only failing to provide the necessities of life.

<sup>242</sup> Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law*: 80.

<sup>243</sup> *Ibid.*

puzzled over the concept of action and whether it, in the context of other important considerations, is key to criminal liability.<sup>244</sup> According to Duff, what we *do* includes at least some of the consequences of our actions and these may well be at odds with our choices. For this and a variety of other reasons Duff elects for action theory against the alternatives. I've opted for choice theory over action or character theory for the simple pragmatic reason that it seems most implicitly endorsed by the SCC. By way of illustration, recall the Court concluded in *Beatty* that momentary lapses of care and attention can happen to any normal driver. We conclude from this, not that the action didn't belong to the driver, but that both the action and the results were no not sufficiently authorized by choice, will, or decision.<sup>245</sup>

Character theory stands as the more plausible alternative to choice theory, but only because it is more easily distinguishable from choice and action. Michael Moore says of character theory as it relates to excuse that, "one is excused for the doing of a wrongful action because and only because such action is not determined by (or in some other way expressive of) those enduring attributes of ourselves we

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<sup>244</sup> See for example, Douglas Husak, "Does Criminal Liability Require an Act?," in *Philosophy and the Criminal Law: Principle and Critique*, ed. Antony Duff (Cambridge, UK: Cambridge University Press, 1998); Michael S. Moore, *Act and Crime: The Philosophy of Action and its Implications for Criminal Law* (Oxford, UK: Clarendon Press, 1993).

<sup>245</sup> I want to quickly concede that Action Theorists would say results not sufficiently voluntary are not the consequence of 'actions'. In other words, the objection might be that people don't understand Action Theory if they don't see that actions must be sufficiently authorized by an actor or agent. So, two options would be open to the Action Theorist, like Duff, with respect to defending Justin Beatty's innocence: argue for Beatty's non-culpability because there was *no action*, or agree with the SCC that the action was involuntary. In the long tradition of Aristotelian Action Theory, an agent can be morally tied to consequences caused involuntarily. Clearly, the voluntary/involuntary (and non-voluntary) distinctions are crucial to unlocking the moral status of actions.

call our characters."<sup>246</sup> As with choice theory, we can see once again that both liability and excuse fit hand in glove. Character theory can explain everything we've taken for granted in terms of choice theory. For example, nothing about Daniel Tschetter's driving resulting in the deaths could be negated by *his* character. He had been an alcoholic for eighteen years and his driving record was not impeccable. Or similarly, nothing about the character of Daniel Tschetter's *driving* was defensible. Numerous witnesses testified to his dangerous driving and excessive speed long before Tschetter made his way to the outskirts of Calgary where the fatal collision occurred. His driving expressed culpable character and nothing about his known character could negate his actions. The driving of Justin Beatty, in contrast, did not express sufficiently culpable character. Nothing about Justin Beatty's character could be used as evidence to prove culpability. With Tschetter, no one would have needed to die for the law to have impugned his driving—so uniformly dangerous was the entire episode his character authorized. Conversely, with Beatty, had three people not died nothing authorized by Beatty's character would have been of interest to criminal law.

Might character theory be used to negate the charges of criminal negligence in faith healing cases? Certainly an argument can be made that character theory can take the accused farther in the direction of acquittal than the presumed choice theory but it would be wrong to say that character considerations have been completely absent in making the case against faith healers in the first place. As we saw in the previous chapter, faith healers like the Tutttons can be impugned for the

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<sup>246</sup> Moore, "Choice, Character, and Excuse," 29.

presumed choices they make in terms of disordering their relational priorities in ways a reasonable person would not. But, someone unimpressed by choice theory could make a different claim about the same set of facts. Indeed, the character claim is very easy to see in Jeremy Horder's conception of culpable indifference—that "complex attitude" that is causally connected to the offending harm. The character theorist could argue that the complex attitude of, what I called, *affected* indifference results less from choice and more from something like the formation and expression of character. Critics of choice theory may not fully deny that choices can be culpable, but without a context of character a choice is a mere atomic unit of authorized decision making. To explain a choice's culpability it must be seen as expression or an extension of a person's character. If a generally culpable character cannot be found then fault ought not be attributed, and similarly if culpable character is discernible then fault is attributable whether or not a full-throated 'choice' exists. And of course in cases of criminal negligence where there's an obvious absence of subjective-type choices corresponding to the harm, it can be very useful to find something even 'choice-lite' to which fault can be attributed. This is what Horder has done, the character theorist could argue, namely, turn criminal negligence into a 'choice-lite' offence where the character evaluations ground fault.

To fold character theory into the objective standard—as we've done with choice theory—we could say that faith healers violate a standard of good character expected of good parents. It's not that reasonable people don't make the kinds of choices faith healers make; rather, it's that reasonable people don't show the kind of failures of character that faith healers show. When we consider the previous

inventory of cases, it appears that character theory is up to the same challenge as choice theory of both impugning and excusing. Whatever choice theory can do, character theory can do better—or at any rate, just as well.

The case of Emma Czornobaj appears, though, a bit of an outlier. It would seem that choice theory is better used to explain her culpability, but that character theory would apply better in her defence. After all, she made a deliberate choice to stop her vehicle in the middle of a busy high-speed road way. A reasonable person doesn't make that *choice*! So, when someone does and people die, culpability does not unfairly follow. On the other hand, she did something that put her own life and safety in some degree of peril and attempted to do something that showed commendable moral character. The world is a better place with people like Emma Czornobaj in it! No one is disputing that her choices and her actions caused needless loss of life, but the character theorist could argue that her wrongdoing is mitigated by the character her actions and choices *expressed*. Good character, in the end, should mitigate bad choices.

A very similar kind of character argument could be used in the faith healing cases. The defence could concede quickly that, yes, it looks for all the world that faith healers make indefensible, inexcusable *choices* that no reasonable person should ever make. But, the defence could interject, these choices must be understood in an overall context of exemplary character. The trier of fact from the previous chapter, conceiving of the reasonable person as one who rightly orders one's relational priorities, made the faith healer look like a psychopath with an Abraham-complex. But the defence could argue that is a caricature made of choices

and particular beliefs. There is nothing culpably self-serving or agent-relative in a faith healer's genuine character. Faith healing parents, on the contrary, are extremely selfless, sacrificial, loving, and dutiful. Yes, their greatest love and highest duty is to their religion, but this expresses a capacity for indisputable virtue and it extends to the care for their children. In every other respect, it could be argued, that faith healing parents are exemplary in the care for their children. While so many permissive 'liberal' parents neglect the serious moral training of children, faith healing parents show the greatest care for moral education. Again, the defence need not pretend that somehow these parents made a good *choice* with respect to one aspect of a child's health care—they did not! But, no trier of fact thinking about the reasonable person *of good character* should be able to detect the marked departure necessary for a conviction.

This all sounds plausible, but the trier of fact need not be too quick to acquit based on character theory. As noted just prior, Horder's conception of culpable indifference is obviously not devoid of character considerations, and there's much about faith healing character to remain critical. Resolute and tenacious theological commitments that seem to ignore what is obvious to the rest of the world could easily be interpreted as an expression of less than good character. Nor, of course, is it unproblematic to exculpate someone simply because there are certain aspects of the accused's character the trier of fact is either fond of or sympathetic to.

Christopher Tutton's death resulted from the parents' failure to heed unequivocal professional medical advice, not once but twice. To be sure, character theorists look for more than atomic bits of decision making, but surely risking Christopher's life

not once but twice says something less than praiseworthy about the parents' overall character. Persistence and strength of will may be in general more praiseworthy than intemperance and weakness of will, but there are instances in which strength of will can have very blameworthy results.<sup>247</sup>No one would debate that the Tuttons, indeed most all faith healers, are very good people—law abiding in all respects—but why should a person's criminal liability for an undeniable harm be vitiated by a positive balance of good character? This makes as much sense as holding an accused liable for an undeniable result, not because the trier of fact was confident he was culpable, but only because one was confident he was a bad guy. Let's substitute, say, someone like Marc Creighton for Dominic Martin—someone with a known history of illegal drug use for a presumed upstanding middle class family man. Now, let's suppose it's Marc Creighton, not Dominic Martin, who forgets his child in a hot car. Will the history of the accused have some bearing upon the criminal charge, and the likelihood of a successful prosecution? Quite possibly. *Should* though, as a matter of law, a person's background (i.e., a presumed expression of his or her character) determine or even influence fault in an unrelated offence? Choice theorists have a way of supplying the response protective of an accused's right to a presumption of innocence prior to being *proven* guilty. The character theorist, on the other hand, may play to the descriptive strength of the legal realist, conceding that 'is'

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<sup>247</sup> Magda Goebbels, the wife of Hitler's propaganda Minister, Joseph Goebbels, poisoned her six children, killing all of them on May 1<sup>st</sup>, 1945. Hitler had just killed himself the day before and the end of the Reich was imminent. The strength of will to kill her children, believing this was a better fate for them than living in a world without German National Socialism, was no doubt remarkable. But, if only Magda Goebbels had been weak-willed, perhaps her children would have survived the end of the war and gone on to live happy lives. See Alfred R. Mele, *Autonomous Agents: From Self-Control to Autonomy* (New York, NY: Oxford University Press, 1995).

determines 'ought' in this situation.<sup>248</sup> Perhaps it doesn't scandalize the character theorist that, say, Marc Creighton could receive different legal treatment than, say, Dominic Martin.

It should be clear that application of character theory yields mixed results for the defence, but there's something about the general approach of character theory that has more potential to rebut the charge and rebut the claim that faith healing parents depart markedly from a reasonable person. Character theory encourages the trier of fact to broaden one's focus from the atomic time slices of presumed decision making, bringing other considerations into view. In short, character theory can support a wider, more contextual analysis of what the accused allegedly did. This strategy may bode well for the faith healer—better, it would seem, than if sharp focus remains on the unreasonable choices faith healers undeniably make. The defence could reason as follows: if wider scope provides an explanation of the evidence more conducive to acquittal, why stop with the broader view of character theory? Why not bring other considerations into view that provide even better explanations not just of what the faith healer has done, but why, in fact, society would be less inclined to condemn these actions? In short, the defence could benefit significantly by considering the historical context by which triers of fact can understand their delegated responsibility to construct the reasonable person. This more historical approach does not so much offer an alternative view of the

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<sup>248</sup> There are jurists who are critical of character theory for precisely this reason. See Kenneth W. Simons, "Does Punishment for 'Culpable Indifference' Simply Punish for 'Bad Character'? - Examining the Requisite Connection Between Mens Rea and Actus Reus " *Buffalo Criminal Law Review* 6, no. 1 (2002-2003).



reasonable person, as it encourages the trier of fact to think more reflectively about what one is doing in the process.

The justification for this longer more historical view is found in the previously mentioned work, *Rethinking the Reasonable Person*, by Mayo Moran.<sup>249</sup> Recall, when Oliver Wendell Holmes introduced his conception of the reasonable man in the late 1800s, “he” was thought to be a more practical antidote and a more functional heuristic guide to the unworkable moralizing that prevailed, Holmes thought, in much of criminal law and legal reasoning. Holmes, and other legal realists, sought to shorten the gap between the “is” and the “ought” of criminal prohibitions by requiring of people not more (and not less) than could justifiably be seen as normal contours of ordinary people in ordinary social interactions. To steer clear of criminal sanction, Holmes thought, minimal attention to common sense and common human experience was sufficient. What was sidestepped in chapter 7’s discussion of Holmes was his principled indifference to the unequal burdens of criminal prohibition. The person with less education, less intelligence, less physical coordination, less self-control, and conversely, more resentment, more envy, more unlawful desires, etc., might find himself on the wrong end of the law more often than an the otherwise “ordinary” person—and according to Holmes, so be it.

Holmes wrote in *The Common Law*:

The true explanation of the rule [that punishment aims only to prevent crime] is the same as that which accounts for the law's indifference to a man's particular temperament, faculties, and so forth. Public policy sacrifices the individual to the general good. It is desirable that the burden of all should be equal, but it is still more desirable to put an end to robbery and murder. It

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<sup>249</sup> Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*.

is no doubt true that there are many cases in which the criminal could not have known that he was breaking the law, but to admit the excuse at all would be to encourage ignorance where the law-maker has determined to make men know and obey, and justice to the individual is rightly outweighed by the larger interests on the other side of the scales.<sup>250</sup>

The criminal law, on Holmes's account, puts everyone, without prejudice, on fair warning, but not exactly on equal footing. One can easily see why this approach to the justification of punishment can raise doubts about the fairness of objective standards and the possibility of absolute or unconditional liability for causing certain results. These, if we recall, were the exact concerns of the SCC in *Tutton* and *Waite* in 1989. The impartial trier of fact, functioning in the twenty-first century and possessing something of a historical view of the evolution fault in our country, could well be suspicious of objective standards that are insufficiently sensitive both to genuine moral innocence and to the unequal distributions of harm and wrong amongst certain classes of victims; e.g., women, children, the disabled, etc.<sup>251</sup> While Holmes's conception of the reasonable person or the "man of ordinary prudence" may have been an egalitarian improvement in nineteenth century jurisprudence, Moran claims legal reasoning about the reasonable person has not kept pace with increasing egalitarian social concerns. "The result", she claims of years of legal stagnation,

... is a deeply conventional account of what is reasonable—it is what people ordinarily or customarily do. But so understood, a reasonable person

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<sup>250</sup> Holmes, "Lecture II: The Criminal Law," 48.

<sup>251</sup> Moran does not explicitly address the challenges of multiculturalism, but certainly growing diversity of immigrants to liberal democracies generates unique problems for applying "reasonable person standards". See Alison Dundes Renteln, *The Cultural Defense* (New York, NY: Oxford University Press, 2004).

standard will rarely assist an equality seeker. To the extent that people commonly treat others in ways that are discriminatory or disrespectful, reading reasonableness as ordinariness will do nothing but replicate—with the force of law—existing inequalities. The question then is whether it is possible to realize the egalitarian promise of the objective standard by somehow disentangling the reasonable person from the ordinary person.<sup>252</sup>

From the subtitle of her book it should be obvious what Moran has in mind: *An Egalitarian Reconstruction of the Objective Standard*. Ultimately what is most crucial about an objective standard is that it be fair and just in its application. Horder's conception of penal negligence was used in the previous chapter to complain that faith healers show disordered priorities with a peculiarly religious form of culpable indifference. But, a reasonable person with egalitarian scruples could turn the tables, saying that punishing (or more seriously punishing) faith healers for an entirely accidental death *also* disorders social relations in a heavy-handed sort of way. The trier of fact need not agree with the course of action chosen by the faith healer. Indeed, she could agree with common sense and complain that faith healers get the world wrong. But a trier of fact with egalitarian concerns could well be critical of the hegemony of 'common sense' shared by a secular majority. Running afoul of this shouldn't be punishable *under criminal negligence*.

The defence could encourage the trier of fact to employ a bit of that historical consciousness that can give rise to society's more egalitarian impulses. Whatever might be said about the Holmesian version of the reasonable man, he didn't possess a historical consciousness except perhaps in the scientific sense. For example, the common sense objectivist developed in chapter 7 was used to convict faith healers

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<sup>252</sup> Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard*: 14.

on the basis of the following principle: “Because we all know more today about medical science and health, you ought to have known *much* better than to do what you did.” In other words, because medical science has provided us with more reliable means for treating diseases and saving and prolonging life, there is no excuse for letting children die in needless sorts of ways. We can simplify further: “Because we all know more, *you* too ought to have known *better*.” But the trier of fact, motivated by Moran’s concern for fairness for all, could take a wider, more reflexive approach that encompasses both science and morality: “Because we know more, *we* too *ought* to know better.” In other words, because *we* have seen through the long lens of history our all-too-human capacity to be inhumane to each other in the name of principle, we ought to show some caution when this impulse tempts us in the present. This is not to say that reasonable egalitarians would completely reject the role that punishment as public condemnation can play in a just society, but clearly impartial triers of fact can be more intentionally political in their legal duty to assess the ‘facts’.

Let’s now, on behalf of the defence, carry forward this egalitarian correction to ordinary ‘reasonableness’. Recall that George Fletcher described his moral approach to attribution as primarily evaluative, not descriptive: “Attribution of a wrongful act is not posited solely on the basis of particular facts but on the basis of a social and legal evaluation of all the facts bearing on whether the actor can be properly blamed for a crime.”<sup>253</sup> A big part of the social and legal evaluation of faith

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<sup>253</sup> Fletcher, *Basic Concepts of Criminal Law*: 83.

healing deaths today must certainly include an awareness of the acrimonious, often quite toxic relationship that exists between religious groups and secular society. No one can be blind or deaf to the rather vocal anti-religious climate in which we've lived since 9-11. This study has made a smattering of references to the influence of the so-called "new atheists", but there has also been, in both academic culture and society generally, a measurable backlash against what might be described as 'piling on' or 'unnecessary roughness' by atheists.<sup>254</sup> The concern is that atheists have become so venomous in their criticisms of religion and theism generally that otherwise educated, intelligent, but privately religious people have been excluded from serious intellectual endeavours just because they maintain faith commitments. In spite of the efforts of new atheists, of course, religion and supernatural belief isn't being obliterated.<sup>255</sup> Far from a great secular, atheistic awakening, liberal democracies are arguably seeing a resurgence of fundamentalism, religiosity, and spirituality.<sup>256</sup> What might all this mean for faith healers on trial for criminal negligence?

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<sup>254</sup> See Alain de Botton, *Religion for Atheists: A non-believer's guide to the uses of religion* (New York, NY: McClelland & Stewart Ltd, 2012).; Ronald Dworkin, *Religion Without God* (Cambridge, MA: Harvard University Press, 2013).; Thomas Nagel, *Secular Philosophy and the Religious Temperament: Essays 2002-2008* (New York, NY: Oxford University Press, 2010).; Bruce Sheiman, *An Atheist Defends Religion: Why Humanity is Better Off with Religion than Without it* (New York, NY: Alpha, 2009).

<sup>255</sup> We can draw a distinction between supernatural and *supra*-natural belief systems. There is no lack of atheists and agnostics who resist the 'naturalist' label. These individuals may well deny that there are supernatural realities or that supernatural explanations are epistemically justifiable; nevertheless, they may be quite content with the fact that naturalism is an inadequate explanation of their beliefs about the world. That is, there may well be important realities and explanations that are *beyond* the merely 'natural'.

<sup>256</sup> Monica Duffy Toft, Daniel Philpott, and Timothy Samuel Shah, *God's Century: Resurgent Religion and Global Politics* (New York, NY: W.W. Norton & Company, 2011).

Impartial triers of fact, even equipped with Holmesian common sense, could find themselves more sympathetic to the legal and political criticism of religious people—even people as radically religious as faith healers. The defence could argue, contrary to the prosecutorial arguments of the preceding chapters, that faith healers are not dangerously anti-social. They are *not* psychopaths with an Abraham-complex. And they certainly ought not be associated with truly dangerous zealots like jihadists, honour killers, or violent anti-abortion radicals. Furthermore, defence attorneys could attempt to persuade triers of fact of the broader context of criminal negligence convictions. Convicting faith healers with a charge of criminal negligence puts them on equal footing with people like Daniel Tschetter and Marc Creighton. This, the defence could argue, is patently unfair and unjust. In spite of efforts to preempt and foreclose on the mistake of fact defence, faith healers could insist, in a quasi-confessional mood, that in the final analysis, they made a mistake—a colossal mistake. A mistake that, in some possible world in which a more present deity answers prayers more exactly, would not have resulted in a child's death. Since no proof is ever forthcoming that atheists have got the world right, political and legal space for holding religious beliefs must remain permissible and intellectually legitimate. Again, the contextual focus could be on the utter ubiquity of religious belief and religious practice, and not on the apparent failure of one particular sort of religious belief. If the defence can succeed in getting the trier of fact to consider the facts of the case in this more capacious context then the overall reasonableness of faith healers might not be so obviously out of step with conceivable norms. The defence may not so much try to persuade the trier of fact that the parents didn't

commit the offence, but that there are more charitable, more humane, less stigmatizing alternatives available to them—like a summary conviction of s. 215, “failing to provide the necessaries of life.”

As discussed briefly at the end of chapter 5, it is open to the trier of fact in cases like these to render verdicts in keeping with one’s values. While this may sound scandalous, as though the trier of fact gets to ironically ignore the facts of the case, it’s important to acknowledge the surprising paucity of ‘brute facts’: parents did the highly unexpected and a child died. The question is simple: is this highly unexpected behaviour ‘wanton or reckless disregard for another’s life or safety’? These facts about the parents’ actions and the child’s death do not speak for themselves. This leaves a profound degree of latitude for triers of fact to rule in accordance with their own perceived sense of fairness and justice. There is a potential analogue here to the phenomenon known as “jury nullification”; i.e., the collective refusal of a jury to pronounce guilt upon an accused in spite of a consensus that the individual committed the charged offence. The phenomenon of jury nullification typically occurs in the litigation of more serious offences wherein an accused has for some reason garnered a substantial degree of principled sympathy from jurors.<sup>257</sup> Perhaps the sentence is unduly harsh or, in the larger

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<sup>257</sup> Jury nullification can occur not only when triers of fact become sensitive to characteristics in the accused. A jury may take issue with a particular offence as a matter of law and agree the offence is unfair or that its application in this instance is unfair. Additionally, no one should think that jury nullification is always on the side of justice in the broadest sense. For example, a jury consisting of white supremacists might be “principally sympathetic” to one of their own and refuse to hold a confederate accountable for his racially motivated crime. See Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine* (Washington, DC: Cato Institute, 1998).; Simon Stern, “Between Local Knowledge and National Politics: Debating Rationales for Jury Nullification after *Bushell’s Case*,” *Yale Law Journal* 111(2002).

context, the sentence is regarded as morally or legally undeserved. Often there is little or no dispute that the accused actually authorized the crime from a choice-theoretical perspective, but equally as often there is some characteristic (e.g., race, socioeconomic status, or community affiliation) to which jurors are sensitive and this factor or consideration takes overriding importance in their verdict.

A similar moral phenomenon could be at work in the mind of the trier of fact as he or she considers the prosecution of religious parents who bear no resemblance to stereotypical criminal offenders. It could well be obvious from an objective perspective that faith healers are wilfully blind and reckless in the mortal endangerment of their children, but nevertheless, the trier of fact could decide to acquit regardless of the clarity of the evidence and against them. Admittedly, there is dis-analogy here with genuine 'gold standard' jury nullification. In cases of criminal negligence there are frequently lesser offences that can be sought still satisfying the legal interests of both the prosecutor and the trier of fact—and perhaps criminal justice generally. Finding Michael Waite guilty of dangerous driving but acquitting him of criminal negligence causing death is still pronouncing him criminally guilty for *something*. Accepting a guilty plea from Leslie MacDonald for failing to provide the necessaries is not, obviously, a conviction for criminal negligence manslaughter but it's something that registers some degree of public disapprobation for carelessly causing a death. Nevertheless, because criminal negligence is norm-dependent and the creation of the norm is a lawfully delegated task, a jury can't really be seen to be 'nullifying' anything as clearly as, say, a law against intentionally attacking or killing another person. But what the trier of fact can do in terms of the offence of



criminal negligence is less subversively disregard certain norms of public rationality that are instrumental in protecting lives and promoting public safety. It is open to the trier of fact to set aside or override the norm requiring, for the protection of others, people to be attentive to common sense, or the norm to be especially careful with the lives of our vulnerable children, or the norm not to engage in death-defying wishful thinking. It is open to the trier of fact to acquit people who, for all the world show reckless disregard for another's life, and thereby refuse to condemn people for whom some degree of principled sympathy is felt. This could entail showing greater lenience toward alleged criminal wrongdoing in an effort to negatively stigmatize fewer people in society. This does not entail turning a blind eye to genuine criminal wrongdoing that unambiguously threatens social wellbeing; rather, it means taking more humane approaches to profoundly idiosyncratic harms—harms that while tragic, do not threaten social well-being.

In this chapter we have attempted to offset the arguments favouring criminal negligence convictions in cases involving faith healing deaths with arguments and considerations favouring acquittals. The preferred strategy here has not been to generate competing or alternative conceptions of a reasonable person against whom the faith healer benefits by relative comparison. Rather, we granted that a genuine reasonable person understood by public law would necessarily need to be someone generally attentive to the teachings of common experience. The sober admission needs to be made that there is virtually no publically available objective standard whereby the faith healer's conformity could be established. Nevertheless, acquittal is not dependent upon conformity with any norm. Rather, the defence need only cast

reasonable doubt on the evidence and argument that the faith healer's departure from the norm is marked and substantial. One useful strategy open to the defence would be try to shift the focus of evaluation away from the choices or actions of the accused and more towards the accused's general character. The character of the reasonable person may be sufficiently vague as to restrict the degree of departure discerned from it. Whether or not a faith healer's departure from any norm is marked and substantial is an open question of evaluation. Quite independently of what the defence even attempts to argue, the trier of fact may withhold guilty verdicts even if the faith healer's departure from the norm is decidedly marked. There may be any number of social and legal considerations related to the facts impinging on the attribution of fault. We considered the historical trajectory towards a more egalitarian impulse in the application of the objective standards in law. Triers of fact are more aware of the potentially harmful impositions of abstract standards on both themselves and others. They're also aware of the religious and political disagreements that threaten social solidarity and social cohesion. How the trier of fact reconciles some of these public tensions will clearly play some role in his or her assessment of liability in these religiously volatile and emotionally charged homicide cases. In the final analysis, there is nothing about the facts of a criminal negligence case that in any way speak for themselves. Showing wanton or reckless disregard for another's life or safety is dependent on the principled (or not so principled) social and legal evaluations of the trier of fact. It is open to triers of fact to either override or uphold with their verdict certain norms of public

rationality considered lawfully instrumental in protecting lives and promoting public safety.

## Chapter 10: Conclusion

Christians from all denominational and cultural stripes should be willing to acknowledge the general Christian tenet that faith is a powerful resource in the life of the believer. The Christian religion has historically been considered a transformative, wonder-working, even supernatural belief system. No Christian needs to be a fundamentalist to affirm this! As far as revealed religions go, perhaps Christianity is not odd in offering supernatural explanations of otherwise 'natural' realities. But certainly the New Testament accounts of Jesus's ministry places extraordinary emphasis on the power of faith to achieve miraculous results. Most Christians would be quick to affirm the 'miraculous' power of both faith and God. Unfortunately, many would not be careful to disambiguate the power of *belief* from the power of belief *in* God. Whether it is faith *simpliciter* or faith in God *per se* that moves mountains is not a question that attracts a great deal of attention from the rank and file. Christians have been taught to expect the extraordinary and hope for the miraculous. Christians have also been taught to qualify what is meant by 'miracle'. The Christian could prosaically say that the cosmos is a miracle, or that life is a miracle, or that love is a miracle. Daffodils and puppies become candidates for miracles! And, of course, so does medical science—as though God specially paved the way for its discovery. Conservative defenders of the Christian tradition—indeed most traditional theists—want to affirm that prayer connects believers to a divine power outside themselves. The belief is that God longs to interact with the world and the humans he created. He can be counted on to assist with all manner of life's

difficulties from cradle to the grave. 'God' provides comfort in times of trouble and he gets credit, too, for guiding the believer to lost cell phones and to helping football teams win Super Bowls. Religious faith is a ubiquitous presence in the world, and it has profound instrumental value because many people detect in it a causal power to alter people and events. This doesn't seem to be a misguided religious belief at all. It just sounds like reasonable, ordinary religious belief.

In cases of faith healing deaths, though, something seems to go terribly wrong with this ubiquitous religious impulse. If God is so useful from cradle to grave, why in these instances does the grave follow the cradle so quickly? We should be reminded that belief in the causal efficacy of prayer is almost always harmless. Whatever it may or may not 'cause', prayer should not cause harm! No one really tries to walk on water or to move mountains—certainly not literally, and not very figuratively either. While scripture gives believers every reason to expect the impossible, not many Christians *attempt* it. And when faith healers do this, even the religiously sympathetic are inclined to say, 'no reasonable person does this!' Most reasonable Christians know the difference between the otherwise strange *beliefs* one can harmlessly be obliged to affirm and the *actions* no amount of faith should ever justify. In other words, it's one thing to give voluntary assent to, say, the virgin birth, the sacramental power of the Eucharist, the eternal damnation of the unrepentant, or the penal substitution of Christ's death; it's quite another to believe things that obligate unreasonable, death-defying *actions*. But, faith healers are not 'most Christians'. They feel justified in taking beliefs that millions of others assent to in a formal, nominal, and doctrinal sense and reifying them and trusting in them in

terrifyingly dangerous ways. What for most Christians are harmless generalities and metaphorical affirmations (e.g., that faith can move mountains!), become for faith healers dogmatic assertions to be relied on like skydivers rely on parachutes.

As we try to determine what if anything faith healers do wrong, it is not, to be clear, the reification of beliefs that is their legal difficulty. That is arguably an epistemic failing, but that's not criminally blameworthy—at any rate, not without more qualification. For example, there's nothing criminal going on if and when, a devout Roman Catholic, whose mind is awash with thoughts of transubstantiation, imagines himself *really* consuming Christ's flesh in the Eucharist. No one is calling the police because a believer thinks he is really engaging in cannibalism. No one is saying it's permissible to believe in transubstantiation provided the belief is not very strong and not too vividly imagined. No! Liberal democracies should protect the freedom of conscience, and if one's conscience wants to vividly imagine things that don't otherwise comport with rather more public accounts of rationality or even morality, so be it. Criminal law should not restrict such liberty, even if liberal public education might try to persuade people in a different direction. Religious people should be free to believe and imagine what they want for themselves. They can believe about *reality* whatever they like. But, when conscience motivates actions that results in needless harm and death of others, then the motivating beliefs and values rightly become the focus of criminal scrutiny and evaluation. The evidence shows, and in turn allows 'common sense' to predict, that persistent application of faith healing results in harm and hastens death. From a public, human perspective—which must be the perspective of law—faith healing is as risky and as reckless as

anything possibly could be. It does not merely *appear* this way; it *is* this way. So, surely, faith healing deaths warrant thorough criminal investigation, not just to reassure society that children aren't being artfully murdered by nefarious parents, but to reassure society that the homicide is not culpable in any criminal sense.

In search of criminal culpability in non-murderous homicides we considered the potential analogue of 'hot-car' deaths. Finding, after all, a religiously motivated parallel is difficult. Faith healers don't seemingly belong in a conversation alongside talk of radical jihadists, honour killers, or violent anti-abortionists. Faith healers certainly have more in common with parents or care-givers who tragically and very accidentally leave infants and toddlers unattended in a sweltering vehicle than they do with homicidal fanatics. So, how does the criminal law respond to a careless caregiver like Dominic Martin or Leslie MacDonald? There's been no uniform response. We certainly hope that an accused in this situation will be dealt with justly and humanely. But what does this look like? What criminal response if any is called for when dealing with achingly bereaved parents? Surely, faith healing parents are achingly bereaved as well.

Asking *whether* the criminal law is rightly brought to bear upon these kinds of deaths turns quickly into a question of *how* the criminal law could and should find fault with an accused in these kinds of cases. The two Canadian criminal options are "failing to provide the necessities of life" and "criminal negligence." Failing to provide the necessities is the less serious of the two offences, and while faith healers quite literally fail to provide what *is* necessary for their children to survive, the explanation of the failure seems to go beyond culpable ignorance or careless

neglect. The death itself seems wrongfully and culpably caused. From the outside, the parents seem to deliberately endanger their loved ones and this looks and sounds a great deal like showing wanton or reckless disregard to one who is, quite to the contrary, owed a considerable duty of care. So, faith healing deaths could justifiably warrant the more serious public censure provided for in the criminal negligence offence. But, if prosecutors elect this route, they face the challenge of persuading the trier of fact of the heightened fault element of the offence. And this, it turns out, is far more difficult and more contentious than it appears. As we saw, it's not just difficult in relation to faith healing deaths. Criminal negligence in virtually all instances has been and continues to be a vexing offence for lawyers, judges, and jurors—and society generally.

There is a morally and socially praiseworthy reason for the ongoing handwringing and ambivalence inspired by criminal negligence. We sensibly want criminal wrongs to be somehow *obviously* wrongful. As a society we want our convicted criminals to wear black hats, as it were, and to be guilty of virtually self-evident wrongs. Unfortunately, not every action that the state sees fit to prohibit is palpably wrong or immoral. Some things are prohibited because the state says they're wrong and provided they promote a justifiable public interest, their prohibition is morally and politically justified. But having a justification for wrongs that mediate between deep moral wrongs and thinner social policy concerns does little to make their fault element easier for judges or triers of fact to discern. In other words, we can know *that* we'd like to prohibit and deter certain outcomes without knowing precisely *what* makes an accused guilty or not guilty when he or she causes



one of those unfortunate outcomes. Punishing people for less than genuinely wrongful behaviour is something to be laudably avoided. Unfortunately, criminal negligence seldom reveals offenders who are obvious wrong-doers—apart from the harms they cause. Almost invariably, the prosecution of the criminal negligence offence yields a certain degree of unease and disagreement because serious criminal liability is being considered for someone whom triers of fact may not agree clearly deserves it. We might regret the results—as the accused surely does—but that’s a different story. The trier of fact may not be fully convinced, may not be morally satisfied, that the accused really authorized or really owns the harm he or she caused. It may not be very obvious what a reasonable person does under the circumstances, other than apparently not causing the harm that was caused; nor is it obvious whether the accused’s departure from the norm is marked and substantial. We can’t find faith healers liable for simply failing to be reasonable; they must be *criminally* unreasonable. This is not an easy gap to measure.

Furnished with the necessary moral and legal constraints against punishing the innocent, what should we think about the criminal condemnation of faith healers for the deaths they cause? The bottom line I have advanced is this: children ought not die this way and that in spite of religious freedom, religious proponents should be deterred from considering this course of action for their children. Parents in liberal democracies need to appreciate they are stewards, not owners, of their children’s lives. Parents are deputized, as it were, by the state to raise children and carefully hand off autonomy to them. Parents have a great deal of freedom to pass on their own values and beliefs, but those values and beliefs cannot jeopardize or

endanger a child's life. My goal, therefore, has been to identify the strongest and fairest arguments with which to prosecute faith healers when their actions result in the deaths of their children. Canadian society can rest assured that *Charter*-era jurisprudence is scrupulous in its protection of moral innocence. With these concerns in full view, I argue that there is a positive criminal case to be made against faith healers—at least *some* faith healers, like the Tuttons and the Shippys.

First, I have argued that we need to better understand what faith healers actually believe with respect to the presumed medical care they are providing. While it may be very tempting for a fair minded person to think faith healing deaths obviously result from a mistake of fact, the analysis I've provided should show that there is nothing mitigating or exculpatory in their presumed mistake. Without even considering the potential reasonableness of their course of action, it should be clear that faith healers do not actually believe, as a matter of fact, that their child *has been* healed. They *want* to believe their child is healed. They *hope* their child is being healed. They believe God has *promised* to heal their child. But, comparing faith healing parents to parents who sincerely but mistakenly believe their child is cured yields a vivid contrast. If the faith healer sought to press the mistake of fact defence, the more accurate conclusion to be drawn is that faith healing parents willfully blind themselves to the natural and predictable fate of their children.

Secondly, in terms of the positive case against faith healers, I argued they depart markedly from the actions of a reasonable person inasmuch as parents have responsibilities to be attentive to the actual risks their children face with the proposed course of action. A reasonable parent knows roughly how the world

works; action is one thing and inaction is another. Reasonable people regardless of culture or era have known the difference between doing something and doing nothing to slow the advance of disease and prolong life. When something can be done to meaningfully preserve a child's life it is unreasonable not to do so. When literally nothing can be done to save the life of a loved one it is *then* acceptable to simply hope, and perhaps pray, for the best. Virtually all faith healing deaths result from parents choosing to pray or have faith, but from a public and scientific, let's call it objective, perspective these actions are *today* indistinguishable from doing nothing. Even people who promote alternative medicine in supposed opposition to the hegemony of medical science and the pharmaceutical industry still do *something* that would resemble treatment. This study is not intended to impugn all forms of alternative medicine; but it does take a critical view of doing nothing from an objective point of view. Both law and science are concerned with facts as they are publically available and not how private idiosyncratic groups want to observe them with privileged 'eyes to see'. If a trier of fact takes common sense to be the guiding norm of the reasonable person then criminal negligence is proven beyond a reasonable doubt.

Thirdly, and lastly, I considered an objection that might leave some unpersuaded by the common sense objectivist. One might think that, in point of fact, the preceding argument only proves that faith healers show reckless or wanton disregard for *reality* or secular wisdom. But, getting the world wrong or denying common sense is not a *criminal* wrong. If closer fidelity to the actual statute is demanded the prosecution can shift the focus to meet the objection. This argument

concludes that faith healers show wanton or reckless disregard directly for their children's lives by clearly disordering their natural affections and the way they conceive of and discharge their rightful duties. Their children's lives are gravely endangered by being subordinated to a dubious metaphysical narrative about 'higher' priorities. The ancient figure of Abraham, considered in Christian and Jewish lore as the archetype of faithfulness, is the central character in arguably one of the most famous and most chilling stories in the entire Bible. In Genesis 22, Abraham is commanded by God to sacrifice his cherished son, Isaac, on an altar atop Mount Moriah. Abraham obediently followed God's commands and at the crucial moment, with Isaac poised for slaughter, Yahweh intervenes to say, "Now I know ..."

Of course, what God knows is that anyone willing to sacrifice his son can be trusted to do anything, like be the father of a great nation. Most religious people gloss over the grim details of this story to celebrate the value of human obedience in the face of unthinkable internal conflict. From an outsider's perspective, the Abraham story depicts not a hero, but a delusional psychopath. Any reasonable father *today* who hears a voice commanding him to kill his child surely seeks medical assistance! Unfortunately, faith healing parents value all too well the example set by Abraham. Rather than reinterpret the story or seek medical assistance, the challenge before them is to place their own children on the figurative altar of God's will and simply trust the biblical promises. No reasonable religious parent reading Genesis 22 should be inspired to place his or her child on any figurative altar that needlessly risks *death*.

In stark relief to the Abraham story, the trier of fact should be encouraged to consider another famous perspective—famous to philosophers at least. The children are being used merely as means to the other-worldly ends of their parents. These children are not being respected as ends-in-themselves. As one might object that it's not a crime to show wanton or reckless disregard for secular wisdom, neither is it a crime to violate a formulation of the Kantian Categorical Imperative. Fair enough. But it is a crime to show reckless disregard for another's life and safety. By using children as means to enact and thereby prove one's absolute commitment to God, faith healers prove to *themselves*—and to a court of law—there are no lengths to which they will not go to show their devotion to their religious ideals. This, the trier of fact must conclude, is reckless disregard for the life and safety of our most vulnerable and most treasured possession—our children. Faith healers ought to be found liable for criminal negligence not for getting the world wrong—though they do—but for causing such predictable harm in their death-defying human relationships.

In summary, we have taken a thorny legal and moral problem and given it a thorny legal and moral solution. Though a positive case can be made for the liability of faith healers, there is no tidy or satisfying bow for this study. I want to insist that each faith healing death needs to be assessed carefully; each will have its own set of circumstances and each case should be assessed on its merits. Though certain generalizations can be made about faith healers and faith healing deaths, there is much to consider when trying to discern and attribute fault. Canada is very fortunate—more fortunate than the United States—in that faith healing deaths

occur very infrequently in our country. We have far fewer snake handlers, too! We could hope that Canada has seen the last *Tutton* or the last *Shippy*. Perhaps as many hopes go, this one too may be unrealistic. But even if we don't see another faith healing death, we've certainly not seen the last careless and accidental death in this country. No doubt, people will continue to act in ways that tragically result in serious harm or the loss of life, and criminal negligence may be brought to bear. I hope through this study more clarity has been brought to the vexing nature of the criminal negligence offence, clarity that will not go to waste if no child ever dies again from faith gone awry. "Hot car" deaths continue to capture headlines. At the time of writing, Emma Czornobaj—the Quebec woman whose decision to help some ducklings on a busy highway resulted in two *human* deaths—is still awaiting her final legal fate. A jury has found her guilty of criminal negligence causing death and dangerous driving and she has been sentenced to ninety days in jail and a ten-year driving ban. She is currently appealing her sentence. And if another faith healing death occurs tomorrow, the study should prove useful to lawyers, judges, and jurors tasked with considering both the facts and values surrounding the case.

I'm confident, as well, that the study will contribute to the ongoing ruminations of philosophers of law, philosophers of science, and philosophers of religion. A great many Christian apologists are today going to great lengths to stem the tide of 'new atheism' and arguing strongly for the basic rationality of religious belief. Religious belief, they contend, deserves epistemic respect in the market place of other presumably warranted and justified beliefs. Even some atheists are coming to the defence of religious belief generally, cautioning their fellow secularists against

any form of dogmatic fundamentalism—including their own. Again, my hope is not to cast unnecessary aspersion on religious belief or religious epistemology generally. Where religious belief mimics ordinary morality and results in the protection of human rights and the promotion of social well-being, no grievance should be found with the free exercise of conscience and religious belief. But, when religious belief departs so markedly from anything recognizably human—that is, when morality becomes exclusively ‘other-worldly’—then religious faith can be neither celebrated nor protected. When religious people behave in ways that society accurately predicts will threaten rights and endanger lives, they attract the scrutiny and censure of the criminal law. Whatever else might be said of the virtues of religious faith, society is right in saying religious people trust to a fault when faith results in a child’s death.

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## Appendix: *Shippy* Sentencing Hearing

Action No.: 991149856Q2  
E-File No.: RCP10SHIPPYS  
Appeal No.: \_\_\_\_\_

IN THE PROVINCIAL COURT OF ALBERTA  
JUDICIAL DISTRICT OF RED DEER

HER MAJESTY THE QUEEN

v.

STEVEN PAUL SHIPPY  
RUTH ANNE SHIPPY

Accused

---

PROCEEDING

---

Red Deer, Alberta  
June 26, 2000

Transcript Management Services, Regional  
4909 - 48 Avenue  
Red Deer, Alberta T4N 3T5  
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1 Proceedings taken in the Court of Queen's Bench of Alberta, Courthouse, Red Deer, Alberta  
 2 \_\_\_\_\_  
 3 June 26, 2000 Morning Session  
 4  
 5 The Honourable Court of Queen's Bench of Alberta  
 6 Mr. Justice Sirrs  
 7  
 8 J.I. Fraser For the Crown  
 9 (No Counsel) For the Accused Steven Shippy  
 10 (No Counsel) For the Accused Ruth Shippy  
 11 K. Waite Court Clerk  
 12 \_\_\_\_\_  
 13  
 14 THE COURT: Mr. Fraser.  
 15  
 16 MR. FRASER: Thank you, My Lord. The Crown is ready to  
 17 proceed with sentencing. I suppose you should check with Mr. and Mrs. Shippy to ensure  
 18 they're ready.  
 19  
 20 THE COURT: I presume you are ready, Mr. and Mrs. Shippy?  
 21  
 22 THE ACCUSED S. SHIPPY: Yes, we are.  
 23  
 24 MR. FRASER: I can proceed, then, My Lord?  
 25  
 26 THE COURT: (NO AUDIBLE RESPONSE)  
 27  
 28 **Speaking to Sentence by Mr. Fraser**  
 29  
 30 MR. FRASER: My Lord, you'll recall on the 7th of June you  
 31 adjourned the matter of sentencing to today's date. One thing I was going to state at the  
 32 outset, this case, of course, has attracted a lot of press interest and Your Lordship may  
 33 have seen that it was somehow quoted in the paper that the Crown wasn't seeking a gaol  
 34 term. And I couldn't figure out where that was coming from because I never had spoken  
 35 to the press. The only thing I could think of that may have happened is when Your  
 36 Lordship said, after you convicted them and put sentencing over that you were not going  
 37 to keep them in custody pending sentencing. And I said I agreed with that, we weren't  
 38 seeking that, that's what I meant. So, I just wanted to make sure that was clear on the  
 39 record.  
 40  
 41 My Lord, if I can just remind the court again, as I'm sure I don't have to but what,

1 essentially, Your Lordship found in convicting both Mr. and Mrs. Shippy under Section  
2 215, fail to provide necessities, is that you felt, firstly, that the picture of Calahan  
3 looked -- you did not make it exact but analogous of a child of the Holocaust due to his  
4 extreme thinness and emaciation. You've also said that while you felt that both Mr. and  
5 Mrs. Shippy were loving parents that their wilful blindness on medical matters and that  
6 they didn't have any thought of getting medical help because of their religious beliefs  
7 overrode their love of their children. And I think, in essence, that's how I took the facts  
8 as to how Your Lordship found it in convicting on the charge.

9  
10 This is an extremely difficult sentencing. I agonized over it between the 7th and today's  
11 date. And as Your Lordship is probably aware, under Section 215 the sentencing options  
12 go anywhere from a discharge up to two years incarceration. And, of course,  
13 incarceration up to that limit would also include the court looking at a conditional  
14 sentence if you felt that was the way to go.

15  
16 I can advise that when I went to look in *Ruby* and other case studies such as *Nadin Davis*  
17 it would appear that the cases where high gaol terms are imposed is where there is actual  
18 abuse to a child such as beating or malnutrition where sentences are handed out anywhere  
19 from a year up. And, clearly, that's not the case here. For want of a better term, My  
20 Lord, this is a case of omission. That they could have done something for Calahan but  
21 didn't rather than (INDISCERNIBLE) by commission by inflicting any injury to him.  
22 The accused, I think I may have said it on the 7th but I'll indicate again, they have no  
23 record.

24  
25 Now, based on that, as I said, sir, one may look at this and say this is a case of religious  
26 beliefs versus the rights of children to a healthy existence. And, of course, under Section  
27 718 the court is instructed that all alternatives to be gaol are to be looked at. And it  
28 might be argued here what is the point of looking at incarceration if it's not going to  
29 rehabilitate in the sense that they are set in their religious beliefs, what is that going to  
30 accomplish. But I do think, sir, that it should be looked at.

31  
32 There are three main concerns that the Crown has here, sir, and I'll outline them and  
33 expand on them somewhat. I think the main concern that the court has to look here, aside  
34 from rehabilitation, as I said, sir, I don't know how much of a factor that's going to be  
35 until, perhaps, you hear from Mr. and Mrs. Shippy. I think, obviously, denunciation, a  
36 deterrence, particularly a general deterrence have to be looked at here. And the three  
37 things that caused a concern, one, you've already heard about, sir. There was the *Goetz*  
38 case from 14 years ago that involved people from the same community out in Rimbey and  
39 I believe are even relatives. And that particular case, as you heard, the young girl that  
40 died of pneumonia and that went to trial. Justice Holmes convicted of the same offence  
41 that Your Lordship convicted on. And, basically, speaking to Mr. Marriott he didn't ask



1 for a gaol term and they received a sentence of three years probation. The only terms  
2 were being keep the peace and to have their children seek medical -- sorry, seek medical  
3 assistance for any children under 16 years of age if they are seriously ill, so.

4

5 Clearly, you know, that would have been known on the community. Clearly, as Your  
6 Lordship found at the trial when I asked to put evidence in on a voir dire, they may not  
7 necessarily have been around at the critical time of '85 but certainly afterwards and at the  
8 time of 1988. I submit, they should have known and, obviously, that didn't deter them.  
9 So, I think that's a factor the court has to look at.

10

11 Secondly, as I said, the press has taken an interest in this case and I note that Mr. Shippy  
12 was quoted after Your Lordship convicted. And if he's misquoted then, of course, he  
13 should tell the court that. But, basically, this is the quote from the paper:

14

15 After the verdict the boy's father said that he believes he has the  
16 right not to seek medical help for his eight children. "I wouldn't  
17 change a thing," Steven Shippy said. He added that he thinks  
18 Calahan would have died even if they had taken him to a hospital.  
19 "I believe that God takes someone for a purpose."

20

21 In essence, that's the comment there. I didn't see Ruth Shippy quoted so I don't know if  
22 her feelings are the same as his and, obviously, that's something Your Lordship will have  
23 to enquire. But she has said that she stands by her husband.

24

25 And then, sir, there is a bigger picture here in the sense that you have heard that the  
26 group they belong to, the Followers of Christ, have their roots in Oregon and Idaho. And  
27 after the sentencing I arranged to get some materials faxed up to me from Oregon City,  
28 Oregon as to a study that has been done down there. And I'd like to just read out certain  
29 excerpts about children who have died in that community. Not saying that the Shippys  
30 were necessarily, directly involved in those but certainly that is their faith belief. So, I'd  
31 like to read certain excerpts, if I might, My Lord?

32

33 THE COURT: What are you reading from?

34

35 MR. FRASER: Just some statistics that these people have dug  
36 up. It's not an opinion, it's statistics that they dug up as to numbers of children of this  
37 faith community who have died over the years.

38

39 THE COURT: Who are these people?

40

41 MR. FRASER: The Followers of Christ, sir.

1  
2 THE COURT: No, but who are these people that put these  
3 statistics --  
4  
5 MR. FRASER: Oh, I'm sorry, it was a couple of reporters from  
6 the Oregon -- Oregonian which is a newspaper in Oregon City, Oregon.  
7  
8 THE COURT: Okay.  
9  
10 MR. FRASER: As I said, sir, I'm going to leave out any  
11 editorialization, I'll just simply put in what the studies indicated. Basically, it says that:  
12  
13 More than a fourth of nearly 100 child and maternal deaths in the  
14 past 30 years among the Followers of Christ in Oregon, Oklahoma  
15 and Idaho were likely preventable with routine medical care.  
16  
17 It goes on to state:  
18  
19 That an investigation found out 78 children buried in Oregon City  
20 since 1955, at least 21 would have lived with medical intervention,  
21 often as simple as antibiotics. Further, that 38 children buried in  
22 Oregon City died before reaching their first birthday, many within  
23 hours or days of birth. Little is known about most of the  
24 children's illnesses because investigations of at least three fourths  
25 of the deaths have either been inconclusive or no investigative  
26 records exist.  
27  
28 Clackamas County, that's in Oregon City, My Lord.  
29  
30 Officials list 15 infants stillborn. Doctors don't know whether  
31 many of those babies were dead before delivery, died during the  
32 birth or took a breathe and died later. And then in the past ten  
33 years three mothers in the Oregon City church have died giving  
34 birth and that's 900 times the ordinary rate of maternal deaths.  
35  
36 And then because the Shippys -- I believe Mr. Shippy has indicated in the past and I  
37 know from checking out that is a fact their immediate group comes from Idaho. The  
38 study went on to say:  
39  
40 That the Idaho group has witnessed at least 12 childhood deaths  
41 and one mother dying during childbirth in the past 20 years. How

1           many were preventable or whether there was more deaths is  
2           unclear. Record keeping and death investigations were minimal.

3

4           And then in Oklahoma where the followers started in the late 19th century it's been noted  
5           that three preventable childhood deaths have occurred since 1985.

6

7           Now, in Oregon and Idaho, My Lord, the States there have what are called Medical  
8           Exemption laws which indicate that if you have an honest religious belief then you can't  
9           be prosecuted. Oklahoma rescinded that law in 1985. It was noted that two sets of  
10          parents since have gone to gaol for letting their children die. I have tried to find out what  
11          those cases were but was unable to do so.

12

13          So, I appreciate the court has to be careful as to what weight you put on a newspaper  
14          article but I did talk to Mr. Larabee who is the person -- one of the authors of this and  
15          they've done an exhaustive study down there. It's really a big concern down there  
16          because that's, of course, where the large -- where the group originated. And up in  
17          Alberta, to my knowledge, there have only been the two cases, the one before the court  
18          today and the *Goetz* decision from 14 years ago.

19

20          So, because of those reasons, sir, what I perceive, you know, is the precedent and the fact  
21          that, at least, Mr. Shippy has indicated that -- and I don't know if remorse is the right  
22          word or what it is, it just seems to be a continuation of what his position has been  
23          throughout that there is a higher power here, God. But in what terms of what we have to  
24          deal with here, obviously, my main concern, submitting on behalf of the Crown, is general  
25          deterrence and, of course, protection, protection of children, particularly the eight Shippy  
26          children that still remain and to our knowledge are in good health, so.

27

28          I took a look and I thought certainly up in the higher end of a gaol term would be  
29          inappropriate because, as I said, sir, that deals with abuse, physical or starvation or  
30          something like that. I would submit, sir, what might be colloquially called a slap of the  
31          wrist, 30 days wouldn't be appropriate either. I think there has to be a midpoint. So,  
32          perhaps, sir, it may be just simply a bit of educated guesswork on my part but just  
33          looking at what I feel the facts are here and the principles that I've stated. I'm submitting  
34          to the court that you should look at a period of incarceration of six months for each of  
35          them.

36

37          And then the question will then go on, sir, if you feel incarceration is required for the  
38          reasons that I've stated or your own reasons, you will have to go on and consider if a  
39          conditional sentence is appropriate here you'll have to decide, of course, as a condition  
40          precedent, if the Shippys are a danger to their community. Mainly their community of  
41          their young children. And then you'd have to go on to decide if the other sentencing

1 principles will be met as well by a conditional sentence.

2

3 The only thing I can tell the court from my perspective about that is if Mr. and  
4 Mrs. Shippy tell you that they've had even a small change of heart and are prepared to  
5 accept medical intervention, then the Crown would probably be content with a conditional  
6 sentence. But, of course, that's obviously our main concern. The impression I have from  
7 Mr. Shippy is he's not prepared to bend, Mrs. Shippy, I don't know about. I get the  
8 feeling, a gut feeling emotionally, that perhaps she is. And, of course, you'll recall  
9 Mr. McLean (phonetic) is the only defence witness did testify to that. But, certainly, that  
10 is something that the Crown and I'm sure the court will want to hear about.

11

12 So, if I can sum up, sir, in conclusion, as I said, sir, I think the court has to look at a  
13 period of incarceration, six months. If you decide to make it conditional or if you decide  
14 that probation is to be imposed either in itself or to follow, I gave consideration as to  
15 what terms would be appropriate because this is going to be a very difficult order to  
16 enforce. I spoke to Mr. Willard (phonetic) this morning, he's the probation officer in  
17 Rimbey, he'll be the supervisor or probation officer if Your Lordship goes that way, that  
18 will supervise Mr. and Mrs. Shippy. And he indicated to me and we tossed some terms  
19 around he says making them take -- because down in the States they've done things like  
20 taking classes and courses and literature on childhood illnesses. Have them purchase a  
21 thermometer or other medical aids, those are very unenforceable in Mr. Willard's view.  
22 And after reflection I tend to agree, so.

23

24 The conditions we came up with, sir, and I submit these to the court to consider if that's  
25 the way you're going to go, aside from the statutory ones is -- and I would ask the court  
26 to, again, put in the same condition that was imposed on Mr. and Mrs. Goetz 14 years ago  
27 to seek medical assistance for any children under 16 years of age. The only term I didn't  
28 like was seriously ill because that, of course, a very subjective term.

29

30 THE COURT: Mr. Fraser, I would take the position that  
31 keeping the peace and being of good behaviour in complying with Section 215 says the  
32 same thing. If they do not seek medical help when their children need it they are into a  
33 situation where they are not keeping the peace and being of good behaviour, are they?

34

35 MR. FRASER: I agree with that, sir, the only problem with  
36 that, of course, is that's post facto. I sort of wanted to have something in there that might  
37 be a little more preventative, if I can put it that way. The end result, I think, is exactly  
38 what Your Lordship says is that there's going to be a charge, it would be the same thing.  
39 I'm trying to put something else in there as a bit more of a guide.

40

41 THE COURT: Well, I wish I could agree with you but without

1 any school nurses or anybody with any medical training being able to view these children  
2 while they are in the home, I do not see that anything preemptive can be done.

3

4 MR. FRASER: Well, although Mr. Willard and I did discuss,  
5 you may recall there was the nurse, Ginny Grinde who testified at the trial and I don't  
6 know if she's willing to do it or whatever but there might be avenues out there to look at.  
7 But if the court feels it's unenforceable and as I said, we tossed a lot of things around and  
8 keep the peace would cover it. The only other terms, sir, or two other terms, first of all,  
9 counselling may be appropriate. And what Mr. Willard was thinking of is grief  
10 counselling. You know, particularly if there is some grief here, it might certainly be  
11 appropriate to help them along.

12

13 The other thing, sir, and you heard reference at the trial that after Calahan died Child  
14 Welfare came in to check the other children out. And I would ask the court to allow for  
15 Child Welfare in Red Deer on suitable notice, maybe 24 hours or whatever to conduct  
16 spot checks. And that if they have a concern about the medical health of any child, in the  
17 past they had to get an order but that if they have reasonable and probable grounds to  
18 believe the health or well-being of a child is affected that they can take that child  
19 immediately for medical assistance. So, that is, sir, sort of terms that I was proposing.

20

21 THE COURT: Do they need my authority to do that?

22

23 MR. FRASER: I'm sorry, sir?

24

25 THE COURT: Does Child Welfare need my authority to direct  
26 that they can take the child for treatment?

27

28 MR. FRASER: Yes, they do. Not necessarily your authority,  
29 they would need family court. Last time in August they got Judge Lawrence to issue an  
30 order. They feel they do, sir. I don't think they would do it unless there was a court  
31 order.

32

33 THE COURT: Okay. On your request I can understand maybe  
34 Child Welfare authorities being permitted on their property, say, twice a year to view the  
35 health of the children and then they would make a determination then as to whether they  
36 need an order.

37

38 MR. FRASER: All right. Okay. If you feel that's too intrusive  
39 then that may be the way to go. I would submit, though, more than twice a year. I don't  
40 know if twice a year would do it but if you feel they should only go on a few times a  
41 year and then get an order, then that's fine. The last time, of course, when they got the

1 order from Judge Lawrence their reasonable and probable grounds was the death of  
2 Calahan. Now, of course, it would have to be something different but, I suppose, they  
3 could get that information and would certainly get it if they are allowed on there a certain  
4 number of times a year.  
5  
6 Basically, sir, that is how the Crown views it. As I said, I know it's extremely difficult  
7 and I've tried to come up with what I feel is a fair representation. So, if Your Lordship  
8 has any questions I'd be pleased to answer them.  
9  
10 THE COURT: Thank you.  
11  
12 MR. FRASER: Thank you.  
13  
14 THE COURT: Mr. and Mrs. Shippy, are you prepared to  
15 respond to what the Crown is asking? Do you want to speak to sentence as to what I  
16 should do as far as sentencing the two of you?  
17  
18 THE ACCUSED S. SHIPPY: Yes.  
19  
20 THE COURT: Do you need a minute to compose yourself?  
21  
22 THE ACCUSED S. SHIPPY: No. We'd like it if we go home with our  
23 children, twice a year if Ginny --  
24  
25 THE COURT: Please stand.  
26  
27 THE ACCUSED S. SHIPPY: Oh, sorry. If Ginny Grinde come out, if she  
28 was willing.  
29  
30 THE COURT: The Crown has pointed out that there was some  
31 comments in the press that you had indicated that nothing in your mind has changed so  
32 far as your belief that you would not seek any medical intervention should one of your  
33 other children become ill. He also indicated that if you had been misquoted you certainly  
34 can address the court to tell the court whether this is taken out of context or you were  
35 misquoted. Can you say anything in that regard?  
36  
37 THE ACCUSED S. SHIPPY: No, that is my religious belief. But as far as --  
38 it's an awful hard thing to lose a son and to say if something like that happened again I  
39 don't know. All I can say my religious beliefs I would like to say if something come up  
40 like that again I don't know what I'd do.  
41

1 THE COURT: Anything further you would wish to say,  
2 Mr. Shippy?  
3

4 THE ACCUSED S. SHIPPY: (NO AUDIBLE RESPONSE)  
5

6 THE COURT: Did your wife plan to say anything to the court,  
7 do you know?  
8

9 THE ACCUSED S. SHIPPY: I don't think she'd be up to it.  
10

11 THE COURT: Well, we can take an adjournment if she  
12 planned to say something to the court, if that is her wish.  
13

14 THE ACCUSED S. SHIPPY: Do you want to say anything or just get it over  
15 with?  
16

17 THE COURT: We will take a five minute adjournment and if  
18 Mrs. Shippy wants to say anything after that.  
19

20 (ADJOURNMENT)  
21

22 THE COURT: Mrs. Shippy, do you wish to say anything to  
23 the court?  
24

25 THE ACCUSED R. SHIPPY: My children are my life. I did everything I  
26 possibly could with Calahan. I mean I live for my kids. I live for my family. All I want  
27 to do is protect them, make sure they're well.  
28

29 **Sentence**  
30

31 THE COURT: Mr. and Mrs. Shippy, would you please stand  
32 up. I have found you guilty as the parents of Calahan, who was under the age of 16  
33 years, in failing to provide for him the necessities of life in that you refused to seek out  
34 the medical aid that was necessary to ensure that his health was not endangered  
35 permanently.  
36

37 I have in all other aspects determined that you are loving and caring parents. It is your  
38 position that it is your devout faith which I understand does not permit the intervention of  
39 doctors or nurses to assist in providing medical treatment that justifies your actions in the  
40 eyes of God. You have a problem in Canada. The laws that presently exist in Canada is  
41 that you may believe and worship as you please provided that you are 16 years of age.

1 At age 16 Calahan would have been able and been deemed to be on his own. He would,  
2 as a matter of right, be able to accept all your beliefs. But until he is 16 years of age  
3 you, as his parents, do not have the unfettered right to do with him as your faith would  
4 teach you to do.  
5

6 The law of Canada does not permit you to deny Calahan medical treatment because of  
7 your religious beliefs. In Canada we have one of the most comprehensive social, medical  
8 and hospital plans in the world. Our society has collectively decided that we do not want  
9 children to suffer because of their parents inability to pay for medical treatment. As much  
10 as you might try to reject the values of Canadian society, your individual rights under the  
11 *Canadian Charter of Rights and Freedoms* do not give you the right to reject medical  
12 treatment for your children when there is a danger to the permanent health of those  
13 children.  
14

15 The government authorities did not intervene with your decision not to correct Calahan's  
16 cleft palate although the doctor in the trial gave evidence that this problem could have  
17 been routinely corrected with minor surgery. This problem did not endanger Calahan's  
18 long term health. However, when you refused medical treatment for Calahan when he  
19 was obviously very ill and you were treating him for the flu, I have found that you  
20 purposely endangered Calahan's life and you tried to justify it by your religious beliefs.  
21

22 In this situation you should and can expect the authorities to intervene in your lives. The  
23 law is clear that you can not endanger the life of a child because of your religious beliefs  
24 and until a child is 16 years of age, they can not decide such issues for themselves.  
25 Mr. and Mrs. Shippy, you are both mature adults. By all respects except for your failure  
26 to seek medical help for Calahan you appear to be loving, caring, responsible parents.  
27 The crime for which you have been convicted, as has been pointed out by the Crown,  
28 calls for a maximum sentence of two years imprisonment.  
29

30 The aggravating factor in this offence is that both of you are in a position of trust to  
31 Calahan. Calahan relied on your experience and knowledge to decide what was best for  
32 him. Your decision for him that it was God's will that he die smacks of Darwinism in  
33 that he believed that for the good of the human race only the strong should survive. Our  
34 Canadian law rejects his theories.  
35

36 In your favour I have considered the following, you have no previous convictions. You  
37 are otherwise of good character. You would appear to have good work records in that  
38 both of you are hardworking contributors to society. And I have seen visible displays of  
39 your remorse for what happened to Calahan.  
40

41 As first offenders, I believe it to be enough punishment that both of you will now have



1 criminal records. That is, you are criminals in Canadian society. And, thus, pursuant to  
2 Section 731.1 of the *Criminal Code* I, firstly, find that a firearms prohibition is not  
3 warranted and I direct that for 36 months you comply with the terms of a probation order  
4 which I will now make.

5  
6 Firstly, you will keep the peace and be of good behaviour. That you will appear before  
7 the court when you are required to do so. That you will notify the court or your  
8 probation in advance of any change of your name or address. Now, these conditions are  
9 mandatory and can not be changed. And, also, in keeping the peace and being of good  
10 behaviour, it means that you must comply with the laws of Canada including providing  
11 the necessities of life for your other children.

12  
13 In addition to these mandatory terms I also would add that you are to provide access to  
14 the authorities from the probation office and the authorities from the Child Welfare office  
15 to attend upon your property three times per year to visit with you and to view the general  
16 health of your other children. I also make these directions, the clerk is to provide you  
17 with a copy of the probation order. The clerk is to explain the substance of the order to  
18 you and ensure that you understand the conditions imposed upon you and what may occur  
19 if you violate these conditions. If the clerk can not certify that you understand the order  
20 you are to be brought back before the court for further directions. Mr. Fraser, do you  
21 have anything further?

22  
23 MR. FRASER: Just a couple of things. First of all, I presume  
24 you mean a suspended sentence and probation for three years?

25  
26 THE COURT: Yes.

27  
28 MR. FRASER: All right. I'm wondering, sir, if -- I forgot to  
29 mention this but it's not standard but it is almost, if you could have them report to a  
30 probation officer once per month or as otherwise required?

31  
32 THE COURT: I purposely left that requirement out in that  
33 where they live. The probation office will do what they need to do so far as visiting them  
34 at least three times a year.

35  
36 MR. FRASER: All right. So, basically, that's what you sort of  
37 thought would be their visitations is the three times a year. I take it, Your Lordship isn't  
38 going to impose any counselling or anything, leaving that up to them?

39  
40 THE COURT: Right.

41

1 MR. FRASER: And the only other thing that just sort of  
2 popped into mind and we're starting to do with more up in the Wetaskiwin/Leduc area,  
3 does the court want to consider any reviews? It's been doing that with lengthy probation  
4 orders or just leave it up to the probation officer if he feels something is warranted?

5

6 THE COURT: Thank you, we will just leave it to the  
7 probation officer.

8

9 MR. FRASER: All right. I have nothing further, sir. The  
10 question of surcharge, I don't know if you want to impose it or waive it?

11

12 THE COURT: There has been enough suffering here, I would  
13 waive any requirement for a victim surcharge. Mr. and Mrs. Shippy, do you have  
14 anything further you wish to say?

15

16 THE ACCUSED S. SHIPPY: No, sir.

17

18 THE COURT: Okay.

19

20 MR. FRASER: Thank you, My Lord.

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23 PROCEEDINGS CONCLUDED

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## VITA

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