

The Persistence of Prior Fault: The Defence of Intoxication in Canada

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Abstract:

In this paper, the author discusses the state of the defence of intoxication in Canadian criminal law. Intoxication casting doubt on an element of an offence may, in certain circumstances, be considered by the trier of fact in a criminal trial in determining whether that element has been proven. However, underlying the defence in Canada is the distinction between so-called specific and general intent offences and, for the latter, the actio libera in causa doctrine continues to have some relevance. The doctrine which sometimes imposes restrictions on a criminal defence where the defendant has caused the conditions of the defence has come under constitutional scrutiny in Canada. Nevertheless, the doctrine persists in spite of Supreme Court of Canada jurisprudence to the contrary. The author outlines and provides a critique of the current state of the defence of intoxication and argues that, while it may be permissible in terms of culpability theory to restrict excuses and justifications where the defendant has caused the conditions of the defence, it is problematic for defences that conceptually are a denial of an element of an offence. Instead, a new offence for dangerous intoxication should be legislated.

I. INTRODUCTION

In this paper, I will explain the extent to which the doctrine of *actio libera in causa* applies in Canadian criminal law to the so-called¹ defence of intoxication. I will concentrate on the defence² of intoxication because of the complexity of the defence that has arisen because of constitutional requirements, Supreme Court of Canada jurisprudence, and legislative reform. By way of contrast, at a later point in the paper, I will also briefly address the defences of provocation, self-defence and defence of property, and duress, all of which incorporate the doctrine of “prior fault”³ to some degree. The main thrust of the paper will, however, be a critique of the prior fault doctrine as it has applied to the defence of intoxication to show that the resultant position is unprincipled, unworkable, and overly complex and that it is inconsistent with the usual approaches to criminal liability. Although the jettisoning of the current intoxication rules would result in very few acquittals, I acknowledge that there will be some situations in which the claim for public protection is strong

¹ I refer to it as a “so-called” defence because, conceptually, evidence of intoxication, where it is relevant, is simply a special way of denying an element of an offence, usually the mental element or *mens rea*. This paper will deal with both voluntary and involuntary intoxication, although the latter is exceedingly rare.

² In spite of the similarities in many respects between the United States and Canada, we do spell some words differently, “defence” and “offence” among them. Throughout I shall use Canadian spellings. Similarly persisting with what is familiar to me, I shall employ the citation style in use in Canadian legal scholarship.

³ Rather than repeatedly use the Latin term, I shall refer to the doctrine as “prior fault” to refer to the situation where a person accused of a crime attempts to rely on a defence whose conditions she or he has created.

enough to warrant the creation of a new offence of dangerous intoxication as a lesser included offence in certain narrow circumstances.

Although there are broad similarities between the United States and Canada in economic and cultural terms but also because both are federal states, there are nevertheless significant constitutional differences that come into play in discussing the Canadian position. Consequently, the first part of this article will set out the Canadian constitutional framework, both in terms of the division of legislative powers between the federal and provincial governments and in terms of entrenched individual rights.

Flowing from the constitutional position is the criminal law itself, which is largely, but not completely, in statutory form. In this section, I will set out the context in which the legal rules governing defences has evolved. In Canada, there is considerable complexity and nuance involving the respective legislative and judicial roles.

I will then explain the current position in relation to the defence of intoxication. From there, I will advance my critiques of the current law to substantiate my claim that it is at odds with criminal culpability principles, constitutionally suspect, and, at times, unfair in its application. I will conclude with my own proposals for a legislated offence of dangerous intoxication.

II. The Canadian Constitutional Framework

A. Constitutional Division of Powers

Federal states divide legislative authority between the national government and sub-national entities. Canada, the United States, and Australia are among the nations whose constitutions establish federations. However, unlike the United States and Australia in which authority over criminal law is allocated to the states, in Canada, the power to legislate in relation to criminal law has been given to Parliament, our national government. This arises from the *Constitution Act, 1867*,⁴ which, by section 91(27), gives the national Parliament the sole authority to legislate in the fields of criminal law and criminal procedure.⁵ At the same time, the provinces are given authority under section 92(14) over the “administration of

⁴ *Constitution Act, 1867*, Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. A major part of the Canadian constitution arose from this Act, originally called the *British North America Act* (U.K.) 30 & 31 Vict., c. 3, a statute of the British Parliament. Until 1982, in order to change the Canadian constitution, an Act of the British Parliament was required. Repatriation of our constitution occurred in that year, resulting in the re-naming of the Act and, perhaps more important for later discussion, the passage of the *Canadian Charter of Rights and Freedoms*, Schedule B, Part I, *Constitution Act, 1982*, R.S.C. 1985, Appendix II, No. 44 [hereinafter “the Charter”]. The Charter constitutionally entrenches individual and group rights.

⁵ Perhaps confusing, this does not mean that the provinces cannot pass penal laws. They may do so under s. 92(15) but only in relation to the enforcement of valid provincial laws. Therefore, provinces cannot pass penal laws that infringe upon the federal power to pass criminal laws. The federal criminal law power has been given a wide interpretation by the Supreme Court of Canada so as to include, for example, federal environmental protection legislation and such preventive criminal law as the licensing of the owners of firearms.

justice” and the establishment of courts other than the Supreme Court of Canada.⁶ Nonetheless, the federal government has the authority under section 96 to appoint the judges of the superior trial courts, provincial courts of appeal, and, of course, the Supreme Court of Canada. Just to complicate matters even more, the “administration of justice” covers a wide spectrum of activities short of “criminal procedure.”⁷ The most important of these is the power for provinces to prosecute criminal offences (as opposed to other federal offences which are prosecuted by the federal government).⁸ The federal power over criminal procedure has led to legislation, the *Criminal Code*,⁹ that sets out offences and punishments and the rules governing criminal investigations, compelling appearance in court and bail, preliminary inquiries, trials and appeals.

⁶ The Supreme Court of Canada was established under the *Supreme Court Act*, R.S.C. 1985, c. S-26. All provinces and territories other than Nunavut have two trial courts, a provincial or territorial court and a superior court. Nunavut has amalgamated the two courts into one, the Nunavut Court of Justice. The respective jurisdictions of these courts to try offences is not of relevance to this paper.

⁷ I have explored the distinction between “administration of justice” and “criminal procedure” more fully in Tim Quigley, *Procedure in Canadian Criminal Law* (2nd ed. Looseleaf) (Toronto: Carswell, 2005), chapter 2.

⁸ This is a mild oversimplification but the nuances are beyond the scope of this article.

⁹ *Criminal Code*, R.S.C. 1985, c. C-46. (Hereinafter referred to as the “Criminal Code” or the “Code.”)

B. The Charter of Rights and Freedoms

The *Canadian Charter of Rights and Freedoms* serves more or less the same function as the *Bill of Rights* does in the United States, namely, the protection of individual and legal rights.¹⁰ Sections 2 to 6 protect individual rights such as freedom of the press, assembly, association, and religion and voting and mobility rights. Sections 7 through 14 protect legal rights and are the most relevant in criminal law. Thus, for example, section 8 protects against unreasonable search and seizure, section 9 against arbitrary detention or imprisonment, and section 10 provides a right to consult counsel when a person is detained or arrested.

However, there are some important structural differences between the two documents. Under the Canadian Charter, if a law¹¹ is found to violate a right contained in it, the state has an opportunity to have the law upheld if it is justified under section 1. That section reads as follows:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This means that the federal Parliament or a province may seek to justify a law that would otherwise be unconstitutional by showing that there is a broader societal interest in overriding an individual right in a particular context. However, the test

¹⁰ The Charter also protects some group rights such as linguistic rights under ss. 16-22, minority education rights under s. 23, and Aboriginal rights under s. 25.

¹¹ “Law” includes the common law as well as statutory law. Thus, for example, in *R. v. Swain* (1991), 5 C.R. (4th) 253 (S.C.C.), the Supreme Court of Canada held that the common law rule permitting the Crown (the prosecutor in almost all criminal cases) to lead evidence of insanity over the accused’s wishes violated s. 7 of the Charter.

for justification is stringent.¹² The level of government seeking to justify a constitutional violation must prove (a) sufficient importance of the objective of the impugned law and (b) that the means chosen to achieve the objective are proportionate to the benefit to be obtained from it. Proportionality in this context has three dimensions: (i) a rational connection between the impugned measure and its objective; (ii) minimal impairment of the right or freedom in question; and (iii) overall proportionality between the deleterious effects of the impugned law and its salutary effects.

A second major difference between the Canadian Charter and the American *Bill of Rights* is in the available remedies. Under section 52 of the *Constitution Act, 1982*,¹³ the courts may strike down legislation that violates the Charter (and is not justified under section 1).¹⁴ However, constitutional violations can occur through state action, such as by the police or the prosecution, rather than through legislative action. Consequently, section 24 of the Charter permits the courts to provide remedies such as a stay of proceedings, damages, costs, etc. Section 24(2) is particularly important since it permits the exclusion of otherwise admissible

¹² The leading case is *R. v. Oakes* (1986), 50 C.R. (3d) 1 (S.C.C.), although other cases have sometimes modified the *Oakes* tests and the Supreme Court of Canada may be criticized for not always adhering to the strictness of *Oakes*. For a more comprehensive discussion, see: Don Stuart, *Charter Justice in Canadian Criminal Law* (5th ed.) (Toronto: Carswell, 2010), at 17-29.

¹³ *Supra*, note 4.

¹⁴ Other techniques than striking down the legislation have been crafted by the courts. These include “reading in” components necessary to validate a law or “reading down” by removing an offensive portion of the law. These concepts are beyond the scope of this paper.

evidence if a Charter right has been violated. However, unlike the American position, Canada does not have an automatic exclusionary rule. Instead, a court must engage in the balancing of the seriousness of the violation, the impact of the violation on the accused's constitutional rights, and the societal interest in adjudication on the merits of the case.¹⁵

More germane to the present topic is the approach taken by the Supreme Court of Canada when a common law rule is found to violate the Charter. The approach with a statutory provision is that, after finding a presumptive violation of a Charter provision, a court will determine whether the state has proven justification under section 1. In the case of a common law rule, however, the Supreme Court has truncated the approach. If a common law rule violates the Charter, the Court will often simply replace it with another common law rule that is seen by the Court to comply with the Charter.¹⁶ This may be a sensible approach, given the awkwardness that would exist if the state actor, in this case the courts, determined whether or not its own law was justifiable. The effect, however, is that the alternative of straightforwardly quashing a common law rule and leaving the task of passing a new statutory provision to Parliament does not occur. Hence, Parliament is not faced with the responsibility of passing a statute to replace the impugned common law. In the ensuing discussion of the defence of intoxication, the role of the courts and Parliament is heavily intertwined.

¹⁵ In *R. v. Grant* (2009), 66 C.R. (6th) 1 (S.C.C.), the Supreme Court reformulated the balancing test for exclusion or admission of evidence obtained in the course of a Charter violation.

¹⁶ *E.g.*: *Swain*, *supra*, note 11.

Before turning to a discussion of the defence of intoxication, mention must be made of two Charter provisions, section 7 and section 11(d). Section 7 is seen as the umbrella legal right section with the ensuing sections 8 through 14 being particular examples of the protection offered by it. It reads as follows:

Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

This is a very broad and seemingly undefined set of rights. The Supreme Court of Canada has held that it provides more than due process protection and that it empowers the courts to engage in constitutional review of the substance of laws.¹⁷ As well, in fleshing out what is meant by “liberty,” “security of the person,” and, especially, “the principles of fundamental justice,” the Supreme Court has recognized, *inter alia*, protection for bodily integrity,¹⁸ a right to disclosure of the prosecution’s case,¹⁹ a right to remain silent,²⁰ broader protection against self-incrimination,²¹ a right to make full answer and defence to an accusation of

¹⁷ *Reference re s. 94(2) of the Motor Vehicle Act (British Columbia)* (1985), 48 C.R. (3d) 289 (S.C.C.). [Hereinafter “*Motor Vehicle Reference*”].

¹⁸ *R. v. Stillman* (1997), 5 C.R. (5th) 1 (S.C.C.).

¹⁹ *R. v. Stinchcombe* (1991), 96 C.C.C. (3d) 1 (S.C.C.).

²⁰ *R. v. Hebert* (1990), 77 C.R. (3d) 145 (S.C.C.).

²¹ *R. v. S.(R.J.)* (1995), 36 C.R. (4th) 1 (S.C.C.); *R. v. White* (1999), 24 C.R. (5th) 201 (S.C.C.).

criminality,²² protection against abuses of process by the state,²³ and protection against impermissibly vague laws.²⁴

The jurisprudence in which substantive review of laws has taken place has a great deal of relevance to the defence of intoxication. In *R. v. Vaillancourt*²⁵ and *R. v. Martineau*,²⁶ the Court struck down constructive murder (essentially felony murder) provisions in the Criminal Code. Although *Vaillancourt* was decided on a less stringent standard, *Martineau* held that a conviction for murder required proof beyond a reasonable doubt of subjective foresight of death. Therefore, constructive murder provisions that could lead to a conviction on a lesser standard were held to be unconstitutional. The majority of the Court in these cases found violations under both section 7 and section 11(d) of the Charter.²⁷

The section 7 violation arose because the particular stigma and severe punishment of murder (mandatory life imprisonment) meant that, as a principle of fundamental justice and a deprivation of liberty, it requires a stringent mental

²² *R. v. Rose* (1998), 20 C.R. (5th) 246 (S.C.C.); *R. v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.).

²³ *R. v. O'Connor* (1995), 44 C.R. (4th) 1 (S.C.C.); *R. v. Regan* (2002), 49 C.R. (5th) 1 (S.C.C.).

²⁴ *Canada v. Pharmaceutical Society (Nova Scotia)* (1992), 15 C.R. (4th) 1 (S.C.C.); *R. v. Heywood* (1994), 34 C.R. (4th) 133 (S.C.C.).

²⁵ *R. v. Vaillancourt* (1987), 60 C.R. (3d) 289 (S.C.C.).

²⁶ *R. v. Martineau* (1990), 79 C.R. (3d) 129 (S.C.C.).

²⁷ Section 11(d) provides that: Any person charged with an offence has the right ... to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal[.]

element. In *Vaillancourt*, perhaps in order to achieve a majority, Justice Lamer used reasonable foreseeability of death as the culpability standard but nonetheless found the provision in question did not achieve that level. Subsequently, in *Martineau* (and some accompanying cases), a majority of the Court adopted the yet more stringent standard of subjective foresight of death.²⁸ In the same case, the Court asserted as a principle that those causing harm intentionally must be punished more severely than those causing harm unintentionally. This latter principle has great relevance for the ensuing discussion.

The second basis for invalidating the constructive murder provisions was under a form of substituted fault. The reasoning was that the various constructive murder provisions had been designed by Parliament to substitute a lesser standard of fault than that for the more typical form of murder under section 229(a)(i) and (ii). Murder other than constructive murder requires proof beyond a reasonable doubt that the accused either meant to cause death or meant to cause bodily harm known by him or her to be likely to cause death and being reckless about whether

²⁸ This spawned challenges to the culpability standards of other offences but with rather mixed results since the Supreme Court has held that relatively few offences will require subjective fault in order to be constitutional. More generally, however, the Supreme Court of Canada has held that a criminal offence must have a fault requirement even if its stigma and punishment do not require subjective fault: *Motor Vehicle Reference, supra*, note 17 (absolute liability offence unconstitutional if there is a possibility of imprisonment); *R. v. Creighton* (1993), 23 C.R. (4th) 189 (S.C.C.). In *Creighton*, the Court also held that the constitutional standard for negligence for criminal offences is gross negligence (a marked and substantial departure from the reasonable person standard). However, in the same case, the Court also applied simple negligence as the standard for the consequences of what is called a predicate offence (one in which there is an unlawful act requirement plus a consequence), the predicate offence being the unlawful act. This aspect of the substantive review of offences is not of relevance to this paper.

death ensued or not. Thus, it would be possible to convict someone of constructive murder when there was a reasonable doubt about the usual *mens rea* requirement.

This doctrine of “substituted fault” is of great importance to the present law dealing with the defence of intoxication and will be discussed in greater detail below. Moreover, “substituted fault” in this context is a form of prior fault because the fault derives from the person’s prior involvement in another crime rather than from the *mens rea* requirement for ordinary murder. As will be seen, the current law of intoxication has adopted an analogous approach.

III. THE STRUCTURE AND INTERPRETATION OF CANADA'S CRIMINAL CODE

In order to properly understand the state of the defence of intoxication in Canada, it is necessary to have some understanding of our Criminal Code. It is a strange creature with the roles of Parliament and the judiciary being very intertwined.

As a consequence of the constitutional allocation of jurisdiction over criminal law to the federal government, Canada’s Parliament passed its first Criminal Code in 1892.²⁹ It was based on the English Draft Code of 1879,³⁰ itself largely a creation of the British judge, Sir James Fitzjames Stephen. Rather than periodic overhaul, the

²⁹ *Criminal Code*, S.C. 1892, c. 29.

³⁰ *Report of the Royal Commission to consider the Law Relating to Indictable Offences* (British Sessional Papers, House of Commons, 1878-79, vol. 20) at 217-366. For a more complete account, see: Don Stuart, *Canadian Criminal Law* (5th ed.) (Toronto: Carswell, 2007), at 2-13.

Code has remained largely the same in the intervening years. Piecemeal amendments to add new offences, punishments, or police powers have rendered the Act extremely prolix, disorganized, and unwieldy. Moreover, the term “Code” attached to the Act is misleading since the Criminal Code is not a complete codification of offences and defences. It neither supplants the common law nor does it even have a comprehensive general part to set out the rules of criminal culpability. Thus, it is quite unlike codification in the civil law tradition or that proposed in the *Model Penal Code*.³¹ Indeed, it is unlike the Criminal Codes in those states of Australia which have engaged in codification, since, in those states, resort to the common law as an interpretive aid may only occur where there is ambiguity or the language used has acquired a special meaning at common law.³²

In contrast, apart from the defects mentioned above, these are some of the main features of the Canadian Criminal Code. First, in the interpretation of the Code, the courts regularly have resort to the common law.³³ Second, although Part I of the Code purports to be a general part, it does not define the mental states necessary for criminal culpability. Third, offence definitions sometimes contain express mental elements but often require the application of the common law presumption of *mens*

³¹ *Model Penal Code: Proposed Official Draft* (Philadelphia: American Law Institute, 1962).

³² *R. v. Stuart* (1974), 134 C.L.R. 426 (H.C. Aust.). Eric Colvin and John McKechnie, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (6th ed.) (Chatswood, New South Wales: LexisNexis Butterworths, Australia, 2011) at 8.

³³ For instance, in *R. v. Jobidon* (1991), 7 C.R. (4th) 233 (S.C.C.), the Court read in common law limitations to the ability to consent to the application of force in an otherwise consensual fist fight.

rea in order to imply a required mental state. Many offence definitions are a mixture of express and implied *mens rea* requirements. Fourth, some defences are in statutory form³⁴ but, as will be seen, others are derived from the common law. Finally, although section 9 expressly bars common law offences other than contempt of court, section 8(3) provides that:

Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act and any other Act of Parliament except in so far as they are altered by or are inconsistent with this Act or any other Act of Parliament.

Although in its terms seemingly limited to justifications, excuses, or defences recognized at the time of the enactment of the Code, this provision has been interpreted as not freezing the power of the courts to recognize new defences.³⁵ This interpretation has permitted the recognition of not just new justifications or excuses,³⁶ but also defences that are conceptually a denial of an element or the voluntariness of the conduct,³⁷ procedural defences,³⁸ or judicial stays of the

³⁴ *E.g.*: Mental disorder (s. 16); compulsion by threats (s. 17); self-defence (ss. 34-37); defence of property (ss. 38-42); provocation (only as a partial defence to murder) (s. 232).

³⁵ *R. v. Kirzner* (1977), 1 C.R. (3d) 138 (S.C.C.).

³⁶ *E.g.*: Due diligence for strict liability (in Canada, negligence offences albeit with a reverse onus): *R. v. City of Sault Ste. Marie* (1978), 3 C.R. (3d) 30 (S.C.C.); common law duress: *R. v. Ruzic* (2001), 41 C.R. (5th) 1 (S.C.C.); necessity: *R. v. Perka* (1984), 42 C.R. (3d) 113 (S.C.C.); officially induced error: *Lévis (Ville) c. Tétreault* (2006), 36 C.R. (6th) 215 (S.C.C.).

³⁷ *E.g.*: Mistake of fact: *R. v. Pappajohn* (1980), 14 C.R. (3d) 243 (S.C.C.); intoxication as a defence to specific intent offences: *R. v. Leary* (1978), 37 C.R.N.S. 60 (S.C.C.); *R. v. Bernard* (1988), 67 C.R. (3d) 113 (S.C.C.); extreme intoxication as a defence to general intent offences: *R. v. Daviault* (1994), 33 C.R. (4th) 165 (S.C.C.). *Daviault* has

proceedings because of state misconduct or other oppressive conduct.³⁹ In fashioning new defences, the Supreme Court of Canada has frequently reversed the burden of proof to the accused on a balance of probabilities. As will be seen, this is especially relevant in the context of the defence of intoxication.⁴⁰

From this brief discussion, it can be seen that determining both the elements of offences and potential defences is a complex matter. With this complexity in mind, let me now turn to a discussion of the defence of intoxication itself.

IV. THE DEFENCE OF INTOXICATION IN CANADA

A. DEFINING THE DEFENCE OF INTOXICATION

A sensible place to begin the discussion of the defence of intoxication is to define what is meant by the “defence.” Indeed, referring to it as a “defence” is a major cause of the conceptual confusion that has crept into the law. Normally, the state bears the burden beyond a reasonable doubt to prove the conduct elements (*actus*

been partially attenuated by s. 33.1 of the Code which was enacted as a legislative response to the decision.

³⁸ *E.g.*: Forms of double jeopardy such as *res judicata* or issue estoppel: *Kienapple v. R.* (1974), 26 C.R.N.S. 1 (S.C.C.); *R. v. Gushue* (1980), 16 C.R. (3d) 39 (S.C.C.); *R. v. Mahalingan* (2008), 61 C.R. (6th) 207 (S.C.C.).

³⁹ *E.g.*: Abuse of process: *R. v. O'Connor* (1995), 44 C.R. (4th) 1 (S.C.C.); *R. v. Regan* (2002), 49 C.R. (5th) 1 (S.C.C.); entrapment (in Canada, a species of abuse of process): *R. v. Mack* (1988), 67 C.R. (3d) 1 (S.C.C.).

⁴⁰ *Daviault, supra*, note 37.

reus) and the mental elements (*mens rea*) of an offence. The defence of intoxication discussed here simply refers to evidence that may be considered by the trier of fact in deciding whether the state has met this burden.⁴¹ However, in part because of the conceptualization as a “defence,” intoxication has been placed under certain restraints or limitations that distinguish it from other ways of casting doubt on an element of an offence.

Intoxication itself refers to an “alteration of mind ... from the consumption of alcohol or other psychotropic substances.”⁴² Some such substances are legal, alcohol obviously being the most common, while others such as heroin or cocaine are illegal. The legality or illegality of the substance has no bearing on the defence of intoxication, although as the discussion will show, attitudes of morality may underlie the legal doctrine. Alteration of the mind itself does not give rise to a claim of the intoxication defence. Lowered inhibitions or heightened emotional states may explain why a person behaved in a certain way but, unless the intoxication was such as to cast doubt on an offence element, it has no legal relevance except, perhaps, at the sentencing stage of criminal proceedings.

⁴¹ I must acknowledge that some writers have expressed doubts that there is any plausibility to alcohol-induced automatism or to a lack of intention through intoxication. *E.g.*: H. Fingarette and A. Hasse, *Mental Disabilities and Criminal Responsibility* (Berkeley: University of California Press, 1979); C. Mitchell, “The Intoxicated Offender—Refuting the Legal Myths” (1988), 1 *Int. J. L. Psychiatry* 77, at 79. However, until more is learned about how intoxicating substances affect the human mind, we must proceed on the basis that there are effects that may have a bearing on the conditions for criminal liability.

⁴² Eric Colvin and Sanjeev Anand, *Principles of Criminal Law* (3rd ed.) (Toronto: Thomson Carswell, 2007), at 467.

B. DISTINGUISHING INVOLUNTARY AND VOLUNTARY INTOXICATION

Next, it is important to distinguish between involuntary and voluntary intoxication. Involuntary intoxication occurs where the defendant involuntarily consumed the substance causing the intoxicated state. In practice, this has rarely occurred and therefore the Canadian position is not entirely clear. In principle, however, a person who has become involuntarily intoxicated should be afforded a defence on the basis of the negation of the voluntariness of the conduct. The leading decision in Canada remains *R. v. King*,⁴³ in which the accused was ultimately acquitted of driving while impaired by a drug after he had been administered sodium pentothal by his dentist. The Supreme Court decision is not a model of clarity since the majority was split and two justices analyzed the situation on the basis of *mens rea*.⁴⁴ Nonetheless, the test for involuntariness that was arrived at was a mixture of subjective and objective fault: it was involuntary intoxication if the accused had not known or could not reasonably have been expected to know that his ability to drive would be impaired by the drug in question. Thus, the test is essentially one of whether or not the accused was negligent in ingesting the intoxicating substance.⁴⁵

⁴³ *R. v. King* (1962), 133 C.C.C. 1 (S.C.C.). See also: *R. v. McDowell* (1980), 52 C.C.C. (2d) 298 (Ont. C.A.) which applied *King*.

⁴⁴ Justice Taschereau was on better ground conceptually to see the involuntariness of the impairment as a negation of the voluntariness of the act.

⁴⁵ This is in contrast to the English position which requires that the accused must have awareness of the risk that consuming a substance might impair mental ability:

Cases of involuntary intoxication are extremely rare, largely because the focus is usually on whether or not the accused knew that he or she was ingesting a potentially intoxicating substance. Since alcohol is overwhelmingly the most common intoxicant in general usage, there is undoubtedly an assumption that virtually everyone knows of its intoxicating effects. This can work potential injustice as shown by the decision in *R. v. Lynch*.⁴⁶ Due to a medical condition unknown to him, the blood alcohol level of the accused exceeded the legal limit for driving even though he had consumed an amount of alcohol that would not have resulted in that level in a normal person. Nonetheless, he was convicted on the basis of his voluntary consumption of the alcohol. Consequently, where intoxication becomes relevant as a potential defence, we are virtually always considering voluntary intoxication.

C. THE EVOLUTION OF THE DEFENCE OF INTOXICATION IN CANADA

1. Before the Charter of Rights and Freedoms:

In Canada and most other common law jurisdictions, the role of intoxication in proof of the mental element attracted little attention until the British House of

R. v. Bailey, [1983] 2 All E.R. 503, at 507 (C.A); *R. v. Hardie*, [1985] 80 Cr. App. R. 157, at 163 (C.A.).

⁴⁶ *R. v. Lynch* (1982), 69 C.C.C. (2d) 88 (Nfld. C.A.).

Lords decided *D.P.P. v. Beard*⁴⁷ in 1920. Although it was, in my view,⁴⁸ a spectacular misreading of the decision, it came to be the authority for determining that intoxication may cast doubt on the mental element for offences known as “specific” intent but not for those known as “general” intent offences (“basic” intent in Great Britain). This was so in spite of the fact that the words “general intent” or “basic intent” appear nowhere in the judgment.

Nonetheless, without a great deal of analysis, this came to be the position in Canada as well. It was likely that it was largely restricted to being a mitigating device on murder charges since Canada had the death penalty in that area. Intoxication casting doubt on the *mens rea* for murder gave rise to a conviction for manslaughter.⁴⁹ Other offences did not seem to attract much attention until *R. v. George*,⁵⁰ which held that robbery is a specific intent offence for which the intoxication defence is available. Similarly, so is theft, a lesser included offence to robbery but not assault, also a lesser included offence. The Court in *George* did not engage in a fulsome analysis but did opine that theft was a “purposive” offence and assault was not. The rule that intoxication might be a defence to specific intent crimes but not to general intent crimes thus became entrenched without comprehensive analysis or justification.

⁴⁷ *D.P.P. v. Beard*, [1920] A.C. 479 (H.L.).

⁴⁸ Tim Quigley, “A Shorn Beard” (1987), 10 *Dal. L.J.* 167.

⁴⁹ *E.g.*: *R. v. McAskill v. The King*, [1931] S.C.R. 330 (S.C.C.); *R. v. Hartridge* (1966), 48 C.R. 389 (Sask. C.A.).

⁵⁰ *R. v. George*, [1960] S.C.R. 871 (S.C.C.).

However, it was not long before the rule was challenged. The challenge was unsuccessful in the United Kingdom in *D.P.P. v. Majewski*⁵¹ and this led to a similarly unsuccessful challenge in Canada in *Leary v. The Queen*,⁵² a rape case. There, by a six to three majority, the Court merely followed *Majewski* in upholding the special/general intent dichotomy. In dissent, Justice Dickson (later Chief Justice of Canada) decried this intoxication rule:

There seems little reason for retaining in the criminal law—which should be characterized by clarity, simplicity, and certainty—a concept as difficult of comprehension and application as "specific intention".⁵³

This was, of course, a reference to the fact that there is no certain way of determining whether a particular offence is a specific intent offence or a general intent offence, a criticism that I will discuss in greater depth below.

2. The Effect of the Charter on the Intoxication Rules:

After the passage of the Charter of Rights and Freedoms and particularly after the decisions in *Vaillancourt*⁵⁴ and *Martineau*,⁵⁵ it was inevitable that further challenges to the intoxication rules would occur. This soon occurred in *R. v. Bernard*,⁵⁶ again a sexual

⁵¹ *D.P.P. v. Majewski*, [1976] 2 All E.R. 142 (H.L.).

⁵² *Leary v. The Queen*, [1978] 1 S.C.R. 29 (S.C.C.).

⁵³ *Ibid.*, at 42.

⁵⁴ *Supra*, note 25.

⁵⁵ *Supra*, note 26.

⁵⁶ *Supra*, note 37.

offence case but this time involving the offence of sexual assault causing bodily harm.⁵⁷ Once again, a majority of the Supreme Court of Canada upheld the specific/general intent dichotomy, on this occasion against a constitutional challenge.⁵⁸ However, the reasoning was different and the Court was split in different directions. Of the seven justices delivering the decision, four supported the dichotomy but were in turn split into two camps. Three other justices favoured ridding the law of the distinction between the two kinds of intention but one of those would nevertheless have dismissed the accused's appeal on the basis that a conviction was inevitable on the facts.⁵⁹

Justices Beetz and McIntyre upheld the rule on the basis that a general intent offence is one in which the mental element does not extend beyond the *actus reus* or conduct elements; that is, there is no further or ulterior intention. In this view, a specific intent offence is one in which there is a further or ulterior intention beyond that accompanying the conduct. In answer to the argument that, for general intent offences, the Crown (the prosecution) was relieved of its burden of proving the mental element where intoxication was involved, these justices replied that there were alternative ways in which the Crown might prove the necessary *mens rea*: (i) by inference from the conduct itself; and (ii) by proving that the accused had voluntarily become intoxicated. Justices

⁵⁷ The Criminal Code had been amended by S.C. 1980-81-82-83, c. 125 to replace rape, attempted rape, and indecent assault with sexual assault offences, including sexual assault causing bodily harm and aggravated sexual assault.

⁵⁸ See the discussion at note 28 and surrounding text. *Bernard* was decided after *Vaillancourt* but before *Martineau*. Nevertheless, the relevant constitutional principles had already been established in *Vaillancourt*.

⁵⁹ Termed the proviso or "harmless error" provision, s. 686(1)(b)(iii) of the Criminal Code permits an appellate court to dismiss an appeal despite legal errors in the trial if no miscarriage of justice would occur.

Wilson and L'Heureux-Dubé concurred in the result but, acknowledging that the second means of proving *mens rea* might violate the substituted fault doctrine established in *Vaillancourt*, contented themselves with reliance upon an inference from the conduct. They suggested that evidence of intoxication might become relevant in the determination of a general intent offence when the degree of intoxication was so severe as to approach insanity or automatism.

After *Bernard*, it was obvious to legal commentators that eventually the other shoe must fall, that the substituted fault doctrine would require reconsideration in some case in which the accused was profoundly intoxicated while committing a general intent offence. It did not take long for this to happen: *R. v. Daviault*,⁶⁰ yet another case of sexual assault causing bodily harm but with even more disturbing facts than its predecessor cases, *Leary* and *Bernard*. Having heard expert evidence that the accused, a chronic alcoholic, might have dissociated as a result of his alcohol consumption, the trial judge acquitted on the footing that there was a reasonable doubt about the *mens rea* for sexual assault. When the case reached the Supreme Court of Canada, a six to three majority held that sections 7 and 11(d) of the Charter were offended by not permitting evidence of intoxication to cast doubt on the *mens rea* of a general intent offence. Although accepting that ordinarily the mental element might be inferred from the conduct, this cohort of the Court held that it was constitutionally impermissible to substitute the fault in becoming voluntarily intoxicated for the *mens rea* of the offence.

However, rather than abolishing the distinction between specific and general intents, the majority held that they could construct a new common rule to replace the

⁶⁰ *Supra*, note 37.

Leary/Bernard approach.⁶¹ Consequently, they did so—but with a twist. The new rule allocates the burden of proof to the accused to prove, in the case of a general intent offence, that he or she was in a profound state of intoxication akin to automatism or insanity and therefore lacked either the *mens rea* or the voluntariness of the *actus reus*.⁶² Successfully meeting that burden results in an acquittal (subject to the legislative sequel discussed below). Acknowledging that a reverse onus itself violates the presumption of innocence in section 11(d), the majority tersely held that there was section 1 justification for the reversal in this context but, in any event, it was possible to construct a new common law rule. In the case before them, a new trial was ordered because the trial judge had not applied this more onerous burden of proof.

3. The Legislative Response to *Daviault*:

A great deal of controversy erupted from the decision in *Daviault*. Consultations ensued with women’s organizations, academics, lawyers and others in order to settle on a legislative response. Given the constitutional structure—that the courts are allocated the

⁶¹ This was not a novel approach: *Swain, supra*, note 11 and *supra*, note 16 and surrounding text.

⁶² The Supreme Court of Canada seemingly has a penchant for reverse onus burdens in relation to mental capacity defences. In *R. v. Chaulk* (1990), 2 C.R. (4th) 1 (S.C.C.), on less than rigorous application of s. 1 justification criteria, the Court upheld the reverse onus for the mental disorder defence in s. 16 (previously called the defence of insanity). Somewhat gratuitously since the issue had not been argued, the Court reversed the burden of proof for the defence of automatism (variously called “sane automatism” or “non-insane automatism”) in *R. v. Stone* (1999), 24 C.R. (5th) 1 (S.C.C.).

authority to assess the constitutionality of laws—it might have been supposed that a legislative response would reject the substituted/prior fault approach since *Daviault* had determined that such an approach is unconstitutional. However, Parliament responded quickly with a measure that contains a form of this doctrine:

33.1 (1) It is not a defence to an offence referred to in subsection (3) that the accused, by reason of self-induced intoxication, lacked the general intent or the voluntariness required to commit the offence, where the accused departed markedly from the standard of care as described in subsection (2).

(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person, while in a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour, voluntarily or involuntarily interferes or threatens to interfere with the bodily integrity of another person.

(3) This section applies in respect of an offence under this Act or any other Act of Parliament that includes as an element an assault or any other interference or threat of interference by a person with the bodily integrity of another person.⁶³

It can readily be seen that subsection (2) is a form of prior or substituted fault in spite of the constitutional jurisprudence impugning it.⁶⁴ It is clear that the fault involved in self-induced intoxication replaces the normal *mens rea* or voluntariness

⁶³ *An Act to amend the Criminal Code (self-induced intoxication)* S.C. 1995, c. 32, s. 1. In another context, Don Stuart, *supra*, note 12, at 8 referred to this type of Parliamentary response which seems to be directly at odds with Supreme Court of Canada jurisprudence as “in your face” legislation designed to undo a controversial Charter decision.

⁶⁴ There is an interpretative issue in ss. (2) about whether the marked departure from the reasonable person standard relates to the criminal conduct that has been charged or to becoming profoundly intoxicated. In *R. v. Vickberg* (1998), 16 C.R. (5th) 164 (B.C.S.C.), the preferred interpretation was that the subsection refers to the ensuing harm, rather than the conduct in becoming intoxicated.

requirements for any general intent offence involving the bodily integrity of the victim.

What, then, of the constitutionality of section 33.1? Perhaps because so few cases occur in which the degree of intoxication is severe enough to bring the *Daviault* defence and section 33.1 into play, there is not yet a definitive decision from an appellate court. In general, lower courts have held that the provision presumptively contravenes both of sections 7 and 11(d) of the Charter.⁶⁵

This seems unexceptional since that is what *Daviault* determined. The argument that there is no constitutional violation has, however, been advanced on the footing that equality rights under section 15 of the Charter must be considered in determining whether the provision violates section 7.⁶⁶ Thus, it is important to mention the preamble contained in the legislative bill that enacted section 33.1, in particular, these two clauses:

Whereas the Parliament of Canada recognizes that violence has a particularly disadvantaging impact on the equal participation of women and children in society and on the rights of women and children to security of the person and to the equal protection and benefit of the law as guaranteed by sections 7, 15 and 28 of the Canadian Charter of Rights and Freedoms

Whereas the Parliament of Canada recognizes that there is a close association between violence and intoxication and is concerned that self-induced intoxication may be used socially and legally to excuse violence, particularly violence against women and children.

⁶⁵ The case law is reviewed in Stuart, *supra*, note 30, at 456-58. See also: Kelly Smith, "Section 33.1: Denial of the *Daviault* Defence Should be Held Constitutional" (2000), 28 C.R. (5th) 350.

⁶⁶ Isabel Grant, "Second Chances: Bill C-72 and the *Charter*" (1995), 33 *Osgoode Hall L.J.* 381.

Although a preamble is not part of the legislation, it does have relevance in indicating the legislative purpose.⁶⁷ There can be little doubt that a large majority of violent offences are committed by men and that much of that violence, including sexual assault offences, is directed against women.⁶⁸ However, the problem with this argument is that the Supreme Court of Canada has clearly stated that there is no hierarchy of Charter rights such that one right trumps another.⁶⁹ It is difficult to see how equality rights might override the constitutional rights, including the right to make full answer and defence, of an accused person.

In addition, the section 7 principle established in *Vaillancourt* and *Martineau* that intentional harm should be punished more severely than unintentional harm appears to be violated by the section. This is because, through its operation, a person intoxicated to the point of being an automaton would be punished at the same level as someone who committed a violent offence with the subjective fault required by that offence.

It is difficult to avoid the conclusion that section 33.1 presumptively violates sections 7 and 11(d). Indeed, that is the conclusion drawn in the few cases that have considered the section. Therefore, the focus in those cases has been on whether or not the violation may be justified under section 1 of the Charter.

⁶⁷ *R. v. Darrach* (1998), 122 C.C.C. (3d) 225, at para. 24 (Ont. C.A.).

⁶⁸ Data cited in *R. v. Osolin*, [1993] 4 S.C.R. 595 (S.C.C.) show that 99% of sexual assaults are committed by men and 90% of the victims are women. Although other offences involving violence may be more likely to be committed by men against men, a significant proportion are against women and spousal violence remains an intractable problem in Canada.

⁶⁹ *Dagenais v. Canadian Broadcasting Corp.* (1994), 34 C.R. (4th) 269 (S.C.C.).

Recall that a presumptive violation of a Charter right may be justifiable if the state shows (a) sufficient importance of the objective of the impugned law and (b) that the means chosen to achieve the objective are proportionate to the benefit to be obtained from it. The second requirement has the three dimensions of (i) a rational connection between the impugned measure and its objective; (ii) minimal impairment of the right or freedom in question; and (iii) overall proportionality between the deleterious effects of the impugned law and its salutary effects.

These requirements have been assessed differently in the somewhat sparse jurisprudence. In *R. v. Vickberg*⁷⁰ and *R. v. Decaire*,⁷¹ the legislation was ultimately upheld under the section 1 analysis. In contrast, *R. v. Brenton*,⁷² *R. v. Dunn*,⁷³ *R. v. Jensen*,⁷⁴ and *R. v. Fleming*⁷⁵ all concluded that section 1 justification had not been proved by the Crown. In all of these cases, a common thread was that there was no pressing objective to warrant overriding constitutional rights because there were so few instances of extreme intoxication to satisfy that criterion. In *Brenton*, all three

⁷⁰ *Supra*, note 64.

⁷¹ *R. v. Decaire*, 1998 WL 1733745 (Ont. Gen. Div.).

⁷² *R. v. Brenton* (1999), 28 C.R. (5th) 308 (N.W.T.S.C.). *Brenton* was reversed: 2001 NWTCA 1 (N.W.T.C.A.). However, that decision was on the footing that there was an insufficient factual foundation for the constitutional challenge, rather than a reversal of the decision on the constitutionality of s. 33.1.

⁷³ *R. v. Dunn* (1999), 28 C.R. (5th) 295 (Ont. Gen. Div.).

⁷⁴ *R. v. Jensen*, [2000] O.J. No. 4870 (Ont. S.C.J.). *Jensen* was appealed: (2005), 27 C.R. (6th) 240 (Ont. C.A.). However, the Court ducked the s. 33.1 issue by holding that the jury at trial had implicitly rejected the intoxication defences. For a comment, see: Don Stuart, (2005), 27 C.R. (6th) 240.

⁷⁵ *R. v. Fleming*, 2010 ONSC 5169 (Ont. S.C.J.).

components of proportionality were also found not to be established, while the other three cases ruled that there was more than minimal impairment of the rights through section 33.1.⁷⁶ A quote from *Brenton* gives the flavour of the judicial objections to the section:

This defect in s. 33.1 has been highlighted by numerous commentators. The similarity between what the majority in *Daviault* condemned as an impermissible substitution and what s. 33.1 tries to accomplish was noted by Prof. Heather MacMillan-Brown in "No Longer 'Leary' About Intoxication: In the Aftermath of *R. v. Daviault*" (1995), 59 Sask. Law Review 312 (at 332):

The amendment will probably undergo constitutional scrutiny and it is questionable whether the section will survive a *Charter* challenge. Although the section appears on its face to deal with the constitutional problems with respect to s. 7 and s. 11(d) of the *Charter*, it does so only semantically. Rather than substituting the intent to become intoxicated for the intent to commit the crime, the act of being intoxicated, when coupled with a violent offence, has become the crime. The mental element is satisfied by the intentional and voluntary act of becoming drunk in addition to the physical act of committing a violent offence. In this way, the question of whether the offender intentionally and voluntarily committed the violent act becomes irrelevant in the face of the question as to whether the offender voluntarily and intentionally became intoxicated.

It appears that, through the amendment, the government is attempting to do indirectly what it cannot do directly. Under s. 33.1, just as with the common law, a defendant may be convicted of a violent crime despite a reasonable doubt as to whether or not he had the requisite intention and as to whether the act was voluntary. Furthermore, one of the most prominent criticisms of the *Leary* rule will remain under the amended legislation. In the case of a sober offender, the Crown will be required to prove the requisite mens rea for the crime. If the offender is intoxicated, the Crown is required to prove a lesser degree of mens rea, which is satisfied by evidence that the accused intentionally and voluntarily became intoxicated. It will no longer be necessary to prove mens rea with respect to the violent crime itself. This leads to the same situation criticized in *Daviault*, in which a drunken offender may be convicted of a violent crime despite the absence of voluntariness and mens

⁷⁶ S. 33.1 applies only to general intent offences involving a threat to bodily integrity. Nonetheless, the courts holding that there was no s. 1 justification all saw this limitation as impairing constitutional rights more than was permissible.

rea, whereas a sober offender, with the same absence of voluntariness and mens rea, would be acquitted.

Prof. David Paciocco, in "The Legacy of *Daviault*: Part I The Constitutionality of Bill C-72" (1995), 2 Sexual Offences Law Reporter 105, identified four particular violations of fundamental justice with respect to s. 33.1:

While it might find salvation in s. 1 of the *Charter*, this legislation is arguably in prima facie violation of virtually every accepted criminal law principle related to the identification of conduct as criminal. It is indisputably in violation of some. In particular, the section:

1. substitutes the mens rea of voluntary intoxication for the mens rea required by the offence;
2. probably ascribes fault at a level lower than the minimum constitutional mens rea of objective foreseeability of consequences where the conduct constitutes a marked departure from the norm;
3. ignores the minimum constitutional requirement of the voluntariness of the act; and
4. violates the principle of contemporaneity between the mens rea and actus reus.⁷⁷

Similarly, Don Stuart, perhaps Canada's preeminent academic criminal lawyer, has commented in relation to the grudging acceptance of section 33.1 in *R. v. Cedeno*,⁷⁸ that the application of the section "looks very much like absolute liability," which the Supreme Court of Canada has firmly rejected when there is a possibility of imprisonment.⁷⁹ In the absence of higher court consideration, it is not possible to predict if the provision will ultimately withstand constitutional scrutiny. In order to reach a higher court, there must be a case in which the accused can meet the *Daviault* reverse onus burden but is denied a defence by section 33.1. Such cases will necessarily be rare. Nevertheless, a shadow has been cast against this Parliamentary response to the courts.

⁷⁷ *Brenton*, *supra*, note 72, at paras. 57 & 58.

⁷⁸ *R. v. Cedeno* (2005), 27 C.R. (6th) 251 (Ont. C.J.).

⁷⁹ *Supra*, note 30, at 458.

D. CRITIQUE OF THE CANADIAN DEFENCE OF INTOXICATION

Several criticisms may be advanced against the intoxication rules now in force in Canada. Let me begin with the argument that the current law is overly complex. For many years, I have taught first year Criminal Law students that the reasoning is something like this:

1. In the vast majority of cases in which there is evidence that accused was intoxicated, it casts no doubt whatever on voluntariness or the mental element; instead, intoxication often provides an explanation for an accused's anger or lack of impulse control;
2. Where there is evidence that the accused was intoxicated, one must first determine whether the offence is one of specific or general intent;
3. If it is a specific intent offence, intoxication may be considered in deciding whether the accused had the actual state of mind necessary for culpability;
4. If it is a general intent offence, evidence of intoxication is irrelevant to culpability (that is, it is ignored) unless the accused was so drunk as to be an automaton (*Daviault*); in that situation, the accused must prove the defence on a balance of probabilities;
5. For offences involving an assault or other threats to bodily integrity, section 33.1 of the *Code* effectively rules out the defence;
6. Consequently, there may be a constitutional challenge to section 33.1 for which the decisions are mixed.

The bewilderment of first year law students can only be exceeded by that of jurors when these issues surface in an actual trial.⁸⁰ And imagine how much more complex jury instructions become if the accused faces a mixture of specific and general intent offences.

A second complaint is that, if there are both specific and general intent offences, there must also be a way of distinguishing them. Although various courts have attempted to explain the distinction through various tests,⁸¹ these tests fail to account for certain offences. I will not engage here in a lengthy argument against these efforts since I have done it elsewhere.⁸² Suffice it to say that, if there are no meaningful criteria by which to distinguish the two kinds of intents, there is no difference in kind between them. This is sensible. An intention to apply force is required for the general intent offence of assault under section 265 of the Criminal Code.⁸³ But attempted murder under section 239 requires the intention to kill and is a specific intent offence.⁸⁴ Intention in both cases carries the same meaning and so to suggest that the two offences have *mens rea* requirements that are different in

⁸⁰ Of course, the constitutional challenge must be determined by the trial judge. However, if the trial judge upholds s. 33.1, it must be explained to the jury.

⁸¹ Most notably in *Majewski, supra*, note 51 in which the various Law Lords resorted to the Basic Intent, Purposive, and Recklessness Tests.

⁸² Tim Quigley, "Specific and General Nonsense" (1987), 11 *Dal. L.J.* 75.

⁸³ *George, supra*, note 50.

⁸⁴ *R. v. Kireychuk* (1974), 19 C.C.C. (2d) 253 (Alta. C.A.); *R. v. Ancio* (1984), 39 C.R. (3d) 1 (S.C.C.).

kind is illogical. As a result, the simplest way to distinguish specific and general intent offences is to compile lists of the offences that have been so categorized by the courts.⁸⁵ Of course, that does provide an answer for offences not already determined.

In addition to undue complexity and no meaningful criteria for distinguishing the two types of offences, there are other objections to our current law. Those that are relevant to this paper have now largely been transferred from the refusal to permit intoxication to cast doubt on a general intent to section 33.1. However, before turning to those issues, let me mention problems with the *Daviault* approach itself since it remains in effect for any general intent offence not involving a threat to someone's bodily integrity.

The reverse onus is itself objectionable as a violation of the presumption of innocence in section 11(d) of the Charter and not subjected to rigorous section 1 scrutiny because the Supreme Court of Canada developed it as a common law rule. Although the *Daviault* reverse onus brings it into line with the other mental capacity defences, mental disorder and sane automatism, it should not be forgotten that the judiciary devised the reverse onus for the latter and upheld the statutory reverse onus for mental disorder through arguably slipshod section 1 justification.⁸⁶

Second, in *Daviault*, the Court found unconstitutional the prior fault of becoming intoxicated as a substitute for the mental element of a general intent offence.

However, the Court left intact the other branch from *Bernard* that the "minimal

⁸⁵ Don Stuart, *supra*, note 30, at 437-39 has constructed such a list.

⁸⁶ *Chaulk*, *supra*, note 62 and *Stone*, *supra*, note 62 being the relevant cases.

intent” involved in a general intent offence may be inferred from the conduct. This was seen to be an answer to the objection that the Crown is relieved of its burden of proving the mental element when intoxication is bound up with a general intent offence. However, it does not hold up to scrutiny. Drawing an inference of a mental element from the conduct is a common method of proof of that mental element, indeed, necessary if there is no direct evidence such as a confession. However, the very point of the constitutional challenge in *Bernard* was to permit intoxication to cast doubt on that inference. Thus, in preserving the “minimal intent” approach, the Court was engaging in circular reasoning. A case not involving intoxication, *R. v. Starratt*,⁸⁷ provides a vivid illustration of the difficulty with the *Bernard* proposition. In that case, a police officer who swung around his handcuffs and struck the complainant in the mouth was acquitted because of a reasonable doubt about his intention to apply force. Yet, an intoxicated person⁸⁸ in precisely the same position as Starratt would be convicted because the intention to apply force, the so-called “minimal intent,” would be inferred from the conduct. In the vast majority of cases, the inference would be correct but the possibility exists that in some cases, there would potentially be reasonable doubt if the evidence of intoxication could be considered. As a matter of common sense, the intoxication of someone swinging an object such as handcuffs might well explain why the behaviour was careless, but not necessarily intentional.

⁸⁷ *R. v. Starratt* (1971), 5 C.C.C. (2d) 32 (Ont. C.A.).

⁸⁸ But not so intoxicated as to have the *Daviault* defence.

As set out above, the locus of the debate about *action libera in causa* in Canada's intoxication rules has moved from general intent offences *per se* to section 33.1. Nevertheless, the objections to the doctrine remain essentially the same. Self-induced intoxication is not defined and therefore the dividing line between voluntary and involuntary intoxication remains blurred.⁸⁹ Presumably, the test in *King*,⁹⁰ that it is involuntary intoxication if the accused had not known or could not reasonably have been expected to know that she or he would become intoxicated, remains applicable.⁹¹ Nevertheless, a definition for "self-induced" or a reversion to the language of voluntary or involuntary conduct in becoming intoxicated would have been helpful.

More importantly, section 33.1 preserves the substitution of becoming voluntarily intoxicated for the *mens rea* of a general intent offence. While, on the *Vickberg* interpretation,⁹² the liability of an intoxicated offender is assessed on whether there was a marked departure from the reasonable person standard when committing a general intent violent offence, liability is nevertheless on the basis of substituted fault. This is because, by virtue of being intoxicated, the offender's liability is judged through this reduced standard, rather than by the normal fault requirement for that offence. Moreover, the fault is determined on an objective

⁸⁹ See the discussion in section IV.B above.

⁹⁰ *Supra*, note 43.

⁹¹ In *R. v. Chaulk*, 2007 NSCA 84, *Vickberg*, *supra*, note 64, at paras. 52-55 and *Brenton*, *supra*, note 72, at para. 32, *King* was followed.

⁹² *Supra*, note 64.

basis, although it is more than simple negligence since the provision stipulates that there must be a marked departure from the reasonable person standard.

Nevertheless, this marked departure substitutes for the mental element otherwise required to be proved by the Crown. Many, if not most, offences involving a threat to bodily integrity require subjective fault. For example, in Canada, all assault and sexual assault offences require an intention to apply force and awareness of the risk that the complainant was not consenting. Where section 33.1 applies, the Crown need only prove that the conduct of assault or sexual assault showed a marked departure from the reasonable person standard.⁹³

As previously discussed,⁹⁴ section 33.1 also violates the section 7 principle that intentional conduct should be punished more severely than unintentional conduct. Where the accused is a drunken automaton whose liability is determined through section 33.1, he or she is subject to the same punishment as a person who has committed that offence while sober. Yet the intoxicated person is punished for causing harm unintentionally while the sober person is only punished if the requisite subjective state of mind has been proved.

In addition to this obvious different standard of fault for an intoxicated offender as compared with a sober offender charged with the same offence, there are other complaints. First, it is a basic principle of criminal culpability that the *actus reus* and the *mens rea* be contemporaneous. Section 33.1 violates this basic principle because

⁹³ Some offences, such as criminal negligence causing death or bodily harm, do not require subjective fault; instead, the negligent conduct must have shown a marked departure from the reasonable person standard. For these objective fault offences, my argument does not hold.

⁹⁴ See text following note 69.

the fault for the general intent offence becomes the fault in becoming intoxicated at an earlier time. Objective prior fault is especially problematic because the particular offender need not be proved to have foreseen intoxication, let alone the commission of the offence. Instead, Parliament has substituted a moral standard for what is normally a legal requirement, *mens rea*.⁹⁵ What is punishable is markedly departing from the reasonable person standard in becoming intoxicated and there is, at least arguably, absolute liability in relation to the harm caused.

There is also a problem with whether there can be any deterrent effect from this standard. Indeed, there are two problematic features of section 33.1 that weigh strongly against successful deterrence of intoxicated conduct. First, intoxicated people are simply not amenable to deterrence in any event; indeed, it is not necessary that the level of intoxication be extreme since impulsive or aggressive, rather than thoughtful and measured, behaviour are the hallmarks of intoxication.⁹⁶ At least dating back to Jeremy Bentham, grave skepticism has been advanced against deterring intoxicated individuals from committing crimes.⁹⁷ Specific deterrence fails because the individual beginning to indulge in an intoxicating substance will not be deterred from becoming intoxicated, let alone from committing the *actus reus* of a violent offence. General deterrence also fails because, even if those inclined to

⁹⁵ I addressed this argument more fully in "Specific and General Nonsense," *supra*, note 82, albeit in relation to the law before s. 33.1 was enacted.

⁹⁶ John Paul Robinson and M. Darley, "Does Criminal Law Deter? A Behavioural Science Investigation" (2004), 24 *Oxford J. of Legal Studies* 173, at 195-96.

⁹⁷ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (Oxford: Clarendon Press, 1907), at XIII.9.

become profoundly intoxicated are aware of the rules governing the defence of intoxication when sober, they will certainly not be aware when intoxicated. As well, although there is harm when an intoxicated person commits an offence against bodily integrity, this occurs only in a tiny minority of the situations where someone has become highly intoxicated. Thus, the certainty of detection and punishment that is required for successful deterrence is lacking. Moreover, if deterrence is desirable in the case of general intent offences, why is it also not desirable for specific intent offences? Moreover, while, for some specific intent offences, there is a general intent lesser included offence for which the intoxicated offender will almost always be liable, this is not always the case. For example, a reasonable doubt about the *mens rea* for murder will lead to a conviction for manslaughter. However, a reasonable doubt about the *mens rea* for theft leads to an outright acquittal. This greatly weakens any possible deterrent effect.

A second objection is that section 33.1 is actually attempting to deter negligence. Negligence is, of course, not a state of mind. Rather, it is a failure to meet a normative standard because of an absence of thought on the relevant question. H.L.A. Hart⁹⁸ argued that general deterrence may be achieved through punishing negligence because normal people on learning of the prohibition of negligent conduct will become more careful. However, when people take more care, they are advertent to the risks associated with their behaviour. Negligence is inadvertent to risks and so the general deterrence sought to be achieved can, at best, only be applicable to those who consciously choose to act in a certain way, not to those who

⁹⁸ H.L.A. Hart, *Punishment and Responsibility* (Oxford: Clarendon Press, 1968), at 19.

do not choose to act. Since intoxication is not itself normally a crime, it is difficult to see how the typical citizen will have the knowledge of the law to develop the moralizing and educative effect that is necessary for general deterrence.

It is interesting that, of all of the defences in Canada that invoke the *actio libera in causa* doctrine, the defence of intoxication (both as a negation of *mens rea* and under the *Daviault* defence) is the only one in which the fundamental concepts of a voluntary act and *mens rea* are implicated.⁹⁹ Indeed, it is the only such instance in which the “defence” is a common law defence. All of the other defences in which there is a form of *actio libera in causa* are statutory defences. Statutory duress under section 17 (actually framed as compulsion by threats in the Code) is not applicable if the accused was a party to a conspiracy or association that might subject him or her to compulsion. One of the forms of self-defence, section 35, places restrictions on the magnitude of defensive force and a requirement to retreat if the accused initiated an assault against or provoked the other person.¹⁰⁰ Another form of self defence in section 34(1) requires that the accused to have not provoked the other party. Sections 38(2), 41(2), and 42(2) and (4), defence of property provisions, all contain forms of *actio libera in causa* by deeming more than passive

⁹⁹ The only instance in which it might be said that intoxication does not implicate volition and *mens rea* would be where the accused voluntary became intoxicated in order to carry out the offence. This is a fanciful example that could not, by definition occur since the level of intoxication I am discussing is that which casts doubt on the voluntariness of the act or *mens rea*. It surely must be metaphysically impossible to purposefully become intoxicated in order to later do something without volition or *mens rea*.

¹⁰⁰ The utility of s. 35 has been greatly attenuated by the decision in *R. v. McIntosh* (1995), 36 C.R. (4th) 171 (S.C.C.), in which, as a matter of statutory interpretation, the Court held that such an accused may still rely on the less restrictive self-defence provision in s. 34(2).

resistance by a trespasser an assault, thus availing the accused once again of the self-defence provisions.¹⁰¹ Finally, the partial defence of provocation in section 232 (which reduces that which would otherwise be murder to manslaughter) states that it is not provocation for the victim to have exercised a legal right or if the accused incited the provocative conduct of the victim. In all of these statutory defences, the doctrine might be defended on the basis that the accused has consciously and knowingly engaged in the prior conduct.¹⁰² This is not the case with intoxication and therefore it is an inappropriate candidate for the application of the *actio libera in causa* doctrine.

Finally, the intoxication rules, including section 33.1, operate on the assumption that the only cause of a lack of *mens rea* is the intoxication of the offender. In reality, there may be more than one reason why a person lacked the *mens rea*. It may be, for example, that a person who has committed the *actus reus* of an offence had consumed alcohol and a prescription drug not knowing or having the means to know its effects. It may be almost impossible to say whether the resulting condition is voluntary intoxication by alcohol or involuntary intoxication by the drug or a mixture of both. Emotional states such as anger or fear would add to the difficulty of

¹⁰¹ The Code speaks only of resistance but this has been interpreted as requiring more than passive resistance: *R. v. Baxter* (1975), 33 C.R.N.S. 22 (Ont. C.A.).

¹⁰² I am not conceding that these provisions may not be criticized, perhaps on the ground of a violation of the principle of moral voluntariness, which has been held to be a principle of fundamental justice in s. 7. See, e.g.: *R. v. Ruzic* (2001) 41 C.R. (5th) 1 (S.C.C.) in which the Court held that s. 17 duress was unconstitutional in respect of its immediacy and presence requirements. The Court did not address the *actio libera in causa* component of the defence. Moral involuntariness should not be confused with the voluntariness of the *actus reus*; the term refers to the lack of a moral choice. The concept is derived from George Fletcher, *Rethinking Criminal Law* (Boston: Little, Brown & Co., 1978).

the assessment. Suppose that person also has an underlying mental disorder, perhaps short of the defence in section 16 of the Criminal Code. The analysis becomes yet more complicated. Finally, suppose the person had recently been involved in a car accident or fight and had incurred a concussion. Although it begins to resemble a law school examination, the point is that a one-dimensional view of intoxication as the reason for lacking *mens rea* is on tenuous ground indeed.

For all of the reasons advanced above, it has long been my view that abolition of the existing intoxication rules (including section 33.1) is the better course of action. Thus, for any offence requiring subjective fault, there would be a straightforward determination on all of the evidence, including intoxication, of whether the accused person has been proved to have that culpable state of mind. Of course, for offences requiring either simple negligence (strict liability offences in Canada) or gross negligence in the form of a marked departure from the reasonable person standard, intoxication would continue to be irrelevant to culpability. This is because negligence is a failure to meet a normative standard, not a state of mind. In Canada, the Supreme Court of Canada has accepted that, for criminal offences, gross negligence is a constitutionally permissible culpability standard.

It can be posited that the complicated intoxication rules in Canada and elsewhere relate to a fear on the part of the judiciary about threats to social protection if evidence of intoxication were permitted to cast doubt on the mental element for all subjective fault offences. The fear is legitimate but its magnitude is very overstated and this is clearly shown by the experience in common law jurisdictions which chose not to follow the path taken in Canada and the United Kingdom. New Zealand,

in *R. v. Kamipeli*,¹⁰³ and the non-criminal code states in Australia, in *R. v. O'Connor*,¹⁰⁴ both rejected the approach taken in *Majewski*¹⁰⁵ to restrict the defence of intoxication to specific intent offences. Instead, for all subjective fault offences, both jurisdictions simply require an assessment on all of the evidence of whether the accused acted voluntarily and with the *mens rea* required for the offence.

There has been very little controversy in either country and precious few acquittals. A judge conducted a study in Australia in the year after the decision in *O'Connor* and discovered that the defence was advanced for offences for which it had previously not been available in only eleven of 510 trials.¹⁰⁶ Although there were three acquittals in the eleven cases, only one could safely be attributed to the defence of intoxication becoming available for all subjective fault offences.

¹⁰³ *R. v. Kamipeli* (1975), 2 N.Z.L.R. 610 (C.A.).

¹⁰⁴ *R. v. O'Connor* (1980), 29 A.L.R. 449 (H.C.).

¹⁰⁵ *Supra*, note 51.

¹⁰⁶ Judge G. Smith, "Footnote to *O'Connor's Case*" (1981), 5 C.L.J. 270. The study was conducted in the state of New South Wales. However, the state of Victoria had permitted intoxication to cast doubt on the *mens rea* for all offences at least since *R. v. Keogh*, [1964] V.R. 400 (S.C. Vict.) with no apparent controversy. New South Wales has now by statute reinstated the specific/general intent rule: *Crimes Act 1900 No. 40* Ins 1983 No 180, Sch 1 (3). Rep 1990 No 11, Sch 2. Ins 1996 No 6, Sch 1. South Australia has also passed statutory amendments that affect the *O'Connor* position, although the effect on the law of intoxication is not completely clear since the amendments do not affect offences for which foresight of a consequence or awareness of circumstances is required: *Criminal Law Consolidation (Intoxication) Amendment Act 2004* (No 40 of 2004), now Part 8 of the *Criminal Law Consolidation Act 1935* (SA) http://www.austlii.edu.au/au/legis/sa/consol_act/clca1935262/. See, in particular, s. 268(3). As far as I am able to tell, these legislative developments were not in reaction to any particular case or controversy.

According to Don Stuart,¹⁰⁷ the experience was similar in New Zealand. In Canada, after *Daviault* was decided but before section 33.1 of the Code was enacted, the *Daviault* defence was advanced in eleven cases but successful only in five, of which two were later overturned on appeal.¹⁰⁸ It is no wonder, then, that the Australian conducting his study concluded that “... the decision in O’Connor’s case, far from opening any floodgates has at most permitted an occasional drip to escape from the tap.”¹⁰⁹

As the same judge put it:

No one with any experience of the criminal courts should be greatly surprised at this result for the simple practical reason that any “defence” of drunkenness poses enormous difficulties in the conduct of a case. To name but one, if the accused has sufficient recollection to describe relevant events, juries will be reluctant to believe that he acted involuntarily or without intent whereas, if he claims to have no recollection, he will be unable to make any effective denial of facts alleged by the Crown.¹¹⁰

In addition, and especially where alcohol is the intoxicant in question, most triers of fact are highly skeptical of a claim of a lack of *mens rea* particularly where the conduct in question appears purposeful. This may simply be because of the common knowledge of the effects of alcohol—that it lowers inhibitions and increases aggression.

¹⁰⁷ *Supra*, note 30, at 459, note 560, referring to a study by the New Zealand Criminal Law Reform Committee in 1984, some nine years after *Kamipeli* was decided.

¹⁰⁸ Martha Drassinower and Don Stuart, “Nine Months of Judicial Application of the Daviault Defence” (1995), 39 C.R. (4th) 280, cited in Stuart, *supra*, note 30, at 455.

¹⁰⁹ Smith, *supra*, note 106, at 277.

¹¹⁰ *Ibid.*

The benefit of ridding the law of the artificial distinction between specific and general intent (and consequently the need for section 33.1 in its present form) would be much greater clarity, consistency, and simplicity in determining criminal culpability. Adopting the Australian and New Zealand position would also permit a better assessment of the need for social protection from intoxicated offenders.

This is not to say, however, that there is no merit to the policy aims of the current law concerning intoxication. Violence, particularly violence towards women, must be addressed by our legal system. In the vast majority of cases, however, there would be no sacrifice of social protection if a straightforward assessment of voluntariness and *mens rea* occurred in all cases.

Nevertheless, the possibility remains that, in a very few cases, the claims of social protection might outweigh the application of consistent voluntariness and *mens rea* determinations. Although this has not been the case in Australia and New Zealand to any known degree, the facts in *Daviault* itself suggest this possibility. There, the accused, a chronic alcoholic, might have consumed sufficient alcohol to raise his blood alcohol level to between 400 and 600 milligrams per 100 millilitres of blood, a level that would induce coma or death in most people. While in that state, he brutally sexually assaulted an elderly woman who was partially paralyzed and in a wheelchair. Although extremely rare, even the existence of such cases points to the need for a legal mechanism to deal with the situation. In order to avoid constitutional violations and the complexity, contradiction, and other problematic features of the present law, I suggest a separate lesser included offence of dangerous intoxication.

V. PROPOSAL FOR A DANGEROUS INTOXICATION OFFENCE

Many years ago, I proposed a backup offence of dangerous intoxication where, in narrow circumstances, an offender would otherwise be acquitted on the basis of intoxication but the claims of social protection are paramount.¹¹¹ Although I hold to the main features of that proposal, the jurisprudence since, in particular the Charter jurisprudence, leads me to make some slight alterations to that proposal.

An outline of the proposal is as follows:

1. For any offence requiring subjective fault, the trier of fact should determine culpability on all of the evidence, including that of intoxication;
2. Where the offence charged involved serious personal violence or a threat thereof, the jury in a jury trial should be instructed that an acquittal on the basis of the evidence of intoxication would not be a final determination of culpability;¹¹²
3. If there was an acquittal on the original offence, the accused would become liable for the dangerous intoxication offence;
4. The trier of fact would consider liability for this offence on the evidence already heard as well as any supplementary evidence relating to the

¹¹¹ Tim Quigley, "Reform of the Intoxication Offence" (1987), 33 *McGill L.J.* 1.

¹¹² This is necessary because, in Canada, it is impermissible in a jury trial to refer to the possible punishment for an accused: *R. v. Latimer* (2001), 39 C.R. (5th) 1 (S.C.C.); *McLean v. The King*, [1933] S.C.R. 688; *R. v. Cracknell* (1931), 56 C.C.C. 190 (Ont. C.A.); *R. v. Stevenson* (1990), 58 C.C.C. (3d) 464 (Ont. C.A.). It is also necessary so that there would be a genuine determination of the voluntariness and *mens rea* of the accused.

intoxication and would determine whether the intoxicated condition had occurred through the fault of the accused;

5. The fault of the accused in becoming intoxicated would be on the standard of whether his or her conduct in becoming intoxicated exhibited a marked departure from the reasonable person standard;¹¹³
6. The punishment for such an offence should be a maximum of five years imprisonment but the emphasis should be on treatment of any substance abuse issue from which the accused suffers.

I acknowledge that there are objections to such a proposal. One of these is that there would be a tendency for the defence and the Crown to agree to a guilty plea to the dangerous intoxication offence in lieu of the substantive offence involving personal violence. My proposal would deal with this by not permitting such a guilty plea except after an acquittal on the more serious charge on the merits. Thus, the dangerous intoxication offence would operate as a lesser included offence but not one for which a plea bargain could be made.

There are, however, other objections.¹¹⁴ One of these might be termed “fair labelling” in the sense that to convict someone in the circumstances of *Daviault* of dangerous intoxication, rather than sexual assault, is to minimize the harm that that person has caused. Presumably, this is what Parliament wished to avoid in enacting

¹¹³ My original proposal provided for recklessness as the standard. However, in the interim, the Supreme Court of Canada has held that the gross negligence standard is constitutional for all but the few offences whose stigma and punishment requires subjective fault. The gross negligence standard is, however, required as a minimum fault standard for true criminal offences: *Creighton, supra*, note 28.

¹¹⁴ Isabel Grant, *supra*, note 66 has advanced some of these objections.

section 33.1. However, as the previous discussion has shown, there are serious concerns about the constitutionality of that provision. While it might be possible to add the consequence (the substantive offence) as an element of the dangerous intoxication offence, there is the risk that this might be seen as itself a constitutional violation in the sense of once again substituting a form of prior fault.¹¹⁵ Another possibility, listing the substantive offence parenthetically in the conviction for dangerous intoxication would be less susceptible to challenge but it does divert the focus from the accused's actual culpability for becoming dangerously intoxicated to the harm that was caused without voluntariness or *mens rea*.

A further objection is that the focus on treatment.¹¹⁶ The main criticism is that such an offence shifts the attention to the medical condition of the accused rather than to the moral responsibility of committing the offence. There is truth to this in a general sense but we must keep in mind that the criminal law is not intended to punish immoral behaviour without insisting on certain standards of culpability having been met. It is also true that some such offenders may not have a substance abuse issue. It is likely, however, that someone reaching a severe state of intoxication does require treatment, perhaps not just for substance abuse but for other behavioural and cognitive issues. In any case, I have attempted to respond to

¹¹⁵ In any event, it would be necessary to have some fault attached to the consequence: *Creighton, supra*, note 28. *Creighton* set this standard as foreseeability of the risk of bodily harm that is neither trivial nor transitory. This, too, would be problematic, if not in constitutional terms, then in terms of ridding the criminal law of illogical propositions. Would the reasonable person be able to foresee causing such harm from becoming intoxicated when, in the vast majority of situations, an intoxicated person does not cause such harm?

¹¹⁶ Grant, *supra*, note 66, at 384-85.

this concern by proposing a maximum available punishment of five years imprisonment for those not requiring or unamenable to or refusing treatment.

VI. CONCLUSION

Given the high incidence of intoxication of those committing criminal offences, it is not surprising that criminal law culpability theory has struggled to find appropriate responses. However, as I have argued, the conflicted morality involved in the current law in Canada has led to an overly complicated, constitutionally suspect, and unprincipled approach.¹¹⁷ A better approach is to consistently apply the usual culpability standards, assess where gaps then occur, and then respond with measures that do not contradict the culpability standards or violate the constitution. A separate lesser included offence seems to me the best, albeit not perfect, approach.

¹¹⁷ I say “conflicted morality” because, at least in the case of our most common intoxicant, alcohol, it is legally purchased and consumed and its use is very socially acceptable. Prescription drugs are legal and soft drugs such as marijuana are widely accepted.