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What are Intoxicated Offenders Responsible for? The "Intoxication Defense" Re-examined

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Abstract I provide a brief history of the common law governing the criminal liability of intoxicated offenders, and the codification and application of the intoxication rules in Canada. I argue that the common law and its statutory application in Canada violate a number of principles of criminal justice. I then argue that the rules cannot be saved by attempts to subsume them under principles of prior fault. I end with a modest proposal for law reform.

Keywords Automatism · Criminal defenses · Intoxication · *Mens rea* · Moral fault · Prior fault · Responsibility · Substitution · Voluntariness

Brief History of Intoxication in Criminal Law

The common law has always had difficulty dealing with intoxicated offenders. Clearly intoxication should not be an excuse or justification, nor are persons who use intoxicants exempted from meeting the demands of the criminal law or answering for their failure. Intoxication, if relevant to questions of criminal responsibility and liability, seems to be so because intoxication can affect a person's mental states. Intoxication might be relevant to the mental states of persons at the time they commit an offence, and so relevant in determining whether they had the required *mens rea* for the crime charged. If crimes require subjective *mens rea*—knowledge, intention, malice, planning, deliberation, foresight, awareness, advertent recklessness or wilful blindness—then intoxication should be relevant to assessments of guilt, because it is relevant to an essential element of such crimes. Defendants should be able to use intoxication as an evidential basis for claiming that they lacked the *mens rea* of the offence and so to raise a reasonable doubt as to fault, for all offences requiring subjective fault. Not surprisingly, then, the "intoxication defense" began as a common law defense in recognition of the fact that an accused person may be sufficiently intoxicated not to have the subjective *mens rea* for the crime charged.

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On the other hand, both policy considerations and general conditions underlying exculpation support a regime in which voluntary intoxication cannot be used to relieve persons of criminal responsibility. This tension has been played out in law in a number of ways designed to restrict the use of intoxication evidence to prevent findings of criminal responsibility.

The first modern restriction on the use of intoxication evidence comes from *Director of Public Prosecutions v. Beard* (1920), a rape and felony murder case. The House of Lords began with the common sense relevance of intoxication to *mens rea*. "That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proven in order to determine whether or not he had this intent" (pp. 501–502). This suggests that intoxication should function as the basis of a claim that the accused lacked the required *mens rea* to be guilty of the offence charged, and thus as an evidentiary consideration of relevance to proof of fault.

But the Lords then restrained this role for intoxication by developing a distinction between general intent and specific intent offences, and they limited the "defense of intoxication" to specific intent crimes. The distinction rests upon a difference with respect to the *mens rea* element of the offences. Although there is no canonical formulation of the distinction, the *mens rea* for general intent crimes is only a conscious performing of the prohibited act or the basic intent to perform it. Examples of general intent crimes include all forms of assault, manslaughter, mischief, and breaking and entering. To commit assault, for example, it is only necessary that the accused intended to apply force to another person without consent and did so.

Specific intent crimes, by contrast, require a further or ulterior purpose beyond the mere intention to perform the prohibited act, or have specified *mens rea* conditions beyond recklessness. Examples include robbery, breaking and entering with the intent to commit an indictable offence, assault to resist or prevent arrest, murder, theft, aiding and abetting a crime, attempted crimes, and being an accessory after the fact. Several scholars and jurists have challenged the dichotomy between general and specific intent as artificial, unprincipled, and indeterminate (Quigley, "Specific Nonsense?" 1987a; "A Shorn Beard" 1987b; "Reform of the Intoxication Defense" 1987c; Healy 1994; Colvin 1981. See also the Dickson dissents in *Leary v. The Queen* 1978; *R. v Bernard* 1988; *R. v. Quin* 1988; *R. v. Penno* 1990). Yet the Supreme Court of Canada adopted specific/general intent dichotomy in *Leary v. The Queen*.

The purpose of distinguishing between general (or basic) intent crimes and specific intent offences was to limit the range of cases in which a "defense of intoxication" could be raised. Intoxication evidence may be used to raise a reasonable doubt as to whether the accused had the specific fault element required for a specific intent offence, while intoxication could not be used with respect to general intent offences.

Not only did the common law make intoxication evidence inadmissible in cases involving general intent offences, but it allowed the Crown/prosecutor to substitute intoxication for the otherwise necessary fault elements of the offence. Under the common law, intoxication can be substituted for the *mens rea* of any general intent crime. Thus, though intoxication may be introduced to defeat the *mens rea* requirement of specific intent crimes, it is taken to be sufficient evidence of *mens rea* for general intent offences.

The case law stems from the *D.P.P. v. Majewski* (1976). Lord Elwyn-Jones there said that the fault of becoming voluntarily intoxicated could be substituted for the *mens rea* of a general intent offence.

> If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary *mens rea* in assault cases.

The Canadian Supreme Court adopted this part of *Majewski* in *Leary* as well, and applied it in *R. v. Bernard*. McIntyre J. in *Bernard* explained the substitution rule as follows:

> The requisite state of mind [for general intent offences] may be proved in two ways. Firstly, there is the general proposition that triers of fact may infer *mens rea* from the *actus reus* itself: a person is presumed to have intended the natural and probable consequences of his actions. For example, in an offence involving the mere application of force, the minimal intent to apply that force will suffice to constitute the necessary *mens rea* and can be reasonably inferred from the act itself and the other evidence. Secondly, in cases where the accused was so intoxicated as to raise doubt as to the voluntary nature of his conduct, the Crown may meet its evidentiary obligation respecting the necessary blameworthy mental state of the accused by proving the fact of voluntary self-induced intoxication by drugs or alcohol.… The result of this two-fold approach is that for these crimes accused persons cannot hold up voluntary drunkenness as a defense. They cannot be heard to say 'I was so drunk that I did not know what I was doing.' If they managed to get themselves so drunk that they did not know what they were doing, the reckless behaviour in attaining that level of intoxication affords the necessary evidence of the culpable mental condition. Hence, it is logically impossible for an accused person to throw up his voluntary drunkenness as a defense to a charge of general intent. Proof of his voluntary drunkenness can be proof of his guilty mind. (McIntyre J. in *Bernard*, paras. 75–76)

Another result of this approach is that if an accused is charged with a specific intent offence and successfully raises intoxication as a defense, the Crown can infer proof of his fault for any lesser included general intent offence.

A further result is that general intent crimes are converted into near absolute liability offences for intoxicated defendants (Quigley 1987a, pp. 112–113; Mackay 1990, pp. 38–39). Consider an intoxicated accused person who commits the *actus reus* of a general intent offence by accident or mistake. Even if we accept the "early principle of the common law… that a voluntary destruction of will power would entitle a person to no more favorable treatment with regard to criminal conduct than a sober person," the operation of the common law in fact treats intoxicated offenders much worse than sober offenders (McIntyre J. in *Bernard*, para. 71; Horder 2004, pp. 25–29). Because being intoxicated can be substituted for the *mens rea* of general intent crimes, intoxicated offenders are denied all of the *mens rea* defenses available to sober offenders in the same circumstances. Additionally, they cannot raise any justification or excuse that requires meeting objective standards of reasonableness under the unfortunate circumstances leading to the offence. If a person must *reasonably* believe that she is under unlawful attack and has no safe avenue of escape except the use of deadly force against her attacker to have a defense of self-defense, as is true under Canadian law; or if she must *reasonably* believe that the threat from another that leads to her criminal conduct under duress is credible; or if

she must *reasonably* believe that she is facing imminent peril that compels her criminality under conditions of necessity, then she will not be able to avail herself of the justifications or excuses of self-defense, duress or necessity (Mackay 1990). Intoxicated offenders are also barred by statute in Canada from relying on a defense of honest belief in consent to defeat a charge of sexual assault, even though Canadian law only requires an honest belief in consent, not a reasonable belief, for all but intoxicated offenders (*R. v. Pappajohn* 1980; *R. v. Sansregret* 1985).

These rules apply only to those whose intoxication is voluntary or self-induced. How the common law has developed in determining whether intoxication is voluntary is itself highly problematic, though, and so must be discussed.

Voluntary or Self-Induced Intoxication

In Canada and elsewhere, there is a rebuttable presumption that impairment from alcohol or drugs is voluntary, a presumption that is rarely overcome. The intoxicated offender imagined in common law imbibes significant qualities of drugs, alcohol or both, over an extended period of time. Even if reaching a state of intoxication or impairment is not intended, any reasonable person engaging in such behaviour must anticipate that impairment might result from his actions. Indeed, it seems simply inconceivable that the person himself did not, at some point in the process of consuming the intoxicants, advert to the risk of impairment. If this was the only type of person caught by our intoxication rules, they would likely not generate the controversy they have, but this is not the only type of person who satisfies the conditions for voluntary intoxication.

The conditions on involuntary intoxication are stringent. A person cannot plead involuntary intoxication just because he did not intend to become intoxicated, or did not know or foresee that his conduct would produce intoxication. If a person ingests or consumes anything which *he knows or ought to know is an intoxicant*, he cannot plead involuntary intoxication (*R. v. King* 1962; *R. v. Tramble* 1983; *R. v. Vickberg* 1998). Among the authorities appealed to in support of this position is Justice O. W. Holmes, who wrote in *The Common Law* that: “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.” Applied to intoxication, it has been “taken as a matter of ‘common experience’ that the consumption of alcohol may produce intoxication and, therefore, ‘impairment’ …, and I think it is also to be similarly taken to be known that the use of narcotics may have the same effect” (*King* quoting Holmes).

The presumption that persons know that consumption of intoxicants is inherently dangerous and risks impairment is rarely overcome. This is so, even if the resulting intoxication is highly improbable, if it results from ingesting known intoxicants. Thus even if someone has a completely unpredictable reaction to a small amount of marijuana, for example, or someone else puts drugs into the person’s alcoholic drink without his knowledge, his resulting intoxication is not involuntary because it is in part due to his ingesting substances that are known by reasonable people to be intoxicants. (*R. v. Brenton* 1999; *R. v. Talock* 2003) Lack of fault for an offence due to involuntary intoxication can only exonerate if the intoxication itself was without fault, and fault for intoxication is in practice established merely by the consumption of anything reasonably known to be an intoxicant. Case after case demonstrates that the real test is proof of the voluntary consumption of intoxicants. As Clackson J. said, “self-induced intoxication… means the accused voluntarily consumed a substance which he knew or ought to have known was an

intoxicant and appreciated or should have appreciated that he risked becoming intoxicated" (*R. v. Huppie* 2008, para. 23, relying upon history provided by Bateman J. A. in *R. v. Chaulk* 2007). As another Canadian judge put it, "the law in Canada requires that the Court find that the accused consumed the alcohol. A successful *mens rea* defense would involve evidence that the act of drinking was prompted by threats or mistake and thus not an act of volition" (*R. v. Thompson* 1993). Put positively, if a person knows or ought to know that what he or she is voluntarily consuming is an intoxicant then any resulting state of intoxication is itself deemed to be voluntary. As Dyer J. put it, after reviewing the jurisprudence on voluntary intoxication, "a trial judge in dealing with voluntary consumption of drugs… [must] consider whether an accused person knew or had any reasonable grounds for believing that such consumption might cause him to be impaired. In so doing, I do believe the Court should not permit negligence or carelessness on the part of the accused to become a defense. I think persons who take drugs or drink voluntarily are required to act responsibly in taking them and are to be taken to reasonably understand the likely results of taking them in most cases" (*R. v. Kataria* 2005, para. 102).

In fact, however, the possibility of taking drink or drugs *responsibly* seems to be ruled out from the start. The courts have ruled, for example, that a person cannot claim to know from experience how long a sleep-aid medication takes to work to escape liability for impaired driving, though this suggests that the accused did not appreciate the risk that he would become impaired while in care and control of a vehicle. They have ruled that "It is not necessary for the Crown to show that the appellant knew the degree to which he would be affected. The Crown need only show knowledge that (the intoxicants in question) could affect him and that in fact they did so" (*R. v. Jensen* 1991, para. 25; quoting with approval *R. v. King* 1962). Generally, the courts take it as a matter of common knowledge that drugs, whether illicit, prescription or unregulated such as cold medications or sleeping aids, are known to be intoxicants and so any impairment resulting from their voluntary use is also voluntary.

The case of *R. v. Brenton* illustrates this law in practice. Mr. Brenton shared a marijuana cigarette with his landlady one evening after work. He had prior experience with the drug, though was not a habitual user, and had never had an unusual reaction to it. He smoked the joint hoping to relax before bed. Instead, he had an extreme, statistically and subjectively unpredictable reaction to the drug, producing a state of automatism, in which he assaulted his landlady. He was convicted at trial. On appeal, Brenton argued that his conviction should be overturned because his intoxication was not voluntary. "The appellant argued… that it cannot be said that he intended to become intoxicated or should have known that he would become intoxicated given the relatively small amount of marijuana he ingested. His purpose for smoking the marijuana was to relax so as to help him sleep. Therefore, it was argued, the result was an unintended and unexpected outcome and thus tantamount to non-voluntary intoxication." Justice Vertes rejected this argument: "I cannot agree with the appellant's submission. Generally speaking, if the ingestion of a drug (or alcohol) is voluntary and the risk of becoming intoxicated is within the contemplation or should be within the contemplation of the individual, then any resulting intoxication is self-induced. Involuntary intoxication is generally confined to cases where the accused did not know he or she was ingesting an intoxicating substance (such as where the accused's drink is spiked) or where the accused becomes intoxicated while taking prescription drugs and their effects are unknown to the accused. This is fairly basic law" (*Brenton* 1999, paras. 30 and 31). Thus it is voluntary consumption of intoxicants, rather than any subjective appreciation that impairment might result, that is the fault of intoxication, fault that can be substituted for the *mens rea* of any general intent offence.

Extreme Intoxication and Automatism

Common law has long required criminal conduct to be voluntary, the product of a controlling mind. Mere bodily movements, whether caused by a bee sting or seizure, cannot be criminal. Automatism is a defense precluding criminal responsibility for acts performed involuntarily or unconsciously, as defeating the *actus reus*. As LaForest J., writing for the majority of the Supreme Court in *R. v. Parks* (sleepwalking) explained, automatism negates the element of voluntariness. "Automatism occupies a unique place in our criminal law system. Although spoken of as a 'defense', it is conceptually a sub-set of the voluntariness requirement, which in turn is part of the *actus reus* component of criminal liability" (*R. v. Parks* 1992, p. 896). The rationale for this defense seems to hold, moreover, regardless of the cause of the automatism: sleep disorders, a blow to the head, severe psychological trauma, and more can produce automatism, and insofar as it undermines the ability of a person to act in a conscious and voluntary way, he is not criminally responsible.

Paradigmatic cases of automatism involve persons who bring about prohibited results while sleepwalking, in a disassociative state caused by a blow to the head or a severe emotional trauma, or in the throes of a seizure or other condition that undermines their ability to control their bodily movements. If I strike a person, causing him injury, while in any of these states, I will not be held criminally responsible or made liable for that harm. Whether one is in a state of automatism is conceptually determined by the degree to which one is in conscious and voluntary control of one's bodily motions and actions. It does not generally depend upon the cause of one's automatism.

Common law has, however, made two distinctions within the class of automatistic 'actions', based on their cause. First, the law distinguishes automatism caused by disease of the mind, treating such cases under broader insanity or mental defect provisions. And it distinguishes automatism resulting from extreme intoxication. When automatism is caused by voluntary intoxication, the intoxication rules apply, and thus those who commit general intent offences while in a state of automatism will be found to have sufficient fault for the crime in virtue of their intoxication.

In 1994, in *R. v. Daviault*, the Canadian Supreme Court re-examined the common law rules on automatism caused by extreme intoxication (Cory J. in *R. v. Daviault* 1994). The Court ruled that *extreme* intoxication could negative either the *mens rea* or *actus reus* of even general intent offences, and that allowing conviction in cases where the Crown has not proved the existence of the *mens rea* and *actus reus* beyond a reasonable doubt is an unjustified infringement of principles of fundamental justice and the presumption of innocence under the *Canadian Charter of Rights and Freedoms*. Since the *Charter* violation was the product of the common law intoxication rules disallowing intoxication evidence to be heard with respect to general intent offences, the Court felt free to refashion the rule so as to bring it into conformity with the *Charter* (*R. v. Swain* 1991, p. 978, and *Daviault* 1994, p. 100; see also Carter 1995). The new rule allowed that if an accused could prove on a balance of probabilities that his intoxication was so extreme as to produce a state akin to automatism, then he was entitled to an acquittal (Cory J. in *Daviault*, p. 89). Only defendants so intoxicated as to be "incapable of forming the most basic or simple intent required to perform the act prohibited by a general intent offence" would qualify for the modified intoxication defense (Ibid., p. 113).

The response to the *Daviault* decision was extraordinary. Both the popular press and many anti-violence groups condemned the Court's decision, as did many academic commentators (Shaffer 1996). That the *Daviault* case involved an allegation of sexual assault lent greater publicity to the Court's decision than it would likely have otherwise garnered;

headlines suggesting that intoxication had become a defense to rape in Canada fueled the fires of outrage. The legislature responded quickly with amendments to the Criminal Code which would remove the "defense of extreme intoxication" for offenders who commit acts of violence, even if they did so involuntarily in a state of automatism. The relevant subsections of s. 33.1 of the Criminal Code "Self-induced Intoxication: When Defense Not Available: Criminal fault by reason of intoxication" read as follows.

> S. 33.1 (1) It is not a defense 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 recognised 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. (Bill C-72 *An Act to Amend the Criminal Code* (Self-Induced Intoxication), 1st Session, 34th Parl. 1995; proclaimed 15 September 1995 S.C. 1995, c. 32)

Section 33.1 was introduced explicitly to close the very narrow exception that *Daviault* created to the restriction on the common law defense of intoxication. Whereas before *Daviault* no person could raise intoxication to defeat *mens rea* for any general intent crime, *Daviault* allowed that extremely intoxicated offenders could use their intoxication to raise a reasonable doubt about their *mens rea* or even *actus reus*. Section 33.1 purposefully foreclosed the possibility, opened by *Daviault*, that extremely intoxicated offenders could be acquitted of general intent crimes of violence because of their intoxication.

Objections to the Intoxication Rules

Canadian law requires those who commit crimes of violence while in a state of automatism due to extreme intoxication to be held criminally responsible for their conduct. This violates a very fundamental principle of criminal justice: the voluntariness principle. Common law has long held that persons are responsible only for committing or bringing about the *actus reus* of a crime if their conduct is voluntary and conscious. There must be an agent whose conduct is under her voluntary and conscious control. The voluntariness component of the *actus reus* is well summed up by Vertes J. in *R. v. Brenton*.

> The concept of voluntariness… represents the fundamental principle of our criminal law that no act can be regarded as criminal unless it is a voluntary act…. Thus it is an aspect of the *actus reus*. It is the minimal requirement that acts must be conscious acts. There must be a mind capable of exercising the will-power to do the physical act that represents the crime. There must be a state of awareness on the part of the actor that he or she is doing the act. One can phrase this principle in numerous ways but the point is that voluntariness is an aspect of all crimes since all crimes must have an *actus reus*…. (*Brenton* 1999, para. 42)

Larry Alexander calls this The Voluntary Act Principle: "there can be no criminal liability in the absence of a voluntary act", and says that "it is the law in all Anglo-American jurisdictions that 'no person is guilty of a crime unless she commits a voluntary act'" (Alexander 1990, p. 85, quoting Dressler 1987, p. 65). This requirement has been incorporated in the Model Penal Code. [Model Penal Code § 2.01 (Proposed Official Draft 1962)]. (Though Douglas Husak has persuasively argued that the "act requirement" is false, his objection is to the claim that an "act" must be part of the *actus reus* for which liability is imposed. We can take his point, but still accept the other aspect of Alexander's claim here, which is that there is a requirement that the *actus reus* be committed consciously and voluntarily, whatever exactly the *actus reus* is constituted by. I am unaware of anyone who thinks that we should impose liability upon those who perform or bring about the *actus reus* of a crime while in a state of unconsciousness or lacking voluntary control over their conduct/bodily motions. Certainly Husak himself accepts the voluntariness requirement) (Husak 1998; reprinted in Husak's 2010). Canadian intoxication law violates the principle of voluntariness, requiring conviction despite a reasonable doubt as to the *actus reus*. It also violates the presumption of innocence, since it allows conviction even when the Crown has not proved an essential element of the offence.

Canadian law also requires conviction despite a reasonable doubt as to the other essential element of crimes, namely *mens rea*. To commit a crime a person must have the required "guilty mind" or fault element. Among the subjective mental elements required for different offences are intention, knowledge, foresight, wilful blindness and recklessness. Recklessness is a subjective awareness of or advertence to the risk that one's conduct might constitute or bring about the *actus reus* of the offence charged, and continuing despite that risk. Many criminal law theorists, as well as some judges, have insisted that all crimes must have subjective *mens rea*. Indeed, many theorists think that what distinguishes true crimes from regulatory offences or torts is just that the latter can be committed without subjective fault, whereas criminal conduct requires subjective awareness of the harm one does. But no criminal jurisdiction has operationalized such a blanket requirement, and all legal systems allow that some crimes can be committed with only the objective fault of (gross or criminal) negligence. Negligence is determined by what a reasonable person in the same circumstances would have known, foreseen, intended or appreciated, and gross negligence is a marked departure from what a reasonable person would have done in the circumstances. A person can bring about a prohibited result without any subjective fault, being unaware of the risk that his conduct may produce that result, negligently; here fault is based on the fact that he did not know or attend to facts that a reasonable person in the same circumstances would have attended to, and criminal fault consists of precisely this negligent failure to attend to relevant features of his circumstances, where that leads to a prohibited outcome.

Voluntariness is also a component of *mens rea*. Again Justice Vertes' summary is useful.

> Voluntariness is also linked to the *mens rea* component. It is a principle of fundamental justice that every criminal offence punishable by imprisonment must have a *mens rea* component. There must be at least some minimal mental state as an essential element of the crime…. This requirement of *mens rea* may be satisfied in different ways. There may be a subjective or an objective approach. … But there must be some *mens rea* element, as there must be an *actus reus*, since otherwise the offence would be one of absolute liability, something that in criminal law violates both [the right to life, liberty and security of the person, and the right not to be

> deprived thereof except in accordance with principle of fundamental justice] and [the presumption of innocence]…. Voluntariness is the basic constituent element of the *mens rea* requirement. The conscious doing of an act (being the *actus reus*) encompasses the intention to do it and therefore constitutes the minimal *mens rea* for general intent offences (Brenton 1999, para. 43).

Canadian law requires conviction even when the trier of fact has a reasonable doubt as to the voluntariness element of *mens rea*.

Finally, there is a required connection between the *actus reus* and *mens rea* constituting a crime: the principle of contemporaneity. *Actus non facit reum, nisi mens sit rea*: the intent and the act must concur to constitute the crime. That is, the *mens rea* must be directed to the *actus reus* itself, and they must occur, if not simultaneously, at least in tight temporal relation. This principle, too, is violated by Canadian law, since the fault of becoming intoxicated may occur prior to the criminal conduct and be in no way directed toward it or have it within the accused's contemplation while ingesting the intoxicants.

Intoxicated accused in Canada are deemed, just in virtue of fulfilling the conditions of the *actus reus* of general intent crimes of violence, to thereby have the criminal fault necessary for conviction. Canadian law deprives intoxicated offenders from relying upon the automatism defense which would be available to them if their lack of consciousness and voluntary control had been caused by any other factor than self-induced intoxication (or mental illness). This is problematic, given that automatism defeats the minimal mental elements of both the *actus reus* and *mens rea*.

The common law rule, and its subsequent codification, also relies on an unacceptable substitution rule. (For early judicial expression of this concern, see the dissenting opinions of Dickson, C. J. *Leary* and *Bernard*.) The law allows proof of intoxication to be substituted for proof of the *mens rea* element of every general intent crime involving actual or threatened bodily interference. (See *R. v. Oakes* 1986 for a general analysis of when substitution is permissible.) A substitution rule is permissible only if proof of the substituted element would lead inexorably to belief in the essential element. In *R. v. Vaillancourt*, Lamer J. (as he then was) explained: "[T]he legislature, rather than simply eliminating any need to prove the essential element, may substitute proof of a different element. In my view, this will be constitutionally valid only if upon proof beyond reasonable doubt of the substituted element it would be unreasonable for the trier of fact not to be satisfied beyond reasonable doubt of the existence of the essential element. If the trier of fact may have a reasonable doubt as to the essential element notwithstanding proof beyond a reasonable doubt of the substituted element, the substitution infringes ss. 7 and 11(*d*) [of the *Charter*]" (*R. v. Vaillancourt* 1987, p. 656; *R. v. Whyte* 1988). By 1994 the Court had concluded that allowing intoxication to be substituted for the *mens rea* of general intent crimes even in cases where the defendant was so intoxicated as to be incapable of performing a voluntary act violated the rules for legitimate substitution. As Cory J. said, "The consumption of alcohol simply cannot lead inexorably to the conclusion that the accused possessed the requisite mental element to commit a sexual assault [the charge in *Daviault*], or any other crime. Rather, the substituted *mens rea* rule has the effect of eliminating the minimal mental element required for sexual assault. Furthermore, *mens rea* for a crime so well recognized that to eliminate that mental element, an integral part of the crime, would be to deprive an accused of fundamental justice" (*Daviault*, para. 90). When construed as a substitution rule, s. 33.1 offends principles of fundamental justice as fully as did the common law.

One commentator, however, questions whether s. 33.1 should be read as a substitution rule. Instead, Heather MacMillan-Brown suggests that s. 33.1 introduces a new fault element directly. "Rather than substituting the intent to become intoxicated for the intent to commit the crime, the act of becoming 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" (MacMillan-Brown 1995, p. 332), Even if we accept this understanding of s. 33.1, the requirements for proof of voluntary intoxication currently fall so far short of what would be required for proof of *voluntary and intentional intoxication* that it will not save the law under current interpretation. This is so because a person may have voluntarily ingested what he knew or should have known was an intoxicant, but did not intend or foresee, and could not have foreseen, intoxication producing impairment or loss of conscious and voluntary control resulting. The case of Brenton illustrates that this is more than a philosopher's fancy; there have been real cases in which the risk of impairment was not and could not have been foreseen, even by a reasonable person in the same circumstances as the accused at the time of ingesting the intoxicant(s).

Many cases involve the combination of alcohol and other drugs, whether banned substances, prescription medications or over-the-counter products. Many drugs in the latter two groups contain warnings against mixing them with alcohol, but the warnings actually suggest that sleepiness might result. While it might be negligent to drive an automobile or operate dangerous equipment in circumstances where ought to anticipate extraordinary tiredness being experienced, it is doubtful that such warnings suffice to establish that a reasonable person combining a small amount of alcohol with such drugs would or ought to anticipate that he might become intoxicated and violent and actually do or threaten harm. The fact pattern in *Brenton*, involving the consumption of at most half a marijuana joint, producing loss of voluntary control and violence, raises equal concern. Such an outcome was not subjectively foreseeable, nor, I would argue, even objectively foreseeable. Even a reasonable person would not have anticipated the resulting danger. Nonetheless, the trial judge felt compelled to find the accused guilty, even though entertaining a reasonable doubt as to the voluntariness of Brenton's conduct.

Justifications of the Intoxication Rules

Are there any good reasons for thinking that the violation of basic principles of justice the intoxication rules require can be justified? Does voluntary intoxication warrant the differential treatment of intoxicated offenders?

The willingness to substitute intoxication for the *mens rea* of every general intent offence or to find in intoxication an alternate basis of criminal liability stems from the conviction that individuals who become voluntarily intoxicated are morally blameworthy for doing so. When Canadian courts have addressed the constitutionality of the restrictions on the intoxication defense, the most common jurisprudential approach has referred to the blameworthiness of becoming voluntarily intoxicated. Thus concerns about whether the restrictions violate fundamental justice, which centrally protect against punishing the "morally innocent," are thought to be more easily met, because intoxicated offenders are not morally innocent, just in virtue of their self-induced intoxication. (See Lamar C. J. for

example in *R. v. Penno* 1990. The notion of moral innocence relied upon is drawn from Fletcher 1978.) There are three general fault-based arguments that might be used to ground the moral blameworthiness of intoxicated offenders.

First, there is the doctrine of prior fault.[1] Prior fault is relevant to exculpatory defenses. If certain conditions exculpate because they make compliance with the law too onerous a burden for a humane legal system to demand, it seems reasonable to consider whether the accused person culpably created the conditions of incapacity to obey the law. As Andrew Ashworth succinctly put it, "an accused should not be permitted to rely on an incapacitating condition which arose through his own fault" (Ashworth 1975, p. 103). This doctrine finds expression in law as a limit to the defenses of necessity, duress, and self-defense. A person cannot use these defenses if, respectively, he created the situation of peril (say, lit the fire initially), if he was engaged in criminal activities with those who subsequently threatened him into committing the crime he claims was coerced (say, had been engaged in a criminal conspiracy or was a member of a criminal organization with those who subsequently coerce him), or if he was the initial aggressor (in the situation leading to an unlawful assault which he kills his attacker to repel).

The law with respect to prior fault may be acceptable for exculpatory defenses, but not for intoxication. Exculpation requires justification or excuse, in which essential reference is made to the reasons why the accused person acted as he did and the moral light in which his actions are shown; prior fault is therefore relevant (Duff 2000, 2007; Gardner 2007; Horder 2004; Tadros 2005).

Moreover, limitations on exculpatory defenses based on prior fault display the required connection between the prior fault at *T*1 and the subsequent crime at *T*2. There exists sufficient connection between the criminal act at *T*2 and the prior faulty conduct at *T*1 to ground culpability for the former in the latter: the very acts at *T*1 give rise to the need for the criminal acts at *T*2, and those engaged in them can be reasonably expected to know that their conduct at *T*1 creates just such a risk.[2] But with intoxication, the prior action involves a kind of fault, if it even is a fault, to which the criminal law ought not to avert and which may be quite independent of the subsequent criminal activity. Ingesting intoxicants may be neither immoral nor illegal, unlike prior acts of aggression or criminal enterprise. Thus while liability for acts not themselves committed with the requisite *mens rea* may well make sense if they arise from actions that are themselves criminal or a failure to perform a legal duty, thus involving prior *criminal* fault, it is not clear that prior fault can be attributed automatically to a person who engages in the legal activity of ingesting intoxicants. The prior fault of ingesting intoxicants cannot ground culpability for the later crime, moreover, unless the subsequent risk of criminality was or should have been within the contemplation of the person at the time of ingesting the intoxicants; this is not guaranteed under the law as it operates. But the more basic reason that the analogy between intoxication and these other cases fails is because intoxication is not an exculpatory defense: a justification or excuse (Ashworth 1980; Paizes 1988; Quigley 1987c; Williams 1961). Intoxication is relevant only insofar as it affects the mental states of the accused or the voluntariness of his conduct at the time of acting, and not because it shows that he acted for good or understandable reasons.

[1] The doctrine of prior fault may itself be justified by the "tracing principle" developed by Fischer and Ravizza (1988), esp. section VII in chapter 2. I have argued that the tracing principle cannot justify our legal treatment of intoxicated offenders in Dimock (2010).

[2] Thus Fischer and Ravizza's tracing principle applies, because the two acts are suitably related to one another.

Let us now ask directly the question that the prior fault argument raises: is voluntary intoxication necessarily faulty conduct? Many judges and academic commentators suggest that becoming voluntarily intoxicated is necessarily reckless. The claim must be a necessity claim if the substitution rule is to be acceptable, because voluntary intoxication creates an irrebuttable presumption of criminal fault for general intent crimes involving bodily interference. The problem with this line of argument should now be apparent. The law characterizes voluntary intoxication as intoxication resulting from the consumption of substances the person knew or *ought to have known* were intoxicants, and that he knew or *ought to have known* might cause impairment. Thus the law seems to make negligence sufficient for voluntariness, rather than the subjective standard of recklessness.

It is surely problematic, moreover, that a legally innocent action can be a conclusive basis of criminal fault, indeed, fault for a vast range of crimes, including crimes the commission of which is punishable by life imprisonment. This line of thought has attracted many, notwithstanding, because they believe that becoming intoxicated is necessarily reckless. If that were true then the substitution rule would be acceptable; proof of intoxication would suffice as proof of recklessness and so *mens rea*. But the argument trades on an ambiguity concerning "recklessness." Recklessness as the fault element of crimes is more constrained than recklessness outside law. To be guilty of a crime, a person must be reckless *with respect to the criminal act or result* specifically. It is not a crime to be reckless per se. Legal recklessness implies foresight of specific consequences or an awareness of or adverting to risks with respect to a prohibited act or result, and a decision to assume that risk. This presents a dilemma. On one horn, we must suppose that every person who becomes voluntarily intoxicated is reckless with respect to every prohibited act or result that falls within the bounds of general intent offences. This should function as a *reductio ad absurdum* of this way of understanding the argument; we cannot infer such foresight or advertence merely from the fact that a person became voluntarily intoxicated. On the other horn, we must admit that the recklessness evidenced by voluntary intoxication is not of the same kind as reckless in law, and therefore even if intoxicated offenders are reckless in some sense, it is not the sense required for criminal fault.

We should not, however, accept the general claim that becoming intoxicated is necessarily reckless, even understood in the non-legal sense of recklessness. Recklessness can be inferred from intoxication in some circumstances, but only given additional facts. A person who routinely becomes violent when he drinks alcohol, for example, could reasonably be expected to foresee the danger that he might assault someone if he drinks and so can be considered reckless with respect to that danger. But equally conceivably, a person could take all reasonable steps to avoid harming others while intoxicated, if she perceived the risk of impairment in advance.[3]

Yet the claim that becoming intoxicated is reckless persists. It is claimed that it is common knowledge that intoxication is inherently dangerous. Such a claim is especially problematic in a country like Canada, where in most provinces the state itself sells most of the alcohol available to consumers. In the latest year for which there are statistics (April 1, 2007–March 31, 2008), beer and liquor stores in Canada sold $18.8 billion worth of alcoholic beverages, or 222.9 million litres. Provincial and territorial governments realized a net income of $5.2 billion from the sale of liquor and related products. These figures underreport the actual consumption of and amount of money spent on alcohol, because they do not include liquor on which taxes are not collected or home-brewed alcohol (Statistics Canada

[3] See Dimock (2009) for additional arguments against the proposition that becoming intoxication is necessarily reckless.

2009). Canada had 26,975,718 persons over the age of 15 during this period, the age at which the Canadian government begins to study alcohol and drug use, though the legal drinking age is nowhere lower than 18 years. Canada has, then, a high rate of alcohol consumption per capita, a rate which has been increasing over the past thirty years. Yet crime rates in Canada, especially crimes of violence, have fallen in that same period ("Crime Statistics in Canada 2008" Juristat; "Firearms and Violent Crime 2008" Jusistat).

Societal data seems then to refute the claim that alcohol use is positively correlated with violent crime. And our governments have not told citizens not to consume alcohol or pharmaceuticals because of the risk of criminality. To the contrary, members of our society are inundated with advertisements extolling the pleasures of alcohol (including from government-owned liquor retailers) and promoting the ideal of better living through pharmaceuticals (which are regulated through Health Canada). Our governments certainly have not pointed, with a few notable exceptions such as impaired driving, to specific dangers that consuming intoxicants might produce. Instead, our government urges that we "drink responsibly".[4] This suggests that government thinks it is at least possible to drink responsibly, something that is incompatible with its treatment of any consumption of intoxicants as necessarily reckless.

Chester Mitchell argues that the treatment of voluntary intoxication as criminally reckless cannot be sustained on the scientific evidence (Mitchell 1988). It is simply not true that the majority of people who ingest drugs or drink, even to the point of intoxication, are thereby reckless in doing so. The probability that ingesting intoxicants will cause serious crime is simply to low statistically to allow us to infer foresight of the latter from the former. (Ibid., p. 78) This is borne out by statistics on the correlation between alcohol and crime, at a societal level, and it is also true of the use of other intoxicants that have come before the courts, including over-the-counter cold and sleep remedies, and prescription pharmaceuticals. It is not true that individuals who consume intoxicants are reckless in taking them: persons who take small amounts of intoxicants and have an unexpected adverse reaction to them producing actual impairment, and those with no prior history of adverse affects from a given intoxicant, cannot be expected to foresee a danger of criminality resulting from their conduct, because criminality is not within the ambit of such conduct.

Perhaps it might be conceded that consuming intoxicants is not necessarily reckless, but instead that it is necessarily negligent. This is the third possible fault-based argument one might attempt. Not even negligence can be inferred from the ingestion of intoxicants, however, because most North Americans take intoxicants on a regular basis (when we include not just alcohol, but also narcotics, prescription drugs and over-the-counter products) without either intoxication to the point of serious impairment or criminality resulting. Since there is no statistically significant correlation between taking intoxicants and violence, no reasonable person could be expected to foresee such a connection; reasonable persons do not foresee what is false! Certainly just based on crime statistics, we must conclude that the use of intoxicants does not pose a high risk of criminality. Thus the eventual criminal act is simply too remote and unforeseeable from the act of ingesting intoxicants, and even from becoming intoxicated, for intoxication to constitute negligence for it (Gough 1996). Unlike genuine instances of prior fault, the act of ingesting intoxicants

[4] The Liquor Control Board of Ontario uses "Please drink responsibly" as a regular feature of it community messaging, including advertising and on its bags. If the very consumption of alcohol is necessarily criminally reckless, then at the very least the government is complicit in that fault, perhaps so much so that it has lost the right to hold citizens to account for it. On the role of complicity and standing to hold responsible, see Tadros (2009).

and violence are not related such that a person should foresee the risk of one from the other.

Now someone may object that I have dismissed the charge of negligence too quickly. Allowing, *arguendo*, that negligence (perhaps gross negligence) can suffice for criminal fault, law set standards of care that everyone is to meet, and punishes failure to do so. If a person unintentionally but carelessly causes harm, perhaps no wrong is done to her in holding her responsible for failing to meet the standard of care thus demanded. As H.L.A. Hart explained, a person acts negligently who fails, though unintentionally and non-deliberately, "to take the most elementary of the precautions that the law requires him to take in order to avoid harm to others" (Hart 1968, p. 147). His negligence is established by the fact that he "failed to comply with a standard of conduct with which any ordinary reasonable man *could* and *would* have complied: a standard requiring him to take precautions against harm. The word 'negligently', both in legal and non-legal contexts, makes an essential reference to an omission to do what is thus required.…" Provided the person had, when she acted, the normal capacities for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities, Hart sees no necessary injustice in punishing her for failing to take the required precautions against harming others (Ibid., pp. 147–148). The Model Penal Code incorporates this understanding of negligence, and accepts it as a form of culpability sufficient for criminal fault.

> *Negligently*. A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation… (Model Penal Code § 2.02(4)(d))

Larry Alexander has argued, contra Hart but persuasively I think, that negligence will reduce to strict liability (liability based just on causation of harm or risk, with no requirement of culpability) unless we can trace the negligent act back to a prior culpable voluntary choice made by the actor, in which case the actor will be reckless rather than negligent. Whether that is universally true, however, many acts found to be negligent by courts are so found because they are the product of a past culpable choice. It would seem that negligent acts committed by intoxicated offenders fall (or are treated by judges and legislators as if they fall) into the "sizable subclass of negligent acts where the failure of the defendant to advert to the risk was caused by some prior culpable—and hence fully voluntary—choice of the defendant" (Alexander 1990, p. 101). This approach, if it could be made to work, would have the advantages of making liability for intoxicated offences consistent with the voluntariness principle. As applied to intoxication, however, it does not in fact work.

Can we trace the negligent act (the actual offence inadvertently committed) back to a choice that was voluntary, connected in the right way to the failure to advert to the risk that the offence would be committed, and which was culpable? I have already given some reasons for thinking we cannot. First, not all intoxication results from a culpable choice, since it can result from taking an intoxicant under conditions where neither impairment nor harm was or reasonably could have been expected. Moreover, the choice to imbibe intoxicants may be a choice to engage in a perfectly legal activity. Third, even if the choice to become intoxicated is culpable, it may be too remote in the causal chain to be treated as the proximate cause of the resulting offence. This would surely be true in cases where individuals have chosen to risk intoxication in the course of trying to commit suicide by

drug overdose but in fact harmed others once intoxicated, and in cases of accidental overdose of over-the-counter cold medications. Finally, if all intoxicated offending deserves punishment because it can be traced back to the culpable choice to become or risk becoming impaired, then it seems that all intoxicated offenders bear the same degree of culpability. Yet what punishment they will be liable to will depend upon the actual offence committed and will vary accordingly. Thus it is possible that the degree of culpability involved in the prior culpable choice may be quite disproportionate to the negligent act actually charged and punished (Ibid., p. 102).

I deny that ingesting intoxicants is necessarily reckless or even negligent. Some of my arguments depend upon denying that the consumption of intoxicants is inherently dangerous. Actual intoxication itself is not even inherently dangerous, given that it leads to actual crime in <1% of cases (Mitchell pp. 88–89). This has been challenged by an anonymous referee (R) for *Criminal Law and Philosophy*. R suggests "that a drunk person rarely commits what amounts to a serious crime seems not to be the right comparison. What we need to know is how much more likely a person is to do something that amounts to a crime while drunk than while sober. That difference could be very pronounced, even if the absolute likelihood remains low." This is an interesting challenge, but I don't know how it could be determined except on evidence that actually establishes subjective reckless for the intoxication and the attendant risk of violence. Once a person has actually become intoxicated and violent we can say that the likelihood of violence is 1, of course, but it seems impossible to determine the likelihood of violence *ex ante* just on the basis of intoxication alone. Unless we know something about the person's prior experience with the intoxicant in question and past incidences of violence accompanying intoxication, we seem to have nothing more to base our predictions on than general statistical evidence. But if we have knowledge of a prior history of violence while intoxicated, then we have the basis for establishing recklessness or at least criminal negligence. A person who has a history of becoming violent while intoxicated could be expected to foresee the danger in becoming intoxicated, or at least a reasonable person in his circumstances would have foreseen it.

Even if imbibing intoxicants is not reckless or negligent per se, a person might nonetheless attempt to rescue the intoxication rules on the grounds that holding persons responsible for crimes they commit while intoxicated is just a case of (bad) moral luck. In many areas of life we accept that what a person is responsible for depends upon luck. By becoming intoxicated, persons place themselves in a position where they may do great harm, and even if their doing that harm depends upon their also suffering moral luck, no wrong is done to them in holding them responsible for the harm caused. This seems a desperate ploy.

First, it is true that under tort law we are often held responsible, and made to compensate, for moral luck. Even here, though, some proof of negligence is typically required. But no one thinks that criminal liability should attach just on the basis of moral luck.[5]

[5] One except might seem to be Tony Honoré, who argues in "Responsibility and Luck: The Moral Basis of Strict Liability" that strict liability (liability that attaches to us in virtue of our conduct and its outcome alone, irrespective of fault) may be morally defensible. But even he restricts the use of strict liability to criminal sanction against those whose suffer bad luck in producing unwanted outcomes only from conduct that is "dangerous: storing explosives, running nuclear power stations, keeping wild animals, marketing drugs or other dangerous products, and… driving a car" (see Honoré 1999, p. 23). Even though Honoré is arguing in favour of outcome responsibility, it is not clear that he means his account to apply to criminal sanctions as well as tort remedies, since he accepts that criminal responsibility requires either fault or special danger, but then talks in the case of special dangers as giving rise to a duty to compensate victims, rather than the right of the state to impose criminal punishment (see also Lewis 1988).

Criminal liability would be grounded just on moral luck unless there was an underlying requirement of fault, however conceived. Moral luck is not typically accepted as a basis of criminal liability unless there is underlying fault of a kind the criminal law should attend to. Think of the paradigmatic cases. Two people drive home after an evening of heavy drinking, all other relevant facts held the same between them. One hits a child who runs into the street and the other, being lucky in that no child runs into his street, arrives safely home. Or think of the thin skull rule requiring that we take our victim as we find him. It may be just a matter of moral luck that the person I punch suffers from an underlying condition that results in my punch doing more serious injury to my victim than your similar punch does to your non-thin-skulled victim.[6] But if my victim dies and yours does not, a result depending only on luck, I'm guilty of manslaughter while you only of assault. What these examples actually show is that there must be some underlying criminal fault, such as drunk driving or assault, before moral luck can influence our criminal responsibility for outcomes. If neither of us is driving drunk, and is otherwise attentively and lawfully operating well-maintained licensed vehicles, then moral luck alone will not license holding the driver who hits the unfortunate child in a tragic accident criminally liable. Tort remedies might be called for, but no criminal fault attaches. Likewise with the thin skull rule: it only becomes operative once criminal fault has been triggered, in this case the fault attaching to an intentional assault (*R. v. Adkins* 1987). If the blow is purely accidental, tort remedies again may be needed, but the label 'criminal' does not properly attach, regardless of the severity of the resulting injury. If, as I have argued, there is nothing remotely like criminal fault involved in consuming intoxicants, then the basis on which moral luck could attach is simply absent.

R has suggested, however, that if intoxication significantly increases the likelihood that a person will engage in criminal conduct compared to the likelihood of the same person engaging in criminal conduct while sober, "then this might bolster the view that getting drunk is, like some of the activities in which strict liability is imposed in tort, an 'ultra-hazardous' activity—i.e. one that, for various reasons, we do not wish to ban outright, but for which all harm will be at the feet of those who cause it while engaged in that activity. So while it may be counter-intuitive, in the way the author suggests, to describe getting drunk as 'criminally reckless,' it may be sufficiently less counter-intuitive to describe it, in light of its known effects on human cognition and decision-making, as sufficiently hazardous to put you on notice that getting drunk brings you into the land of strict liability." This is again a provocative suggestion. But it depends upon a false antecedent: it is not true that intoxication significantly increases the likelihood that a person will engage in criminal conduct. Intoxication leads to violence in <1% of cases. Furthermore, governments have not indicated that becoming intoxicated is an ultra-hazardous activity, and in places like Canada would be hard pressed to do so, given their role in promoting and directly benefiting from the consumption of alcohol. It becomes even more problematic when we remember that intoxication can result from the use of cold remedies and pharmaceuticals. Even if we could get around these difficulties, such a position would surely require a test for voluntary intoxication that insisted on subjective fault for it, if it is to place us in a position where strict liability for harms will be thereafter imposed. Such a proposal would, I would think, require much clearer warnings if it was to satisfy principles of fundamental justice, moreover, and if the law was to satisfy requirements of fair labeling.

[6] Famously *Vosburg v. Putney*, 78 Wis. 84, 47 N.W. 99 (1890); 80 Wis. 523, 50 N.W. 403 (1891). In Canada see *Smithers v. The Queen* [1978] 1 S.C.R. 506.

Possible Solutions

One possible solution is to abandon the common law rules on intoxication altogether: the specific/general intent dichotomy, substitution rule, and exclusion of intoxication evidence from triers of fact. Defendants would then be able to introduce evidence of intoxication to raise a reasonable doubt as to fault, whatever the fault elements may be. This is the approach taken in Australia, New Zealand, South Africa and other jurisdictions after experience with the common law rules. Under this approach, misleading talk of an "intoxication defense" would be jettisoned. Instead we could follow the lead of New Zealand's Court of Appeal: "Drunkenness is not a defense of itself. Its true relevance by way of defense, so it seems to us, is that when a jury is deciding whether the accused has the intention or recklessness required by the charge, they must regard all the evidence, including evidence as to the accused's drunken state, drawing such inferences from the evidence as appears proper in the circumstances" (*R. v. Kamipeli* 1975; *Bernard* 1988). This has the merit of simplicity, a virtue not to be lightly dismissed, especially in legal systems using juries as fact-finders, and where trials may involve a combination of charges, some involving specific and others general intent offences; in such cases, eliminating confusion caused by instructing juries to consider intoxication with respect to some of the charges and entirely dismiss its influence when deliberating about others would be a good thing (McCord 1990, p. 371).

Another widely supported suggestion is to introduce a new criminal offence of being dangerously intoxicated. Dangerousness could be conclusively proved by actual or threatened violence, but also by conduct that is inherently dangerous even if it has not yet produced harm. This suggestion meets many policy concerns about the link between intoxication and violence. It has other virtues, such as fair labeling and increased deterrence potential. But it does nothing to solve the problem of understanding voluntary intoxication itself too broadly. Insisting that there be meaningful *mens rea* conditions for being intoxicated in such an offence (such as MacMillan-Brown's requirement that intoxication must be voluntary and intentional) would be required for this solution to not run afoul of the basic principles of criminal justice trammeled by the common law.

The alternative I favour requires less radical reform than either of these suggestions. We should revise the common law understanding of what constitutes voluntary intoxication. If we required recklessness with respect to impairment, rather than just negligence with respect to the consumption of intoxicants, then for all practical purposes the concerns raised in this paper would dissolve. The problem with our current rules is that a person could consume something that he knows or should know is an intoxicant, yet in no way be reckless with respect to his subsequent impairment or the possibility of becoming violent when impaired. A person who consumes intoxicants that he did not foresee might cause impairment or subsequent harm, and even that a reasonable person in the same circumstances (with the same knowledge of past experience with the same intoxicant, a general understanding of his own level of tolerance for the intoxicant, the same general warnings from prescription medications, etc.) would not foresee as producing a risk of subsequent impairment or violence, should not be punished for the subsequent impairment or harm. To punish him even when the conduct leading to impairment was not reckless, or even negligent taking due account of the rarity of violence actually falling within the ambit of danger created by consumption, is to punish either his intoxication itself or his bad moral luck. Neither is acceptable. The first is ruled out as violative of fair labeling. And it should not be possible for liability to prison sentences including life imprisonment to be based just on engaging in a legal activity. All else besides the fault of consuming intoxicants might be a matter of moral luck, and criminal liability should not rest just on luck.

The injustice required by the existing rules has led to some provincial judges refusing to apply the law as strictly construed. Owen-Flood J., for example, in *R. v. Vickberg* (1998), deviated from the accepted understanding of voluntary intoxication. Mr. Vickberg was a heroin addict, who was prescribed Clonidine and Imovane to alleviate his withdrawal symptoms as he tried to recover from his addiction. On the relevant day, he knowingly took six to eight Clonidine tablets; in fact, he had taken 60 Clonidine and 20 Imovane tablets. Part of Vickberg's defense was that his resulting intoxication was involuntary. In deciding this question, Owen-Flood J. set out a test for self-induced intoxication that deviates from that described above.

> The defense contends that "the act of self-induced intoxication is the predicate act upon which this section purports to establish moral blameworthiness." Clearly, the term "self-induced" was intended to be given meaning, otherwise the word "intoxication" alone would have been used. I am in agreement with the defense that "self-induced" must mean something more than simply the accused himself ingested the pills, as opposed to someone else administering them. I am satisfied that for intoxication to be self-induced, the accused must intend to become intoxicated, either by voluntarily ingesting a substance knowing or having reasonable grounds to know it might be dangerous, or by recklessly ingesting such a substance. I am unable to find, beyond a reasonable doubt, that Vickberg's intoxication was self-induced as this term is used in s. 33.1. Therefore, I hold that s. 33.1 is inapplicable to the facts of this case. (*R. v. Vickberg* 1998)

This decision flies in the face of common law jurisprudence in requiring proof of intentional or reckless intoxication, if such intoxication is to be the criminal fault for intoxicated offenders. Adopting such a solution would not solve all of the problems with the law on intoxication as it is practiced in Canada, but it would at least ensure that persons cannot be held criminally liable for crimes they do not have the *mens rea* for due to a condition they were not even reckless in creating.

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