Intoxication in the Codification of Canadian Criminal Law

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Summary of the Argument

1. There are two primary options: whether to codify an open or a limited defence and, second, whether to create some form of criminal liability for intoxicated conduct. "Open" means the relevance of evidence of intoxication is not artificially restricted by rules of law but left to the trier of fact to weigh in relation to the issues before the court, and "limited" means that the relevance of intoxication is artificially restricted.

2. The limited defence at common law in Canada, which rests on the distinction between specific and general intent, is untenable. The distinction is specious because it is incoherent in the sense that it describes no discernible mental state otherwise known in the general part of the criminal law. Moreover, it is inconsistent with fundamental principles of criminal justice, including the requirement of fault, the presumption of innocence and the principle of contemporaneity. Any codification of the general part should exclude the limited defence currently recognized in Canadian law.

3. Any other limitation of the defence of self-induced intoxication also risks infringement of one or more of these fundamental principles of criminal justice.

4. An open defence would avoid these objections but it must be taken as an imperative of policy that people who do harm while intoxicated should not easily escape criminal liability.

5. Proposals to punish intoxicated conduct can take several forms. These include an alternative verdict of committing the physical element of the offence charged while intoxicated; a separate offence of committing the physical element of a substantive offence while intoxicated; and an independent offence of doing harm while intoxicated. But each is open to the same objections of principle as can be made against the limited defence, and to some other objections too.

6. As the objections to some form of liability for criminal intoxication are as significant as the objections to a limited defence, the best solution lies in the option that involves the least infringement of principle and the maximum effect in policy.

7. It is submitted that the three best options for codification should be ranked in order of priority as follows:

a. A limited defence, excluding intoxication as a defence to basic acts but allowing it as a defence to particular circumstances or consequences specified in the offence. Correspondingly, intoxication should be allowed with respect to mistakes concerning relevant circumstances or consequences, including circumstances giving rise to mistaken beliefs in justification or excuse.

b. An open defence in which evidence of intoxication may be considered in relation to any inculpatory or exculpatory element that is relevant to guilt.

c. An open defence with some form of liability for criminal intoxication.

With respect to (*a*), further limitation could be imposed by excluding intoxication wherever recklessness is an element in issue.

8. The order of priority is explained as follows. The second option does not satisfy legitimate concerns of policy, which are to limit the success of claims to acquittal by reason of self-induced intoxication. Given that the first option provides the simplest compromise between those considerations of policy and the logic of the general part, and does so most simply and with the least violence to principle, it should be favoured over the third. But if the first is considered to raise insurmountable objections of principle, the second should be next in priority because the objections of principle will apply equally to the first and the third.

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Introduction

On the assumption that codification of Canadian criminal law will proceed, this paper considers how intoxication might be included in such legislation. The focus of discussion is on two primary options: whether to enact an *open defence* or a *limited defence* of self-induced intoxication[1] and, second, whether to create some form of criminal liability for intoxication.

I. The recurring dilemma

At common law Canadian courts have allowed a limited defence of intoxication by restricting it to offences of so-called "specific intent" and recognising it as a basis for concluding that intoxication negates proof of specific intent beyond reasonable doubt.[2] The effect is typically to mitigate liability for the offence charged to a lesser and included offence, although there can be an unqualified acquittal if there is no alternative verdict.[3] This limited defence has been characterised as an exception to the general rule that intoxication cannot diminish or negate criminal responsibility.[4] A limited defence is more charitable to the accused than no defence at all, but the current defence at common law has been subject to repeated criticism on the primary ground that the distinction

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[1] It is inexact to speak of the "defence" of intoxication and more exact to say that sufficient evidence of intoxication can negate proof beyond reasonable doubt of guilt on the whole of the case. The "defence" of intoxication typically describes no more than a failure of proof in this sense. To the extent that the law recognises justifications or excuses based on subjective criteria, intoxicated mistakes might provide an evidentiary foundation for such claims.

[2] *Beard* [1920] A.C. 479 (H.L.); *MacAskill* [1931] S.C.R. 330; *George* [1960] S.C.R. 871; *Leary* [1978] 1 S.C.R. 29; *Bernard* [1988] 2 S.C.R. 833. *Cf. Majewski* [1977] A.C. 443 (H.L.) and *Caldwell* [1982] A.C. 341 (H.L.).

[3] *E.g.*, theft.

[4] *Reniger* v. *Fogossa* (1551) 1 Plow. 1, 75 E.R. 1. This "general rule" is now dubious, chiefly because it predates the modern era of criminal jurisprudence in which responsibility can only be attributed upon proof that the accused committed the alleged act with a prescribed mental state. By the logic of these modern principles, the general rule should be an open defence. The thrust of current debate about intoxication concerns the validity of limitations on this principle.

between specific and general intent is incoherent, untenable and unjust.[5] An open defence, by contrast, is not restricted to a class of offences or to particular elements of guilt but allows evidence of intoxication to be adduced before the trier of fact whenever it is relevant to the existence of non-existence of the mental element required for proof of guilt. This approach has been adopted at common law in Australia and New Zealand.[6] In *Daviault*,[7] which is now before the Supreme Court of Canada, the trial judge asserted that this is now also the position in Canadian law, following the opinion of Wilson J. in *Bernard*.[8]

The choice between an open and a limited defence has been characterised as a clash between the logic of the law and political anxieties.[9] The paradox in dealing with this issue is well known. For as long as the law professes commitment to modern principles of personal fault, there can be no limitation upon the defence of intoxication without contradiction of the precept that criminal responsibility can only be legitimately imposed for fault consisting of a mental state in the accused that accompanies the forbidden act. Thus, in the absence of compelling empirical evidence that intoxication cannot negate a mental state that is relevant to guilt, the effects of intoxication on the mental state of the particular accused at the time of the alleged offence must be a question for the trier of fact on the whole of the evidence.

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[5] In Canadian jurisprudence the most eloquent judicial statements of this critique remain the dissenting opinions of Mr. Justice Dickson in *Leary*, *supra*, note 2 and *Bernard*, *supra*, note 2. The secondary literature is vast.

[6] *O'Connor* (1980) 146 C.L.R. 64 (H.C. Aust.); *Martin* (1984) 58 A.L.J.R. 217 (H.C. Aust.); *Kamipeli* [1975] 2 N.Z.L.R. 610 (C.A.). See also *Chretien* 1981 (1) S.A. 1097 (A.).

[7] [1991] R.J.Q. 1794 (C.Q.), *rev'd* [1993] R.J.Q. 692; Supreme Court File No 23435. Argument in the Supreme Court was heard on 4 February 1994 and the decision was reserved.

[8] *Supra*, note 2.

[9] See, *e.g.*, *Bernard*, *ibid. per* McIntyre J. See also Law Reform Commission of Canada, *Recodifying Criminal Law*, Report 31 (1987), 31: "Logic precludes conviction, and policy and principle preclude complete acquittal."

It has been argued with great force that the distinction between specific and general intent describes no discernible mental states and that specific intent corresponds to no mental state known in the General Part of the criminal law.[10] Accordingly, the central argument against a limited defence is that it rests on a fiction that cannot be sustained empirically or normatively. The fiction is that there is no case in which an intoxicant can negate any relevant form of *mens rea* and that intoxicants can only negate focussed cognitive states rather than conative or volitional states. It is a fiction that serves no other purpose but to limit the instances in which evidence of intoxication may be considered when the trier of fact considers proof of fault.

A fresh attack in Canadian law is that the limited defence of intoxication at common law is inconsistent with guarantees provided in the *Canadian Charter of Rights and Freedoms*, notably the principles of fundamental justice in section 7 and with the presumption of innocence in section 11(*d*).[11] These views restate, in large measure, objections to the common-law defence. The thrust of the argument is that a limited defence of intoxication is inconsistent with principles of fundamental justice, including the presumption of innocence, to the extent that the restriction would permit conviction despite the possibility of reasonable doubt as to the "moral innocence" of the accused. This compendious proposition can be reformulated in different ways with different emphases. As a matter of substantive law, it might be said that the limitation on the defence of intoxication does not adequately recognise "innocent" conduct. If there may be doubt that a person is guilty, but the law decrees that evidence of intoxication is irrelevant to that decision, the law compels conviction of the innocent. Thus the question under section 7 is whether it is always inconsistent with the principles of fundamental justice to hold an accused liable for committing the external elements of an offence, even where evidence of intoxication might raise a reasonable doubt of guilt on the whole of

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[10] This point was recently addressed by the Law Commission, though not for the first time. See *Legislating the Criminal Code - Offences against the Person and General Principles*, Law Comm. 218 (Cmnd 2370, 1993), 82. See also the extensive analysis in the Commission's Consultation Paper No 127, *Intoxication and Criminal Liability* (1993), 27-35.

[11] See *Bernard*, *supra*, note 2, *per* Wilson J. See also *Korpeza* (1991) 64 C.C.C. (3d) 353 (B.C.C.A.) *per* Wood J.A.; *Canute* (1993) 20 C.R. (4th) 312 (B.C.C.A.).

the case.[12] It might also be said that conviction for the commission of an act while intoxicated purports to substitute one form of culpability (intoxication) for another (*mens rea*), with the objections either that intoxication is not an element of fault at all or that, if it is, it is not commensurate with the elements of the offence otherwise imposed by Parliament.

As a matter of adjectival law, several arguments can be raised against the limited defence of intoxication to support the conclusion that it violates the presumption of innocence. One is that the defence in effect creates a mandatory presumption of basic intent if it is assumed or asserted that proof of intoxication is proof of basic intent.[13] The presumption thus artificially eliminates an element of guilt from the definition of the offence. Moreover, the presumption itself can be attacked on the basis that the proposed inference from intoxication to basic intent is irrational in the sense that the premise does not necessarily imply the conclusion. Another variant of the same point is that the limited defence suspends the requirement of proof beyond reasonable doubt by allowing for conviction despite the possibility of reasonable doubt on some essential element of guilt. On each of these various grounds the current formulation of the limited defence is open to challenge as a violation of the presumption of innocence. It is self-evident that there would also be a violation of the presumption of innocence if a legal burden were imposed on this basis of acquittal.[14]

At the same time it is widely held that people who cause harm while intoxicated are not "morally innocent". As there is a sufficient quotient of moral blameworthiness in intoxicated wrongdoing, it is a legitimate use of the criminal sanction to attribute

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[12] In *Penno* [1990] 2 S.C.R. 865 it was suggested that evidence of intoxication might be admissible to raise a reasonable doubt of voluntariness in the *actus reus*. This point was considered at (1992) 71 Can. Bar Rev. 143, 149.

[13] *Bernard*, supra, note 2, *per* McIntyre J. This point was examined at (1990) 35 McGill L.J. 610, 625-631.

[14] The possibility of imposing a legal burden was raised by the Court in the argument of *Daviault*. It is difficult to see how this result could be reached without a violation of the presumption of innocence and even more difficult to see how a court could condone and justify such a violation *ex proprio motu*.

responsibility for such conduct.[15] The force of this position depends, obviously, on what is meant by "guilt", "blameworthiness" and "innocence" in the criminal law. This argument in favour of conviction of persons who commit criminal acts is often fuelled by reference to the high incidence of intoxication in the commission of offences. Moreover, there is a general revulsion at the prospect of acquittals for intoxicated offenders. Unless some limitation (even an artificial restriction) is placed on the defence of intoxication, there will not only be a wider chance of acquittal but, in any case, a chance of acquittal that increases with the degree of intoxication.

It is easy to mount a destructive critique of the limited defence at common law, either on the ground that the distinction between specific and general intent is nonsense or on the broader ground that any limitation is inconsistent with the principles of fundamental justice and the presumption of innocence. Moreover, there is no doubt that evidence, expert and otherwise, could be adduced in appropriate cases to support the inference that the nature and intensity of intoxication in the instant case was so severe as to negate any relevant mental state or even the voluntariness of the act. For these reasons it is frequently suggested that the law should provide an alternative means for conviction of persons who do harm while intoxicated. The attraction of this alternative, chiefly, is twofold: it avoids the tortured nonsense of the limited defence based on the distinction between specific and basic intent and, second, it meets the policy objective that intoxicated persons should not escape criminal liability for the harm they do. It is also suggested that this approach offers more flexibility in the disposition of offenders, particularly as regards therapeutic dispositions. There are many possible options for some form of liability to sanction intoxicated wrongdoing. None of these, however, is without significant difficulties and thus any exercise in codification of the law on intoxication must question whether any of these options is a net improvement over some form of limited defence that is not based on the distinction between specific and general intent.

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[15] See Sub-committee on the Recodification of the General Part of the Criminal Code of the Standing Committee on Justice and the Solicitor General, *First Principles: Recodifying the General Part of the Criminal Code of Canada* (1993), 33-38 (hereinafter cited as *First Principles*).

The difficulties include some of the same objections that can be raised against a limited defence. For example, if such liability is in any way attached to what would otherwise be the *actus reus* of a substantive offence, it would require that the element of intoxication be a valid substitute for the element of *mens rea* that would otherwise have to be proved. Yet being intoxicated is not of itself the same as that mental element. Getting intoxicated is even less comparable to the mental element because it occurs before the act causing harm and not with it. On any account an offence that includes the *actus reus* of a substantive offence would amount at the very least to an offence of negligence and, more probably, to an offence based on a principle of constructive liability in which the accused is held liable for conduct that was unforeseen and perhaps unforeseeable due to intoxication. Alternatively, if liability were not attached to the physical elements of a known substantive offence, but based on a wider principle of dangerous intoxication or intoxicated wrongdoing, the objections are no different because the crux of liability would be not only the harm done but an element of fault in *becoming* intoxicated. In sum, options for some form of liability raise objections based on fundamental principles of criminal justice, including the presumption of innocence, the principle of contemporaneity and general disdain for constructive liability. Moreover, there are other difficulties, such as the precise basis of liability (an alternative verdict or a separate offence), procedural issues and the quantum of punishment.

In short, this difficult issue appears to defy satisfactory solution in the sense that any option for legislative reform also raises serious grounds of objection. The recurring objections to a limited defence and to some form of offence overlap: violation of the presumption of innocence, violation of the principle of contemporaneity and violation of the principle that liability should be based upon proof of fault in the accused actor in the performance of a criminal act. If the same objections also arise against each of the main alternative options, perhaps the best solution lies in legislation that does least damage to these three principles and secures the highest return on objectives in policy.

Thus, and to repeat, the primary options for codification of a defence of intoxication are whether to adopt an open defence or a limited defence (and if so how to limit it) and, second, whether to adopt some form of liability for criminal intoxication.

II. The proposed section 35

On 28 June 1993 the Minister of Justice released for discussion a White Paper entitled *Proposals to Amend the* Criminal Code *(General Principles)*. These proposals were presented in the form of draft legislation and among them was Clause 10, which suggested codification of the defence of self-induced intoxication in the following terms:

35. (1) Self-induced intoxication does not form the basis of a defence to, or negate criminal responsibility for, an offence, unless

(a) the description of the offence specifies, or the law otherwise provides, that there be a motive, purpose or intention in addition to the basic intention to commit the act or omission specified in the description of the offence; and

(b) either

(i) the self-induced intoxication negates a motive, purpose or intention, other than the basic intention, referred to in paragraph (*a*), whether or not it also negates that basic intention,

or

(ii) the self-induced intoxication results in a mistaken belief as to a circumstance, whether or not the circumstance is specified in the description of the offence, which mistaken belief would form the basis of a defence to, or negate criminal responsibility for, the offence.

(2) Notwithstanding anything in this section, self-induced intoxication does not form the basis of a defence to, or negate criminal responsibility for, an offence, where

35. (1) L'intoxication volontaire n'exonère pas de la responsabilité pénale ni ne constitue un moyen de défense, sauf si, à la fois:

a) la disposition créant l'infraction, ou une autre règle de droit, précise qu'il doit y avoir, outre l'intention d'accomplir le fait constituant l'infraction, un motif, un but ou une intention particulière;

b) le motif, le but ou l'intention particulière sont absents en raison de l'intoxication, qu'il en soit de même ou non de l'intention d'accomplir le fait en cause, ou l'intoxication a pour conséquence de faire croire à tort à l'existence ou non d'une circonstance, précisée à la disposition ou non, et cette croyance exonérerait de la responsabilité pénale ou fonderait un moyen de défense.

(2) Le paragraphe (1) est inapplicable si soit la présente loi ou toute autre loi fédérale prévoit que l'intoxication ne peut fonder un moyen de défense ni exonérer de la responsabilité pénale, soit l'intoxication constitue un élément de l'infraction, soit la

personne s'était intoxiquée afin d'être en mesure de la commettre.

(a) this Act or any other Act of Parliament so provides;

(b) intoxication is an element of the offence; or

(c) the person became intoxicated in order to be fortified to commit the offence.

(3) Nothing in this section shall be construed as affecting the operation of section 16 or 16.1.

(3) Le présent article ne porte pas atteinte à l'application des articles 16 ou 16.1.

The White Paper does not include a proposal for the enactment of an offence of criminal intoxication and, to date, there has been no statement by the Government of Canada that there should be such an offence.[16]

The general orientation of section 35

Section 35 would codify the principal features of the orthodox defence at common law. The Government proposes to limit the defence of intoxication to cases in which it negates some element of "motive, purpose or intention in addition to the basic intention to commit the act or omission" or it induces a mistaken belief that "would form the basis of a defence to, or negate criminal responsibility for, the offence". The first of these restrictions is similar in principle to the notion of specific intent at common law. Indeed, it could be construed as an attempt to define specific intent.[17] It allows the conclusion that there might be at least a reasonable doubt, due to the effects of intoxication, that the accused committed the prohibited act with the requisite element of motive, purpose or

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[16] Proposals to this effect have been made by the Law Reform Commission of Canada, *supra*, note 9; the Canadian Bar Association, *Principles of Criminal Liability* (1992), 106; and the parliamentary Sub-committee, *supra*, note 15, 38..

[17] The proposed words are similar to those in s. 22 of the *California Penal Code*, which refers to "any particular purpose, motive or intent ... necessary ... to constitute any particular species or degree of crime".

intention beyond the basic intention to perform the act. As drafted, section 35 rejects the position taken by the dissenters in *Leary* and *Bernard*.

The general orientation of section 35 is positive in the sense that attempts to state when evidence of intoxication *is* relevant rather than when it *is not*. In some jurisdictions the opposite approach has been recommended, typically by saying that evidence of intoxication is irrelevant to an issue of recklessness. This approach accepts the general principle, dictated by commitment to principles of subjective fault, that in the absence of specific limitation intoxication would always be relevant to any issue of *mens rea*. Hence, it is argued, the statute need only specify the restriction of general principle, not the principle itself. This approach is not apt if the Government should choose, as it has in the White Paper, to limit the defence of intoxication by reference to some subset of mental states that has no other existence in the law. It might also be noted that no reference is made to offences in which any element of reasonableness is at issue. There is no need for this, of course, as the standard applied will always be that of the reasonable person who is not intoxicated.

Intoxicated mistakes

Section 35 would appear to say that evidence of intoxication could be relevant to any issue of inculpation or exculpation, provided that the offence charged is one that includes the element of motive, purpose of intention beyond the basic intention to perform the act. This would mean, for example, that an intoxicated mistake with respect to age would be a good claim on a charge of sexual interference or sexual exploitation.[18] It would mean that intoxication could be invoked as the basis for mistaken belief in circumstances giving rise to a justification or excuse, again provided that the offence charged is one that includes an element of "specific intent". These conclusions are broadly consistent with the apparent result in *Moreau*,[19] which was that there can only be a defence of intoxicated mistake if the mistake negates the element of specific intention

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[18] As a result of the amendment introducing subs. 150.1(4) and (5), the mistake would also have to be reasonable according to the standard of a reasonable sober person.

[19] (1986) 51 C.R. (3d) 209 (Ont. C.A.). *Cf. Murray* (1986) 31 C.C.C. (3d) 323 (N.S.S.C., App. Div.).

required for proof of the offence. Yet the precise import of both section 35 and *Moreau* is not clear. It could be argued that the Ontario Court of Appeal only allowed evidence of intoxication in relation to the particular element of specific intent in the offence. In the example of sexual interference, this could be construed to mean that intoxication would be admissible only in relation to the words "for a sexual purpose", thus excluding intoxicated mistakes as to age. As worded, however, section 35 plainly allows evidence of intoxication to be adduced to negate proof of any element in the offence charged, provided that somewhere in that offence there is an element of motive, purpose or intention beyond the basic intention to perform the act. The difference between the narrower and broader views here would not likely produce major differences in results but there is a difference in the scope of intoxication.

As regards mistaken beliefs in circumstances of justification or excuse, several points can be made. The most obvious is that when such beliefs arise in a state of intoxication they can only be adduced in evidence if justifications and excuses allow for subjective perceptions of the accused in the circumstances. If they are based solely on objective criteria of reasonable beliefs,[20] the intoxicated mistake will be irrelevant unless it would also have been held by a reasonable and unintoxicated person in the same circumstances. On the assumption that justifications and excuses will allow for some subjective element,[21] as is proposed in the White Paper, there is a further choice, which is to allow evidence of intoxicated beliefs in any instance where a justification or excuse might arise or to restrict such evidence to claims of justification or excuse that are raised against offences of "specific intent". An obvious example of the difference would be simple assault. This wider view would produce the anomaly that evidence of intoxicated mistakes might be relevant to an exculpatory claim of justification or excuse when it

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[20] See *Taylor* [1947] S.C.R. 462; *Salamon* [1959] S.C.R. 404; *Reilly* [1984] S.C.R. 396.

[21] See Criminal Law Officers Committee of the Standing Committee of Attorneys-General (Australia), *Model Criminal Code* (1992), Cl. 305:

> If any part of a defence is based on actual knowledge or belief, evidence of intoxication may be taken into consideration in order to determine whether that knowledge or belief existed. If any part of a defence is based on reasonable belief, then in determining whether that reasonable belief existed, regard must be had to the standard of a reasonable person who is not intoxicated.

would not be admissible to raise a reasonable doubt in respect of the prosecution case in chief. The answer to this particular problem must be determined by the answer given generally to the problem of intoxication. Thus, if it should be decided that the law requires an open defence of intoxication, it should be equally open in respect of all issues relevant to guilt or innocence. If a decision is taken to impose an artificial limitation on the relevance of intoxication to proof of fault, the same limitation should apply in respect of justifications and excuses.

Specific limitations

Subsection 35(2) would specify three further limitations on the defence of intoxication and, in the main, they present no controversy or difficulty in principle. Paragraph (*a*) stipulates that the general rule on intoxication might be subject to specific variation by Parliament. An obvious example is the limitation of claims of intoxicated mistakes with respect to consent in cases of sexual assault.[22] Paragraph (*b*) states the obvious: where intoxication is a necessary element of guilt, as in impaired driving, it cannot also be a sufficient basis of acquittal.[23] Finally, the exclusion of intoxication induced as Dutch courage is uncontroversial.[24] On this last point, however, the drafting might be made more precise so as to make clear that the accused has already conceived the offence at issue. This could be done by adding a further sub-paragraph to the effect

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[22] R.S.C. 1985, c. C-46, s. 273.2 (as am.).

[23] See *Penno* [1990] 2 S.C.R. 865.

[24] See *Gallagher* [1963] A.C. 349 (H.L.). In Australia the Final Report on the *Model Criminal Code* deletes this rule.

> On reflection, the Committee concluded that the rule was superfluous in the case of a person who has the relevant fault element and dangerous in the case of a person who does not. For example it is dangerous if D has a change of heart after getting drunk in order to strengthen his or her resolve to kill V, and accidentally kills V, in a car accident while driving home.

See the Report, *supra*, note 20, 51. It is not clear why this hypothetical case would not be resolved by the ordinary principles of accident and the principle of contemporaneity. It would appear to assume an arid and literal application of the rule. A better argument would seem to that it is redundant. The best argument is that the chances are almost nil that a person would form the requisite *mens rea* of an offence, become intoxicated and thereafter lack the same mental element in the commission of the act.

that intoxication cannot be adduced where the person charged "had resolved before becoming intoxicated to do the relevant act".[25]

Involuntary intoxication

The White Paper makes no specific provision for involuntary intoxication, that is intoxication that is not attributable to the responsibility of the accused. Such a provision is not strictly necessary because it can be adequately addressed by other principles of general application concerning the requirement for proof of voluntary conduct or fault. This omission from the White Paper means that the issue would be left to the common law, which provides an acquittal on the basis of the absence of fault or even voluntariness. The scope of involuntary intoxication is wider than the limited defence because it provides a complete answer to any offence and its result differs from the mitigating effect that the limited defence has in most instances. If the Government should decide eventually to adopt an open defence, it matters little for the purposes of the defence itself whether the intoxication was voluntary or involuntary, although it would matter significantly if there is serious attention given to the option of liability for intoxicated conduct. The Government would want, presumably, to avoid conviction of any person for conduct while intoxicated when that intoxication is not attributable to his or her responsibility. Given the possible variations, and the interest in thoroughness, it is suggested that the Government should include in a recodification of the law express resolution of the problem of involuntary intoxication. The principle of that provision is that a person is not criminal responsible for acts committed in a state of intoxication for which he was not responsible, provided that the intoxication also negates the guilt of the accused on the whole of the evidence.

Involuntary acts

Where intoxication leads in fact to involuntary conduct, it should lead in law to a complete acquittal based upon a failure to prove the mental element and the *actus reus* of the offence. Thus intoxication should allow for an acquittal of any charge if it induced

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[25] These words were proposed in the proposed section 3C of the *Crimes Act, 1914*, proposed in the *Crimes Amendment Act, 1990*. They are also included in the proposed section 29(2)(b) of the *Crimes Bill, 1989* (New Zealand). Neither of these measures has yet been enacted.

involuntary conduct. Canadian courts have refused to follow this logic except in cases where the accused was not responsible for his intoxication.[26] Instead, intoxication that induces a state of mental disorder has been classified as mental disorder and intoxication that otherwise induces involuntariness has been limited by the defence of intoxication rather than treated as automatism.[27] These decisions in policy allow for the state to assert supervisory and therapeutic control over a person found not guilty be reason of mental disorder and for society to convict. They allow too for conviction of any included offence of "basic intent", despite the possibility of involuntariness.

Where intoxication is so extreme as to negate any relevant mental state or the voluntariness of an act, the Government would apparently treat it as automatism with the meaning ascribed to it in the proposed section 16.1.

> **16.1** (1) No person is criminally responsible for an act committed or an omission made while in a state of automatism.
>
> (2) In this section, "automatism" means a state of unconsciousness or partial consciousness that renders a person incapable of consciously controlling their behaviour while in that state.
>
> (3) The burden of proof of showing automatism is on the party that raises the issue, on a balance of probabilities.

If indeed the Government proposes to treat automatism induced by intoxication under section 16.1, it would distinguish Canada from virtually every other jurisdiction in which codification of the general part has been contemplated. This position represents a partial endorsement and a partial rejection of the conclusions reached by Wilson J. in *Bernard* and it can be justified on the basis that an acquittal of the offence charged by reason of the special verdict of automatism proposed in section 16.1 would still entail considerable disabilities for the accused. The rationale for including it must therefore be that these disabilities provide sufficient social protection, that they are therapeutically sound and

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[26] *E.g.*, *Honish* (1991) 68 C.C.C. (3d) 329 (B.C.C.A.), *aff'd* (1993) 78 C.C.C. (3d) 96n (S.C.C.).

[27] See *McDowell* (1980) 52 C.C.C. (2d) 298 (Ont. C.A.); *Revelle* (1979) 21 C.R. (3d) 162 (Ont. C.A.), *aff'd* [1981] 1 S.C.R. 576; *King* (1982) 67 C.C.C. (2d) 549 (Ont. C.A.).

more rational than the limited defence of intoxication. These assumptions require explanation and justification by the Government.

The crux of section 16.1 is incapacity for the conscious control of behaviour. It would seem in section 16.1, even though not explicit, that a state of incapacity for the conscious control of behaviour can be induced by intoxication.[28] This is one instance where it is perhaps quite apt for the court to be directed to consider the capacity of the accused to act voluntarily but otherwise it is submitted that any formulation of the law relating to intoxication would do well to exclude any reference to capacity.[29]

Drafting

Assuming that the underlying policy is sound, the drafting of section 35 is not as precise as it could be. It is unhelpful to attempt a statutory definition of specific intent, especially when specific intent itself has no meaning in the definition of mental states proposed elsewhere in the White Paper. The phrase "motive, purpose or intention" would appear to include one point that is strictly irrelevant (motive) and another that is partly redundant (intention). If it is decided to continue with a statutory defence that is limited to some elements of guilt, that defence should be defined by reference to elements of guilt that are themselves defined elsewhere as principles of general application. This could be done by reference only to mental elements or to mental elements that are applied to aspects of the *actus reus*. For example, if it were decided that the defence should be available only in respect of intention as to consequences, the defence would be limited

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[28] See *MacKinlay* (1986) 28 C.C.C. (3d) 306 (Ont. C.A.); *Canute* (1993) 20 C.R. (4th) 312 (B.C.C.A.); *Crane* (1993) 81 C.C.C. (3d) 276 (Man. C.A.); *Cormier* (1993) 86 C.C.C. (3d) 163 (Que. C.A.); *Dumais* (1993) 87 C.C.C. (3d) 281 (Sask. C.A.); *Cooper* (1993) 18 C.R. (4th) 1 (S.C.C.). The cases cited here are chiefly concerned with "capacity" as it arises in another context. Some courts state that the capacity for intention and the existence of intention are two separate issues in cases involving intoxication, and should be treated as such. Others state the the only issue for the trier of fact is whether, due to intoxication, the accused had the requisite intention for the offence. In most instances the two approaches will not produce any conflict but the issue remains unresolved as a matter of practice. It is not an issue that requires legislative correction.

[29] This was also the position of the Law Reform Commission of Canada and the Canadian Bar Association.

by the definition of intention as to consequences.[30] Another problem with language in section 35 is the phrase "basic intention", which is imported from common-law jurisprudence. This is a misleading phrase because it uses a term of art for one mental state in a manner that does not discriminate among different mental states (*i.e.*, intention, knowledge and recklessness). It is an anachronism because it is a usage of the word "intention" that dates from a time in which all mental states were indiscriminately described as a form of intention.

These are cosmetic considerations in some respects but it would be preferable if the definition of intoxication used only terms that are used elsewhere in a codification of the General Part. To rectify this amendments of the following nature could be considered:

> (*a*) the offence requires proof of intention in respect of specified circumstances or consequences in addition to proof of any other mental state relating to the act or omission specified in the description of the offence; and
>
> (*b*) either
>
> (i) the self-induced intoxication negates the element of intention as to circumstances or consequences, whether or not it also negates any other mental state required for proof of guilt .....

This suggestion is given to show how the defence proposed could be redrafted so as to be consistent with other proposals in the White Paper. Even if the White Paper is substantially altered with respect to elements of fault, the defence of intoxication should be constructed only of terms that are explicitly used elsewhere the proposed legislation.

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[30] A proposal to this effect is found in the draft section 12.5.

II. Alternative options

A. *Implausible options*

No solution of the problem posed by acts committed in a state of intoxication will be perfect but some options for dealing with it are so imperfect that they are unworkable in the Canadian context. Four deserve mention.

1. Maintain the distinction between specific and general intent

One option would be to preserve the current limited defence of intoxication, either at common law or by enactment of words to the following effect:

> With respect to any offence that requires proof of specific intent as an element of guilt, evidence of self-induced intoxication may be considered by the trier of fact when determining whether specific intent has been proved beyond reasonable doubt.[31]

This option can only be viable on the assumption that the undefined term "specific intent" has sufficient coherence and prescriptive value to withstand theoretical scrutiny and to provide effective practical guidance. The history of Canadian experience with this approach proves that it lacks value on both counts. Moreover, there is no basis on which to suppose that the courts will continue to enforce the limited defence on its current terms.[32]

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[31] The Australian states that have criminal codes include in them provisions that purport to restate the specific-intent rule, although there are two different versions of it. In Tasmania section 17(2) of the Code makes explicit reference to specific intent without qualification: "Evidence of such intoxication as would render an accused incapable of forming the specific intent essential to constitute the offence with which he is charged shall be taken into consideration with the other evidence in order to determine whether or not he had that intent." In Western Australia and Queensland, section 28 of the Code provides as follows: "Where an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed." The "intention to cause a specific result" overlaps with instances of specific intent in Canadian law but it might be argued that the class of specific-intent offences in Canada is wider.

[32] There are indications that the Supreme Court will take a fresh look, and perhaps a fresh approach, to the matter when it decides *Daviault*.

2. Abolish any defence of intoxication

Another option would be to state the law in terms that return it to what is supposed to have been the original position.

> Self-induced intoxication is no defence to any charge and any evidence of self-induced intoxication adduced to support the inference that the accused is not guilty of the offence charged shall be excluded as irrelevant to the general issue before the court.

This severe proposal could not be considered without complete repudiation of the notion of fault based upon the mental state of the actor in committing the act. The limited defence allowed at common law rests on an acceptance that intoxication can negate at least one element of "moral guilt" and where that occurs it must follow that there is moral innocence in respect of that element. Simple abolition of any defence of intoxication would entail convictions in the absence of any mental state. No serious argument has been advanced in Canada that intoxication cannot and does not affect any mental state or the voluntariness of action,[33] and thus complete abolition of the defence must be rejected as too extreme.[34]

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[33] A majority of the Federal-Provincial Task Force that reported on Report 30 of the Law Reform Commission of Canada (1986) urged a severe restriction of the defence of intoxication:

> The defence of intoxication should not apply to any crime, unless there is a total loss of self-control, or unconsciousness; in which case the accused shall be subject to conviction for a separate offence of becoming intoxicated in a situation where there is a potential risk of interference with, endangerment of, or harm to, the person or property of another.

The dissenting member said that neither this or any other proposals for reform marked an improvement over the effect of the common-law rules.

[34] The Law Commission notes that this option has been adopted legislatively in nine American states. See *Intoxication and Criminal Liability*, Law Comm. Consultation Paper No 127 (1993), 49-50. In each instance, however, the law rests expressly on a fiction that intoxication imports either the mental element required for proof of the offence charged or an equivalent element of fault. The Law Commission quotes a model jury instruction in Virginia to this effect: "[A person] may be perfectly unconscious of what he does and yet be responsible. He may be incapable of specific intent, but the law imputes specific intent ... from the nature of the act and the circumstances under which it was committed."

3. Codify the position of Wilson J. in *Bernard*

A third option would be to legislate the solution proposed by Wilson J. in *Bernard*, which would have allowed a defence of intoxication to offences of general intent where the degree of intoxication was so severe as to be "verging on" or "akin to" automatism or insanity.[35] She appeared to describe a state of severe intoxication that approximates but falls short of mental disorder. Wilson J. thus proposes a compromise between the limited defence and the open defence, and the contingency upon which she would allow an exception is evidence of intoxication so extreme as to impair the accused in a manner akin to automatism or insanity. The compromise proposed in *Bernard* can be explained in two ways: either it is a tentative embrace of the open defence or it is a rejection of the open defence in all but the most exceptional cases. It reads as if the second were the preferred view but it is really the first in substance because the major premise of the argument is that evidence of intoxication can negate elements of the prosecution case in chief.

On either view, however, the coherence of the test proposed depends on the degree of intoxication suffered by the accused, which is described by Wilson J. in figurative language: "akin to" or "verging on" automatism or insanity is not the same as automatism or insanity. How, as a question of law, will a trial judge know whether the evidence of intoxication in the instant case is sufficient to induce severe intoxication that is "akin to" or "verging on" automatism or insanity? Even assuming that the test has enough prescriptive coherence for it to be followed as a matter of practice, it would only force a parade of expert toxicologists. Moreover, the compromise does not specify what mental states could be negated. There is no reason to suppose that it could not raise a reasonable doubt in respect of any mental state. In short, the proposed compromise does not provide a solution of principle for the problem of principle. It merely transforms the problem into a question of fact that cannot intelligibly be stated as a question of law. It would only succeed in supplanting an old set of intractable criteria by another set: some mental state just short of involuntariness or mental disorder and a degree of extreme

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[35] *Supra*, note 2, 884, 887. These phrases appear to come from the opinion of Martin J.A. in *Swietlinski* (1978) 44 C.C.C. (2d) 267 (Ont. C.A.), *aff'd* [1980] 2 S.C.R. 956. It was not clear in Wilson J.'s opinion why the law should be more generous to the accused in a case of near-automatism than it is in automatism.

intoxication. With respect, therefore, it is submitted that the test proposed by Wilson J. in *Bernard* is not a model for codification by Parliament.

4. Leave it to the courts

A fourth option is to abandon any attempt to legislate a defence of intoxication and to leave the matter to the resolution of the courts. This option is not compatible with the objective of a comprehensive enactment of the general principles of criminal liability. Moreover, the history of judicial attempts to resolve the matter suggests that the courts are not best equipped to provide an acceptable solution. The Supreme Court was profoundly divided in *Leary*[36] and *Bernard*[37] and the various reasons for judgment in *Penno*[38] were cacophonous. In *Daviault*[39] the Court must again reconsider the distinction between specific and general intent at common law. Although the facts of that case present an opportunity for a searching reconsideration of intoxication at common law, there is no reason to suppose that the Supreme Court can provide satisfactory legislation on the various issues relating to self-induced intoxication. The facts of *Daviault* simply do not present the Court with an opportunity for comprehensive treatment of the subject.

B. *Plausible options*

It is submitted that codification of intoxication in a revised General Part of the Code must proceed from two points: that the limited defence as currently formulated is unworkable and should be abandoned; second, that persons who do serious harm while intoxicated should not escape liability for their actions. The principal options for legislative reform can be reproduced schematically as follows.

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[36] *Supra*, note 2.

[37] *Supra*, note 2.

[38] *Supra*, note 11 .

[39] *Supra*, note 8.

I. The defence of intoxication (with or without liability for acts while intoxicated (see II))
- **A. Open, or**
- **B. Limited, so as to exclude**
  - **1. One or more elements of the offence**
    - **a. the voluntariness of the act**
    - **b. a mental element (perhaps specified to one or more aspects of the *actus reus*)**
      - **i. intention**
      - **ii. knowledge or wilful blindness**
      - **iii. recklessness**
  - **2. One or more aspects of a defence, justification or excuse**
    - **a. mistake as to any inculpatory element (or a subset thereof),**
    - **b. mistake as to a justification or excuse**
  - **3. Specified offences**

II. Liability for acts committed while intoxicated
- **A. An alternative verdict of conviction for committing the act charged while intoxicated**
- **B. A separate offence that includes the physical elements of the offence charged**
- **C. A separate offence that does not include the physical elements of a specified substantive offence**

There is no uniformity, or even consensus, among proposals for resolution of the problem of self-induced intoxication. This is especially apparent in federal states with divided legislative jurisdiction over criminal law, such as Australia and the United States, where two or more approaches to the issue can be found. There are several jurisdictions, including Canada, the United Kingdom (England and Wales), the United States and Australia in which successive proposals for legislative reform reveal differing and inconsistent views.

1. First option: an open or limited defence?

Most jurisdictions continue to enforce a limited defence of intoxication. Some have enacted a limited defence, including several American states that have followed the recommendation of the *Model Penal Code* that intoxication should be irrelevant to any

issue of recklessness.[40] Others have law-reform bodies that have recommended an open defence but the legislator has not acted upon the proposal.[41] Several jurisdictions have proposed an open defence with a complementary proposal for some form of liability for intoxicated wrongdoing, thus giving some evidence of the force of political considerations that bear on this issue.[42] No jurisdiction of the Commonwealth has enacted an unqualified open defence and none has enacted an open defence that is complemented by liability for intoxicated wrongdoing.

The proposal for an open defence *simpliciter* raises concerns that there would be easy acquittals and that it is inimical to the public interest to allow higher chances of acquittal with increasing levels of intoxication. It has been argued that the best defence against this fear is the common sense of triers of fact, who are not likely to be seduced to allow an acquittal by reason of intoxication. This consolation has often been reinforced by reference to an Australian study that attempted to gauge the effects of the open defence at common law that was proclaimed by the High Court in *O'Connor*.[43] That study suggests that the open defence rarely produces an acquittal. The force of this evidence is unclear, however, chiefly because it is only a small sample and not intended to be systematic or comprehensive. It might say a good deal about the administration of the law in the District Court of New South Wales at the time. In a study published in 1986 the Law Reform Commission of Victoria concluded that the law as stated in *O'Connor* has not produced disturbing results that required legislative correction, but in the same report it disclosed that in its own survey of cases (typically in magistrates' courts) there

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[40] *Model Penal Code*, s. 2.08

[41] This was the proposal in Clause 29 of the Crimes Bill 1989 (New Zealand), affirmed by the Casey Committee: see *Report of the Crimes Consultative Committee* (1991), pp. 19-20. In Australia the Criminal Law Officers have recently reached the same conclusion: see Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code: Final Report* (1992), 50-53. A minority of the Law Reform Commission of Canada reached the same conclusion: see *Recodifying Criminal Law*, Report 31 (1987), 30-32.

[42] Canada; United Kingdom; New Zealand (in part).

[43] *Supra*, note 6; see Smith, *Footnote to O'Connor's Case* (1981) 5 Crim. L.J. 270.

had been some thirty (30) acquittals due to intoxication.[44] These empirical observations are insufficient grounds on which to decide the issue in Canada. Indeed, it is submitted that empirical data cannot determine what is essentially a question of principle. Even if an open defence would yield only one acquittal of a serious offence, is that outcome desirable or tolerable? In the Court of Quebec Henri Daviault was acquitted by a judge sitting alone who had a reasonable doubt of Daviault's guilt because the evidence established extreme intoxication. Should the law provide for this outcome, even if it might be rare?

2. Second option: the manner in which the defence can be limited?

There are several ways in which a defence of intoxication could be limited and they are not mutually exclusive. Five are worthy of note and are discussed briefly below. By way of introduction, however, it seems clear that any such limitation should be based on the terms used elsewhere in a codified General Part. Less clear is whether the defence should be applicable only to specified mental states and whether it should be applicable only to mental states as they apply to particular aspects of the *actus reus* (such as consequences or circumstances). It is obvious, however, that the wider the limitation the wider the breach of principle. The Law Commission for England and Wales has proposed that intoxication is not available to negate recklessness, either in its orthodox form or in the form identified by Lord Diplock in *Caldwell*[45] and *Lawrence*.[46] In the *Model Penal Code* itself this is accomplished simply by a declaration of irrelevance. In others it is sometimes provided that an unawareness of the risks due to intoxication is itself reckless. Both approaches amount to a presumption of recklessness and the effect is to eliminate proof of that element from the prosecution case.[47] The approaches just

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[44] Law Reform Commission of Victoria, *Intention and Gross Intoxication* (1986), para. 48, cited in *Review of Commonwealth Criminal Law* (Interim Report, 1990), 117-118. In the latter review it was thought that the rate of acquittal was significant enough to cause concern. It was concluded that a codification of national criminal law in Australia should retain the limited defence of intoxication enforced in the Code states of Queensland and Western Australia (see note 31, *supra*).

[45] *Supra*, note 2.

[46] [1982] A.C. 510 (H.L.).

[47] It appears that the constitutional validity of these limited defences has been affirmed.

noted provide for a limited defence that restricts evidence of intoxication to forms of intention, as distinct from recklessness, without distinguishing between general and specific intent. The exclusion of intoxication from cases of recklessness also involves no discrimination between recklessness in the basic act and recklessness in attendant circumstances or consequences.

a. *By reference generally to the physical and mental elements in the prosecution case*

As noted previously, the Government has apparently opted to treat automatism induced by intoxication as automatism and not to treat such claims under the provisions on intoxication. This would produce a special verdict with a medical order. The merit of this position is strongest in relation to chronic alcoholics and intoxication by some drugs. Its wisdom in relation to wrongdoing done in momentary episodes of extreme intoxication is open to question on the basis that it might be too lenient and therefore politically objectionable.

The most common limitation on the defence of intoxication is one that distinguishes between recklessness and other forms of *mens rea* (*i.e.*, intention, knowledge and wilful blindness).[48] As already noted, this was the position of the American Law Institute in the *Model Penal Code* and it has been adopted on several occasions by the Law Commission for England and Wales.[49] This distinction is open to the same attacks that can be made against the limitation at common law to specific intent, especially to the argument that such a rule would eliminate recklessness from the prosecution case and create a presumption of this essential element. Unless it can be demonstrated empirically that intoxication cannot negate recklessness, the objection is that the exclusion of intoxication from issues of recklessness is no less arbitrary than the distinction between specific and general intent because it would still expose the accused to conviction despite the possibility of reasonable doubt on an issue that is essential to guilt.

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[48] In variant of this in one American state evidence of intoxication is relevant to the issue of intent in murder but it is irrelevant to any other offence.

[49] Law Comm No 143 *Codification of the Criminal Law* (H.C. 270, 1985); Law Comm. No 177, *A Criminal Code for England and Wales* (1989), cl. 22; Law Comm. Consultation Paper No 122, *Offences against the Person and General Principles* (1992); Law Comm No 218, *Legislating the Criminal Code - Offences against the Person and General Principles* (Cmnd. 2370, 1993).

The essence of this proposal is that the scope of the defence of intoxication would be defined by reference to specific elements of the prosecution case. Another problem associated with this option is that it presupposes the ability of the courts to discriminate between offences of reckless and offences involving other aspects of *mens rea*. It also presupposes an ability clearly to define various elements of fault and to identify offences in which they apply. Offences in the Special Part of the criminal law are often silent or otherwise ambivalent as to the elements of fault. The Government's White Paper proposes a definition of the various mental elements of fault but this would not eliminate uncertainty as to the elements of offences in the Special Part. Despite this difficulty, it a plausible option for dealing with intoxication in the General Part is simply to restrict its scope by reference to mental elements recognised in the law, notably intention or knowledge but not recklessness or wilful blindness.

b. *By reference to specific sub-elements of the physical and mental elements in the prosecution case*

This option, stated in these general terms, is the approach taken at common law by the distinction between specific intent and other forms of *mens rea*. While that distinction is specious, it does not necessarily follow that all such limitations are unacceptable possibilities in policy. One option that can be considered on these lines is to say that evidence of intoxication would be allowed to negate proof *mens rea* in relation to relevant circumstances or consequences but not the basic act prohibited in the offence. This formulation could be limited to intention (or knowledge) or extended to circumstances and consequences for which recklessness is the determining element.[50] This option has some similarities to the distinction between specific and general intent but it also has intuitive appeal in the sense that it is more for a trier of fact to determine whether the awareness of relevant circumstances or consequences was negated by intoxication. The primary disadvantage, in addition to some of the arguments that might be levelled against the current defence at common law, is that there is no clear way of reading the elements of an offence so as to separate basic acts from attendant

[50] It should be noted that the White Paper proposes to define intent and recklessness with respect to basic acts, circumstances and consequences. This is done in an awkward manner in the proposed section 12.5 and 12.6 but it does not follow, of course, that these distinctions are illusory or unworkable.

circumstances or consequences. This is especially true with respect to circumstances but, as shown by theft, it is also true in cases where the law seeks to punish the causation of specified events.

c. *By reference to specific types of mistake*

The position on mistakes is in part determined by any limitation imposed on a limited defence of intoxication.[51] The position with respect to mistaken beliefs in justification or excuse requires separate consideration. If a strictly objective standard of reasonableness is enforced in relation to these claims, the accused would have little basis on which to raise a justification or excuse. The rationale for this would be, in general terms, that there can be neither justification nor excuse for harm inflicted by a person whose apprehension of personal danger is induced by voluntary intoxication. If this course is not taken, and claims to justification and excuse allow for subjective standards to be used, intoxication could be relevant as the basis for a mistaken belief in the circumstances giving rise to a valid claim of justification or excuse. It has been proposed in section 35 that such mistakes should only be relevant where the claim of justification or excuse is raised to an offence of specific intent. The rationale for this limitation is that the scope of intoxicated mistakes should be no wider for justifications and excuses than it is for the elements of fault. The counter-argument is equally plausible too: to the extent that the law is committed to subjective standards as the basis for assessing culpable conduct there is no good reason to limit mistaken beliefs in justification or excuse to offences of "specific intent".

d. *By creating a list of offences to which intoxication could afford a defence*

This option has had support in Canada from the Canadian Bar Association[52] and in Britain from the Law Commission for England and Wales.[53] In both instances it was recommended that an acquittal on any one of the listed offences by reason of intoxication would entail conviction of an alternative offence of criminal intoxication. The proposal

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[51] See the discussion above at pages 10-11.

[52] Canadian Bar Association, *Principles of Criminal Liability* (1993), 106.

[53] Law Commission Consultation Paper No 127, *Intoxication and Criminal Liability* (1993), 79-80.

of the Canadian Bar Association does not include a proposed list of offences,[54] nor does it include an exposition of the principle on which such a list would be composed. Nor does it explain or justify its position with respect to any other offence that is not included on the list, although it can be surmised that the Association would favour an open defence. If so, this might lead to the anomalous conclusion that the intoxicated person who does serious wrongdoing is exposed to imprisonment for doing it intoxicated while the person charged with an offence not on the list could get a straight acquittal because he acted without fault. Another point on which the Bar Association is not clear is why it proposes that the penalty for the alternative offence should be the same as for an attempt of the offence.[55]

The proposal to restrict the scope of intoxication by reference to specified offences is an alternative to a limitation by reference to specific elements of liability. On both approaches, as already noted, there is an aspect of arbitrariness but it is far from clear that this arbitrariness would now attract constitutional censure in Canada under the Charter. Under this approach Parliament might allow intoxication as a defence to murder, which is a proposal that has found favour in other jurisdictions too. In England and Wales the Law Commission has proposed a more extensive list of offences and consideration would have to be given here to extension of the defence to other offences. At the same time attention might be given to specific *exclusion* of the defence of intoxication. Of particular significance in this regard would be offences of sexual assault. Recent amendments of the *Criminal Code* preserve in theory a commitment to subjective principles of fault for sexual offences, but would allow a defence of honest and unreasonable belief in consent only if it was not induced by intoxication. Attention might now be given to the possibility of a provision that explicitly excludes the possibility that guilt for sexual assault can be negated by evidence of intoxication.

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[54] The Law Commission proposed a tentative list of the offences: homicide; bodily harm; criminal damage; rape; indecent assault; buggery; assaulting a constable, and resisting or obstructing a constable, in the execution of his duty; violent disorder, affray and provocation of violation within the meaning the Public Order Act 1986; causing danger to road users. See Law Comm. Consultation Paper 127, *Intoxication and Criminal Liability* (1993), 79-80, 96.

[55] The Law Commission says that the "maximum punishment for the new offence should be less than, but proportionate to, that for the underlying listed offence." *Ibid.*, 81-82, 97.

e. *By imposing a legal burden on claims of intoxication*

An option would be to allow a defence of self-induced intoxication, whether the current defence or some other, but to encumber it by imposing a legal burden upon the accused. This would be no less than a deliberate violation of the presumption of innocence by Parliament, which would require further that it be justified under section 1 of the Charter as a reasonable violation of the presumption of innocence in a free and democratic society. There is ample evidence that violations of this kind are increasingly easy to sustain, and on the strength of this trend the Government appears less reticent to recommend deliberate violations of the presumption of innocence. That is apparent, for example, in the proposal in Clause 7 of the White Paper now under consideration, which suggests that automatism be codified in a new section 16.1 with a legal burden upon the accused. The specific impetus for this proposal derives from the analogy to mental disorder but it must be asked in all of these cases whether the difference between a reasonable doubt and proof on a balance of probabilities is worth a deliberate violation of the presumption of innocence. It will be only if conviction despite reasonable doubt, and in the absence of proof on the civil standard, is a more important social good that compliance with the presumption of innocence. Certainly there would be cases where the difference between an evidential and a legal burden would make the difference between acquittal and conviction, especially if a statutory defence of intoxication were open in respect of any mental state, but it is submitted that the objective of limiting acquittals by reason of intoxication can be achieved by other means than by imposition of a legal burden on the accused.

3. Third option: liability for criminal intoxication?

The proposal of an offence of criminal intoxication has often been made in an attempt to avoid the difficulties of an open defence and, at the same time, to ensure that intoxicated people who do harm will not escape criminal responsibility or sanction for their actions. The only reason to create liability for criminal intoxication is to compensate for the effects of a defence of intoxication. There are several options for some form of liability for criminal intoxication.

a. *An alternative verdict of doing the act in the substantive offence charged while intoxicated*

One obvious objection to an alternative verdict is that the alternative is in no intelligible sense the equivalent of guilt as defined in the offence charged. Thus the alternative verdict is as vulnerable to criticism for hypocrisy and contradiction as the limited defence at common law. It amounts to nothing but an open exploitation of constructive liability to avoid the effects of acquittal by reason of intoxication. The proposal of an offence of criminal intoxication can be made either by defining it in terms that include explicitly the *actus reus* of the substantive offence charged or by defining it in terms that do not.[56] Offences of this nature might be charged as alternative counts or even without charging the substantive offence that could be charged if there were no issue of intoxication.

The proposal of the Canadian Bar Association for an alternative verdict of criminal intoxication for listed offences is a variant of the proposal now under consideration. As noted, it is an approach that has been provisionally adopted in the United Kingdom by the Law Commission for England and Wales. In addition to the objections raised above, this approach is unacceptable in the absence of a clear criterion for constructing the list of offences. That criterion would not only define the scope of an alternative verdict, of course; it would impliedly define the "default" position of the law in respect of all other offences. Clearly the criterion would have something to do with serious harms but it is submitted that this is no more rational a method for convicting intoxicated wrongdoing than some other limitation on the defence of intoxication.

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[56] An early proposal on these lines was made by the Butler Committee in Britain in its *Report of the Committee on Mentally Abnormal Offenders* (Cmnd. 6244, 1975). The Committee recommended an alternative verdict of dangerous intoxication when the accused was proved to have committed the *actus reus* of a listed offence. Later a minority of the Criminal Law Revision Committee (Professor Williams and Professor Smith) adapted this proposal in their recommendation for a verdict that the accused committed the act charged while intoxicated. See Criminal Law Revision Committee, *Offences against the Person* (Cmnd 7844, 1980).

b. *A separate offence of doing the substantive offence while intoxicated, requiring that it be charged separately and that it not be available as an included offence*

This option is simply impractical because no prosecutor can know in advance of every case whether the outcome will turn on evidence of intoxication and it is unrealistic to rely on the amendment of charges to accommodate this obstacle.

c. *Some other form of separate offence*

This criticism is perhaps slightly less apposite in relation to the proposal for a substantive offence of criminal intoxication that does not refer expressly to the *actus reus* of some other substantive offence. Suppose, for example, an offence that sought to punish harm that is caused by persons who are intoxicated:

> Every one who causes harm [*viz.* bodily harm, death or serious damage to property] in a state of self-induced intoxication is guilty of an offence.[57]

Not only would any offence of this type suffer from all of the defects of constructive liability, it would multiply them by exposing people to criminal liability for accidents or other innocent occurrences that happen when they are intoxicated.

If the objection to offences of criminal intoxication is that they rest on notions of constructive liability, there are two possible answers to the objection that should be considered. One is that there is no constructive liability because intoxication in the commission of a criminal act is an equivalent element of fault in relation to criminal conduct. The other is that it is only an element of constructive liability in the limited sense of penal negligence allowed in *Creighton*.[58] Can it be argued that intoxication in the commission of an act is the equivalent of committing the act with the prescribed element of fault? The answer depends on just how elastic the concepts of "moral innocence" and "moral guilt" are in Canadian law. There is no violation of the

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[57] A stronger version of this idea was floated by Dr. Andrew Ashworth in *Intoxication and General Defences* [1980] Crim. L.R. 556, which consisted of what he called intoxication "as a kind of inchoate offence".

[58] (1993) 23 C.R. (4th) 189 (S.C.C.).

presumption of innocence, and no violation despite the possibility of "moral innocence", if committing the proscribed act while intoxicated defines a quotient of moral guilt that is the equivalent of committing the proscribed act with the mental state otherwise required for proof of guilt. This is not a "substitution" in the sense described by Lamer J. in *Vaillancourt*.[59] It is analogous to alternative modes of committing an offence, such as the distinction in paragraph 229(*a*)(i) between an intentional killing and intentional causing of bodily harm with recklessness as to death. Reliance upon recent decisions of the Supreme Court involves not only adoption of constructive liability and "penal negligence" but adoption of the rationale of social protection that is offered in those cases as an acceptable alternative to subjective principles of fault. An offence of criminal intoxication could be formulated in terms such as the following: "Every person who harms or endangers the person or property of another, while intoxicated, is guilty of an offence if such conduct shows a marked departure from the standard of reasonable conduct of a person who is not intoxicated."

An offence cast in these terms would have sweeping scope. It might be quite effective as a measure to ensure conviction of people who commit criminal acts while intoxicated but its ingredients require close examination before any proposal for implementation of this option can be considered. An obvious issue for attention is the *actus reus* for such an offence. It is arguable that an offence drawn in such wide terms should be restricted to cases of actual bodily harm, or death, and not endangerment or harm to property. Another issue is to clarify the relationship between the element of fault in the offence and the conduct. A state of intoxication must be proved as part of the *actus reus* and the offence would seem to sanction any harmful conduct that a reasonable sober person would not have done. This would not require proof that intoxication caused the accused to deviate from the standard of reasonable conduct. It would require a conclusion that the accused did something unreasonable, while intoxicated, that a reasonable person would not have done. Such an offence would create a huge range of possible liability because it amounts to a general offence of unreasonably causing harm while intoxicated. If the acts giving rise to such liability were interpreted to include omissions, the sweep of liability would be even greater. Thus there might well be

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[59] [1987] 2 S.C.R. 636.

objections to an offence of the kind proposed on the basis that its ambit is too wide and possibly even too vague. In short, while it now appears that Canadian law no longer regards liability based on subjective mental states as a principle of fundamental criminal justice, the objective standard of a marked departure from the standard of reasonable conduct is perhaps too broad a basis on which to police the problem of intoxicated conduct.

Proposals for some form of liability for intoxicated wrongdoing are rationalised on the basis that intoxication is a sufficient alternative of fault to be substituted for the element of *mens rea* otherwise required. If so, it would not violate the principle of contemporaneity even though it would mark an extension of constructive liability because its central premise is simply false. Other proposals seek to fix fault in the process of becoming intoxicated and then to extend this originating fault to the subsequent commission of harmful wrongdoing. While there might well be some element of fault in conscious self-intoxication, its extension to the later conduct stretches the transaction to the point that liability for these elements remains only a naked illustration of constructive liability.[60] The only basis on which to defeat this characterisation would be to require that self-induced intoxication by the accused carried with it a reasonably foreseeable risk that the accused would involve himself in wrongdoing.

Thus the gist of proposals for an offence of criminal intoxication is that a person who makes a responsible choice of self-intoxication is responsible for subsequently committing the *actus reus* of a criminal offence, or some other prohibited harm, while intoxicated. One premise of this is that there is sufficient fault for the attribution of criminal responsibility for being intoxicated and doing prohibited acts. Another premise is that there is sufficient fault in choosing to become intoxicated and that this element of fault extends to the commission of subsequent acts while in a state of intoxication. On

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[60] This objection can be raised against the recommendations of the Law Reform Commission of Canada as published in Report 31 (1987) and as later varied in evidence before the parliamentary sub-committee hearing submissions on recodification of the general part. The Commission originally proposed an offence of "committing the offence charged while intoxicated" but later adopted a standard of "criminal intoxication leading to the commission of the offence charged". The words "leading to" are opaque. Either they include some concept of causation, and some attendant element of fault, or they do not. The first would be difficult to establish and the second is simply unworkable.

either account, however, it is another instance of constructive liability because the *actus reus* of the proposed offence will include some element for which there is either no element of fault, or a fiction of fault, and for which there is no coherent explanation of causation. Intoxication (that is, either *getting* or *being* intoxicated) could perhaps be defined statutorily as a sufficient element of fault but that does not necessarily make it one or, if it does, it does not make it an element of fault that is transposable with any other element of fault that might be included among the elements of guilt in a substantive offence. Thus, although a separate offence of intoxication might preclude acquittal of people who perform prohibited acts while intoxicated, it does so in a manner that creates as many problems as the limited defence.

If the definition of such liability only reproduces problems that arise in relation to the defence, or if it creates new problems of equal or greater difficulty, there is no appreciable advantage over maintaining a limited defence. The obvious objection to any proposal for liability based on the intoxication of the accused is that it involves some form of constructive liability, some violation of the principle of contemporaneity, some violation of the presumption of innocence or some other violation of basic principles of criminal jurisprudence. If so, it must be asked whether there is any advantage in this form of liability over a limited defence that has the same effects and suffers the same weaknesses. Indeed, it is submitted that all three variants of an offence of criminal intoxication are flawed for the same reasons that critics attack the construction of the defence at common law.

There are other difficulties, too, with proposals for some form of liability for criminal intoxication. One is practical and it is that each of these offences would presuppose a clear decision by the trier of fact to acquit of a the offence charged by reason of intoxication. In trial by jury it would require a special verdict or a polling of the jury to ascertain the basis of decision. Another objection, also practical, has been expressed in Australia and the United Kingdom: that conviction of some form of criminal intoxication will emerge as an easy compromise for a craven or divided jury.

Another intractable problem raised by proposals for an offence of criminal intoxication is the determination of an appropriate range of penalties. There is no

compelling basis upon which to pro-rate harm committed while intoxicated by reference to harm committed with the requisite element of *mens rea* because there is rational basis for calibrating the proportionality of one to the other. The only alternative is for Parliament to stipulate a range of penalties. Professor Quigley suggested as part of his scheme a range of possibilities according to the result of the conduct at issue or the classification of the offence:

> 7. Upon conviction for an offence of dangerous incapacitation, the accused shall be liable:
>
> (*a*) where death resulted from the condition of dangerous incapacitation, to imprisonment for five years;
>
> (*b*) where the offence charged was a summary conviction offence, to punishment for a summary conviction offence;
>
> (*c*) for any other situation, to imprisonment for two years.

By contrast, the Law Commission for England and Wales expressly resiled from the option "to provide a "flat rate" maximum for all cases under the new offence",[61] precisely because it could discern no basis for setting a maximum. In a provisional conclusion the Commission said that any penalty for the new offence would have to be proportionate in the sense that the penalty for an offence of deliberate intoxication would vary with the penalty for the substantive offence that might otherwise be charged. This approach is evidently sound in its attempt to gear the severity of punishment to the harm actually caused by the conduct of the accused, but it only begs for definition of the criterion of proportionality itself as between the proposed new offence and a substantive offence. This is essentially the same difficulty that would arise in trying to determine an appropriate maximum sentence. The Canadian Bar Association recommended that conviction of the alternative offence of criminal intoxication in the commission of a listed offence should carry the maximum for an attempt of the offence. This too would seem to be, ultimately, arbitrary. The range for attempts, fixed at half of the completed offence, gives a discount for not completing the offence, even where the failure involves

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[61] Law Commission Consultation Paper No 127, *Intoxication and Criminal Liability* (1993) 81-82.

serious harm. The inculpatory elements are otherwise proved, including the element of intention. By contrast, the proposal for intoxication proceeds on the concession that there is no fault but would nonetheless fix guilt on the same tariff as attempts. This is not a rational basis for proportionality.

Conclusion

The conclusion this leaves is a choice between an open defence with some sort of liability for intoxication or a defence limited on terms to be determined. Adherence to the principle of liability for subjective fault, and further adherence to the principle of contemporaneity, compel acquittal of the accused if intoxication negates proof beyond reasonable doubt in respect of either principle. At the same time there is broad revulsion at the idea that an acquittal should be entered for self-induced irresponsibility. There is no ready solution of the choice between an open and a limited defence. There is no logical basis for the limited defence because it rests on a fiction that intoxication can negate some mental states but not others. Conversely, the open defence is opposed by many for strictly consequential reasons: if it is allowed, the criminal law will be invoked to find innocence in bad acts done by intoxicated people. A serious difficulty with either option is that each involves a measure of constructive liability. Constructive liability exists wherever liability for the whole of an offence can be imposed upon proof of part of it. Thus under the orthodox common-law defence there is constructive liability to the extent that there might be no proof of a necessary mental state other than "specific intent". This is especially clear with respect to offences in which the *actus reus* includes a specific circumstance or consequence. But any attempt to create a form of liability raises the same difficulty, even those proposals that recommend a status offence of dangerous incapacitation. The criminal law is rife with limitations that infringe the presumption of innocence and principles of fundamental justice. Virtually all of the affirmative claims such as self-defence, duress, provocation, necessity and the like are hedged by limitations that do not preclude the conviction of a person who is "morally innocent" even though these particular limitations do not apply. It has decided on at least two occasions that some limitations are constitutionally impermissible because they draw

a notion of "moral innocence" that is too narrow.[62] A limitation on the defence of intoxication thus leaves two possibilities. One is that the limitation does not infringe upon the notion of moral innocence because there is a sufficient quotient of moral guilt in committing criminal acts while intoxicated. The other is that if there is, strictly, some limitation on the notion of moral innocence it is justifiable.

Given that none of the plausible options for legislative reform can avoid all conflict with some fundamental principle of criminal jurisprudence, the best solution is the one that does it least and in the simplest manner. In order of priority, it is submitted that the best solutions are these:

> A limited defence, excluding intoxication as a defence to basic acts but allowing it as a defence to particular circumstances or consequences specified in the offence. Correspondingly, intoxication should be allowed with respect to mistakes concerning relevant circumstances and consequences.[63]
>
> An open defence in which evidence of intoxication may be considered in relation to any inculpatory or exculpatory element that is relevant to guilt.
>
> An open defence with some form of liability for criminal intoxication.

The axioms on which this proposal rests is that the defence should be limited as far as possible without violating the presumption of innocence and the principles of fundamental justice, and that liability for intoxicated acts should be extended as far as possible without violating the presumption of innocence or any other principle of fundamental justice (such as the principle of contemporaneity). Nonetheless, such violations are inherent in each of the three options. The order of priority may be explained by saying that the second option does not satisfy concerns of policy and therefore cannot be favoured. Given that the first option provides the simplest compromise between those considerations of policy

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[62] *Hess* [1990] 2 S.C.R. 906; *Langlois* (1993) 19 C.R. (4th) 87 (Que. C.A.), discussed in *Innocence and Defences* (1993) 19 C.R. (4th) 121.

[63] Perhaps this should be stated more generally and flexibly: "That the General Part include a statutory defence of intoxication that is limited in scope to one or more of the mental states [elements of guilt] specifically defined in the General Part (with or without further limitation by reference to particular aspects of the *actus reus*), and that it be extended to mistakes induced by intoxication, whether such mistakes relate to an element of guilt or a discrete exculpatory claim."

and the logic of the general part, it should be favoured over the third. But if the first is considered to raise insurmountable objections of principle, the second should be next in priority because the objections of principle will apply equally to the first and the third.