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Reform of the Intoxication Defence

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The rules which embody the defence of intoxication to a criminal charge have been the subject of much analysis and criticism on the part of academic writers, practitioners, and law reform bodies. The author, following an extensive discussion of reforms made or proposed to the intoxication defence in certain common law jurisdictions, and building on such reforms, presents his own solutions to the problems which have been identified in the existing defence of intoxication. The solutions proposed are intended to ensure, first, that determinations of *mens rea* and voluntariness remain faithful to the principles of culpability theory and, second, that the public is adequately protected in those instances where the application of culpability theory would produce results inimical to the interests of society. The former is achieved through the introduction of a wholly subjective approach to determining *mens rea* and voluntariness of the intoxicated offender. The latter is secured through the creation of a dangerous intoxication offence available where outright acquittal of the accused would pose a genuine threat to society.

De nombreux juristes et avocats praticiens de même que plusieurs commissions de réforme du droit ont analysé et critiqué les règles qui régissent la défense d'intoxication lors d'une inculpation criminelle. Après une étude approfondie des réformes apportées ou proposées à la défense d'intoxication dans certaines juridictions de *common law*, et construisant à partir de ces réformes, l'auteur propose des solutions afin de résoudre les problèmes posés par l'état actuel de notre défense d'intoxication. L'auteur veut d'abord s'assurer que les décisions sur la *mens rea* et le caractère volontaire demeurent fidèles aux principes de la théorie de la culpabilité. Aussi propose-t-il l'introduction d'une approche tout à fait subjective de la *mens rea* d'un contrevenant intoxiqué et du caractère volontaire de ses faits et gestes. L'auteur désire cependant s'assurer que le public soit adéquatement protegé dans les cas où l'application de la théorie de la culpabilité risquerait d'engendrer des conséquences néfastes pour la société. Aussi propose-t-il de créer une infraction d'intoxication dangereuse qui serait disponible lorsque l'acquittement pur et simple constituerait une menace à la société.

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Synopsis

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Introduction

In Canada, and in most other common law jurisdictions, the defence of intoxication to a criminal charge has been very controversial. Generally speaking, an accused is only culpable for a criminal offence when she engaged in voluntary conduct (the *actus reus* requirement) at the same time that she had the aware state of mind (*mens rea*) particular to the offence charged. Yet, the notion that an accused could avoid liability if a lack of *mens rea* (or voluntariness) was due to her self-induced intoxication has been anathema to most common law jurisdictions. As a result, courts have sought to meet this concern by limiting intoxication as a defence to crimes of what are called "specific intent" and refusing it for offences of "general" or "basic"

intent.[1] This dichotomy was upheld in both England and Canada in *D.P.P.* v. *Majewski*[2] and *Leary* v. *R.*,[3] respectively.

This approach has been widely criticised[4] and, indeed, abandoned in the common law states of Australia in *R.* v. *O'Connor*.[5] It is now often accepted that the terms "specific" and "general" intent do not refer to different kinds of intent, but merely indicate when the intoxication defence is or is not available.[6] In other words, the specific-general dichotomy is defensible only on grounds of policy, rather than of culpability theory.[7]

As a result of the criticisms of the present rules, it has increasingly been recognized that reform is in order. While several attempts at reform have been made in different jurisdictions, none has found enough favour with lawyers, judges, academics and legislators to be enacted as law. The Law Reform Commission of Canada, in the context of drafting a new criminal code, has wrestled with reform of the intoxication rules on several occasions. Because none of the Commission's intoxication proposals seem to deal adequately with the problems inherent in the past rules, I consider it timely, if brash, to present my own proposals.

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[1]"Basic intent" is the term used in England for what is called "general intent" in Canada. The terms will be used interchangeably in this article.

[2][1976] 2 W.L.R. 623, [1976] 2 All E.R. 142 (H.L.) [hereinafter *Majewski* cited to W.L.R.].

[3](1977), [1978] 1 S.C.R. 29, 74 D.L.R. (3d) 103 [hereinafter *Leary* cited to S.C.R.].

[4]See: the dissent of Dickson J. in *Leary*, *ibid.* at 31; the majority judgments in *R.* v. *O'Connor* (1979), [1980] 29 A.L.R. 449, [1980] Victorian Reports 635 (H.C.) [hereinafter *O'Connor* cited to A.L.R.]; A.D. Gold, "An Untrimmed 'Beard': The Law of Intoxication as a Defence to a Criminal Charge" (1976) 19 Crim. L.Q. 34; G. Parker, "Criminal Law — Mens Rea — General Principles — Intoxication as a Defence" (1977) 55 Can. Bar Rev. 691; P.B. Schabas, "Intoxication and Culpability: Towards an Offence of Criminal Intoxication" (1984) 42 U.T. Fac. L. Rev. 147; G. Orchard, "Drunkenness as a 'Defence' to Crime" (1977) 1 Crim. L.J. 59, 132; J.C. Smith, Case Comment on *D.P.P.* v. *Majewski* (1976) Crim. L.R. 374; G. Williams, "Intoxication and Specific Intent" (1976) 126 N.L.J. 658; G. Williams, *Textbook of Criminal Law*, 2d ed. (London: Stevens & Sons, 1983) at 464-83; J.C. Smith & B. Hogan, *Criminal Law*, 5th ed. (London: Butterworths, 1983) at 190-201. See also T. Quigley, "Specific and General Nonsense" (1987) 11 Dalhousie L.J. 75.

[5]*O'Connor*, *ibid.*

[6]See: Gold, *supra*, note 4; Smith & Hogan, *supra*, note 4 at 193-94; Williams, *Textbook of Criminal Law*, *supra*, note 4; D. Stuart, *Canadian Criminal Law* (Toronto: Carswell, 1982) at 361-62; Quigley, *supra*, note 4.

[7]Admittedly, not everyone is agreed that the intoxication rules are supportable only on a policy basis. For instance, with the exception of Lord Salmon, all of the judges in *Majewski* attempted to articulate ways of distinguishing one intent from the other. See also J.E. Stannard, "The Demise of Drunkenness" (1982) 2 Legal Stud. 291. For an attempt to explain offences on the basis of an implicit, three-pronged theory, see E. Colvin, "A Theory of the Intoxication Defence" (1981) 59 Can. Bar Rev. 750. All of these, including the policy arguments, are dealt with in Quigley, *supra*, note 4.

Briefly, my own proposals take as their starting point the validity of the various objections raised against the present intoxication rules. They then build on the establishment of a wholly subjective approach to *mens rea* whereby an accused who lacks the requisite state of mind (or volition) is entitled to be acquitted of that offence. For those situations where difficulties might arise from the subjective approach, and where the particular accused represents a manifest danger to the public, I propose a new offence of dangerous incapacitation. In the development of my own recommendations, I consider and criticise the various proposals for reform of the intoxication rules that have been made by different law reform bodies. Thus, my recommendations are evolutionary, not revolutionary, in that they are based in part on previous proposals. Nevertheless, I believe that new ground is broken with my proposals, new ground which I hope will prompt more discussion at a time when the Law Reform Commission of Canada has clearly recognized the need for change in this area of the criminal law.

I. The Starting Point

The starting point for reform must be the installation of a wholly subjective approach to *mens rea* irrespective of whether intoxication (or any other self-induced incapacitation) is the cause of the offence. The attractiveness of such an approach is that it would bring about consistency, simplicity and, as far as such is possible, certainty in culpability theory. No longer would it be necessary to straight-jacket "defences" such as intoxication, mistake or automatism into separate compartments, each with its own rules. Moreover, the subjective approach is the one that offers the best hope for justice for the individual accused since all of her characteristics and personal circumstances can be taken into account in deciding whether she acted voluntarily and with the state of mind particular to the offence.[8]

Why not, then, simply institute subjectivism? Courts have often expressed great fear that juries will accept spurious intoxication defences and/or that a dangerous person might go free if subjectivism were given free rein. *Majewski* and the majority in *Leary* typify this concern. The question then becomes the following: would the adoption of a wholly subjective approach confirm the worst fears expressed in *Majewski* and *Leary*?

The experience in Australia suggests otherwise. For over twenty years, the state of Victoria has managed to survive without any restriction upon

[8]See Stuart, *supra*, note 6 at 119-20.

the intoxication defence.[9] *O'Connor* extended this to the rest of common law Australia.[10] *O'Connor* has since been followed and applied in a few reported cases. Included are *Herbert, Sampson and Wurrawilya* v. *R.*,[11] *R.* v. *Martin*[12] and *R.* v. *Tucker*.[13] The paucity of cases itself suggests that no major difficulties have been encountered. Moreover, though there is little empirical data available, what little there is suggests that no serious problems have been encountered by the whole-hearted embrace of subjectivism. Mr. Justice George Smith of the District Court of New South Wales conducted a survey of approximately 510 trials held in the immediate aftermath of *O'Connor*.[14] As one might expect, the intoxication defence experienced a surge of popularity among defence counsel following *O'Connor*.[15] Nevertheless, the number of cases in which the defence was argued but could not have been relied upon until *O'Connor* was only 11 out of 510 — just over 2 percent of the total. Of the three resulting acquittals, only one could safely be attributed to acceptance of the intoxication defence. Moreover, the Court

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[9]Although the first reported case appears to have been *R.* v. *Keogh* [1964] Victorian Reports 400 (S.C. Vict.), it seems probable that a wholly subjective approach to *mens rea* was used for the intoxication defence before that case was decided. See also *R.* v. *Haywood* [1971] Victorian Reports 755 (S.C. Vict.) and *R.* v. *Bugg* [1978] Victorian Reports 251 (S.C. Vict.).

[10]New South Wales, Victoria and South Australia are common law jurisdictions. Queensland, Western Australia and Tasmania have codified their criminal law. The latter are the least populous states and, hence, have less impact on the law. Of these, only Tasmania has enacted legislation that substantially would conflict with the approach to intoxication at common law: *Criminal Code Act 1924* (Tas.), 14 Geo. 5, 1st. Sched., s. 17 still refers to incapacity to form intent and the presumption that a person intends the natural and probable consequences of her acts.

[11](1982), 42 A.L.R. 631, 62 Fed. L.R. 302 (Fed. Ct. Aust. — Gen. Div.).

[12](1984), 51 A.L.R. 540, 58 A.L.J.R. 217 (Aust. H.C.) [hereinafter *Martin*]. In *Martin*, the Australian High Court clarified one lingering point from *O'Connor*. This was whether there was any "entrenched anomaly" (see decision of Barwick C.J. in *O'Connor*, *supra*, note 4 at 465) whereby intoxication could only reduce murder to manslaughter, even if the degree of intoxication was such as to make the act involuntary. The High Court held that there was no such rule of law. One would have thought that it might have held otherwise if there had been sufficient public outcry from the result in *O'Connor* or from other acquittals on account of intoxication. After all, it must be borne in mind that in Australia a reasonable doubt on voluntariness and/or *mens rea* can lead to outright acquittal for a death caused while intoxicated.

[13] (1984), 36 S.A.S.R. 135 (S.C.S.A.).

[14]Mr. Justice George Smith, "Footnote to O'Connor's Case" (1981) 5 Crim. L.J. 270 at 276-77. Although the methodology used by Smith J. in conducting the survey was somewhat unorthodox ("Because of the methods employed in collecting statistics I am unable to give an accurate figure of the number of jury trials heard in the period under review but . . . [using the figures which were provided] as a basis it is reasonable to assume that between 20th June, 1980 and 30th May, 1981 (allowing for a reduced work-load during vacations) District Court judges would have presided over approximately 510 trials."), the conclusions at which he arrives appear to have been substantiated by his findings.

[15]Smith J. described the popularity of the defence as "passing fashion" in the wake of *O'Connor*, *ibid.* at 277.

of Criminal Appeal of New South Wales advised Smith J. that, in the same period, it had not received any intoxication case that was dependent upon the ruling in *O'Connor*. These findings led Smith J. to state:

> [M]y inquiries would indicate that the decision in *O'Connor*'s case, far from opening any floodgates has at most permitted an occasional drip to escape from the tap.[16]

Nonetheless, even in the birthplace of *O'Connor*, the state of Victoria, some misgivings have been expressed about the effect of the decision. Despite their own findings that intoxication is rarely advanced as a defence and even less often with success, the office of the Law Reform Commissioner of Victoria has been conducting a campaign against *O'Connor*.[17] Whether the outcome of these efforts, if successful, would take the form of a separate dangerous intoxication offence or the restoration of specific and general intent is not yet clear. If for no other reason than to attempt to allay the fears of those who oppose the subjective approach, it is important to discuss in practical terms what it would mean.

As a starting point, it should be borne in mind that, most often, evidence of intoxication buttresses the Crown case. It far more frequently indicates a reason why the accused acted in the prohibited manner, that is, through a lack of inhibition, than that the requisite mental element was negated.[18] For instance, hearing evidence that an intoxicated person lashed out and struck someone would not very often cause one to doubt that there was at least an intentional application of force, even if any aggravated intent, such as to kill or to wound, was lacking. This may have been what Fauteux J. and Ritchie J. had in mind in *R.* v. *George*[19] when each expressed doubt that a person could commit an assaultive act without any intent. Thus, ordinary subjective principles would be sufficient to convict the accused of at least some offence in such a situation.

For most attacks upon the person, there is a gradation of offences and the accused, despite intoxication, will almost invariably be found to have had the requisite state of mind to satisfy one of them. Indeed, in such situations, it would require evidence of a state akin to automatism before

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[16]*Ibid.*

[17]*E.g.*: Australia, Victoria Law Reform Commissioner, *Intoxication and Criminal Responsibility Issues Paper* (Victoria, 1983); Australia, Victoria Law Reform Commissioner, *Intoxication and Criminal Responsibility Discussion Paper* by L. Skene (Victoria, 1984); L. Waller, *Intoxication and Criminal Responsibility* (Alcohol & Drug Foundation, 1982); L. Skene, "Drunkenness and Acquittals" (1983) 57 Law Inst. J. 318.

[18]This is a point made by Murphy J. in *O'Connor*, *supra*, note 4 at 485.

[19][1960] S.C.R. 871 at 879 (Fauteux J.) and 891 (Ritchie J.), 128 C.C.C. 289 [hereinafter *George* cited to S.C.R.]. This was perhaps the leading Canadian case on intoxication prior to *Leary* and was heavily relied upon by the Law Lords in *Majewski*.

there would be much real doubt of the accused having at least some awareness sufficient to constitute *mens rea*. As a consequence, if there is legitimate concern that a dangerous person will go free, it should be directed primarily at the automatous offender.

It should be borne in mind, moreover, that there is a rather heavy evidentiary burden upon an accused who invokes the intoxication defence. First of all, a trial judge has the power and duty to refuse to put intoxication (or automatism) to a jury unless there is a sufficient basis in the evidence.[20] This usually will require that the accused testify. Second, a trier of fact will generally require not only evidence from other witnesses corroborating the condition of the accused, but also expert medical or psychiatric evidence supporting the accused's testimony concerning a lack of intent. Such evidentiary demands impose a heavy tactical burden upon the propounder of such a defence, and operate to weed out the spurious defence.

To this point, I have discussed the situation where, owing to intoxication, the accused was rendered an automaton or did not form any intention at all. There is, however, a situation which will generally involve a lesser degree of intoxication. Such is the case when, due to intoxication, an accused makes a mistake which negatives the *mens rea* for the offence. It has been well-accepted for some years in Canada that an honest mistake provides a defence to an offence requiring *mens rea*.[21] However, there is, or at least was until recently, some uncertainty in the law when the mistake was made by an intoxicated accused and the offence was one of general intent. Consistency with the intoxication rules would suggest that a mistake made by an intoxicated accused could not provide a defence to a general intent offence. Yet there were indications that such a mistake might still be a defence.[22]

This apparent anomaly may have been swept away by the decision in *R.* v. *Moreau*.[23] Martin J., speaking for a unanimous Ontario Court of Ap-

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[20]This point was reiterated in *O'Connor, supra*, note 4 at 466 (Barwick C.J.). The same test is applied in Canada: *Malanik* v. *R.* [1952] 2 S.C.R. 335, 103 C.C.C. 1 [hereinafter *Malanik*].

[21]See *Pappajohn* v. *R.* [1980] 2 S.C.R. 120, 52 C.C.C. (2d) 481 [hereinafter *Pappajohn* cited to S.C.R.], and *Beaver* v. *R.* [1957] S.C.R. 531, 118 C.C.C. 129.

[22]The argument is based on *dicta* in *George, supra*, note 19 at 890 and in *Reilly* v. *R.* [1984] 2 S.C.R. 396 at 404, 42 C.R. (3d) 154, on the fact that intoxication as a cause of mistake was not ruled out in *Pappajohn, ibid.*, and on *R.* v. *Cogan* (1975), [1976] Q.B. 217, [1975] 2 All E.R. 1059 (C.A.). A.J. Ashworth, "Reason, Logic and Criminal Liability" (1975) 91 L.Q. Rev. 102 at 118, though relying on different authorities, has come to the same conclusion. Any such anomaly, if it indeed exists, is due to the compartmentalization of defences in Canadian and English criminal law. The problem for defence counsel then, if the anomaly persists beyond *R.* v. *Moreau, infra*, note 23, is to attempt to categorize the defence as mistake even where intoxication contributed to the making of the mistake.

[23](1986), 51 C.R. (3d) 209 at 225-41, 26 C.C.C. (3d) 359 (Ont. C.A.) [hereinafter *Moreau* cited to C.R.].

peal, held that, where the offence is one of general intent, evidence of intoxication must be ignored in deciding whether the accused made an honest mistake. If the accused, absent the intoxication, would have made the same mistake, then she has a good defence; if not, the defence is disallowed on the policy grounds expressed by the intoxication rules. On the other hand, where the offence is one of specific intent, an honest mistake, whether or not induced by intoxication, will be a defence.

Though this position does not have the sanction of the Supreme Court, given the eminence of Martin J. in the criminal law domain, it probably represents good law. Nevertheless, the issues involved demonstrate the difficulties with the present law. There are competing logics at play when both mistake and intoxication are involved: subjective principles that usually apply to mistake would dictate that a mistake by an intoxicated accused, whether or not caused by the intoxication, should be a defence to any *mens rea* offence. On the other hand, the intoxication rules restrict that defence to specific intent offences. These competing logics are due, of course, to the fact that the law has compartmentalized mistake and intoxication (and automatism as well) into affirmative defences rather than seeing them merely as special ways of denying *mens rea* (or, in the case of automatism, the voluntariness of the *actus reus*). While the ruling of Martin J. restores some order within the existing intoxication rules, though at the expense of requiring an artificial test of the accused's state of mind, it illustrates, at the same time, certain incongruities within those same rules. At the least, adoption of wholly subjective principles would eliminate the inconsistency between the demands of the mistake and intoxication defences.

Under the *O'Connor* approach, these problems with mistake disappear. But would a defence of intoxicated mistake incorporating a wholly subjective approach to *mens rea* have the practical effect of letting dangerous accused go free? I submit that the effect would be negligible. First, a trial judge would not put the defence to a jury unless there is an adequate evidentiary foundation for it.[24] Indeed, under the present law in Canada and, ignoring the potential anomaly for intoxicated mistakes, the defence of mistake has been greatly restricted in this very way.[25] Second, even though the

[24]See *supra*, note 20.

[25]This is a point made by J.M. Williams in "Mistake of Fact: The Legacy of *Pappajohn* v. *The Queen*" (1985) 63 Can. Bar Rev. 597. The cases to which he refers that restrict the defence have done so on the basis that the grounds for the mistake must arise from a source other than solely in the mind of the accused. This approach comes from a *dictum* to this effect by McIntyre J. in *Pappajohn*, *supra*, note 21 at 133. Whether this was meant as a rule of law is very doubtful. It certainly could not be justified under a consistently subjective approach to *mens rea*. Nevertheless, it is quite likely that the presence or absence of grounds from a source other than the accused goes to the reasonableness of the belief in judging the honesty of that belief.

test for mistake is whether the belief was honestly held, there is likely to be great skepticism where an accused advances a patently unreasonable view of the facts even where evidence of intoxication might explain why such an unreasonable belief was held.

The one area that might prove problematic is precisely the situation faced in *Moreau*: invoking the defence of mistake on a charge of sexual assault, where the mistake was possibly due to the accused's intoxicated state, might lead to an outright acquittal. Mistaken belief in consent to sexual activity has proven to be a very controversial topic in Canada.[26] Exploration of that debate is beyond the purview of this article since the implications of adopting an objective or partially objective test for mistaken belief in consent are much broader than the relationship between intoxication and mistake.[27] Nonetheless, there is sufficient concern about the question of intoxicated mistakes to suggest that this is an area that ought to be covered by a new offence. In other words, while the experience in Australia suggests that the subjective approach will suffice for most cases of sexual assault, where an accused is acquitted of such an offence on account of an intoxicated mistaken belief in consent, that accused should be liable for the new offence.

There are some other areas where a thoroughly subjective approach might create some difficulty. Two of these are in relation to the murder-manslaughter dichotomy and the criminal driving offences. To take the latter first, the difficulty does not arise for most criminal driving offences. Even an advanced state of intoxication will create little doubt as to *mens rea* in the mind of the trier of fact inasmuch as the driving of a motor vehicle involves fairly sophisticated movements which ordinarily entail some cognition: placing a key in the ignition, operating the gearshift and footpedals, etc. A problem might arise, however, where there was convincing evidence, probably of a medical nature, indicating that the accused was in a state of automatism.[28] It would no doubt cause a public outcry should such a person be given a defence to a charge of driving while impaired or criminal neg-

[26]See T. Pickard, "Culpable Mistakes and Rape: Relating Mens Rea to the Crime" (1980) 30 U.T.L.J. 75, and "Culpable Mistakes and Rape: Harsh Words on *Pappajohn*" (1980) 30 U.T.L.J. 415.

[27]Since sexual assault is currently a species of assault (*Criminal Code*, R.S.C. 1970, c. C-36, ss 244-246.3 [hereinafter *Criminal Code*]), instituting an objective test for sexual assault would have the same effect on other assaults, the implications of which we might wish to consider very carefully. The alternative might be, as we once did with the offence of rape, to consider sexual assault a sexual offence, rather than a violent offence with sexual overtones. Again, the implications of this would need careful study.

[28]This is what happened in *R.* v. *McVeight* (1985), 14 W.C.B. 57 (Ont. D.C.). Under the present intoxication rules, the accused was convicted of the general intent offence of criminal negligence in the operation of a motor vehicle (no longer an offence) despite being in a state of automatism brought on by the consumption of alcohol.

ligence causing death or bodily harm! Those offences, then, are ones for which some alternative to outright acquittal must be considered.[29]

The murder-manslaughter dichotomy presents more complicated issues. At present where, on a murder charge, there is a doubt as to the requisite *mens rea* or voluntariness on account of intoxication, the result is a conviction for manslaughter even if those elements are lacking for the lesser charge.[30] The basis for this is not entirely clear. I have elsewhere[31] pointed to the historical definition for this principle. Insofar as the *mens rea* question is concerned, if manslaughter includes negligent homicides, the principle may be soundly based even though the result is the possibility of an extremely high penalty (life imprisonment). If, on the other hand, manslaughter contains a subjective *mens rea* requirement, then the principle is an arbitrary one, justifiable only on the policy ground that a person in such a state of intoxication who causes a death should not go free.

Whether manslaughter in Canada has a *mens rea* requirement is not certain. In its two major forms, it is defined as death caused either by an unlawful act or by criminal negligence.[32] Criminal negligence has been interpreted both as always requiring subjective recklessness[33] or, in another line of cases, where based on an act (commission) as opposed to a failure to act (omission), as requiring a marked departure from the standard of care that a reasonable person would have taken.[34] The latter is a negligence standard though of a higher degree than ordinary or civil negligence; if this approach prevails, then convicting of manslaughter where the accused because of her intoxication lacked the *mens rea* for murder is consistent with culpability theory — an intoxicated person is almost certainly a negligent person. However, if criminal negligence requires subjective *mens rea*, as appears to be the case for homicides caused by an unlawful act where there

[29]This is unless, of course, we were prepared to countenance a negligence standard for such offences. I, for one, would not support such a standard for an offence such as *Criminal Code*, s. 203 which has a maximum penalty of life imprisonment. It would be unjust to impose liability for negligence unless there was a markedly lower penalty.

[30]*R.* v. *Hartridge* (1966), 57 D.L.R. 332, [1967] 1 C.C.C. 346 (Sask. C.A.) [hereinafter *Hartridge*].

[31]T. Quigley, "A Shorn Beard" (1987) 10 Dalhousie L.J. 167.

[32]*Criminal Code, supra*, note 27, ss 205(5)(a) and (b), and 217. I am ignoring, for present purposes, s. 215, whereby provocation may reduce murder to manslaughter, and ss 205(5)(c) and (d).

[33]*E.g., O'Grady* v. *Sparling* [1960] S.C.R. 804, 25 D.L.R. (2d) 145. This has not been followed very consistently. See E. Colvin, "Recklessness and Criminal Negligence" (1982) 32 U.T.L.J. 345 at 350-56.

[34]*E.g., R.* v. *Waite* (1986), 52 C.R. (3d) 355, 15 O.A.C. 215 (C.A.); *R.* v. *Sharp* (1984), 39 C.R. (3d) 367, 3 O.A.C. 26 (C.A.); *R.* v. *Tutton and Tutton* (1985), 44 C.R. (3d) 193, 6 O.A.C. 367 (C.A.) (leave to appeal to the Supreme Court of Canada granted May 23, 1985, heard Nov. 10, 1987).

is a *mens rea* requirement for the conduct involved (though not in respect of the death),[35] then manslaughter, for purposes of an intoxication defence, is an arbitrary exception to culpability theory that prevents someone who has caused death while intoxicated from going free.

Thus, even if manslaughter does not require subjective *mens rea*, the introduction of a wholly subjective approach could still result in a manslaughter conviction on the basis of negligence. If manslaughter has a subjective mental element, however, doing away with the specific-general intent dichotomy could permit an outright acquittal. Likewise, the person whose intoxication was so extreme as to render her act involuntary could gain a complete acquittal. Such cases must be few,[36] as the experience in Australia suggests,[37] but there probably should be some alternate disposition available.

This could take several forms. If a new dangerous intoxication offence were created to cover the situation where the accused lacked *mens rea* or volition, murder and manslaughter could be collapsed into one offence covering a wide range of culpability.[38] This would, however, entail removing the fixed penalty for murder to allow for flexibility in sentencing. On the other hand, manslaughter could simply be redefined (or more clearly defined) so as to expressly include culpability for negligence, hopefully with a reduced penalty, along with its other forms. There would then be no need to have a dangerous intoxication offence to cover homicides at all. For present purposes, however, I do not propose to enter into the myriad issues that a redefinition of murder and manslaughter would encompass. My discussion will proceed on the footing that any new intoxication offence must take account of homicides. This is so despite the fact that the Australian High Court, in *Martin*,[39] obviously did not recognize the same need.

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[35]At a minimum, the accused must have known that she was doing the act which was unlawful. For example, see *Smithers* v. *R.* (1977), [1978] 1 S.C.R. 506 at 519-20, 34 C.C.C. (2d) 427. Stuart, however, *supra*, note 6 at 202-03, disagrees.

[36]Still, I once acted as defence counsel for a man who, according to psychiatric opinion, was so drunk as to be an automaton. He was, of course, convicted of manslaughter under the existing law.

[37]If the incidence of such cases were significant, no doubt the Australia High Court in *Martin*, *supra*, note 12 would have preserved the murder-manslaughter "anomaly" noted in *O'Connor*, *supra*, note 4.

[38]This is similar to the proposal of the Law Reform Commission of Canada in *Homicide* (Working Paper 33) (Hull, Que.: Supply & Services Canada, 1984). Under that proposal, murder and manslaughter would be abolished although there would be distinctions drawn between intentional, reckless, and negligent homicides insofar as the penalty was concerned. However, the Commission backed away from this in its latest proposal, *Recodifying Criminal Law* (Report 30), vol. 1 (Ottawa: Law Reform Commission of Canada, 1986) [hereinafter *New Code*] by retaining the manslaughter nomenclature and by not dealing with the penalty.

[39]*Martin*, *supra*, note 12.

Several judges and commentators have recommended a dangerous intoxication offence to take care of those few situations where the subjective approach could lead to public outcry and fears for public safety.[40] The foregoing discussion hopefully will have demonstrated that the catchment area of such a dangerous intoxication offence is exceedingly small. Nevertheless, there is some scope for such an offence. It needs to be available where the application of subjectivism would otherwise result in the outright acquittal of someone who represents a genuine danger. Most often such a person will have been in a state of automatism. Thus, a major issue is to define such an offence in terms that cover the catchment area but go no further.

As for the role of intoxication in a completely subjective regime, it cannot be better stated than it was by the New Zealand Court of Appeal in *R.* v. *Kamipeli*:

> Drunkenness is not a defence of itself. Its true relevance by way of defence, so it seems to us, is that when a jury is deciding whether an 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. It is the fact of intent rather than the capacity for intent which must be the subject matter of the inquiry. The alternative is to say that when drunkenness is raised in defence there is some special exception from the Crown's general duty to prove the elements of the charge. We know of no sufficient authority for that, nor any principle which justifies it.[41]

II. Law Reform Commission and Legislative Proposals

This section discusses the various proposals that have been made in some common law jurisdictions for codification and/or reform of the existing intoxication rules. Because the various proposals made elsewhere have been considered by our own Law Reform Commission in arriving at its array of proposals, it is useful to look at the recommendations in other jurisdictions. I have confined myself to those proposals that have been reflected in the Law Reform Commission of Canada recommendations. All of this is intended to provide background for the approach which I eventually suggest in the last part of the article. First, however, it is useful to examine the strengths and weaknesses of previous law reform proposals.

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[40]See Dickson J. in dissent in *Leary, supra,* note 3 at 47; Barwick C.J. and Aickin J. in *O'Connor, supra,* note 4 at 466 and 494 respectively; Gold, *supra,* note 4; Schabas, *supra,* note 4.

[41]*R.* v. *Kamipeli* [1975] 2 N.Z.L.R. 610 at 616 (C.A.).

A. Model Penal Code

The *Model Penal Code*,[42] a draft code completed by the American Law Institute in 1962, has often been used as a basis for discussion by law reform bodies in England and Canada. The *Model Penal Code* was designed for adoption by the several criminal law jurisdictions in the United States. Hence, it tried to codify all aspects of the criminal law, beginning with statements of purpose and principles of construction, on through general principles of liability, justification and responsibility, to definitions of offences, sentencing and corrections. This was a precursor of similar ventures by the Law Reform Commission of Canada.[43]

Included among the principles of liability are definitions of mental states and voluntariness. Voluntariness is defined in section 2.01[44] and is essentially along the lines followed by the common law in Canada and England, not precluding culpability for acts done in an involuntary state resulting from drug or alcohol intoxication. Mental states founding liability are purpose, knowledge, recklessness and, where so stated, negligence.[45] Purpose and knowledge are defined so as to roughly encompass intent in the common law;[46] recklessness is defined in the following way:

> A person acts recklessly with respect to a material element of an offense when he *consciously disregards 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, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. [emphasis added][47]

It is to be noted that this definition broadly accords with subjective recklessness as we usually know it in Canada.[48] As in Canada,[49] it also includes an objective component insofar as the measure of the risk is concerned. Although negligence is defined in terms not unlike tort law, the *Model Penal Code* requires that the risk be both substantial and unjustifiable (as opposed

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[42]American Law Institute, *Model Penal Code: Proposed Official Draft* (Philadelphia: American Law Institute, 1962) [hereinafter *Model Penal Code*].

[43]See *New Code*, *supra*, note 38.

[44]*Model Penal Code*, *supra*, note 42, s. 2.01 at 24.

[45]*Ibid.*, s. 2.02(1) at 25. See also s. 2.02(3) at 26-27. Of course, negligence is not really a mental state at all, but rather a failure to meet a standard of care.

[46]*Ibid.*, s. 2.02(2)(a), (b) at 25-26.

[47]*Ibid.*, s. 2.02(2)(c) at 26.

[48]On the requirement of advertence to the particular risk, see *O'Grady* v. *Sparling*, *supra*, note 33.

[49]See Colvin, *supra*, note 33 at 346.

to merely foreseeable), and that there be a gross deviation from the standard of care that a reasonable person would observe.[50]

The *Model Penal Code* codifies the common law position that a defence need only be disproved by the prosecution when there is evidence supporting it.[51] Mistake[52] and intoxication[53] are then listed and defined as affirmative defences. Mistakes can negative purpose, knowledge, belief, recklessness, and even negligence.[54] Intoxication, on the other hand, can negative purpose, knowledge and belief. It can also negative recklessness, but only where the actor would not have been aware of the risk if sober (in which case evidence of the intoxication would be irrelevant).[55] In other words, it is a codification of the approach later taken in England in *R.* v. *Caldwell.*[56] The whole of the intoxication section is reproduced below:

> Intoxication.
> (1) Except as provided in Subsection (4) of this Section, intoxication of the actor is not a defense unless it negatives an element of the offense.
> (2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.
> (3) Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01.
> (4) Intoxication which (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.
> (5) *Definitions.* In this Section unless a different meaning plainly is required:
> (a) "intoxication" means a disturbance of mental or physical capacities resulting from the introduction of substances into the body;
> (b) "self-induced intoxication" means intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime;
> (c) "pathological intoxication" means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.[57]

Subsection (4) allows an involuntarily or pathologically intoxicated offender to escape liability on account of a lack of responsibility pursuant to

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[50] *Model Penal Code, supra,* note 42, s. 2.02(2)(d) at 26.

[51] *Ibid.,* s. 1.12(2) at 20. This is similar to the views expressed in *O'Connor, supra,* note 4 at 466 and *Malanik, supra,* note 20.

[52] *Ibid.,* s. 2.04 at 30-31.

[53] *Ibid.,* s. 2.08 at 38-39.

[54] *Ibid.,* s. 2.04(1)(a) at 30.

[55] *Ibid.,* s. 2.08 at 38-39.

[56] (1981), [1982] A.C. 341, [1981] 1 All E.R. 961 (H.L.) [hereinafter *Caldwell* cited to A.C.].

[57] *Model Penal Code, supra,* note 42, s. 2.08 at 38-39.

section 4.01.[58] The result, however, is a committal to an institution for custody, care and treatment.[59]

A major criticism of the *Model Penal Code* is that it was intended merely to codify the common law distinction between specific and general intent.[60] It accomplishes this by excluding the defence of intoxication for any offence having recklessness as a mental element even though recklessness elsewhere in the *Model Penal Code* has a requirement of subjective awareness of the risk.[61] These provisions are subject to several criticisms which are briefly summarized here.

First, there is no sound reason why recklessness should be afforded different treatment from intention. There is no marked difference in culpability between intention and recklessness and, indeed, there is often debate about the distinction between those two mental elements.[62] It is inconsistent to single out recklessness as not permitting the intoxication defence, yet to allow intoxication to negate intention.

Second, the result is an artificial test of the state of mind of the accused. Subsection (2) asks a judge or jury to attempt to assess the state of mind of the accused absent the factor of intoxication. This was the very thing to which Dickson J. was so strongly opposed in *Leary*.[63] It is an almost impossible task, and the resulting danger is that the accused is apt to be fixed with recklessness merely because she possesses normal capacity when sober. Yet, even with normal capacity and in a sober condition, she might not have adverted to the particular risk. Thus, the fears expressed in *O'Connor*[64] and *Leary*[65] that an intoxicated accused would be placed in a worse position than a sober accused could very well come to fruition: a state of mind must be proved by the prosecution for the sober accused but not for the intoxicated one.

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[58]*Ibid.*, s. 4.01 at 66.

[59]*Ibid.*, s. 4.08 at 75-77.

[60]S.H. Berner, "The Defence of Drunkenness — A Reconsideration" (1971) 6 U.B.C. L. Rev. 309 at 345.

[61]*Supra*, note 47.

[62]In human affairs, we are always concerned with probabilities rather than certainties. The difference between intention and recklessness is the difference between a virtual (or moral) certainty and a high probability. " '[I]ntention' and 'recklessness' are more than birds of a feather; they are blood-brothers. . . .": Lord Edmund-Davies in *Caldwell*, *supra*, note 56 at 359.

[63]*Supra*, note 3 at 41-42.

[64]*Supra*, note 4 at 485.

[65]*Supra*, note 3 at 41.

There is an additional problem with the definition of self-induced intoxication. As with the present position in Canada,[66] there is an objective component to the test. This is the introduction of negligence into the criminal law in a way that is unwarranted: a negligence standard does not permit the accused's characteristics and circumstances to be taken into account. Negligence is not voluntary wrong-doing and hence is usually not sufficient to constitute criminal culpability. Consequently, if negligence is to be the standard of criminal culpability, intoxicated offenders should not be the only persons to whom it is applied.

The *Model Penal Code* has its admirable features, notably that it explicitly sets out the requisite mental element for each offence. It therefore has the advantage of making the law certain and known. This benefit applies equally to the intoxication defence in that it is easy to determine whether the defence is available for any given offence. However, the disadvantages set out above are sufficient to lead to rejection of the *Model Penal Code* approach to the intoxication problem. It is nevertheless important because it has been the genesis of other proposals.

B. English Proposals

In England, various recommendations have from time to time been made for statutory change to the criminal law as it pertains to the mental element and, more specifically, to the intoxication defence. I will present these in chronological order, if for no other reason than to show how these proposals have parallelled developments in the case law. I shall begin with the hue and cry that arose out of the decision in *D.P.P.* v. *Smith*.[67] *Smith*, it will be remembered, established for English law that the presumption that a person intends the natural and probable consequences of her acts is only rebuttable by evidence of incapacity.[68] It was a very controversial decision.

1. The Post-*Smith* Studies

As a result of the *Smith* controversy, the Law Commission undertook a study and prepared a report on "Imputed Criminal Intent".[69] The report recommended that a subjective test be legislated, not just for murder, but for all offences requiring intent or foresight.[70] The culmination of the report

[66]The current Canadian definition of self-induced intoxication is represented by *Hartridge*, *supra*, note 30 and *R.* v. *King* [1962] S.C.R. 746, 35 D.L.R. (2d) 386 [hereinafter *King*].

[67][1961] A.C. 290, [1960] 3 All E.R. 161 (H.L.) [hereinafter *Smith*].

[68]The presumption is also rebuttable by evidence of insanity and diminished responsibility, but these are of no concern to the present discussion.

[69]U.K., Law Commission, *Imputed Criminal Intent* (Report No. 10) (London: H.M.S.O., 1967).

[70]*Ibid.* at 11 and 16.

was passage of section 8 of the *Criminal Justice Act 1967* which provides as follows:

> A court or jury, in determining whether a person has committed an offence,
> (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but
> (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.[71]

One might have thought that this provision would clearly have established a subjective test for intent and recklessness in all cases, hence obviating any distinction between specific and basic intent in cases of intoxication. Such a view seriously underestimates the ingenuity of the Law Lords in *Majewski*[72] and *Caldwell*[73] in re-imposing objective tests in some, if not most, situations involving intoxication. However, had the section been interpreted in a literal way, it would have established a completely subjective approach to the mental element. It is important for that reason. It should be noted as well, that it was not thought necessary at that time to propose a dangerous intoxication offence even though the recommendation and subsequent legislation seemingly proposed a completely subjective approach to the mental element.

Shortly after the *Criminal Justice Act 1967* was passed, an attempt was made to draft a codification of the mental element in crime.[74] Working Paper No. 31 recommended that intention, knowledge or recklessness be an element of any new offence unless expressly excluded.[75] In the case of such an exclusion, negligence would be the required element for culpability, but would be considered established in the absence of evidence to the contrary.[76] Intention, knowledge and recklessness were defined in subjective terms. The only objective test sought to be retained was that of the justifiability of the risk in cases of recklessness.[77] This was simply a recognition that ordinary activity involves risks and that only the taking of unjustifiable risks should be punishable; taking reasonable risks should not give rise to culpability. Mistake was recommended to be considered in relation to the

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[71] *Criminal Justice Act 1967* (U.K.), 1967, c. 80, s. 8.

[72] *Majewski, supra*, note 2, interpreted s. 8 as not affecting the substantive law of which the intoxication rules are a part.

[73] *Caldwell, supra*, note 56, ruled out the intoxication defence for any offence having recklessness as a mental element.

[74] U.K., Law Commission, *The Mental Element in Crime* (Working Paper No. 31) (London: H.M.S.O., 1970).

[75] *Ibid.* at 6.

[76] *Ibid.*

[77] *Ibid.* at 30-31.

mental element with honest (though not necessarily reasonable) mistake negating intention, knowledge and recklessness.[78]

Other than through a judicial interpretation of honest mistake in *D.P.P.* v. *Morgan*,[79] this report has gone unenacted and has, indeed, been scuttled by the decisions in *Majewski* and *Caldwell*. As with the previous recommendation, it would only have established a subjective approach without considering the advisability of a separate dangerous intoxication offence.

2. The Butler Committee Report

In 1975, the *Butler Committee Report*[80], studying the problem of mentally abnormal offenders, thought it appropriate to recommend a dangerous intoxication offence.[81] Although evidence of intoxication could be introduced by the defence to show that the accused lacked the requisite mental element for the offence charged, leading to a verdict of not guilty for that offence, the same evidence of intoxication could then be used by the jury in determining the accused's guilt for the offence of dangerous intoxication.[82] While alluding to the concept of specific intent, the Committee referred only to assault as not being of specific intent, pointed out that specific intent had never been defined,[83] and, furthermore, thought that section 8 of the *Criminal Justice Act 1967* would probably overrule any restriction on the intoxication defence.[84] In other words, the Committee saw itself as drafting a proposal to cover only those situations not handled by the subjective approach.

With these thoughts in mind, the Committee, though stressing the logic of their view of the law, nonetheless saw danger to society in permitting habitually violent intoxicated offenders to go free.[85] To take account of those situations, it proposed a new statutory offence, primarily to enforce treatment but, at a minimum, to provide punishment to and control over those who would not accept such treatment.[86]

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[78]*Ibid.* at 63.

[79][1975] 2 All E.R. 347, [1975] Crim.L.R. 717 (H.L.).

[80]U.K., H.C., "Report of the Committee on Mentally Abnormal Offenders" Cmnd 6244 in *Sessional Papers* (1974-75) vol. 16, 221 (Chairman: Butler) [hereinafter *Butler Committee Report*].

[81]*Ibid.*, paras 18.51-53 at 235-36.

[82]*Ibid.*, para. 18.54 at 236.

[83]*Ibid.*, para. 18.52 at 235. The Committee was right insofar as English law was concerned, but in Canada definitions of specific intent were proposed by Fauteux J. and Ritchie J. in *George, supra*, note 19 at 877 and 890, respectively.

[84]*Butler Committee Report, ibid.* This was, of course, prior to the interpretations accorded to s. 8 in *Majewski, supra*, note 2 and *Caldwell, supra*, note 56.

[85]*Ibid.*

[86]*Ibid.*, para. 18.53 at 236.

The offence was proposed as an included offence where a person was acquitted due to a reasonable doubt on the mental element.[87] A conviction would follow for the dangerous intoxication offence so long as the intoxication was voluntary.[88] Voluntary intoxication would mean

> intoxication resulting from the intentional taking of drink or a drug knowing that it is capable in sufficient quantity of having an intoxicating effect; provided that intoxication is not voluntary if it results in part from a fact unknown to the defendant that increases his sensitivity to the drink or drug. The concluding words would provide a defence to a person who suffers from hypoglycaemia, for example, who does not know that in that condition the ingestion of a small amount of alcohol can produce a state of altered consciousness, as well as to a person who has been prescribed a drug on medical grounds without warning of the effect it may produce.[89]

A dangerous offence would be one involving bodily harm or death or sexual attack on another or destruction or damage to property that endangered life.[90] The offence would be of strict liability involving fault only in relation to the voluntariness of being intoxicated.[91] The penalties proposed were up to one year imprisonment for a first offence and up to three years for second and subsequent offences.[92] The maximum would be six months imprisonment on summary trials.[93]

Finally, as in the case of other mental disorders,[94] the Committee recommended that an accused intending to rely upon evidence of intoxication be required to give notice of such intention to the prosecution.[95] The prosecution would then be entitled to counter with rebuttal evidence or evidence of mental disorder.[96]

This was basically a sound approach that attempted to meet the legitimate concern that the subjective approach might not adequately protect society in all circumstances. It had the merit of limiting the scope of the offence to serious offences involving personal violence. In addition to covering actual harm, it might also have included criminal driving offences. Nevertheless, it amounted to tacit recognition that such an offence should have a narrow scope.

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[87] *Ibid.*, para. 18.54 at 236.
[88] *Ibid.*
[89] *Ibid.*, para. 18.56 at 236.
[90] *Ibid.*, para. 18.55 at 236.
[91] *Ibid.*, para. 18.57 at 236.
[92] *Ibid.*, para. 18.58 at 237.
[93] *Ibid.*
[94] *Ibid.*, para. 18.49 at 234.
[95] *Ibid.*, para. 18.58 at 237.
[96] *Ibid.*, paras 18.58, 18.48 at 237, 233-34 respectively.

This approach presents difficulties, however, in two respects: the included nature of the offence and the onus of proof. Let me first deal with the argument against the offence being included within the original offence charged. The only additional factor to be considered by the judge or jury would be whether the intoxication was voluntary. In making the offence included within the original offence, there is a danger that the trier of fact will found liability on the harm committed rather than for the state of incapacitation which preceded the harm; the connection between the two is simply too close. Since we are speaking of an accused who, by definition, lacked *mens rea* (or volition) for the offence charged, we should take care to impose liability for the actual wrong committed by that accused — the act of becoming intoxicated to such a debilitating degree.[97] I am not suggesting a completely separate forum for the inquiry, merely that different considerations ought properly to come into play for the dangerous intoxication offence than for the substantive offence. For example, additional evidence, not relevant or inadmissible on the original charge, might be heard.

There are additional problems surrounding the onus of proof. Despite the apparently subjective definition of voluntary intoxication, once voluntary intoxication was shown, it seems that liability would automatically follow. It is not clear, however, upon whom the burden of proof would lie. Would the Crown have to prove voluntary intoxication or would the accused have to prove that the intoxication was caused against her will? If the onus was on the accused, it could, in Canada, be found unconstitutional. As has been pointed out in relation to a Canadian legislative proposal,[98] such a provision, if enacted in Canada, might offend against the presumption of innocence contained in the *Charter of Rights and Freedoms*.[99] Later in this article, I will consider whether such an offence ought to have a *mens rea* requirement, but, even on the tentative assumption that it need not have, it still might be necessary to place the onus upon the Crown in order to ward off claims of unconstitutionality. In any event, the present law requires the prosecution to prove that intoxication was voluntary though it is usually not an issue and generally is assumed to have been self-induced. There has

[97]The same point has been made by A. Ashworth in "Intoxication and General Defences" (1980) Crim. L.R. 556 at 559-60. The harm committed by the accused is, of course, convincing evidence that such a person represents a danger to the public.

[98]E. Colvin, "Codification and Reform of the Intoxication Defence" (1983) 26 Crim. L.Q. 43 at 69.

[99]*Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, s. 11(d) [hereinafter the *Charter of Rights*]. For a recent Supreme Court pronouncement on reverse onus clauses, see *R.* v. *Oakes* [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 1.

not been any evident difficulty for the Crown in establishing such proof. Therefore, there is no need to reverse the onus.

The penalty provisions are also troublesome. It seems implicit that the Committee thought that punishment of such offenders was the most predominant consideration. While the proposal does indicate that treatment of the offender was contemplated, the approach taken seems very much like the usual sentencing approach, that is, founded largely upon the imposition of imprisonment. Indeed, the rationale behind the proposal was explicitly to provide punishment for those who would not seek treatment. Thus, it did not have a clear rehabilitative aim. Rehabilitation of the individual and protection of the public from dangerously intoxicated offenders surely are more important than the vengeful punishment of one who lacked *mens rea* or volition. Moreover, the treatment of such an offender affords better protection for the public, in my view, than the incarceration and subsequent release of an offender for whom no such treatment is provided. The sentencing approach for such an offence should reflect this position. The possibility of a jail sentence should not be ruled out altogether, but should not be the primary thrust as the *Butler Committee Report* seems to suggest. It is necessary to stress the point that the culpability of the accused is for the condition of dangerous intoxication, of which the dangerous act is admittedly convincing evidence, not for the commission of the substantive offence.

With regard to the Committee's recommendation that an accused be required to give prior notice to the prosecution of her intention to rely on evidence of intoxication,[100] it is not apparent that there is a real need for such notice. At present, the prosecution does not seem unduly handicapped in meeting defence evidence of intoxication for specific intent offences. Surely the same position would hold if the defence were also available for general intent offences. In any event, even if there is some prejudice to the Crown, this could be met by permitting an adjournment where the prosecution was not prepared to meet the defence case. Usually, however, it will be obvious from the police investigation, the preliminary inquiry and the conduct of trial, particularly in defence cross-examination of Crown witnesses, that intoxication will be advanced in the defence case.

In summary, though there are some difficulties with the *Butler Committee Report*, it was, by and large, a useful starting point for discussion. Unfortunately, the impetus for change along the lines it suggested was lost as a result of the subsequent decisions by the House of Lords in *Majewski* and *Caldwell*. *Majewski* held that the defence of intoxication was not permitted for any general intent offence. *Caldwell* went further by imposing an

[100]*Butler Committee Report, supra*, note 80, para. 18.58 at 237.

objective test for recklessness and by refusing the intoxication defence for any offence having recklessness as a mental element. As a result, the defence has been severely restricted. With such severe restrictions, there has been no opportunity to see where problems might arise through the application of a subjective approach. As a result, there has not been any felt need to legislate a dangerous intoxication offence.

3. The Criminal Law Revision Committee's Fourteenth Report

Partly as a response to *Majewski* and also to the *Butler Committee Report*, the Criminal Law Revision Committee, in its *Fourteenth Report: Offences against the Person*,[101] again considered reform of the intoxication rules.

Members of the Committee raised two objections to *Majewski*. One objection was that *Majewski* implied the attribution to an intoxicated offender of a mental state which she may not have possessed at the time of the act. The other complaint was the difficulty in determining whether a particular offence is one of specific or of basic intent.[102] But the Committee agreed that intoxicated conduct is "socially unacceptable and deserving of punishment."[103] Furthermore, in disagreement with the *Butler Committee Report*, a majority of the Criminal Law Revision Committee felt that the punishment imposed ought to be in relation to the harm caused.[104] In other words, a separate offence of dangerous intoxication would not, in their view, suffice since such an offence would not distinguish between a minor drunken act and a drunken killing.[105]

The majority of the Committee felt that creation of a separate offence would generate administrative difficulties, including greater complexity in jury trials, the likelihood of increased use of the intoxication defence and confusion in the public mind.[106] As a consequence, while agreeing that the dichotomy between specific and basic intent was unfortunate, and that intoxication should be permitted to negative the mental element of intention, the majority felt that recklessness should be accorded different treatment. In other words, even while disagreeing with the dichotomy, they retained it in another form: basic intent offences are ones for which recklessness will suffice. This foreshadowed, and may even have promoted, the decision in

[101] U.K., H.C., Criminal Law Revision Committee, "Fourteenth Report: Offences against the Person" Cmnd 7844 in *Sessional Papers* (1979-80) (Chairman: R.H.L.J. Lawton) [hereinafter *Offences Against the Person Report*].

[102] *Ibid.*, para. 258 at 111-12.

[103] *Ibid.*, para. 259 at 112.

[104] *Ibid.*

[105] *Ibid.*, para. 261 at 113.

[106] *Ibid.*, para. 264 at 114.

Caldwell. Basing their proposal on the *Model Penal Code* proposals, they recommended the following changes to the law:

> 1. The common law rules should be replaced by a statutory provision on the following lines:
>
> (a) that evidence of voluntary intoxication should be capable of negativing the mental element in murder and the intention required for the commission of any other offence; and
>
> (b) in offences in which recklessness does constitute an element of the offence, if the defendant owing to voluntary intoxication had no appreciation of a risk which he would have appreciated had he been sober, such a lack of appreciation is immaterial ... .
>
> 2. Voluntary intoxication should be defined on the lines recommended by the Butler Committee ... .[107]
>
> 3. In murder or any other offence in which intention is required for the commission of the offence, a mistaken belief arising from voluntary intoxication should be a defence to the charge if such a mistaken belief held by a sober man would be a defence. However, in offences in which recklessness constitutes an element of the offence, if the defendant, because of a mistake, due to voluntary intoxication, holds a belief which, if he had been sober, would be a defence to the charge, but which he would not have held had he been sober, the mistaken belief is immaterial ... .
>
> 4. Our recommendations on voluntary intoxication should be applicable to criminal offences generally ... .[108]

Thus, recklessness, other than in the case of murder, would be deemed where the accused would have been aware of the risk had she been sober. In the same way, a mistake due only to intoxication would not avail an accused. It can be seen, therefore, that the majority did not meet their own criticisms and retained an artificial finding of fact in cases of recklessness and mistake. Furthermore, their proposal, like that of the *Model Penal Code,* is like the position later taken by the House of Lords in *Caldwell.* The proposal must be severely criticized for introducing an objective test for recklessness.[109]

It can also be criticized for insisting that there must be a connection between the wrongdoing of becoming intoxicated and the eventual conduct. To reiterate, what should be criminalized is the incapacitation, not the resulting conduct.[110] To be sure, the resulting harm is ironclad evidence of the danger represented by the particular accused. It is therefore justifiable to impose culpabiity for the condition of incapacity. However, because the resulting conduct was without the required *mens rea* or volition, it is not

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[107]*Butler Committee Report, supra,* note 80, para. 18.56 at 236.

[108]*Offences Against the Person Report, supra,* note 101, para. 279 at 117-18.

[109]See criticisms of Ashworth, *supra,* note 97.

[110]*Supra,* note 97 and accompanying text.

justifiable to punish for that harm.[111] Furthermore, the Committee's point that a dangerous intoxication offence would not distinguish between a minor act and a killing is a red herring. The bare statement of a conviction for an offence rarely describes its gravity. For example, a sexual assault conviction can mean anything from a minor grabbing to a completed rape.

Professors J.C. Smith and Glanville Williams were a minority on the Committee. They proposed that intoxication should be able to negative intention of any type. For offences having recklessness as a mental element or where a mistake was made, they would also permit the consideration of evidence of intoxication in determining whether the mental element was proved. However, if the accused would have known of a risk if sober or would not have made the mistake if sober, she would be convicted of a separate offence of doing the act while in a state of voluntary intoxication. For a homicide, the punishment would be equivalent to that for manslaughter. For all other offences, the punishment would be the same as for the substantive offence charged. The full text of their proposal is as follows:

> (1) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed an intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
>
> (2) Where a person is charged with an offence and he relies on evidence of voluntary intoxication, whether introduced by himself or by any other party to the case, for the purpose of showing that he was not aware of a risk where awareness of that risk is, or is part of, the mental element required for conviction of the offence, then, if:
> (a) the jury are not satisfied that he was aware of the risk, but
> (b) the jury are satisfied
> (i) that all the elements of the offence other than any mental element have been proved, and
> (ii) that the defendant would, in all the circumstances of the case, have been aware of the risk if he had not been voluntarily intoxicated,
> the jury shall find him not guilty of the offence charged but guilty of doing the act while in a state of voluntary intoxication.
>
> (3) Where a person charged with an offence relies on evidence of voluntary intoxication, whether introduced by himself or by any other party to the case, for the purpose of showing that he held a belief which, in the case of a sober person, would be a defence to the offence charged, then, if:
> (a) the jury are of opinion that he held that belief or may have held it, and

[111]This refers only to elements of an offence which carry a *mens rea* requirement. Sometimes, as for murder, there is a *mens rea* requirement attached to a consequence of the accused's conduct. But this is not always the case. For example, an accused need not have foreseen bodily harm as a consequence of her assaultive conduct in order to be found guilty of assault causing bodily harm (*Criminal Code*, *supra*, note 27, s. 245.1(1)(b)). Likewise, an accused need not have foreseen death as a consequence of an unlawful act in order to be convicted of manslaughter. My comments in the present context are not meant to deal with those situations.

> (b) are satisfied that the belief was mistaken and that the defendant would not have made the mistake had he been sober,
>
> the jury shall find him not guilty of the offence charged but guilty of doing the act while in a state of voluntary intoxication.
>
> (4) Where the offence charged consists of an omission, the verdict under (2) and (3) above shall be of making the omission while intoxicated.
>
> (5) A person convicted under (2) or (3) above shall, where the charge was of murder, be liable to the same punishment as for manslaughter; and in any other case shall be liable to the same punishment as that provided by the law for the offence charged.[112]

The minority made this proposal largely because of disagreement with the majority view that recklessness could be deemed. Unfortunately, their proposal does not avoid entirely the problem of determining a fictional mental state. The trier of fact could very well have difficulty discerning whether an accused would have been aware of a risk or would not have made a mistake if sober.[113] I will later propose that this inquiry, if made at all, ought to be done quite separately from the determination of whether the actual mental state for the substantive offence was present.

Although Smith and Williams argued for a type of separate offence, it is not clear that that is what was actually proposed. Imposing liability for doing the act while intoxicated imports some connection with the substantive offence. Furthermore, to suggest a penalty that is the same as for the substantive offence is to reinforce this connection.

C. The Law Reform Commission of Canada

The Law Reform Commission of Canada has allocated much of its resources to studies in criminal law. The eventual goal is a major overhaul of the *Criminal Code.* This has come in several stages. In 1982, the Commission published *Criminal Law, The General Part: Liability and Defences*[114] as a revision of Part I (ss 3-45) of the present *Criminal Code.* Then, in 1986, it presented its *Proposal for a New Criminal Code*[115] and, later in the same year, a more refined model, *Recodifying Criminal Law,*[116] which I will here refer to as the *New Code.*

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[112]*Offences Against the Person Report, supra,* note 101, para. 263 at 113-14.

[113]The same criticism can be made of the test set down in *Moreau, supra,* note 23.

[114]Law Reform Commission of Canada, *Criminal Law, The General Part: Liability and Defences* (Working Paper 29) (Hull, Que.: Supply & Services Canada, 1982).

[115]Law Reform Commission of Canada, *Proposal for a New Criminal Code, Volume I* (1986) (Working Draft).

[116]*New Code, supra,* note 38.

On each occasion, the Commission has recognized the problems with the present intoxication rules and proposed their reform. As the previous proposals are now dated, it is not worthwhile to devote extensive discussion to them. It is worth noting, however, that the various recommendations have drawn on the reform proposals previously discussed.

For instance, the 1982 report presented two alternatives, the first[117] modelled on the so-called "purposive" test laid down by Fauteux J. in *George*[118] and approved by Lord Simon in *Majewski*[119] and the second purporting to establish a dangerous intoxication offence for which an accused would be liable if acquitted on account of intoxication.[120] The latter appeared to be a hybrid of the *Butler Committee Report* and the *Offences Against the Person Report*, and is therefore subject to the same criticisms. Indeed, both recommendations received heavy criticism.[121]

The first 1986 proposal[122] presaged the minority recommendation in the *New Code*. Under it, the specific-general intent dichotomy would be abolished, but at the very heavy price of instituting negligence as the culpability standard for a wide variety of offences: homicide,[123] harming,[124] endangering,[125] nuisance,[126] vandalism,[127] and arson[128] among them. At the same time, no alternative dangerous intoxication offence was suggested. In the result, this proposal was much like the *Model Penal Code*, but in addition adopted, in effect, the *Caldwell* objective test for recklessness (though calling it criminal negligence) for many offences.

The 1986 *New Code* largely repeated the provisions of the earlier 1986 proposal. However, the Commission once again changed its views on intoxication. Of interest here, the Commission also proposed essentially the same test for automatism as it had earlier. These proposals are reproduced below:

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[117]*Supra*, note 114 at 59.
[118]*George*, *supra*, note 19 at 877, Fauteux J.
[119]*Majewski*, *supra*, note 2 at 637.
[120]*Supra*, note 114 at 59.
[121]Colvin, *supra*, note 98 at 52-73.
[122]*Supra*, note 115 at 9.
[123]*Ibid.* clause 33.
[124]*Ibid.* clause 41. This is particularly amazing given that this offence applies to any serious harm caused by whatever means to another person. The criminal net would be widened to an incredible extent.
[125]*Ibid.* clause 52.
[126]*Ibid.* clause 53.
[127]*Ibid.* clause 67.
[128]*Ibid.* clause 68.

3(3) Intoxication
(a) General Rule. No one is liable for a crime for which, by reason of intoxication, he fails to satisfy the culpability requirements specified by its definition.
(b) Proviso: Criminal Intoxication. Notwithstanding clauses 2(2)[129] and 3(3)(a):
(i) unless the intoxication is due to fraud, duress, compulsion or reasonable mistake, everyone falling under clause 3(3)(a) who satisfies all the other elements in the definition of a crime is liable, except in the case of killing, for committing that crime while intoxicated;
(ii) everyone who kills another person while intoxicated and who falls under clause 3(3)(a), is liable for manslaughter while intoxicated and subject to the same penalty as for manslaughter.[130]

A minority on the Commission recommended the following:

3(3) Intoxication.
(a) General Rule. No one is liable for a crime for which, by reason of intoxication, he fails to satisfy the culpability requirements specified by its definition.
(b) Exception. This clause shall not apply as a defence to a crime that can be committed through negligence unless the intoxication arose through fraud, duress, compulsion or reasonable mistake.[131]

3(1) Lack of Control.
(a) Compulsion, Impossibility, Automatism. No one is liable for conduct which is beyond his control by reason of:
(i) physical compulsion by another person;
(ii) in the case of an omission, physical impossibility to perform the act required; or
(iii) *factors, other than loss of temper or mental disorder, which would similarly affect an ordinary person in the circumstances.*
(b) Exception: Negligence. This clause shall not apply as a defence to a crime that can be committed by negligence where the lack of control is due to the defendant's negligence.[emphasis added][132]

It can readily be seen that clause (a) of both the Majority and Minority Proposals would institute a subjective test for culpability. That is, the effect would be to do away with the specific and general intent dichotomy. Those recommendations, in themselves, should be supported. Criticism can, however, still be mounted against the fallback provisions in each case.

Taking the Majority Proposal's provision first, it is very much like the minority proposal by Glanville Williams and J.C. Smith[133] in the *Offences Against the Person Report.* As such, it is subject to some of the same criticisms.

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[129]Clause 2(2) states: "No one is liable for a crime without engaging in the conduct and having the level of culpability specified by its definition."

[130]*New Code, supra,* note 38 at 27-28 [hereinafter the Majority Proposal].

[131]*Ibid.* at 28 [hereinafter the Minority Proposal].

[132]*Ibid.* at 25-26.

[133]*Supra,* note 101, para. 263 at 113-14.

First, convicting of doing the act while intoxicated obviously connects culpability with the substantive offence. The connection is even more obvious, of course, for their proposal that manslaughter remain as the alternative to murder, but then that particular provision is merely a restatement of the present law in respect of murder and manslaughter. As has been previously stated, the purpose of a separate offence should be to impose liability for the incapacitated condition, not for the conduct which resulted from that condition.

Moreover, a major weakness of the Commission's *New Code* is that it does not deal at all with punishment. This is particularly a weakness for this provision. If convicting of the included offence of committing the crime while intoxicated results in the same penalty, what is the point of having the included offence? If the Commission intended, as it should have, that the included offence meant a lesser degree of culpability, then it ought to have said so and given some indication of how much less the culpability should be.

The "defences" to the assumption that intoxication was voluntary — fraud, duress, compulsion and reasonable mistake — are not likely to have much application. Cases of intoxication of an accused operating under duress or compulsion must be extremely rare. Fraudulently induced intoxication must likewise be very infrequent.[134] Thus, these three defences are more illusory than real. As for reasonable mistake, by requiring the mistaken belief of the accused (presumably that she would not become intoxicated) to be reasonable, the Commission is proposing the retention of an objective, that is, negligent, standard. That is merely a restatement of the approach taken in *King*.[135] This can be criticized both for imposing a negligence standard arbitrarily for intoxicated accused, and for violating the principle of contemporaneity.

Finally, the proviso would greatly widen the ambit of criminal law from what it is at present. This it would do in two different ways. As with the *Proposal for a New Criminal Code*, the *New Code* would lower the culpability threshold to negligence for many offences.[136] Since negligence is defined as

[134]J. Hall, *General Principles of Criminal Law*, 2d ed. (Indianapolis: Bobbs-Merrill, 1960) at 539 has described cases of involuntary intoxication as being "virtually non-existent".

[135]*King*, *supra*, note 66.

[136]*New Code*, *supra*, note 38 at 52-88 essentially repeats the negligence provisions in the *Proposal for a New Criminal Code*. See notes 123-128, *supra*. The differences are that it has added two new offences to this category (endangering by motor vehicle, and impaired or over 80 mg of alcohol in blood while operating or in care and control of a means of transportation: *supra*, note 38 at 65), and it deleted negligence as a ground for liability for vandalism and arson.

a "marked departure from the ordinary standard of reasonable care",[137] it is apparent that an intoxication defence would be of no avail for these offences. At the other end, it would impose liability where presently there is none. For instance, theft is a specific intent offence for which intoxication is presently a complete defence.[138] Under the new proviso, a person acquitted of theft would be liable for having committed theft while intoxicated.

The Minority Proposal avoids some, but not all, of these problems. It does avoid the "horse of another colour is still a horse" argument since it does not provide for a conviction for committing the crime while intoxicated. In addition, it does not impose culpability where traditionally there has been none, that is to say, for theft and other offences which are currently of specific intent and do not have lesser included offences of general intent. However, the same general criticism that the *New Code* too readily imposes liability for negligence applies here as well. The defences allowed for negligence offences committed while intoxicated do not save the *New Code* from this failing, since they would almost certainly have very little application.[139] Finally, since punishment has not been addressed, we have no way of truly assessing the worth of the proposal when we have no idea of what penalty will be provided for a negligence offence. Surely penalty is the most important consideration.

The automatism proposal seemingly does little to change the existing law. First, by excepting loss of temper or mental disorder, it retains the "external factor" test approved by the Supreme Court in *Rabey* v. *R.*[140] Second, it, like *Rabey*, leaves the door open to a defence of automatism caused by an extreme psychological blow but only where an "ordinary person" would be similarly affected. However, sloppy drafting seems to have effected two changes. First, all external factors, such as concussive blows, would be controlled by the additional requirement that such factors also affect an ordinary person. This is unnecessary and unwarranted. The second change is more germane to the present discussion. Because the intoxication provisions deal only with an absence of the required state of mind, it would seem that a person could rely upon automatism as a defence even where the act was rendered involuntary by her intoxication. In other words, the Commission may have adopted the Australian position. If it did not intend this, the Commission ought to have been more careful in its drafting. In

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[137]*New Code*, *ibid.* at 21.

[138]*George*, *supra*, note 19.

[139]The only defence which might have some application is that relating to prescription drugs. See also *King*, *supra*, note 66 where a defence of reasonable mistake might apply. Otherwise, as Hall has indicated, *supra*, note 134 at 539, there have been virtually no cases of involuntary intoxication, which is what the Minority Proposal has countenanced as a defence.

[140][1980] 2 S.C.R. 513, 15 C.R. (3d) 225 [hereinafter *Rabey* cited to S.C.R.].

any case, whatever it intended, the Commission has not done enough to overcome the compartmentalization of the so-called "defences" of intoxication and automatism. It also has not dealt with the problems presented by multiple causes of an automatous condition.

Nevertheless, the Law Reform Commission of Canada has progressed in respect of its recommendations for codification and reform of the intoxication defence. At least it now seems to be unanimous in removing the specific and general intent dichotomy. However, it is my submission that much more thought needs to be given by the Commission to the implications of its latest proposals. It is desirable to have the culpability requirements clearly set out in a new criminal code. However, two major problems flaw the entire work — the over-enthusiastic resort to negligence as a standard for culpability and the failure to address sentencing. These are obviously related to each other. Indeed, nowhere does their relationship become more apparent than in the recommendations on intoxication and automatism. Combined with the Majority Proposal's attempt to take away the defence for offences where it is presently permitted, these flaws are too fundamental not to be given serious consideration. It is to be hoped that the required additional thought will be forthcoming from the Commission.

III. A Modest Proposal

A. Introduction

A dangerous incapacitation offence is required, if for no other reason than to ensure that proper determination of *actus reus* and *mens rea* are made, unfettered by concerns about public protection. A good starting point for proposing a new offence is to review what is required of it. The initial point to be made is that such an offence need not be restricted to cases of intoxication. I have previously[141] outlined how the doctrine of prior fault in becoming incapacitated has been applied as an exception to the contemporaneity rule. Its application extends beyond self-induced intoxication cases to incapacitation caused by other factors such as prescribed drugs and potentially even by extreme psychological blows.[142] Use of the prior fault

[141]Quigley, *supra*, note 4 contains an extensive discussion of the concept.

[142]The position for psychological blows is as yet unclear. The majority in *Rabey*, *supra*, note 140 at 520, adopting the reasons for judgment of Martin J.A. in the Ontario Court of Appeal, left open whether an extreme shock, such as seeing a loved one murdered, leading to a dissociative state during which a criminal act was committed could permit the defence of sane automatism. Dickson J. (as he then was), writing for the minority, would have extended the ambit of sane automatism but, at 552, seemed to impose a requirement that the automatous condition have been achieved without fault on the part of the accused. Whether the majority would agree with this is not clear.

doctrine is unwarranted for either the intoxication defence or the automatism defence because it violates the contemporaneity rule, because the fault is too remote from the eventual harm and because negligence has been used as the measure of fault.[143]

That is all stated by way of background for the position that a new offence should be expanded to include all forms of self-induced incapacitation. Most often, forms of incapacitation caused by alcohol or drug intoxication would result in the new offence being considered. Exceptionally, however, it might be used where the accused, through her own subjective fault, such as a failure to combat a hypoglycaemic state with sugar or a failure to take prescribed medication, fell into a state of incapacity or incognizance and then, while in that state, committed the *actus reus* of an offence.

The definition of voluntary intoxication given in the *Butler Committee Report* was as follows:

> [I]ntoxication resulting from the intentional taking of drink or a drug knowing that it is capable in sufficient quantity of having an intoxicating effect; provided that intoxication is not voluntary if it results in part from a fact unknown to the defendant that increases his sensitivity to the drink or drug.[144]

The last portion was meant to take account of the situation, for example, where a person suffering from hypoglycaemia drank a small amount of alcohol without knowing that the effect of the combination could be a state of altered consciousness. However, it is not wide enough to cover the situation where such a person has failed to counteract the hypoglycaemia with sugar[145] or where a diabetic has failed to take insulin. This is because insulin, sugar or a failure to take either are not usually thought of as intoxicants. Yet, the resulting incapacity is as much due to that person's fault as self-induced intoxication. Thus, there is a need to redraft the definition of voluntary incapacity to take into consideration these and similar circumstances.

The next point to be considered is what the *mens rea* requirement for the act of becoming intoxicated should be. Modifications made by the Butler Committee to the definition of voluntary intoxication to take account of the slightly wider scope for the offence would be sufficient. In other words, the ingestion of drugs or alcohol or the omission to take prescribed substances, in either case knowing that incapacitation could result, would be

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[143]See *supra*, note 66 and accompanying text. *King* established negligence as the standard. The negligence standard was upheld in the case of intoxication in *Hartridge*, *supra*, note 30, and at least not rejected for automatism caused by an extreme psychological blow in *Rabey*, *supra*, note 140.

[144]*Butler Committee Report*, *supra*, note 80, para. 18.56 at 236.

[145]See, *e.g.*, *R.* v. *Bailey* [1983] 1 W.L.R. 760, [1983] 2 All E.R. 503 (C.A.).

sufficient to constitute the *mens rea* for the offence. The accused must simply have awareness of the risk of becoming incapacitated.

Should the offence be connected to the act committed or should it be a separate offence? The point to be borne in mind is the justification for culpability in these circumstances. Punishment for the substantive offence is not justified because, *inter alia*, the accused lacked *mens rea* or volition. In addition, the fault in becoming incapacitated is too remote from and unconnected with the subsequent act. As a result, in considering a separate offence, a consistent approach should be taken. It is not justifiable to found culpability on the act committed. Therefore, it is not proper to have a new offence that is, in some way, tied to the substantive offence. For this reason, the new offence should be neither an included offence[146] nor simply an alternative mode of commission of the substantive offence.[147] Instead, it should be a completely separate offence, culpability for which should be determined independently.

There are other important criteria for a new offence. First, the offence should not apply to every situation where the accused has been acquitted of the original offence because of a lack of *mens rea* or volition. The claims of public protection are not great enough to insist upon culpability for all such acts. For instance, there has been no great public opposition to the very few recorded acquittals, on account of intoxication, for theft[148] or breaking and entering with intent to commit an indictable offence therein.[149] The *Butler Committee Report* was correct in restricting its proposed offence.[150]

One of the grounds for the offence is that the commission of some dangerous act is convincing evidence of the need for the public to be protected from that particular person. The commission of a nondangerous, but

[146]This was the recommendation of the *Butler Committee Report*, *supra*, note 80, para. 18.54 at 236.

[147]This was the recommendation of the minority in the *Offences Against the Person Report*, *supra*, note 101 at 113-14. The accused would be found guilty of performing the act while intoxicated, and given the same punishment in all cases except murder, where the punishment would be equivalent to that of manslaughter.

[148]*E.g.*, *Ruse* v. *Read* [1949] 1 K.B. 377, [1949] 1 All E.R. 398; *R.* v. *Regehr* (1952), 13 C.R. 53 (Sask. Mag. Ct.); *McLaughlan* v. *R.* (1974), 20 C.C.C. (2d) 59 (Ont. C.A.); and, of course, *George*, *supra*, note 19, where the accused was acquitted by the trial judge of the more serious offence of robbery on the ground that he was so intoxicated as to be incapable of forming the specific intent to commit theft, a component of robbery.

[149]*E.g.*, *R.* v. *Campbell* (1974), 17 C.C.C. (2d) 320 (Ont. C.A.); *R.* v. *Curtis* (1972), 8 C.C.C. (2d) 240 (Ont. C.A.); *R.* v. *Johnnie and Namox* (1975), 23 C.C.C. (2d) 68 (B.C.C.A.).

[150]*Butler Committee Report*, *supra*, note 80, para. 18.55 at 236. It recommended restriction to acts causing death or bodily harm, involving sexual attack or destruction or damage to property that endangered life.

nevertheless criminal, act does not have the same persuasive ability. It is not a fair predictor of dangerousness. It is notorious that predictions of dangerousness are fraught with error.[151] Hence, the prediction should only be made where there is very credible evidence to support it. That evidence is available when the accused has committed the *actus reus* of a homicide, of causing bodily harm, or of a sexual assault or some similar act, but usually not otherwise.[152]

I would, in addition, include criminal driving offences, simply because of the danger caused while driving in an incapacitated condition. However, this is primarily to protect against the automatous driver since an impaired condition of a lesser degree would not likely leave the trier of fact in doubt as to the driver's *mens rea*. The nature of the activity is such that evidence of driving ordinarily would lead to the conclusion that the driver had *mens rea* even if her cognitive ability was impaired.

Another important consideration is the disposition. I have left aside this aspect until now because it warrants comment in connection with my own proposals. I submit that the emphasis should be on treatment of offenders convicted of the new offence, chiefly because a person subject to dangerous incapacitation is, in most cases, an obvious candidate for such treatment. However, I would be remiss in not acknowledging that this is apt to be very controversial.

Therefore, let me begin with a brief discussion of the rationale behind punishment and of the different schools of thought about its aims. I will then attempt to apply these considerations to a dangerous incapacitation offence.

H.L.A. Hart has given a standard definition of punishment:

> [T]he standard or central case of 'punishment' is defined in terms of five elements:
> (i) It must involve pain or other consequences normally considered unpleasant.
> (ii) *It must be for an offence against legal rules.*
> (iii) It must be of an actual or supposed offender for his offence.

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[151]See, *e.g.*, A.E. Bottoms, "Reflections on the Renaissance of Dangerousness" (1977) 16 Howard J. of Penology and Crime Prevention 70. Bottoms has cited several studies into the prediction of dangerousness and concluded, at 80, that the best that can be achieved is a false positive rate of 55 to 70 per cent. That is, for every truly dangerous person, between one and two persons who will not be violent are locked up. This is a compelling reason for restricting culpability to those who have actually caused harm.

[152]Ashworth, *supra*, note 97 at 559, has also suggested that the law, rather than punishing all intoxicated persons, regardless of whether harm is caused, on the basis that they have voluntarily created a risk, should reserve its punishment for those intoxicated persons who actually cause harm, that is, who cause the risk to materialise.

(iv) It must be intentionally administered by human beings other than the offender.
(v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed.[emphasis added][153]

It is immediately apparent that the proposal for a dangerous incapacitation offence is justified as falling within the second element. Indeed, it must be emphasized that the present intoxication rules punish what is presently not an offence against legal rules — intoxication — although, of course, only where the intoxicated person has committed a general intent offence while in that condition and while lacking *mens rea* and/or volition. A new offence would be at least as justifiable and probably more so since it punishes more explicitly for the incapacitation, rather than diffusing it through the specific-general intent dichotomy.

Numerous factors are thought to enter into punishment. The ones that are usually mentioned include deterrence, both specific and general, protection of the public, denunciation, both of the offender and of the conduct, rehabilitation, and retribution. Although the approach advocated here is treatment oriented, implying a rehabilitative approach, I wish to argue that these other concerns are not ignored by such an approach.

First, let me examine protection of the public. For most of the cases that would be dealt with under a dangerous incapacitation offence, the accused's condition will have resulted from drug or alcohol consumption. The degree of intoxication and possibly the resulting conduct will no doubt suggest a serious drug or alcohol problem. In those circumstances, the best possible protection for the public is to deal with that problem through treatment. My proposals will include imprisonment as the ultimate sanction. Hence, the person subject to court-ordered treatment will still be liable to imprisonment in case of failure or refusal to co-operate in a treatment program. In any case, protection of the public is generally overrated as a consideration in sentencing since, unless one is able to countenance permanent imprisonment or the death sentence, the protection extends only for so long as the person is under controls, whether they be imprisonment, a probation order or parole. Thus, treatment can as validly provide protection for the public despite the acknowledged problems in achieving success through such treatment.[154]

[153]H.L.A. Hart, *Punishment and Responsibility* (London: Clarendon Press, 1968) at 4-5.

[154]I recognize that some will protest that treatment is not effective where it is coercive. My response is twofold. First, even where an alcoholic, for example, has apparently sought out treatment on her own initiative, it is quite likely that some external pressure was exerted, perhaps by family members, an employer, or friends. In other words, the only difference between that situation and my proposal is the degree of coercion. The second point is that, unless we are willing to completely abandon any pretense of rehabilitation through our corrections system, we must accept that coercive treatment will be necessary even if its efficacy is jeopardized by virtue of the fact that the offender has not willingly chosen the course of treatment.

Deterrence has two components, that of deterring the individual offender (specific deterrence) and that of deterring others in the community who would commit similar acts (general deterrence). In relation to specific deterrence, I have elsewhere pointed out that such cannot be achieved under the present intoxication rules,[155] first, because a person intoxicated to the point of lacking *mens rea* or volition is, by definition, incapable of making the choice of whether to act in a particular way or not and, second, because deterrence depends upon certainty in the law and of punishment which the present rules lack. The first of these problems would be lessened, though not completely eliminated, by a new offence because the offence is one of becoming incapacitated, not of some conduct after incapacitation has been achieved. Thus, the choice by the accused is simply whether or not to embark upon a course of conduct apt to result in incapacitation. That is what is sought to be deterred, not the commission of a general intent offence while intoxicated.

The second problem would also be minimized because the law then would be taking a less ambiguous stand against incapacitation — the individual in question would understand that she risked liability for such an offence if she, in future, allowed herself to become incapacitated. Moreover, mandating treatment would make the punishment both certain and known, and is therefore more likely to enhance the deterrent effect of the offence.

The improbability of achieving general deterrence through the existing rules is also based, to some extent, upon the ambiguities in the law and the uncertainty of punishment for the culpability of becoming intoxicated. With a new offence of dangerous incapacitation and the requirement of treatment where necessary, it can be argued that general deterrence will be more easily achievable since the law and the punishment will stipulate a clearer connection between incapacitation and culpability. At the least, it can be no worse at accomplishing general deterrence than the present position.

Denunciation is sometimes thought to carry remnants from an earlier emotive influence on punishment: vengeance.[156] However, vengeance is no longer considered to have much validity in the sentencing process.[157] Denunciation, however, may still be a factor.[158] If it is, it can still be achieved

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[155]Quigley, *supra*, note 4.

[156]See H.L.A. Hart's discussion of the ideas of J.F. Stephen, a prominent Victorian judge and historian of the criminal law, in *Law, Liberty and Morality* (Stanford: Stanford University Press, 1963) at 61.

[157]See, *e.g.*, *R.* v. *Morrisette* (1970), 75 W.W.R. 644 at 645-46, 1 C.C.C. (2d) 307 (Sask.C.A.), Culliton C.J.S.

[158]Hart, *supra*, note 156 at 62. The denunciatory element "figures largely in the conception of the function and justification of punishment which is even today characteristic of the English judiciary and is shared by many conservative English and American lawyers."

through the legislation of an offence such as I am proposing and by disposition oriented towards treatment where that is feasible. If the aim of denunciation is to express moral condemnation of the offender and to uphold societal morality,[159] this can as easily be achieved through a public trial, conviction and sentence for a new offence as through the same process for any other offence. Moreover, since probation orders, fines and other noncustodial sentences do not appear to scuttle the denunciatory effect for other offences, why should this be the case for a treatment-oriented disposition for a new offence?

Retribution is another factor thought to be part of the sentencing process and one that is said to be in conflict with the aim of rehabilitation.[160] Without entering into a lengthy discussion of the latter proposition, let me say that retribution and rehabilitation are not inevitably in conflict. They can, at times, converge — for example, where the rehabilitative process is thought by the public and the accused to compensate for the crime committed. According to Weiler,[161] there are several components to retribution, among them expiation by the accused of her feelings of guilt, reassurance to the law-abiding that they are not disadvantaged by following the law and that the accused did not gain unfairly from her crime, and the instilling of a sense of justice in the way the case was handled. Vengeance is no longer considered of paramount concern under this new concept of "just desserts" retribution. But these concerns can also be met through a regimen of treatment. An accused, although coerced by a court into taking treatment, may very well feel that she has paid her debt to society by submitting to such treatment. The public can see that she did not escape sanction by the criminal process, and so is vindicated in its resolve to comply with the law. Retribution can be satisfied as much by this approach as by any other form of sentence. In addition, if the treatment is successful, the accused will also have been rehabilitated.[162]

To sum up the discussion on disposition, while other sanctions should be available, the thrust should be in favour of treating those offenders who require it. Such an approach best ensures that the accused will not repeat the behavior; therefore, it provides the most effective protection for the

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[159]*Ibid.* at 63.

[160]P.C. Weiler, "The Reform of Punishment" in Law Reform Commission of Canada, *Studies on Sentencing* (Hull, Que.: Supply & Services Canada, 1974) 91 at 160.

[161]*Ibid.* at 158-60.

[162]Weiler probably would not agree: see *ibid.* at 160. However, at 170, he specifically refers to the unjustifiability under retributive principles of punishing an intoxicated offender on the basis that the offender did not "exercise a meaningful choice". Under his criteria, however, to convict of and punish for a new offence of dangerous incapacitation would be justified if the accused exercised the choice of becoming incapacitated. Later, at 191, Weiler states his opposition to involuntary treatment. However, see my comment on this point *supra*, note 154.

public. The threat of other punitive measures will, of course, have to be retained in order to maintain some sanction against a person who refuses to undergo treatment or fails to comply with the terms of treatment. But the primary emphasis should be upon treatment of the underlying causes of the incapacitated condition. This approach should be made clear in the legislative framework in order to avoid a "renamed prison system".[163]

Accompanying the legislation must be a commitment by Parliament to adequate funding of treatment programs to maximize the chances of successful treatment. It must be conceded that treatment will not always be successful.[164] But neither are imprisonment or the other forms of punishment always successful in deterring crime, much less rehabilitating offenders. At least, by stressing treatment, the aim is unambiguous. In that way, there is some possibility that greater emphasis would be placed on the effectiveness of the treatment, rather than the perpetuation of the confusing and sometimes contradictory goals of the present sentencing process.

Furthermore, conviction for such an offence should not result in an indeterminate sentence. Once again, this is due to the unreliability of our predictions of dangerousness. Since the provision of a new offence would act as a substitute for conviction of a general intent offence under the present law and since present law provides for determinate sentences, there is no good reason for an indeterminate sentence for a new offence. There ought, therefore, to be a maximum penalty and one which reflects the reduced culpability of a person who has committed the *actus reus* of an offence while cognitively or volitively disabled. Naturally, any maximum penalty is necessarily arbitrary and likely to be contentious.

Bearing these thoughts in mind, I now intend to outline my own proposals in some detail. Following that, I will, where necessary, provide some explanation for my suggestions.

B. My Proposals

Although presented in the form of legislation, this is not to suggest that the following proposal for codification and reform is necessarily model legislation. Indeed, there are some areas for which further study is required and which are beyond the purview of this article. At the end of the proposal, I will attempt to explain and clarify some of the points made. To ease the presentation of that discussion, my proposals are set out in point form:

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[163]M. Goode, "Some Thoughts on the Present State of the 'Defence' of Intoxication" (1984) 8 Crim. L.J. 104 at 120, has raised this concern.

[164]*Supra*, note 154.

1. On a trial for any criminal offence requiring *mens rea* except an offence of dangerous incapacitation, the judge or jury shall determine whether the Crown has proved that the accused acted voluntarily and with the *mens rea* required for the offence. That determination shall be made on all of the evidence presented in the trial, including any evidence of the impairment or incapacitation of the mind of the accused from any cause whatever, with the drawing of such inferences from the evidence as appear proper in the circumstances.

2. In a case where an accused might be liable for the offence of dangerous incapacitation and where there is evidence of impairment or incapacitation of the mind of the accused, if the trial is by judge and jury, the trial judge, in charging the jury, shall inform the jury that acquittal on the offence charged and any included offence(s), if on the basis of a lack of voluntariness or a lack of *mens rea*, shall not necessarily amount to a final determination of the culpability of the accused.

3. Where the accused is charged with an offence of a dangerous nature, the judge or jury, when arriving at a verdict of acquittal for the offence charged and any included offences, shall state whether the acquittal is due to a unanimous reasonable doubt as to the act having been committed voluntarily or with *mens rea* due to the incapacitation of the accused. An offence of a dangerous nature is an offence which has resulted in bodily harm or death or involved [serious] sexual attack on another person or destruction or damage to property that endangered life or bodily health or that consisted of the operation of a motor vehicle in an incapacitated condition.

4. Where a verdict has been rendered pursuant to section 3, if the Crown wishes to proceed, the accused shall immediately be placed on trial before the same judge or jury for the offence of dangerous incapacitation. Any evidence heard on the trial of the offence originally charged shall become evidence on the trial of the offence of dangerous incapacitation.

5. The Crown and the accused shall each be entitled to call any additional evidence necessary to a determination of the issues involved in the offence of dangerous incapacitation. The trial judge may, in her discretion, permit either party an adjournment of the proceedings in order to obtain such further evidence but only to avoid unfairness to such party. Otherwise, the trial shall proceed for the new offence. The accused shall be deemed to have made the same election as for the offence charged. Likewise, where the offence charged was one on which the Crown could proceed by indictment or by summary conviction, the Crown shall be deemed to have made the same election as for the original offence charged. No new indictment or information shall be required. However, if a jury trial, the jury should be informed that the accused is to be tried for having been in an incapacitated

condition that resulted in dangerous conduct and not for the particular conduct that resulted.

6. In determining the culpability of the accused for the offence of dangerous incapacitation, the judge or jury, as the case may be, shall only convict if satisfied beyond a reasonable doubt by the Crown that:

(a) in part or in whole, the condition of the accused resulted from her subjective fault, that is, that the accused intentionally or recklessly got into an incapacitated condition by ingesting a substance she knew was capable in sufficient quantity of incapacitating her or got into such a condition by omitting to ingest a substance where she knew that a failure to ingest such substance might result in her incapacitation; provided that such incapacitation is not culpable if it results in part from a fact unknown to the accused that increases her sensitivity to the substance or omission to take the substance; or,

[(b) where, in part or in whole, the incapacitated condition was caused by a mental disorder of a serious and prolonged nature, representing manifest danger to the public.]

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 original offence charged was a summary conviction offence, to punishment for a summary conviction offence;

(c) for any other situation, to imprisonment for two years.

8. The trial judge shall not, however, impose imprisonment for such an offence unless it has been demonstrated that:

(a) the accused refuses to take remedial treatment for the causes of the incapacitated condition in order to prevent its recurrence; or,

(b) there is evidence that treatment of the accused is highly unlikely to be successful; or,

(c) an accused has failed to comply with the terms and conditions of a previous sentence for a conviction for dangerous incapacitation; or,

[(d) no other appropriate disposition is available].

9. The provisions of Part XX of the *Criminal Code*[165] apply *mutatis mutandis* to an offence of dangerous incapacitation, except that, in addition to

[165]Part XX of the *Criminal Code* deals with sentencing.

any other powers of disposition, a trial judge may commit an accused directly to an appropriate institution or other treatment facility. Committal to such an institution or treatment facility shall be by warrant of committal in Form 18 but shall specify the name of the institution or treatment facility and the reason for the committal. A warrant of committal may be varied upon application to the trial judge if it is made to appear that there are valid reasons for doing so.

10. Either party may appeal from the verdict or sentence. Where the offence charged was an indictable offence, the provisions of Part XVIII of the *Criminal Code* shall apply and where the offence charged was a summary conviction offence, the provisions of Part XXIV shall apply.

11. A conviction for an offence of dangerous incapacitation shall be treated as any other conviction for the purposes of the *Criminal Records Act*,[166] the *Canadian Evidence Act*,[167] and the *Criminal Code.*

12. The provisions dealing with an offence of dangerous incapacitation shall apply *mutatis mutandis* to proceedings under the *Young Offenders Act*[168] except that where death resulted from the incapacitation of the accused, the maximum penalty would be three years confinement in "close custody" as defined in section 24(1) of the *Act.*

C. Explanation of the Proposals

What follows is an explanation of the proposals which I have made. Where the proposal is apt to be controversial, I will indicate and advance reasons for making it. Unless otherwise indicated, I shall refer to my proposal by the section numbers given above.

Section 1 is basically a rewording of Section 8 of the English *Criminal Justice Act 1967*[169] and is intended to ensure that the trier of fact makes a determination of volition and *mens rea* by consideration of all of the evidence presented. It leaves room, however, for some offences to require negligence as the standard. Not only is it meant to do away with the specific and general intent distinction under the present intoxication rules,[170] but it also attempts to do away with the requirement of an external factor where the accused relies on the defence of sane automatism.[171] As a result, there

[166]*Criminal Records Act*, R.S.C. 1970 (1st Supp.), c. 12.
[167]*Canada Evidence Act*, R.S.C. 1970, c. E-10.
[168]*Young Offenders Act*, S.C. 1980-81-82-83, c. 110.
[169]*Criminal Justice Act 1967*, *supra*, note 71.
[170]This was confirmed in *Leary*, *supra*, note 3.
[171]This was first laid down as a requirement in *R.* v. *Quick* [1973] Q.B. 910, [1973] 3 W.L.R. 26, [1973] 3 All E.R. 347 (C.A.) and adopted in Canada in *Rabey*, *supra*, note 140.

are implications for the present insanity defence[172] to which I shall later allude. The intent is to restore basic criminal principles to the determination of voluntariness and *mens rea* and to make clear that the onus to prove voluntariness and *mens rea* rests with the Crown.

Section 2 tries to ensure that a jury makes the actual determination of volition or *mens rea*, unfettered by concerns that an acquittal might lead to the outright release of the accused without at least coercive treatment where there is a real concern about public safety. It is necessary to make this an express stipulation because of the normal rule that a jury should not be told the potential disposition.[173]

The rationale for this rule is that a jury should not be influenced by considerations of the severity of the penalty. The rule could be attacked as being unrealistic in any event, since, for murder, for example, it is very likely that most jurors are aware of the mandatory sentence of life imprisonment. While perhaps not certain of the precise range of sentences for other offences, jurors will have some idea of the severity of the offence. Furthermore, it is not clear why a judge as trier of fact should be possessed of this knowledge while a jury should be denied it. There is no evidence to suggest that a judge is less influenced by foreknowledge of the penalty than a jury when making a decision on culpability.

At any rate, I think this recommendation is essential to an unhindered determination of the proper issues. Moreover, the suggestion is not a significant departure from the usual rule. Merely informing the jury that an acquittal is not a final determination should not deflect them from convicting for the offence charged or an included offence if they should find the requisite volition and *mens rea*. On the other hand, it may serve to inhibit convictions motivated by concerns for public safety rather than findings relevant to a determination of *mens rea* or volition.

It is apparent that section 3 calls for a special verdict from a judge or jury. This is to ensure that the accused gains the benefit of any doubt that she was the person who committed the act or of any other available defence. Obviously, one could not justify punishing an accused for dangerous incapacitation where there was doubt that she was the person who committed the act. In the same vein, since a jury can arrive at a verdict by different

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[172]*Criminal Code, supra*, note 27, s. 16.

[173]The rule is a well-established one. See *R.* v. *Larkin* [1943] 1 K.B. 174, [1943] 1 All E.R. 217 (C.A.); *R.* v. *Black* [1963] 1 W.L.R. 1311, [1963] 3 All E.R. 682, 128 J.P. 79 (C.A.); L.J. Blom-Cooper, "Pleading for Mercy" (1964) 27 Mod. L. Rev. 233; A. Maloney, "Addressing the Jury in Criminal Cases" (1957) 35 Can. Bar Rev. 373 at 383-85; *R.* v. *Cashin* (1981), 65 C.C.C. (2d) 56 (N.S.S.C.).

paths,[174] the provision that the verdict must be unanimous on the question of incapacitation negating *mens rea* or voluntariness ensures that an accused gains the benefit of any other defence open to her.

The argument could be made that this provision will unnecessarily complicate jury trials. However, it is difficult to see how this could be any more complicated than the instructions which must presently be given to a jury where, for example, there are multiple charges with some falling into both the specific and general intent categories. Likewise, where there are multiple defences raised, such as insanity, intoxication and automatism, the jury charge is very complex. It can be fairly stated that the present provision is simpler or, at the least, no more difficult. Since the trier of fact is already required to render a special verdict where insanity is proven,[175] this provision should not result in any great problem. It is simply a verbalization by the judge or jury of what they must do in any event.

Where disagreement no doubt would arise is with the scope of the new offence. Following on arguments made earlier, I would advocate a very narrow ambit for the offence, covering only serious cases of harmful conduct, namely death, bodily harm and danger to life and safety. But I also believe that sexual assault ought to be included within the new offence. The result is problematic because of the wide range of activity proscribed under the sexual assault offences.[176] Is there any rationale for excluding common assault from the catchment area of the offence but including the less serious kinds of sexual assault? I am unsure of the answer and, for this reason, have parenthetically inserted the word "serious" as a possible restriction for sexual assaults. It is obviously an area where debate is desirable.

The new offence proposed in section 4 is meant to proceed with dispatch. This is in order to meet the argument made by the majority in the *Offences Against the Person Report* that a separate offence would lead to many more trials. This recommendation seeks to avoid such an occurrence by applying the evidence presented in the main trial. However, the Crown may decide not to proceed if, for instance, the accused is not in need of treatment or deserving of punishment.

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[174]It is accepted law that a jury can arrive at a unanimous verdict even though the individual jurors might have arrived at their decision by different reasoning and on different grounds: *R.* v. *Tuckey* (1985), 46 C.R. (3d) 97 at 109-10, 20 C.C.C. (3d) 502 (Ont. C.A.); G. Williams, "Alternative Elements and Included Offences" (1984) 43 Camb. L.J. 290 at 291-92; *R.* v. *Thatcher* [1987] 1 S.C.R. 652, 57 C.R. (3d) 97, [1987] 4 W.W.R. 193.

[175]*Criminal Code, supra*, note 27, s. 542.

[176]*Criminal Code, supra*, note 27, ss 246.1, 246.2, and 246.3 cover a range from the most minimal touching, presumably to be charged as a summary conviction offence under s. 246.1(1)(b), to the most hideous form of aggravated sexual assault, punishable by life imprisonment under s. 246.3(2).

Section 5 follows this approach by permitting additional evidence to be called, but allowing the proceedings to be adjourned for the purposes of obtaining such evidence only to avoid unfairness to either party. Additional evidence, however, should be permitted because it may well be relevant to the issues to be determined for the new offence and may not have been admissible on the original trial. In order to avoid unnecessary delays, both the Crown and defence are deemed to have made the same elections as for the original offence charged. For the same reason, a new indictment or information is dispensed with. Informing the jury that the trial on the new offence is to decide culpability for incapacitation rather than the resulting conduct is simply a cautionary measure to ensure that the jury focusses on the proper issue.

Section 6 is more controversial. Subsection (a) establishes a subjective test for fault. This would merely bring Canadian law in line with the subjective approach. The proposal is basically a rewording of the *Butler Committee Report*[177] so as to include the situation where the accused has failed to take prescribed substances, such as insulin. Like the *Butler Committee Report*, some leeway is allowed for the accused who did not know that her sensitivity to the substance (or lack of it) might be increased in the particular circumstances.

Subsection (b) is meant as a tentative addition to (a). In large part, whether it is deleted would depend upon whether the insanity provisions of the *Criminal Code* are redrafted. It, along with subsection (a), could provide a complete substitute for the defence of insanity. It will be noted that section 1 would allow acquittal even where a disease of the mind caused the lack of volition or *mens rea*. Subsection (b) of section 6 would then reimpose culpability, although for the new offence instead, but only where the accused was not subjectively at fault for her incapacitated condition and presented a serious menace to the public.

My intention here is to meet the argument that a person who might be considered insane under the present insanity provisions to a degree that negatived voluntariness or *mens rea* would not be subjectively at fault for being in such a condition. Nonetheless, that person represents a danger to the public. It is true that such a person would be rendered culpable for a criminal offence instead of the present finding of nonculpability by reason of insanity. I do not, however, consider that there would be any more stigma attached to a conviction for the new offence than for a finding of insanity. I also believe that the argument against criminal culpability is countered

[177] *Butler Committee Report, supra*, note 80, para. 18.56 at 236. The proviso covers, for example, the situation where an accused took alcohol with a prescription drug and did not know that the combination might cause incapacitation.

by the changes recommended at the disposition stage which would remove the present indeterminate institutionalization in favour of a fixed sentence of maximum duration and a treatment-oriented approach.

Adoption of these proposals would subsume a large part of the present insanity defence. Most of the cases presently dealt with by the first arm of section 16(2) of the *Criminal Code*[178] would be taken care of, in one way or another, by my proposals. Some of these persons, the least dangerous ones, would be entitled to an outright acquittal (as they presently are for summary conviction offences). This typically would cover the situation where a person in a dissociative state has committed some minor act such as a shoplifting. More dangerous individuals could be covered by subsection (b) which does not have a fault requirement.

Section 6 also attempts to deal with cases where there have been multiple causes for the incapacitated condition. A complaint levelled against the present law is the varying treatment accorded different causes of incapacitation.[179] If incapacitation is primarily due to an external factor, the defence is automatism; if primarily due to a disease of the mind, the defence is insanity; if primarily due to intoxication the defence is intoxication.[180] The result, then, could be outright acquittal, acquittal on account of insanity or either acquittal or conviction depending on whether the offence is one of specific or general intent. Under my proposal, whether or not the condition was totally attributable to the accused's subjective fault would be of no moment. For instance, where intoxication was a partial factor but was bound up with a mental disorder from which the accused suffered, this would make no difference to her liability for the dangerous incapacitation offence.

What would be left of the insanity defence could be covered under section 6(b) if consideration were given to abolition of the present defence of insanity. There would be some cases falling under the second branch of

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[178]*Criminal Code*, *supra*, note 27, s. 16(2). The first arm refers to a disease of the mind which renders the accused "incapable of appreciating the nature and quality of an act or omission." This state usually will also be one where the accused acted without volition and/or *mens rea* for the offence charged.

[179]For a discussion of this complaint against the present law, see Quigley, *supra*, note 4 at 110-12.

[180]*R.* v. *Revelle* (1979), 21 C.R. (3d) 161 at 162-67, 48 C.C.C. (2d) 267 (Ont. C.A.), aff'd [1981] 1 S.C.R. 576, 21 C.R. (3d) 161.

section 16(2) of the *Criminal Code*[181] and the provision dealing with delusions.[182] That latter provision has, at present, little application in practice.[183] It is far beyond the ambit of this article to embark upon a critical examination of the insanity defence. Rather, my primary aim has been to subsume within my proposal those portions of the present insanity defence where the accused lacked volition or *mens rea*. Obviously, a redrafting of the insanity defence would be necessary.[184]

With regard to the sentencing provisions in sections 7, 8 and 9, for the reasons previously stated, I believe that prison should be a last resort for those who refuse or do not respond to treatment. Normally, a judge would use the probation, suspended sentence and discharge provisions in the *Criminal Code*[185] to require an accused to take treatment and to enforce the conditions of the order. Nevertheless, in recognition that some sterner measures might, on occasion, be required, a judge should have the power to sentence the offender directly to a suitable treatment facility or institution. The facility should be named in the committal order to ensure that the accused goes to that place and no other. Where the facility turns out to be inappropriate or another facility can better provide the necessary treatment, the sentencing judge should be able to change the committal order.

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[181]*Criminal Code, supra*, note 27, s. 16(2). This second arm covers the situation where the accused, by reason of a disease of the mind, has been rendered incapable of "knowing that an act or omission is wrong." An accused falling under this branch may have acted voluntarily or with *mens rea*, but is excused on account of her mental impairment because she is not considered a fit person to punish by means of the criminal law. That is to say, she is not responsible for her action.

[182]*Ibid.*, s. 16(3). The subsection allows insanity as a defence where, on account of delusions, an otherwise sane person believes in a set of facts which, if true, would have justified or excused her act. In other words, it provides a defence where insanity causes a mistake as to a justification or an excuse. Such a proposal could be made for self-induced incapacitation. However, I have not done so because the implications are quite complex and would require considerable study. Stuart, *supra*, note 6 at 380-81, has made this point. The question of extending a defence to those voluntarily incapacitated where a mistake as to a legal excuse or justification must be postponed for another study. At present, because such justifications as self-defence or defence of property carry with them a requirement of reasonableness, a mistaken belief in a justifiable course of conduct is of no avail where the mistake was caused by intoxication: *Reilly* v. *R.*, *supra*, note 22.

[183]Because of the wording of s. 16(3) of the *Criminal Code*, requiring that a person suffering from delusions must be "in other respects sane", this subsection has been rarely resorted to. See, *e.g.*, *R.* v. *Budic (No. 3)* [1979] 1 W.W.R. 11, 43 C.C.C. (2d) 419 (Alta. C.A.). Indeed, it has been said to be subsumed within s. 16(2): *R.* v. *Abbey* [1982] 2 S.C.R. 24 at 37, [1983] 1 W.W.R. 251, 29 C.R. (3d) 193, 68 C.C.C. (2d) 394, 138 D.L.R. (3d) 202.

[184]Interestingly, the *New Code, supra*, note 38 at 30 proposes to maintain an insanity defence, called mental disorder, except that the provision respecting delusions has been deleted entirely.

[185]*Criminal Code, supra*, note 27, ss 662-66.

Imprisonment should remain as the sanction of last resort. This is primarily to ensure that an accused abides by a discharge or suspended sentence. Those dispositions can be revoked upon application if an accused violates the terms.[186] Exceptionally, there might be an accused who is a repeat offender, refuses to take treatment, or is not capable of responding to treatment. For those situations, a jail sentence might be warranted. Nonetheless, the penalty should reflect the reduced culpability of a person who lacked volition or *mens rea* for the offence originally charged and who, indeed, may well not have meant harm to anyone at all. Whatever the penalty provided, there is little doubt that there will be great disagreement. I suggest five years as a maximum where death resulted.

The most serious act to be covered by the new offence would be an automatous homicide, now resulting in a manslaughter conviction where self-induced incapacity was involved.[187] In Saskatchewan, the usual punishment for manslaughter is in the range of three to three and one-half years imprisonment.[188] Manslaughter offences where intoxication is involved vary from near-murder to automatous homicides. Since culpability for the present offence would only arise where an accused lacked volition or *mens rea*, the punishment properly should be at the lower end of the scale. On this basis, the five year maximum is justifiable. The most dangerous person likely to be acquitted on account of a lack of voluntariness or the mental element is the automaton. Such cases must be extremely rare. The recommendation would adequately handle such situations because it allows a great deal of time for treatment to succeed, yet does not depart significantly from what the accused would receive under the present law.

For offenders who do not require treatment, the usual range of sentences under Part XX of the *Criminal Code* would be available. Usually, such offenders would receive a fine or a suspended sentence or conditional discharge, a term of which might be a prohibition from consuming incapaci-

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[186] *Ibid.*, ss 662.1(4), 664(4).

[187] *E.g.*, Hartridge, *supra*, note 30.

[188] *E.g.*, *R.* v. *Baldhead* [1966] 55 W.W.R. 757, 48 C.R. 228, 4 C.C.C. 183 (Sask. C.A.) (three years); *R.* v. *Smith* (1973), [1974] 1 W.W.R. 635, 25 C.R.N.S. 350 (Sask. C.A.) (three years); *R.* v. *Mikkelson* (1973), 14 C.C.C. (2d) 255 (Sask. C.A.) (three years); *R.* v. *Beatty* (1982), 17 Sask. R. 91, 69 C.C.C. (2d) 223 (C.A.) (three and one-half years). C.C. Ruby, *Sentencing*, 3d ed. (Toronto: Butterworths, 1987) at 409-23, essentially says that this is the range throughout Canada though, of course, both higher and lower sentences have been imposed in particular cases. This broadly accords with the practice in England for similar cases: D.A. Thomas, *Principles of Sentencing*, 2d ed. (London: Heinemann, 1979) at 74 ff. especially at 83-85. R.P. Nadin-Davis, *Sentencing in Canada* (Toronto: Carswell, 1982) at 259 suggests, on a very limited sample of cases, that ten to twenty years is more the norm. It is submitted that this latter authority is incorrect and that the above cases and authorities better reflect the range of sentences.

tating substances. This would cover the vast majority of cases where it was the first occasion on which the offender had become so incapacitated and caused harm. Exceptionally, a judge might still consider that some period of incarceration was required. This is the reason for including subsection (d) to section 8. One would hope that it would be used sparingly since the rationale for such a sentence would seem obscure.

There are, of course, those who believe that all persons with severe mental disorders represent an undue risk to the public. However, given our problems in predicting dangerousness, the indefinite committal of all mentally disordered persons who have engaged in a criminal act would be unwarranted. The better approach is to provide for a maximum determinate sentence, and to use civil commitment procedures to institutionalize those persons presenting a genuine danger to the public. As with the substantive provisions of the insanity defence, this area is a fruitful one for further study.

Sections 11 and 12 are merely procedural recommendations to ensure that the new offence is treated like any other offence for appeal purposes and for subsequent offences. The last provision extends the operation of the recommendations to the *Young Offenders Act*.[189] The only change is to reduce the maximum punishment to bring it into line with the maximum under that *Act*. This is justifiable since a conviction for first degree murder would attract that maximum. There is certainly no reason why a dangerous incapacitation offence should have a greater penalty than murder.

Conclusion

These proposals are not meant to be etched in stone. Nevertheless, they seek to inject greater rationality and consistency into the law while protecting the legitimate concerns of society. The cornerstone of the proposals is the complete adoption of a subjective approach to all questions of *mens rea* and voluntariness. In that way the criminal law can be made simpler, fairer, more certain and more consistent and can better achieve its aims. For those few situations that could prove problematic under a subjective approach, the recommendations that I have made for a dangerous incapacitation offence should provide sufficient protection to the public from manifestly

[189] *Young Offenders Act*, *supra*, note 168.

dangerous people. At the same time, however, those recommendations seek to guard against overreaction and too easy resort to incarceration or institutionalization. Nonetheless, I recognize that any recommendations in this controversial area of criminal law will provoke much debate and criticism. Indeed, the purpose of these proposals is to prompt such discussion.
