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Intoxication is never a defence

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Table of Contents

I. Not a defence, even exceptionally

II. Evidential or substantive?

III. Constructive liability

IV. Specific versus basic intent

V. Closing remarks

Journal Article

Criminal Law Review

Crim. L.R. 2009, 1, 3-14

Subject
Criminal evidence

Keywords
Basic intent; Criminal liability; Specific intent; Voluntary intoxication

Legislation cited
Offences Against the Person Act 1861 (c.100) s.20

Crim. L.R. 3 **Summary:** *This article considers the intoxication doctrine, including whether it is evidential or substantive in nature, and what work is done by the basic-versus-specific intent distinction. Most importantly, the article analyses the structure of the doctrine itself. Sometimes thought of as a defence, the article argues that it is an entirely different kind of doctrine, one that imposes constructive liability upon offenders. Once this is seen, we can better assess its rightful place in the law.*

It is settled law in England and Wales that, when charged with a basic intent offence, it is no answer for D to assert that he lacked mens rea because voluntarily intoxicated from the effects of non-therapeutic drugs.[1] Doctrinally, at least, this is uncontroversial. There is less agreement whether the doctrine is a good one, and the remarks in this essay have a bearing on that question. My primary purpose, however, is to clarify some preliminary matters about the structure of the intoxication doctrine, including whether it is evidential or substantive in nature, and what work is done by the basic-versus-specific intent distinction. Most

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importantly, this essay concerns the nature of the doctrine itself. Sometimes thought of as a defence, I suggest here that it is an entirely different kind of doctrine. It is only once this is clearly seen that we can assess the moral legitimacy of the law.

I. Not a defence, even exceptionally

The point is a simple one, and not entirely new. But it is frequently misunderstood, not least by law students. Some responsibility for that misunderstanding may lie with the textbooks, which typically locate discussion of the topic within that part of the book concerned with criminal defences. Yet it is not only textbooks that associate the two. The courts do the same. In *Attorney-General (Northern Ireland) v Gallagher*, for example, Lord Denning described it as a "general principle of English law that, *subject to very limited exceptions*, drunkenness is no defence to a ***Crim. L.R. 4*** criminal charge, nor is a defect of reason produced by drunkenness". [2] Similarly, in *Bratty v Attorney-General (Northern Ireland)* [3]:

"If the drunken man is so drunk that he does not know what he is doing, he has a defence to any charge, such as murder or wounding with intent, in which a specific intent is essential, but he is still liable to be convicted of manslaughter or unlawful wounding for which no specific intent is necessary …".

In much the same vein, the House of Lords endorsed the trial judge's direction in *Majewski* that [4]:

"… where an offence does not require a specific intent (any intention, for example, to cause grievous bodily harm as certain offences do or offences such as theft requiring an intention of dishonesty)--where no such intention is, as it were, a constituent part of the offence, then if a man has induced in himself a state in which he is under the influence of drink and drugs then that state is no defence".

As Lord Elwyn-Jones put it, [5]

"Acceptance generally of intoxication as a defence (as distinct from the exceptional cases where some additional mental element above that of ordinary mens rea has to be proved) would in my view undermine the criminal law …".

These passages are not wrong. But they invite misreading. Rejecting intoxication as a general defence, they seem to suggest that, at least in certain narrow contexts, it *is* a defence. Indeed, this very way of thinking is found explicitly in some penal codes. [6] Legally speaking, however, intoxication is never a defence. [7]

The criminal law does contain an intoxication doctrine, but it is a doctrine of *inculpation*, not exculpation. Whether the intoxication doctrine is evidential or substantive in character is uncertain, and I shall say something about that question below. Either way, however, it operates for the benefit of the prosecution, not the defence. Wherever the doctrine applies, its function--its sole function--is to treat the defendant as if he acted with mens rea when, in fact, he did not.

The intoxication doctrine is a supplementary device that assists the prosecution to "prove" mens rea where that mens rea does not actually exist. Consequently, the starting point for a court, or a law student, is to ask whether D *in fact* possessed ***Crim. L.R. 5*** the mens rea required for the offence charged [8]; just as it is in cases where D was not drunk. If the prosecution can prove beyond reasonable doubt that D actually had the requisite mens rea, there is nothing more to do. The court can move on to consider the possibility of supervening defences--self-defence, duress, insanity, or the like. Absent a supervening defence, D is guilty. It matters not whether D's actions were motivated by his drunkenness; or that he would not have behaved as he did but for being intoxicated, even involuntarily intoxicated. [9] Mens rea is proved, and that is that. A drunken intent, as the saying goes, is nevertheless an intent. [10]

Suppose, on the other hand, that D lacked mens rea at the time when he perpetrated the actus reus of the offence charged. Ordinarily, he is then entitled to an acquittal. Yet before we acquit, we need to consider *why* mens rea was missing. If D lacked mens rea because intoxicated (i.e. where D would have foreseen the risk of perpetrating the actus reus had he been sober [11]), the intoxication doctrine then comes into operation. The doctrine holds that, where D lacks mens rea because intoxicated and certain additional criteria are satisfied, [12] D is to be *treated as if* he had mens rea. Thus, where the doctrine applies, the prosecution effectively may take either of two paths to satisfy the law's requirement for mens rea. It can prove that D had mens rea; or it can show that D would have had mens rea but for being intoxicated.

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II. Evidential or substantive?

There are two schools of thought. One holds that, where the doctrine applies, a defendant cannot lead evidence of voluntary intoxication in order to cast a reasonable doubt about the existence of his mens rea. [13] On this view, the prosecution remains obliged to prove facts on the basis of which (and in the absence of intoxication evidence) mens rea can be inferred beyond reasonable doubt.

This analysis is highly artificial. It rests on a fiction, a deliberately false inference from the facts. Ultimately, the evidential approach undermines the very process of proof, since it leaves the jury to conclude that a proposition is true, "proved" beyond reasonable doubt, when clearly it is not--when it is not only untrue, but known to be untrue. No surprise, then, to find the courts reduced on occasion to oxymoron: "in considering what the defendant *actually* foresaw the jury must disregard the fact that the appellants had been drinking". [14] The absurdity should be self-evident.

Crim. L.R. 6 Inevitably, too, it will generate some very awkward inferential tasks. Consider a scenario (akin to that in *Lipman* [15]) where D in an automatic, LSD-induced state strangles his partner. On the evidential analysis, we are asked to pretend not only that D is conscious but that he is fully aware of events, so that a "natural" inference can be drawn from his behaviour that he intends to strangle the victim. [16] But D is unconscious! and he remains unconscious even after we disregard evidence of intoxication. [17] Why should we not conclude that he is, in effect, sleepwalking? [18] Quite apart from being artificial, inferences from conduct may be ambiguous even if we disregard evidence of D's intoxication.

It is surely preferable to accept the facts of the matter, and proceed on the basis of truth rather than pretence. To do so requires acknowledging that intoxication doctrine is substantive: where it applies, the defendant is *deemed*, as a matter of law, to have mens rea. [19] This is not to say that mens rea is supplied by D's earlier choice to become drunk. [20] The doctrine is not so wide as that. Rather, it operates to deem that D has mens rea only when he *would have had the required mens rea but for the fact that he was voluntarily intoxicated*. [21] Genuine accidents happen, even to drunks. If the intoxication made no difference to D's inadvertence, it should make no difference to his liability. The true position is that set out by the trial judge in *Aitken, Bennet and Barson*, in the context of a charge under s.20 of the Offences Against the Person Act 1861: the jury must be satisfied beyond reasonable doubt "that each defendant, when he did the act, either foresaw that it might cause some injury … or would have foreseen that the act might cause some injury, had he not been drinking". [22]

In practice, both approaches will normally lead to the same outcome. The argument here is that two advantages are gained by treating the intoxication doctrine as substantive. One is that, as the sleepwalking example suggests, the evidential-inference approach is unstable and may result in variant outcomes for normatively similar cases. It introduces unnecessary inferential complications that have nothing to do with the rationale behind the intoxication doctrine. The second benefit is transparency. A substantive analysis more openly recognises the truth ***Crim. L.R. 7*** that, *on either view*, the intoxication doctrine has real, in-substance effects on an individual's criminal liability, which either way call for justification. As such, it enables us to address those issues more directly.

This way of putting the matter also clarifies the prosecution's task, and its options. Because intoxication is not a defence in itself, the defendant bears no burden of proof in respect of it. For a specific intent offence, the prosecution bears the burden of proving that D actually had mens rea in light of all the evidence, including any evidence tending to suggest that D was intoxicated (voluntarily or otherwise). For a basic intent offence, the burden lies on the prosecution to prove--also in light of all the evidence--either (1) that D actually had mens rea or (2) that he would have had mens rea (typically, that he would have foreseen the risk of the actus reus) but for being voluntarily intoxicated. It follows that the prosecution can adduce evidence of intoxication at trial in order to prove the second option, i.e. the conditions under which the intoxication doctrine applies: to prove, as it were, "basic intent".

III. Constructive liability

If it is a substantive doctrine, then, and not part of the defences, what kind of doctrine is it? Certainly it is not a doctrine of antecedent mens rea. Even the courts do not seriously suggest that D, when getting drunk, somehow foresaw the risk of the

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actus reus ultimately perpetrated. [23] Rather, the intoxication doctrine belongs to a different family of the culpability doctrines. It is a form of constructive liability. [24]

Constructive liability arises in two parts: a gateway wrong, and an aggravating part. The actus reus of the gateway wrong has a corresponding mens rea requirement, while the aggravating part is a matter of strict liability. A standard example of constructive liability is unlawful-act manslaughter: the gateway wrong is any offence of recklessness that creates a reasonably foreseeable risk of some harm to V, whereas the aggravating component is that V dies. Similarly, the gateway offence of careless driving [25] is constructed into the much more serious offence of causing death by careless driving [26] should death happen to result.

Under English law, becoming voluntarily drunk supplies a gateway to liability, [27] without further mens rea, for basic intent offences.

The moral legitimacy of constructive liability is often problematic, and intoxication is no exception. It is a known risk of offences containing strict liability elements that they will lead to convictions of blameless defendants or, at ***Crim. L.R. 8** least, to convictions of defendants who are blameless for the offence of which they are convicted. While constructive liability is sometimes appropriate, it runs that same risk.

Whether constructive liability is justified in any given context depends, in particular, on whether the aggravating element of the offence supplies part of the reason why one should not do the gateway wrong. [28] Obviously, for supporters of intoxication doctrine, the relevant reason lies in an association of drunkenness with disorder and violence, [29] an association long posited in the law. [30] Thus it comes as no surprise to read in the judgment of Lord Elwyn-Jones that [31] :

"If a man of his own volition takes a substance *which causes him to cast off the restraints of reason and conscience*, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition …. The drunkenness is itself an intrinsic, an integral part of the crime, the other part being the evidence of the unlawful use of force against the victim."

Or, in the commentary to the Model Penal Code, that "it is not unfair to postulate a general equivalence between risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk". [32] Arguments such as these rest upon there being an explanatory link between intoxication and crime: the latter is an upshot of the former.

Structurally speaking, this is the right move. Advocates of the intoxication doctrine correctly seek to link self-chosen intoxication to the risks of violence that may follow. They have to make such a link if they are to justify the doctrine.

Notice, however, that a mere statistical link will not be enough here. While there may be an empirical correlation between intoxication and actual instances of violence, in that the latter is likely to be accompanied by the former, it does not follow that the former is likely to be accompanied by the latter. [33] Hence there may be no reasonably foreseeable risk that a particular person, D, will commit offences of violence if he becomes drunk (all the more so if he has never done so before). [34] ***Crim. L.R. 9** There are many factors apart from intoxication that influence how a person, even an intoxicated person, behaves. [35]

Moreover, the link may be insufficient even if it can be established. We do many things of considerable social value that are inherently risky, including driving cars, playing sport, and conducting surgical operations. No one thinks they should be banned, or undertaken only at the risk of strict criminal liability should adverse consequences ensue. The case for the intoxication doctrine needs to show why those risks make drunkenness itself a wrong. The onus on its supporters is all the heavier, too, when one considers that the doctrine itself may be an unnecessary complication, given that most drunken offences are committed with *actual* mens rea. Thus the doctrine is not found in Australia or New Zealand, and its absence is not there lamented. [36]

IV. Specific versus basic intent

Suppose that such a link could be established, one that lends moral support to the imposition of constructive liability for voluntary intoxication. Why not extend it to all offences, including those of specific intent? To answer this question, we must look more closely at what offences count as requiring a specific intent.

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The judgments in *Majewski* suggest two kinds of offence. The first, identified by Lord Elwyn-Jones,[37] is where the crime is one of "ulterior intent",[38] in that the mens rea element extends beyond the actus reus. Theft, on this analysis, is a specific intent crime because the requirement that D dishonestly intends to deprive V refers beyond the actus reus, which requires no deprivation and is satisfied by any act of mere appropriation. The other, proposed by Lord Simon,[39] is where the mens rea requires a "purposive element", by which is seemingly meant intention rather than recklessness.Murder, on this analysis, is a specific intent crime because it requires a purposive intent to kill or inflict grievous bodily harm: recklessness will not do.

These alternatives are complementary, not contradictory. They reflect two quite different categories of offence where the voluntary intoxication doctrine should not extend liability. Let me begin with ulterior intent.

Crim. L.R. 10 There are various ways of dividing up the offences known to criminal law, quite apart from the familiar, if awkward, distinction between *mala prohibita* and *mala in se*. Sometimes, for instance, we separate "result" crimes from "conduct" crimes, according to whether the gist of the crime resides in a particular consequence of D's action. This distinction highlights the role that can be played by consequence elements in constituting a prohibited wrong. For present purposes, what we need is a similar division between crimes on the basis of the role played in them by the mens rea element.

Mens rea requirements can perform at least four different sorts of function in an offence.[40] One of those functions is the key to understanding ulterior intent. Typically, when an offence contains an element of ulterior intent, that element is constitutive of the very wrong that makes D's conduct suitable for prohibition. The mental element, in other words, is essential to determine the criminal *character* of D's behaviour.

In offences of this sort, as Glanville Williams put it,[41] the physical component of the crime "may … be objectively innocent, and take its criminal colouring entirely from the intent with which it is done". Theft is an example. At the core of theft is the appropriation of another's property *with intent to deprive*. The appropriation itself is not enough: by itself, it is objectively "innocent" or ambiguous.[42] Simply to pick up another's pen is not theft, though it is the actus reus thereof. Perhaps one does so in order to return the pen to its owner, or to illustrate an argument about the wrong of theft to one's students. These are not thefts. They are not inchoate or preparatory thefts. They lack the very character of theft. They do not even hint of it.[43]

A moment's reflection will reveal why such offences should be exempted from the intoxication doctrine, even assuming the doctrine is otherwise justified. If, when he picks up something of V's in the pub, D lacks the intent to deprive, there is no theft. Whatever the cause, whether intoxication or otherwise, his conduct lacks the criminal character, the *animus furandi*, of theft. There is simply no wrong for the intoxication doctrine to grip upon.[44] The doctrine is designed to construct a defendant's *culpability* for awrong. It cannot be used to invent awrong that doesn't exist.

Perhaps this seems counterintuitive. Suppose a student takes milk belonging to another student from the fridge and uses it, thinking drunkenly that the milk is her ***Crim. L.R. 11*** own.[45] Here the victim suffers a deprivation; why should this not be theft? Indeed, J.C. Smith viewed the distinction at work here as irrational.[46]

"If a drunken person takes my vase under the impression that it is his own and smashes it, why should he be guilty of criminal damage which does not require an ulterior intent but not guilty of theft, which does? The mistake as to ownership negatives mens rea in both cases and it would be irrational to impose liability in the one case and not in the other."

This charge strikes me as misplaced. The roles played by mens rea differ across theft and criminal damage, at least as those offences are currently formulated. It is true that drinking another's milk, or destroying her vase, each involves harms that criminal damage (directly) and theft (indirectly) are designed to protect against. But the *offence* of theft does not require harm. As noted earlier, the actus reus of theft needs only an appropriation--there is no offence of theft by deprivation. Theft criminalises the wrong, not the harm, which explains why the actus reus is complete as soon as the milk is touched, and why deprivation is not the gist of theft. Without more, picking up or touching the milk may be a trespass, but it is not a theft or anything like it. We need to know about D's dishonest intent to deprive in order to call it a theftuous act. By contrast, the further act of destroying the milk or vase, while adding nothing to the case for theft, constitutes the very harm that is the gist of criminal damage. Now the issue becomes one of culpability. Unlike theft, there is something for intoxication doctrine to grip upon.

Criminal damage thus differs from theft, in that it is not a wrong dependent for its character on mens rea. Homicide, sexual intercourse without consent, and the like too are wrongs whether done intentionally or negligently. They are certainly not

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offences of ulterior intent. For offences of this type, the wrong derives principally from the fact that something is damaged, someone is killed, or violated sexually, etc. The regulatory interest of the criminal law arises primarily from the activities themselves, from *what* objectively is done rather than *why*. In such offences, the primary function of mens rea is different. Mens rea operates not so much to constitute the wrong as to ensure that D is culpable for perpetrating it.

These latter kinds of offences do not in principle exclude the operation of the doctrine. What, then, is exceptional about the "purposive" variety of specific intent offences identified by Lord Simon? Why is murder a specific intent offence even though it involves no element of ulterior intent? Lord Simon himself supplies no convincing reason, saying only that:

"This purposive element either exists or not; it cannot be supplied by saying that the impairment of mental powers by self-induced intoxication is its equivalent, for it is not." [47]

But it is equally true that an element of actual foresight "either exists or not". We need a fuller explanation why self-induced intoxication may, in law, supply the latter but not the former.

Crim. L.R. 12 That explanation is, I think, largely a matter of relative culpability and seriousness. There are some specific families of criminal wrongs where overlapping actus reus elements attract a range of possible convictions that are roughly graded by levels of seriousness. Homicide can be murder or manslaughter. Wounding can be charged, as appropriate, under ss.18 or 20 of the Offences Against the Person Act 1861.Within these families, two features appear. First, the more serious offence typically requires proof of a purposive intent. [48] Secondly, there is always a fall-back offence. In these cases, the intoxication doctrine operates to convict D of the lesser offence.

Understood in this way, the exclusion of intoxication doctrine from purposive intent offences articulates a conclusion that, even if causing death or injury while lacking mens rea because of intoxication is culpable, it is *less* culpable than doing so intentionally. It therefore warrants punishment at a level below the most serious offence within the relevant family.

Intuitively, this seems plausible. Suppose that D genuinely lacks the intention to inflict grievous bodily harm. Let us grant, too, that if his drunken conduct causes serious injury or death, D may deserve punishment. Even so, there seems no reason to treat his culpability as being on a par with the most serious case, given that lesser convictions are available. Within these offence-families, the requirement of a purposive intention marks out the most aggravated version, [49] and there is simply no reason to treat a drunken, unintentional wrongdoer as the most aggravated version of the wrong; so that, in the case of homicide, D must be imprisoned for life. In this context, the exclusion of specific intent offences from the intoxication doctrine is a simple move that allows for increased flexibility, and moral sensitivity, within the criminal law.

V. Closing remarks

At least in the purposive-intent category, some may see a mistake here. If, as I claim, the doctrine is an inculpatory tool, why should the relative level of offence seriousness matter to its application? Flipping the objection around, if intoxication exculpates the accused from the putative crime because a lesser punishment is available, does it start to look like a partial defence?

But that is exactly the sort of thinking that needs to be abandoned. Like the idea that intoxication is immaterial to culpability in basic intent offences, and operates to decrease culpability only in specific intent cases, it gets the ***Crim. L.R. 13*** intoxication doctrine precisely backward. Admittedly, there is a limited analogy, in that partial defences also reflect conclusions about a wrongdoer's relative culpability. But the analogy ends there. Unlike partial exculpations, intoxication is a doctrine of (partial) inculpation. Structurally speaking, they work in opposite directions.

True partial defences, such as provocation, operate to excuse a defendant's *deliberate choice* to harm the victim. Provocation does not deny that D has the mens rea for murder. Quite the reverse: it explains why he did. It prevents conviction of an offence for which the necessary inculpatory elements are satisfied. (Hence, D bears an evidential burden in respect of the defence). Disregard provocation, and the case is a culpable murder.

For intoxication, by contrast, it is not the drunkenness that is supplying the exculpation. It is the lack of mens rea. Indeed, strictly speaking, exculpation is not required. The core inculpatory element is missing. This is why, in a specific intent offence, intoxication informs no substantive defence known to the criminal law (and why the defendant bears no burden to establish it). The defendant's submission is like the "defence" of alibi: that the prosecution has not proved the elements, the actus reus

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and mens rea, of the offence. Of course, courtroom lawyers frequently call such denials a defence, but we should not confuse this usage with the corresponding substantive-law term. The prosecution bears the burden of proving actus reus and mens rea. It has simply failed to do so.

When we come to basic intent offences, on the other hand, *now* intoxication becomes relevant as a matter of substantive law. The prosecution acquires a supplementary way to establish culpability. It need not, though it may, prove mens rea. Or it may prove that D would have had mens rea but for his voluntary intoxication. Where it succeeds in the latter, this is not to conclude that D somehow *had* mens rea in fact, but rather that he evinced the level of culpability that the mens rea requirement is designed to track. Or, as Lord Simon put it, [50]

"… a mind rendered self-inducedly insensible (short of *M'Naghten* insanity), through drink or drugs, to the nature of a prohibited act or to its probable consequences is *as wrongful* a mind as one which consciously contemplates the prohibited act and foresees its probable consequences (or is reckless as to whether they ensue)".

Disregard intoxication, and D is not guilty. Neither is he culpable. [51] He lacks mens rea. The real question is, how far should we use drunkenness to *elevate*, or "construct", D's liability? In England and Wales, the courts have said: partially.

That answer is not obvious. It may be tempting to think of intoxication doctrine as justified because it merely denies the defendant a valueless opportunity: to exculpate himself by pleading his own discreditable conduct in getting drunk. This beguiling view is suggested, in particular, by an evidential analysis of the doctrine. ***Crim. L.R. 14*** But the picture is false--the doctrine is much more than that. It positively grounds D's liability in his choice to become drunk, predicated on the moral equivalence that Lord Simon and others have espoused.

In closing, then, two thoughts. We have yet to see a convincing argument that getting drunk is *in general* a wrong because of inherent risks of violence.Moreover, just as driving or other risk-creating activities do not become wrongs whenever they have unwanted consequences, getting drunk must be shown to be a wrong ex ante, and not merely because things turned out badly. Without this, the doctrine is morally illegitimate.

Secondly, even if the doctrine is justified, a constructive liability analysis suggests that D might be more fairly labelled were he to be convicted of a stand-alone, intoxicated wrongdoing offence, rather than of the crime corresponding to the actus reus he later commits. This method of disposal was once proposed by the Law Commission, [52] and has been adopted elsewhere. [53] If the real culprit is voluntary drunkenness, perhaps we ought to say so.

I am grateful for helpful comments from Matthew Dyson, A. Kumaralingam, A.T.H. Smith, and G.R. Sullivan; and to the audience at Hong Kong University where a draft of this essay was presented. Research for this essay was supported by a Singapore MoE Tier One Research Grant, number R241000045112.

Footnotes

1 I will focus here on this, the core of intoxication doctrine, while acknowledging that the doctrine also governs other contexts, including mistakes about supervening defences like self-defence; intoxication by therapeutic substances; and intoxication resulting in involuntary conduct (i.e. affecting D's responsibility for the actus reus).

2 *Attorney-General (Northern Ireland) v Gallagher* [1963] A.C. 349 HL at 380 (emphasis added).

3 *Bratty v Attorney-General (Northern Ireland)* [1963] A.C. 386 HL at 410.

4 *Majewski* [1977] 1 A.C. 443 HL at 448-449.

5 *Majewski* [1977] 1 A.C. 443 HL at 475.

6 Penal Code 1985 (Singapore) s.85(1): "Except as provided in this section and in section 86, intoxication shall not constitute a defence to any criminal charge". Subsection (2) follows: "Intoxication shall be a defence to any criminal charge if …". Similar provisions appear in the Penal Code of Malaysia. Notwithstanding the explicit language of those Codes, the analysis here extends also to their provisions.

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7 Lord Salmon sees this clearly in *Majewski* [1977] 1 A.C. 443 HL at 481: "This does not mean that drunkenness, of itself, is ever a defence. It is merely some evidence which may throw a doubt upon whether the accused had formed the special intent which was an essential element of the crime with which he was charged."

8 That is, assuming the actus reus is proved (or at least, can be proved but for intoxication-induced involuntariness).

9 *Kingston* [1995] 2 A.C. 355 HL.

10 *Sheehan and Moore* [1975] 1 WLR 739 CA (Crim Div) at 744.

11 See further Section II below.

12 Namely, although the criteria are notoriously uncertain: the intoxicationwas "voluntary"; the offence is one of "basic intent" (below, Section IV); and the substance ingested was "dangerous" or non-therapeutic. The parallel rule for intoxication by therapeutic substances has slightly different criteria.

13 cf. Criminal Code Act 1995 (Aus), s.8.2(1).

14 *Richardson and Irwin* [1999] 1 Cr. App. R. 392 CA (Crim Div) at 395 (emphasis added).

15 *Lipman* [1970] 1 Q.B. 152 CA (Crim Div).

16 Or, at least, that D satisfied the mens rea requirements of manslaughter. (Either way, the "natural" inference here would be that D intended to strangle V.) Had D caused serious injury, a charge under s.20 of the Offences Against the Person Act 1861 would require us to infer recklessness.

17 Compare too s.8.2 of the Criminal Code Act 1995 (Aus), which states in subs.(1) that "[e]vidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed", yet allows in subs.(3) that "[t]his section does not prevent evidence of self-induced intoxication being taken into consideration in determining whether conduct was accidental".

18 Like *Hughes*, where D got out of bed during the night and went to the kitchen "to peel potatoes"; whence she took a knife and returned to the bedroom to stab her husband: *The Times*, May 3, 1978, p.5.

19 cf. Indian Penal Code 1860 s.86; Model Penal Code, § 2.08(2).

20 A suggestion along these lines can be read into one passage from Lord Elwyn-Jones's judgment in *Majewski* [1977] A.C. 443 HL at 474-475, on the basis that to become voluntarily intoxicated is ipso facto reckless. For discussion, see A.P. Simester and G.R. Sullivan, *Criminal Law: Theory and Doctrine*, 3rd edn (2007), pp.633-634.

21 *Richardson and Irwin* [1999] 1 Cr. App. R. 392 CA (Crim Div) at 396-397.

22 *Aitken, Bennet and Barson* (1992) 95 Cr. App. R. 304 CMAC at 308; a direction confirmed by the Courts-Martial Appeal Court.

23 See, in particular, the discussion of Lord Elwyn-Jones's judgment in *Majewski* by Simester and Sullivan, *Criminal Law* (2007); also the insightful analysis by Dickson J. in *Leary v R* [1978] 1 S.C.R. 29 at 46.

24 See Simester and Sullivan, *Criminal Law* (2007), § 6.5.

25 Contrary to s.3 of the Road Traffic Act 1988 (Careless, and inconsiderate, driving).

26 Road Traffic Act 1988 s.2B (Causing death by careless, or inconsiderate, driving); inserted by the Road Safety Act 2006 s.20.

27 Usually, the gateway is itself an offence (cf. J. Gardner, "Rationality and the Rule of Law in Offences Against the Person" [1994] C.L.J. 502, 508-509), but it need not be: A.P. Simester, "Is Strict Liability Always Wrong?" in *Appraising Strict Liability* (2005), p.21 at pp.46-48. In the present context, even though being drunk in public is quite often criminalised, including by many US states, privacy considerations should normally prevent drunkenness per se from being prohibited.

28 For exploration and defence of this large claim, see Simester, "Is Strict Liability Always Wrong?" (2005), pp.44-49. This is, incidentally, the worry about unlawful-act manslaughter (at p.46): there need be nothing about the unlawful act that suggests a foreseeable risk of death.

29 See, e.g., S. Cowan and A.C. Hunt, *Mason's Forensic Medicine for Lawyers*, 5th edn (2008), Ch.24.

30 e.g., in Hale 1 PC 32: "This vice doth deprive men of the use of reason and puts many men into a perfect but temporary phrenzy."

31 *Majewski* [1977] A.C. 443 HL at 474-475; quoting also the argument made by D.A. Stroud, "Constructive Murder and Drunkenness" (1920) 36 L.Q.R. 268, 273: "By allowing himself to get drunk, and *thereby* putting himself in such a condition as to be no longer amenable to the law's commands, a man shows such regardlessness as amounts to mens rea for the purpose of all ordinary crimes." (Emphasis added in both quotations.)

32 American Law Institute, *Model Penal Code Commentaries*, Comment to § 2.08, p.359.

33 Compare the scepticism in C.N. Mitchell, "The Intoxicated Offender--Refuting the Legal and Medical Myths" (1988) 11 *International Journal of Law and Psychology* 77.

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34 An instructive contrast is the example of drunk driving causing death, a distinct offence in many jurisdictions. Here one may point, ex ante, to demonstrable effects of alcohol upon the quality of one's driving and, in turn, to the risks of causing a fatal accident.

35 See J. Hodge, "Alcohol and Violence" in P. Taylor (ed.), *Violence in Society* (1993), p.127.

36 The leading cases are *O'Connor* (1980) 146 C.L.R. 64 HC (Aus) and *Kamipeli* [1975] 2 N.Z.L.R. 610 CA (NZ). See further G. Orchard, "Surviving without *Majewski* Down Under" [1993] Crim. L.R. 426; A.P. Simester and W.J. Brookbanks, *Principles of Criminal Law*, 3rd edn (2007), § 11.2; also, however, S. Gough, "Surviving without *Majewski?*" [2002] Crim. L.R. 719.

37 *Majewski* [1977] A.C. 443 HL at 471; cf. *Morgan* [1976] A.C. 182 HL at 216 (Lord Simon).

38 See generally J. Horder, "Crimes of Ulterior Intent" in A.P. Simester and A.T.H. Smith (eds), *Harm and Culpability* (1996), p.153. The ulterior element need not always be one of "intent". An ulterior requirement of recklessness may sometimes suffice, provided it refers beyond the actus reus component. See, e.g., *Heard* [2007] EWCA Crim 125; [2008] Q.B. 43 at [31] (discussing intentional or reckless criminal damage being reckless whether life was endangered).

39 *Majewski* [1977] A.C. 443 HL at 479-480. Cf. also *Heard* [2007] EWCA Crim 125; [2008] Q.B. 43 at [31].

40 See, e.g., A.P. Simester, "The Mental Element in Complicity" (2006) 122 L.Q.R. 578, 582-583 (text and fn.17).

41 *Criminal Law: The General Part* (1961), p.22.

42 It might be different were the actus reus to require an act of *deprivation*. Appropriation, however, embraces far more preliminary, objectively ambiguous conduct. I return to this point in the text below.

43 Another example is the former offence of indecent assault, perpetrated in circumstances where the conduct itself is ambiguous. In *Court* [1989] A.C. 28 HL, D spanked a young girl on the seat of her shorts. The spanking was indecent *because* it was motivated by D's desire for sexual gratification. The same should in principle apply now under s.78(b) of the Sexual Offences Act 2003.

44 cf. J. Horder, "The Classification of Crimes and the Special Part of the Criminal Law" in R.A. Duff and S.P. Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (2005), pp.21, 36. Admittedly, there may be a civil-law wrong of trespass to V's chattel, should the appropriation be non-consensual. But that is not the same wrong as the (criminal) wrong of theft.

45 I am grateful for this formulation of the problem to A.T.H. Smith.

46 Commentary on *Majewski*, [1975] Crim. L.R. 570, 574.

47 *Majewski* [1977] A.C. 443 HL at 480.

48 Within s.18 of the Offences Against the Person Act 1861, the reference here is to causing grievous bodily harm with intent. The alternative limb, wounding with intent, involves an ulterior intent.

49 Some writers suggest that murder too is a distinct wrong in which the defendant's intent plays a constitutive part: e.g. S.C. Shute, J. Gardner and J. Horder (eds), *Action and Value in Criminal Law* (1993), p.14. Thus Horder, "The Classification of Crimes" (2005), pp.39-40, classifies murder as a specific intent offence by likening it to theft, arguing that there are reasons not to *try* to kill which are distinct from the reasons we have not to kill. But that seems no more true of homicide than, say, of criminal damage.Murder, like criminal damage, is at root a harm-based offence; this is reflected by its definition in many English-language jurisdictions, where it can be committed without an intention to kill (or even to inflict grievous injury). On the analysis here, Horder's attempt to explain the entire specific-basic intent division by a single distinction is over-reductive.

50 *Majewski* [1977] A.C. 443 HL at 479. Cf. Lord Russell at 498, "the element of *guilt or moral turpitude* is supplied by the act of self-intoxication reckless of possible consequences". (Emphasis added in both quotations.)

51 Depending on the facts, there may be a case for saying D was negligent. But that is an ad hoc matter, and in any event falls short of the usual requirement for advertent recklessness.

52 Law Com. Consultation Paper No.127, *Intoxication and Criminal Liability* (1993); but not in its subsequent Report, No.229 (1995). See also the Butler Committee's earlier *Report of the Committee on Mentally Abnormal Offenders*. 1975. Cmnd.6244. I cannot here pursue the objections (such as over-complicating the task of jurors) that influenced the Law Commission to reconsider its position.

53 In Germany, s.323A(1) StGB (roughly translated) provides that: "Whoever intentionally or negligently becomes intoxicated by alcohol or other substances, and performs an unlawful act while in this condition for which [because of the intoxication] he may not be punished, shall be punished with imprisonment for not more than five years or a fine." Subsection (2) further caps the punishment at no more than the maximum provided in respect of the act done while intoxicated.

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