Voluntary intoxication - a lost cause?

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L.Q.R. 264 **The Current Law of Voluntary Intoxication**

It is well known that the law concerning voluntary intoxication presents three important challenges.

First, those who are intoxicated are *in general* more likely to do more harm, but in each case the defendant's *individual* culpability may be less than if he or she had been sober. It is true that a drunken individual poses a threat to himself and to others, and that in some cases the defendant's intoxicated conduct may have posed a risk of even greater harm than that which actually occurred. However, at the same time it is also arguable that the individual culpability of drunken stupidity is less than that of sober and deliberate calculation. This dilemma is further sharpened by evidence from a Cardiff study that more than half of those arrested for alcohol-related crime are first-time offenders. [1] Either we can protect society from those who take intoxicants and then do harm, or we can follow the logic and principle of criminal law by acquitting those who lack the relevant mens rea for the offences with which they are charged. We cannot, apparently, do both. [2]

Secondly, wherever law reform is attempted, to some extent a choice must be made between justice and simplicity. On the one hand, the more varied degrees of culpability the law is able to represent, the more accurately it will label the convicted defendant and the more fully it will be able to realise its goal of achieving justice. On the other, the more complex the law becomes in order to take account of these varying degrees of culpability, the more difficult it becomes for juries and courts to understand and operate. [3] Nowhere is this more true than in relation to proposed reforms of the law relating to intoxication.

Thirdly, not only will more varied degrees of culpability take longer to explain and understand within each trial, they may also lead to greater difficulty for a particular jury in reaching a verdict. On the one hand, it is clearly important and helpful for juries to be able to signal to judges precisely why they have chosen to convict a particular defendant so that the judge can then give effect to that reasoning at the stage of sentencing. [4] On the other hand, the greater the number of options ***L.Q.R. 265*** open to the deliberating jury, the greater the risk that they will not be able to reach a unanimous verdict. [5]

The Law of Intoxication: a Lost Cause?

For the past 30 years the law of intoxication has thus remained in an uneasy state of compromise. Large numbers of academic articles have been written criticising the current rules [6] and in 1993 they were the subject of a Law Commission Consultation Paper, which recommended the introduction of an offence of criminal intoxication, [7] yet in its final report in 1995 the Law Commission concluded that "the *Majewski* [8] approach operate[s] fairly, on the whole, and without undue difficulty" [9] and there is certainly a view that *Majewski* saves the courts valuable resources by leading to guilty pleas. In December 2008 the Law Commission published a further report on this topic, [10] which again concluded that "codification [of the present law] with clarification and modifications is still the right approach", [11] but their specific proposals for codification were ultimately rejected by the government on the basis that they were "scarcely more intelligible' than the current law and furthermore might 'increase its complexity". [12] But before we thus settle by default for the illogical but pragmatic compromise that the common law *Majewski* rules represent, it is worth at least reflecting on the disadvantages of doing so and the possible alternatives to those rules. It will not be possible here to address every single intoxication-related issue in criminal law, [13] but it is nevertheless hoped that in a few key areas some improvements can be suggested.

What is the Matter with the Current Rules?

There are two significant problems with the way in which the current rules on intoxication operate. ***L.Q.R. 266***

1. The current rules of intoxication punish intoxication itself

As Lord Birkenhead put it in *DPP v Beard's* case, [14] under the present law "the cause of the punishment is the drunkenness which has led to the crime, rather than the crime itself". In 1995 the Law Commission's consultees may have rejected the proposed offence of "criminal intoxication" (suggested in the 1993 consultation), but the maintenance of *Majewski* , which those consultees generally supported, leads to exactly the same result, albeit under a different label and with different sentencing. The inevitability of this conclusion becomes apparent as follows.

It is clear that there is no question of intoxication by itself ever being a defence or providing an excuse for a defendant. [15] Rather, *Majewski* applies when a defendant seeks to argue that as a result of intoxication he or she lacked the necessary mens rea for the offence. [16] There are in fact three different ways in which *Majewski* could operate in this context.

The first possibility is that *Majewski* prevents defendants from adducing evidence of intoxication to deny their mens rea. [17] But this must be rejected immediately on the basis of s.8 of the Criminal Justice Act 1967 . [18] This objection would not, of course, apply to the exclusion of evidence of intoxication when the defendant is not trying to deny foresight or intent but to make out a specific defence such as self-defence as in *Hatton* . [19] However, it is surely undesirably complicated to have different rules based on the particular element of the issue in question. [20]

The second and s.8 -compliant interpretation of *Majewski* is that in fact intoxication was there held to *constitute* the mens rea of basic intent offences, [21] in other words that the rule is one of substance not evidence. This interpretation certainly seems to fit best with the dicta of the House of Lords in *Majewski* , [22] and in its 2008 report the Law Commission argues that the "underlying policy" of the current rules is that "an offence will be regarded as one of 'basic intent' if the judiciary conclude that the commission of its external element in a state of voluntary ***L.Q.R. 267*** intoxication (without the fault required by the definition of the offence) is the moral equivalent of committing it with the fault required by the definition of the offence." [23]

However, while this interpretation avoids the problem of s.8 incompatibility and at least explains *why* it is that a defendant can be convicted despite apparently lacking the usual mens rea for the offence, it nevertheless entirely supports the conclusion with which this section began; that we are punishing drunkenness rather than the crime itself. After all, and contrary to the views of the Law Commission, proof of voluntary non-therapeutic intoxication in fact differs from the normal requirement to prove mens rea in several "morally different" ways. [24] Even if, as is the Law Commission's second argument, the current rules on voluntary intoxication are viewed as a kind of *prior* fault principle, [25] there is still a significant moral difference between the argument that a defendant ought to have foreseen in advance an increased risk of harm to persons or property and the argument that he or she did in fact foresee it at the time of the offence.

This brings us to the Court of Appeal's more recent decision in the case of *R. v Heard* , [26] where no doubt it was precisely the difference between intoxication and the usual requirements of mens rea that led Hughes L.J., giving the judgment of the Court of Appeal, to hold that

"there were … many difficulties in the proposition that voluntary intoxication actually supplies the mens rea, whether on the basis of recklessness as re-defined in *Caldwell* or on the basis of recklessness as now understood; if that were so the drunken man might be guilty simply by becoming drunk and whether or not the risk would be obvious to a sober person, himself or anyone else. That reinforces our opinion that the proposition being advanced was one of *broadly equivalent* culpability, rather than of drink by itself supplying the mens rea. ***L.Q.R. 268*** " [27]

However, this in itself raises two further difficulties. First, if the House of Lords in *Majewski* did substantively equate voluntary intoxication with mens rea in that case, it is not clear what authority the Court of Appeal had in *Heard* to reach the conclusion that they are only *broadly* equivalent. [28] Secondly, "broad equivalence" seems to be neither one thing nor the other. Either voluntary non-therapeutic intoxication constitutes the mens rea of a crime of basic intent or it does not. The argument, recently reiterated by the Law Commission, that intoxication cannot be relied upon to deny mens rea because that intoxication itself *constitutes* mens rea may have been subject to criticism, [29] but it was at least internally coherent. Once, however, we take away this justification, and conclude that they are only "broadly equivalent" it becomes difficult to see how the rule itself can remain. If intoxication does not itself constitute the recklessness required for the normal mens rea of the offence, how can it relieve the prosecution of the burden of proving that necessary element of the offence through other means, or prevent a defendant from denying that recklessness? And indeed, unless we can say, like the House of Lords in *Majewski* , that intoxication renders evidence of the denial of the usual mens rea *irrelevant* by itself providing an alternative form of mens rea, how can we preclude a defendant from mounting such a denial of mens rea without infringing s.8 ? Essentially, if *Heard* is right to remove the equivalence between intoxication and mens rea, we are left with the simple policy decision that we will not allow defendants to adduce evidence that would lead to their acquittal, because then we would have to acquit them. [30] No wonder, then, that Lord Salmon concluded that "in strict logic this view cannot be justified". [31]

The conclusion must therefore be that the notion of "broad equivalence" is simply an attempt by the Court of Appeal in *Heard* to have the best of both worlds. The problem is that this cannot be done; the evidential interpretation infringes s.8 and the substantive interpretation equates intoxication with contemporaneous foresight, when those states of mind are not in fact equivalent.

There is, however, a third and final option for explaining the current rules on intoxication. Even before the decision in *R. v Heard* the Judicial Studies Board (JSB) [32] did not recommend reliance on the idea that evidence of intoxication *alone* could constitute the requisite mens rea. Instead its specimen directions (now replaced in similar terms by the *Crown Court Bench Book*) [33] asked the jury to decide whether the defendant *would* have foreseen the relevant harm had he or she not been intoxicated, a test also favoured by the Court of Appeal in *R. v Richardson and Irwin* . [34] The court in *Heard* did not, of course, specifically require the *Richardson and Irwin* /JSB test to be used, but once the evidential interpretation of *Majewski* is ruled out on the basis of Criminal Justice Act 1967 s.8 and if we ***L.Q.R. 269*** are not to adopt the substantive equivalence of intoxication and mens rea, broad or otherwise, suggested by *Majewski* , it is difficult to see what other choice there is.

In its favour, unlike the other wholly common law approaches to the issue discussed so far, this third option, the hypothetical *Richardson* /JSB test, does at least have some statutory support by analogy with s.6(5) of the Public Order Act 1986 . [35] Nevertheless, given the analysis of the House of Lords' decision in *Majewski* outlined above, it is not wholly clear that outside the context of s.6(5) the Court of Appeal in *Richardson and Irwin* was entitled to adopt this hypothetical test instead, any more than it is clear that the Court of Appeal in *Heard* was entitled to downgrade *Majewski* to standing for only "broadly equivalent culpability". The second problem with the hypothetical test again concerns its precise nature. It is clear from *Richardson and Irwin* that the Court of Appeal did not intend it to be a rule of evidence. [36] Nevertheless, when focusing on the specific question of whether the defendants would have foreseen harm had they not been drinking, [37] in one sense the jury are indeed asked to set aside the evidence of intoxication in order to decide whether the lack of foresight would have occurred "drink or no drink". If this is the case then the test does sail very close to the prohibition of s.8 , and in addition it seems that the jury are asked not only to read the defendant's mind, but to read a version of it which by definition never existed.

However, in making such a decision it is arguable that the jury will actually do something subtly but importantly different which does retain s.8 compliance. Initially, in 1993 the Law Commission had been concerned that asking juries such hypothetical questions might be a bit odd, [38] and yet following the consultation process the Commission concluded in 1995 that juries do not find the test difficult to apply. [39] It seems likely that the explanation for this change of heart is something the Commission also identified in its consultation paper [40] ; a jury asked what the defendant would have done had he not been intoxicated must in practice end up asking themselves objectively what a reasonable person would have foreseen in the circumstances, taking into account the defendant's other subjective characteristics (such as mental or learning disabilities). It is true that in *Richardson and Irwin* itself Clarke L.J. was at pains to point out that question 5(b) "asks not about what the reasonable man would have realised, but what the defendant would have realised." [41] Nevertheless, unlike other subjective tests, in this instance it is impossible for the jury to apply the subjective version to existent facts. Unlike a jury asked for the purposes of *G. and R.* [42] to decide whether a sober defendant actually did foresee a particular harm before acting, a jury faced with these hypothetical tests in the context of intoxication has a choice between asking what would have happened in an alternate, non-existent universe where the defendant ***L.Q.R. 270*** was sober, and asking itself more objectively what a reasonable person with the defendant's other characteristics would have foreseen in this one.

Many of those who sought to support the decision in *Majewski* [43] did so precisely on the basis that it criminalised inadvertent conduct which should be regarded as culpable. Indeed, in this sense the decision in *Majewski* in 1976 could be seen as simply a forerunner of the move towards objective recklessness taken in *Caldwell* [44] and subsequent cases, and for those who regard inadvertent conduct as inherently culpable and would prefer a return to a more objective approach to recklessness, the *Majewski* rules of course do not present nearly so large a problem. And indeed other (predominantly statutory) moves since then have also been in the direction of further objectivity. The 2003 Sexual Offences Act replaces the old *Morgan* [45] acceptance of "honest mistake" with the requirement that the defendant hold a *reasonable* belief in consent, and the offence of gross negligence manslaughter as defined by *Adomako* [46] still does not require advertence on the part of the defendant. Nevertheless, the Law Commission have suggested that even the *Adomako* test should be altered to make allowance for defendants who cannot reach the standard of ordinary people [47] and even more crucially, in 2000 the House of Lords referred to a "new, or renewed, emphasis on the subjective nature of the mental element in criminal offences". [48] This approach culminated in their decision in *R. v G.*

and R. [49] to overrule *Caldwell* , Lord Steyn holding that "this …would fit in with the general tendency in modern times of our criminal law. The shift is towards adopting a subjective approach. It is generally necessary to look at the matter in the light of how it would have appeared to the defendant." [50] The result is that as the law stands at present there is a discrepancy; we are permitted to convict intoxicated people when they are inadvertent (provided that they would have foreseen the risk when sober) but we are no longer permitted to convict sober people when they are inadvertent. [51] A person who falls below the normal threshold for liability can ***L.Q.R. 271*** therefore be convicted in spite of this as long as he or she was drunk. [52] In both cases the defendant will have committed the actus reus, but only in the second can he or she be prosecuted. And so Lord Birkenhead must be right, "the cause of the punishment is the drunkenness which has led to the crime, rather than the crime itself". [53]

2. The current rules are only capable of applying to a very limited range of cases

The second big problem with the current rules under *Majewski* arises because however these rules apply, they do so only to offences of basic and not those of specific intent, and thus a line must somehow be drawn between the two. Over the years, much effort has been devoted to drawing this line and numerous tests for locating it have been advanced. [54]

The argument here, however, is that in fact crimes of basic intent *can* only be those where the actus reus consists of the production of a particular prohibited consequence and the mens rea is satisfied by recklessness. [55] The current intoxication rules as analysed above cannot be applied to any other kind of offence because it would make no sense to ask, using the *Richardson and Irwin* /JSB test outlined above, whether the defendant would have foreseen a particular result if sober if that result has nothing to do with the actus reus of the offence in question. From a logical point of view, therefore, if the offence is to be regarded as made out when a particular result has occurred in circumstances where a sober and reasonable person with the defendant's other characteristics would have foreseen it, only reckless result crimes can be regarded as crimes of basic intent.

In the past, this was indeed essentially how the specific/basic distinction operated in practice. [56] However, the most recent consideration of the distinction again comes from the Court of Appeal's decision in *Heard* . [57] Here the defendant was charged with sexual assault contrary to s.3 of the Sexual Offences Act (SOA) 2003 and sought to argue, as had the Law Commission, [58] that because the offence included a requirement of intentional touching it could be regarded as an offence of specific intent. The Court of Appeal rejected this argument, on the basis of Lord Elwyn-Jones' "ulterior intent" test from *Majewski* . [59] But, as du Bois-Pedain notes, ***L.Q.R. 272*** [60] in reaching this conclusion, the Court reinterpreted Lord Elwyn-Jones' "offences of ulterior intent" so that offences of specific intent are those where a result, circumstance or further behaviour must be intended beyond the behaviour prohibited by the actus reus of the crime. [61]

The offence contained in s.3 is different in nature from its predecessor, indecent assault. Whereas in the past indecent assault tended to operate in the same way as battery, i.e. as a result crime, [62] s.3 is enacted in the form of a behaviour crime. Although the section is entitled "sexual assault", in fact it must be committed by "intentionally *touching*" the victim. [63] No doubt at the time it was enacted this was assumed to be simply a linguistic change, and no doubt the Court of Appeal in *Heard* was right to assume that Parliament did not intend thereby to alter the rules of intoxication applicable to the offence. [64] However, as outlined above, once it is understood that *Majewski* is based on a reckless result crime paradigm, it becomes obvious that it cannot possibly apply satisfactorily to the new intentional behaviour offence of s.3 . However much the Court of Appeal may have wanted the policy of the *Majewski* rules to apply to s.3 , in strict logic they cannot, and Ormerod has, in particular, identified two [65] problems caused by the Court of Appeal's attempt to make them do so.

First, it is not clear how we should deal with the example raised briefly by the Court of Appeal in *Heard* , [66] concerning a "defendant who intends to avoid (just) actual physical contact, but realises that he may touch and is reckless whether he will". The court itself tried to answer this by drawing a sharp dichotomy between acts which are deliberate and situations in which the defendant "flails" about, apparently assuming that such a defendant would fall into this latter category. ***L.Q.R. 273*** [67] The problem is that, with respect, this is to avoid the point. A defendant who "flail[s] about, stumble[s] or barge[s] around" is not denying the mens rea of the action, he or she is denying even the voluntariness of the actus reus and is thus in a different situation from a defendant who acts semi-intentionally, such as the defendant who intends to stop short of touching and fails. The point is that the definition of the full offence of s.3 leaves no space for the intoxication rules to attach. Instead, therefore, the court should have held that a mens rea requirement of intention is at least an element [68] of specific intent.

The second problem Ormerod identifies concerns a *Lipman* [69] -style defendant who touches a woman's breast believing himself to be "stroking an animal at the centre of the earth" [70] or a tailor's dummy. [71] Again, if the defendant is not to be allowed to deny his or her mens rea in such a case because s.3 is an offence of basic intent, it is very difficult to see how this is supposed to work. *Lipman* itself concerned a result crime, [72] but when dealing with a behavioural offence such as Sexual Offences Act 2003 s.3 , the problem is much more difficult. It cannot be that the defendant is simply not allowed to adduce evidence of intoxication, because this would be to breach Criminal Justice Act 1967 s.8 , and it cannot be that intoxication provides the requisite intent to touch a human being because even *Majewski* , let alone *Heard* , did not suggest this. It is one thing to ask whether the defendant was reckless in failing to see what a sober defendant would have foreseen, but it is entirely another to use the hypothetical test to equate intoxicated hallucination with intent. [73] The Law Commission's 2008 report deals slightly better with the problem, making clear that under the *Majewski* rule "D would be treated as having been aware of any risk *or circumstance* D *would* have been aware of but for his or her self-induced state of intoxication." [74] However, the first problem still remains in that the intention to touch an animal is perhaps even less "morally equivalent" to the intention to touch a person than are the states of mind of drunkenness and recklessness; certainly, as noted above even *Majewski* did not suggest such an equivalence. ***L.Q.R. 274*** [75]

The conclusion must therefore be that the current intoxication rules can only provide a means for dealing with reckless result crimes. They simply do not have an answer for cases containing an element of behaviour such as these. [76] The only solution available at present is thus to deal with such cases on the basis of the ordinary law, taking into account evidence of intoxication. In other words, again, to treat such elements of offences as elements entailing specific intent as Heard's counsel had argued. [77]

Part of the problem in *Heard* was that it would have made absolutely no difference on the facts of the case if the Court of Appeal had decided to accept the appellant's arguments that offences of specific intent should be those with intentional elements while offences of basic intent should be those capable of being committed recklessly. [78] Heard did intentionally rub his penis up and down the thigh of a police officer, and since (as we know from *Kingston* [79]) a drunken intent is still an intent, Heard clearly had the mens rea necessary for the full offence and it is thus difficult to see why intoxication was an issue at all. As a result, the court was not called upon to apply the *Heard* ruling in other situations and therefore did not realise how difficult this would be.

The conclusion then is that the courts wish effectively to criminalise intoxication itself and that they would like to do so in more cases than the existing rules logically allow, as evidenced by the decision in *Heard* . But is this possible? And is the current default retention of *Majewski* really the best we can do?

Alternatives to *Majewski*

In order to ensure that we avoid pitfalls such as those suffered by the current rules, [80] the effect of intoxication will be considered separately in relation to each different kind of actus reus element; results, behaviour and circumstances.

1. Result crimes

Beginning, then, with the intoxication rules' paradigm type of crime, intoxication will not only mean that in some circumstances defendants do not intend (further) harm, it can also mean that they do not foresee it. [81] In its 1993 Consultation Paper, the Law Commission argued that "in most cases it might be thought obvious that the defendant, intoxicated though he may have been, possessed the comparatively modest degree of awareness of the likely results of his acts that suffices to establish subjective liability", [82] pointing to the case of Majewski himself, where Lord Salmon held it to be "fairly obvious that the defendant knew quite well what he was doing." [83] Where the defendant's actions are aimed at harming the interests of others or their property this will indeed be the case. However, there might also be cases ***L.Q.R. 275*** such as that suggested by the Law Commission in its 1993 Consultation Paper, [84] where the defendant's principal aim was simply to throw a dustbin across the street, in which it never occurs to the defendant that this may in fact hurt another person or cause damage to their property. The reason for the current focus on intent and recklessness in result crimes is that it is these cases that raise the dilemma of *Majewski* most sharply; the logic of the criminal law and indeed of the approach to specific offences in *Majewski* require us to hold that the defendant lacked the necessary mens rea. Throwing a dustbin without further mens rea is just as innocent as trespassing or appropriating

property without further intent.[85] On the other hand, it is precisely these kinds of stupid actions that are both likely to lead to harm and far more likely to be undertaken by those who are drunk and it seems to be felt that society must be protected from this.

We thus have a series of alternatives. One is to abolish *Majewski* altogether. In answer to this suggestion the judges of the Queen's Bench Division pointed to the damage that would be done to the public opinion of the judicial system if even one high profile defendant were to be acquitted.[86] This concern must remain equally cogent today and must therefore render the complete abolition of *Majewski* , without replacement, an impractical alternative. The opposite approach is that adopted in Scotland,[87] according to which no defendant would be allowed to deny mens rea by reference to intoxication.[88] This would avoid illogical distinctions between crimes of specific and basic intent, but it would still entail treating intoxicated inadvertence as criminal when we no longer treat sober inadvertence as such, essentially punishing the intoxication itself. And this leads in turn to the proposal advanced in the Law Commission's 1993 Consultation Paper; an offence of criminal intoxication. There were certainly those who supported such a proposal,[89] however, from the point of view of labelling there is also an important argument against it. It seems implausible to claim that it is worse to class intoxicated inadvertent wrongdoers alongside advertent wrongdoers than it would be to class intoxicated vandals, for example, alongside intoxicated killers.[90] The Law Commission's proposal would have had the advantage of recognising openly that the basis for criminal liability was the intoxication itself, and in that regard it would have been an improvement on *Majewski* , but arguably the particular harm done by the ***L.Q.R. 276*** defendant should also play at least some role in ascertaining his or her criminal liability, as opposed to being taken into account only in sentencing.[91]

The answer could, of course, be given that such an offence would only be one further instance in which the law essentially criminalises activity which increases the chances or level of harm that may occur at a later point, independently of whether that harm is in fact caused.[92] Crimes of possession, whether of weapons or drugs, do precisely this, as do offences of dangerous driving per se, and perhaps also conspiracy and attempt. However, the key difference between such offences and an offence of "being intoxicated" is that we can absolutely prohibit[93] people from forming agreements to commit criminal offences, taking steps towards criminal offences, driving dangerously or possessing illegal and dangerous items,[94] whereas we presumably do not wish absolutely to prohibit them from drinking alcohol or even from becoming intoxicated by it.[95] Intoxication cannot, therefore, be targeted in an inchoate manner. It is apparently only regarded as being problematic when combined with actual harm.

This realisation may in turn point to a better solution than that proposed by the Law Commission. Rather than creating one separate "inchoate" offence of criminal intoxication, which would indeed lump intoxicated vandals together with intoxicated killers, in the case of result crimes it should instead be possible to convict a defendant of "committing [the actus reus of offence X] while intoxicated". Where the defendant commits the actus reus of the offence with the full mens rea he or she will obviously still be guilty of the full offence, and equally, when the defendant commits the actus reus but even a sober and reasonable person could have done so too, he or she should obviously be acquitted altogether. But in between, where he or she commits the actus reus, lacking the mens rea usually required for conviction, but only as the result of intoxication, he or she would become liable to be convicted of the proposed new offence of "committing [the actus reus of offence X] while intoxicated". ***L.Q.R. 277*** [96]

Closely connected to the cases involving absolute denials of mens rea are those in which the defendant initially appreciates the risk but then, over-optimistically, miscalculates the likelihood of the risk materialising, possibly believing that he or she has taken sufficient steps to prevent it from doing so, as in the classic case of *Shimmen* .[97] But in fact such defendants could fall equally well into the rules proposed here. Either the defendant foresaw the risk, in which case he or she will be judged by the ordinary rules, or he or she did not, in which case the defendant will lack the mens rea of the full offence and become liable to be convicted of the proposed alternative offence instead.[98]

Although it would not create an inchoate-style offence, this approach would still resemble that taken for conspiracies, attempt, incitement and secondary liability[99] in the sense that it is not an offence to commit "attempt", "conspiracy" or "aiding" per se. Rather one has to "aid offence X", or "attempt offence Y" and there are thus innumerable separate attempt, conspiracy or secondary offences. However, unlike an inchoate offence the proposed offence would also provide a means of openly recognising the fact that we are essentially criminalising intoxication *and* harm (without mens rea) in circumstances where we would not criminalise the harm by itself in the absence of mens rea or intoxication.

A similar suggestion was made in the past by Professor Glanville Williams and Professor J.C. Smith, [100] only to be rejected by the Law Commission in favour of its single offence of criminal intoxication. [101] However, the argument here differs from those discussed before in two ways.

First, I have sought to establish why a series of derivative offences would be better in principle than the one collective inchoate or endangerment offence preferred by the Law Commission to the Williams/Smith proposal on the first occasion. Secondly, one of the Law Commission's objections to the Williams/Smith proposal was that it covered only crimes of basic intent, leaving intact the problematic distinction between crimes of basic and specific intent. Given that intoxicated defendants can fail to develop the correct form of mens rea for either kind of result offence, the proposals made here would not maintain that distinction. For example, in relation to murder the actus reus in question is homicide, and thus a defendant who killed while intoxicatedly lacking the normal mens rea for any offence against the person would be convicted of "committing homicide while intoxicated". This would be so whether such a person simply failed to foresee a ***L.Q.R. 278*** risk of harm that he or she would have foreseen when sober, or believed, like Lipman that he or she was wrestling snakes. [102] This aspect of the proposal, however, may be a little more controversial. On the one hand, as demonstrated above, it is by no means straightforward at present to locate the specific/basic distinction, and as Ormerod points out, "the distinction is so obscure that the Law Commission recently felt unable confidently to state what the law was", a position he regards as "regrettable", given that "the nature of specific intent" is, for obvious reasons, "a matter of great importance". [103] He also notes that the Court of Appeal in *Heard* even hinted at rejecting this idea of a twofold classification altogether by suggesting that it is not to be assumed that every offence is one of basic or specific intent. [104] But conversely, as noted above, there are those such as Horder [105] and Simester [106] who defend the specific/basic distinction on the basis that an absence of mens rea fundamentally removes the wrongfulness of offences of specific intent but not those of basic intent. The argument here is that the specific/basic distinction should nevertheless be jettisoned for several reasons. The first is that even armed with such conceptual defences of the distinction, actually locating it in practice remains difficult. It is clear, for example, that although Simester refers to theft as "criminalis[ing] the wrong, not the harm", he does not regard the specific/basic line as falling between behaviour-based offences and result (harm) based offences, because he also states that "sexual intercourse without consent … [is a] wrong … whether done intentionally or negligently". Yet for rape, as for theft, the focus of the legal definition of the offence is in fact on the defendant's behaviour in certain circumstances; "the *offence* … does not require harm". [107] How, then, are we to know that rape is an offence in which the harm is assumed, whereas theft is an offence for which the harm is irrelevant? Connected to this are two other points. Retaining the specific/basic distinction also retains the difficulty, encountered in *Heard* , of classifying new offences, and it runs the risk that changes in wording, as had occurred in the case of s.3 of the Sexual Offences Act 2006 , may lead to changes in perception of the role to be played by mens rea in the offence.

Simester's reply might be his statement that "the regulatory interest of the criminal law arises primarily from the activities themselves [in the case of basic intent offences], from *what* objectively is done, rather than *why*." But again, the question is how are we supposed to determine for which offences this is the case, and this in turn leads to another interconnected problem: can we be sure that there ***L.Q.R. 279*** is such a distinction in the first place? Our difficulty in locating it suggests not. It is not clear even from a defendant-centred perspective that it is true to say that in theft we are concerned with why the actions were taken rather than what was done; but if we approach the question from the perspective of the victim (which is in fact more in keeping with the operation of the intoxication rules as a whole, as explained above), [108] it becomes even less clear that this approach is appropriate. After all, from a victim's point of view, as Simester himself notes, accepting that J.C. Smith regarded his distinction as irrational [109] "the victim suffers a deprivation; why should this not be theft?" Certainly there is nothing to suggest that the drunken taking of others' property is either so unlikely or so much more acceptable than drunken criminal damage that it merits different and indeed non-criminal treatment. Surely, therefore, it would be far simpler to abandon the distinction altogether, as the proposal suggested here would do.

Further objections to the proposed offence

A further objection raised by the Law Commission to the Williams/Smith proposal was that since the proposed sentence would be the same as for the full offence there would be little point in forensic exploration of the intoxication issue. However, even if it were thought necessary to retain the same *maximum* sentence for both offences, that does not mean that the options within that sentencing maximum (or tariffs within it) need be applied in the same way in all cases. [110] It was noted earlier that it would be helpful for a jury dealing with an offence of basic intent to be able to signal to the judge whether they found that the defendant had full mens rea or lacked it as a result of intoxication. [111] The proposed offence would allow precisely this to happen and sentencing guidelines could then provide for the intoxication to be taken into account in calculating the sentence. Thus, even if

the full offence and the intoxication version of it did share the same maximum sentence (and they need not do so) that would not mean that the sentences actually given would be identical regardless of intoxication. [112] It could, of course, be suggested that the maximum sentence for committing the relevant offence while intoxicated could be *higher* than that for the full offence, and that the new offence should not simply be regarded as a drop-*down*, but also, potentially as a step *up*. [113] However, it is difficult to imagine circumstances in which this would be appropriate. It is true that those who are intoxicated pose a greater risk to themselves and others, in ***L.Q.R. 280*** general, than those who are sober. But when that risk eventuates it is also the case that their individual culpability is, as noted at the outset, lower than that of someone who acts in a sober and calculating manner. In principle, those who lack the mens rea for an offence ought to be acquitted of that offence. By refusing to do so and by convicting the intoxicated individual of the alternative offence we are already treating him or her more stringently than we do those who are sober, and the proposed new offence thus already represents a step up from the normal treatment of a defendant who lacks the mens rea for the relevant offence. It would therefore be difficult to justify going beyond this with a heavier sentence as well. [114] Of course, if the defendant does have the mens rea for the full offence there is nothing to stop the use of alcohol acting as either an aggravating or mitigating factor in that context; by definition the proposed offence will only be used in situations where the defendant lacks the mens rea for the full offence. And in that context, conviction of an intoxication-based offence would open up the possibility of even more specifically tailored sentencing. Obviously, matters such as intoxication and addiction can already be taken into account by the court in sentencing, and ss.209 – 212 of the Criminal Justice Act 2003 provide for community sentences to include drug and alcohol rehabilitation requirements, but it surely cannot hurt [115] to convict the defendant of an offence which itself signals the need for investigation of the defendant's use of alcohol or drugs. [116] Similarly it cannot hurt to have such convictions recorded specifically, given that current research into the influence of alcohol on crime finds it difficult under the present rules to establish which offences should be counted. [117]

Another of the Law Commission's objections to the Williams/Smith proposal was that it still required the jury to ask themselves a hypothetical question, namely "would the defendant have been aware of the risk had he not been intoxicated?" This objection is a little more problematic, but can still be answered. Instead of asking themselves that hypothetical question, in the case of a result crime, for example, [118] the jury could be asked whether they found that the defendant had committed the relevant actus reus, and if so whether they found that the defendant did so (a) realising there was a risk of that harm occurring (b) in circumstances where even a reasonable person would have committed the actus reus [119] or (c) in ***L.Q.R. 281*** a state of such intoxication that he or she did not foresee the harm when a reasonable person in the defendant's position [120] would have done and would not have so acted. Positive answers to either (a) or (c) would lead to a conviction, of the full offence in the case of (a), and of the special offence in the case of (c), whereas if the jury found, in answer to question (b) that even a reasonable person would not have foreseen the harm, or would have had a good reason for causing that harm, the defendant would be acquitted. It was argued above that the hypothetical test currently used and the objective test ultimately boil down to the same thing in the vast majority of cases, and of course there is no objection to such criminalization of inadvertence when it leads to a conviction for a different offence from the full offence requiring subjective mens rea, provided that the jury are carefully instructed on the difference between the two states of mind, as indicated. It is only allowing inadvertence to be sufficient in some circumstances but not in others for the *same offence* that is objectionable. Nevertheless, it remains possible that there will not be a perfect match between the sober defendant and the objective reasonable person, and on this basis it would probably be better for the law to ask the jury to consider a sober and reasonable person *in the defendant's position*. [121] In terms of simplicity this would still be an improvement on the current hypothetical test which asks the jury to consider a parallel, non-existent set of facts, rather than a more straightforward objective test with slight modifications as proposed here.

It should be noted that direction (c) also deals with two issues that concerned the Law Commission in drafting its offence of criminal intoxication. [122] It avoids the need to specify the particular level of intoxication necessary to trigger the alternative verdict and it ensures that the defendant is only convicted of intoxicatedly committing the relevant offence when there is a causal link between the defendant's intoxication and his or her lack of the normal mens rea.

The Law Commission's principal objection to this proposal, however, was that it would lead to the problem of "split juries". As noted above, this is certainly one of the problems experienced by the criminal law in general and in particular by this area. On the other hand, it is by no means clear that it is such a prevalent and insurmountable problem that it justifies the retention of *Majewski* and the rejection of the alternative proposed here. First, although the Law Commission has adverted to it several times, [123] on other occasions it has felt that juries would be "as capable of handling the decision between the two offences [in this context] as they are of handling the many other cases where, at present, a defendant may be convicted of alternative offences." [124] It may then be that the likelihood of jury splitting is not ***L.Q.R. 282*** so high that it should have any practical

impact on the applicable rules at all. And if it were thought to be a serious problem, there is always the possibility of the use of majority verdicts, albeit that these only apply in certain circumstances. In sum, then, although we should not underestimate the problem of jury splitting, nor should we make it our sole guiding principle, at least until we are convinced that it is likely to produce serious and undesirable effects which must be avoided and cannot be ameliorated by other means.

2. Behaviour crimes

Unlike the current rules on intoxication which, it was argued above, can only really apply to reckless result crimes, the offence proposed here has been phrased in such a way that it could apply equally well to crimes with other kinds of actus reus element. Regardless of the kind of offence at issue, the point is that if the defendant had soberly realised the full truth of the situation, he or she would have chosen to act differently in the first place. [125] The *Richardson and Irwin* /JSB test we have at present entirely misses this point. It does not ask whether the defendant would have *run* the risk if sober, but whether he or she would have *foreseen* the risk if sober. As noted above, this is problematic enough in the case of result crimes, where it amounts to a use of objective rather than subjective recklessness; the defendant is punished not for choosing to run a risk, as he or she would be under the normal rules for reckless result crimes, but for failing to foresee it. But as explained above, in the case of behaviour crimes where there is no such objective alternative to intent or deliberateness, the test becomes even more difficult to apply. [126] However by contrast the proposed new offence specifically recognises that the defendant has committed the actus reus of the normal offence without the mens rea usually required for conviction, but that this whole situation has arisen as a result of intoxication. It does not matter that if sober the defendant would not have committed the actus reus in the first place, because his or her conviction specifically arises from the fact that he or she did commit the relevant actus reus while intoxicatedly lacking the normal mens rea. As a result, the offence can easily be extended to cover crimes with a behavioural actus reus element as well as those based on prohibited results.

Of course, it may well be that there is less need for such an offence when dealing with behaviour crimes. As in *Heard* itself, [127] in many cases the prohibited behaviour will not have been carried out unintentionally [128] and thus the defendant will have the mens rea of the full offence. And some cases will genuinely involve accidental ***L.Q.R. 283*** "flailing" and thus be caught by the rules on act involuntariness. [129] Nevertheless, although they may be rarer, there are circumstances in which defendants could behave more voluntarily than flailing and yet, through intoxication, lack the mens rea of the full offence, as with the example from *Heard* of someone who intends to stop just short of touching another person. [130] It should also be noted at this stage that many crimes will be made up of a combination of behaviour and circumstances (such as theft and most sex offences), and the circumstantial elements of offences will be discussed in more detail below.

It was specifically in order to catch behaviour crimes as well as result crimes that the proposed alternative offence was not defined as "causing [harm X] while intoxicated", but "committing [the actus reus of offence X] while intoxicated". As for the mens rea of the proposed offence in its application to behaviour crimes, just as with result crimes, the objections to the operation of the current rules again vanish once the proposal is to convict the defendant, not of the full offence with a different source of mens rea, but of a different offence entirely, the whole point of which is the criminalisation of only the actus reus of the full offence plus evidence of intoxication. Unlike result crimes, it is true that behaviour-based offences have a variety of different possible forms of mens rea. [131] Nevertheless, for the proposed offence we would still essentially ask the same three questions as before: did the defendant commit the relevant actus reus (a) with the mens rea for the full offence (conviction of the full offence) (b) when even a sober and reasonable person in the defendant's position [132] would have done so (acquittal) or (c) when a reasonable person in the defendant's shoes would not have done so and yet the defendant was so intoxicated that he or she lacked the mens rea for the full offence (conviction of the proposed new offence). For example, if a defendant, although intoxicated, dishonestly appropriates property with intent permanently to deprive, he or she will be guilty of the full offence of theft. [133] If he or she appropriates the property intending to do so only temporarily [134] and/or does so in circumstances where even a reasonable person/the sober defendant would have believed that the owner consented, [135] this provides an equivalent of (b) above and he or she should be acquitted, whereas if he or she appropriates the property without giving any thought to the length of the appropriation and is so intoxicated that it is difficult to describe him or her as dishonest he or she could in principle be convicted of the proposed offence as in (c) above. ***L.Q.R. 284***

3. Inchoate offences

The only circumstance in which it would probably not make sense to create the proposed offence concerns the essentially inchoate crimes such as burglary and attempt. [136] In these circumstances we are not faced with the normal *Majewski* dilemma that society needs protection from harm committed while intoxicated, since by definition no harm has yet been committed. It would be perfectly possible to create an offence of "attempting to commit offence X while intoxicated", if we so wished, [137] but it is submitted that this would be so far removed from the full offence that we should not do so. Creating such slight alterations in the case of individual offences might be thought to be undesirable and no better than the current specific/basic distinction, but this is not the case. Since the proposed offence would, like attempts and conspiracies, presumably be created by a statute, we could at least set out such an alteration in that statute, [138] so that, unlike the current line between offences of specific and basic intent, the future operation of the law would be certain. And, unlike the current specific/basic distinction, the reasoning behind the alterations would be rational, explicable and limited in number. [139]

In general, then, an offence of "committing [the actus reus of offence X] while intoxicated" could potentially apply across the board, [140] unless we choose to create specific, listed exceptions to it, such as for inchoate offences.

4. Offences with an actus reus element of circumstances and intoxicated mistakes The question of what constitutes a mistake is obviously a significant one, well beyond the scope of the current discussion. For simplicity, for the purposes of this section, a relatively narrow definition of mistake will be used, which assumes that in order for a defendant to be mistaken, the truth must be in existence at the time (s)he forms his or her view of the matter.

So far I have dealt with denials that the defendant intended a particular action and denials that the defendant foresaw or intended particular results or further actions. However, where the mens rea requirements relate to an actus reus element of circumstances, it is more likely that D will argue he or she was mistaken about them. But intoxication can also lead defendants to be mistaken about a matter which would, if true, give rise to a defence, such as self-defence. It therefore makes sense to deal with all these potential mistakes together.

The rules concerning intoxicated mistakes are notoriously complex and inconsistent [142] and vary depending on whether the mistake in question relates to a statutory defence to a basic intent crime, [143] the common law defence of self-defence ***L.Q.R. 285*** (whether to a crime of specific [144] or basic intent [145]), belief in consent for the purposes of a non-sexual offence against the person [146] or belief in consent for the purposes of a sexual offence. [147] Thus, again, the current rules are hardly a model of simplicity and clarity incapable of further improvement.

Initially, however, it might be thought that there is less need in this context for a specific set of rules to deal with intoxication, since here the law across the board does tend to take an objective approach and thus the intoxication rules look less out of line. [148] For instance, the decision in *Fotheringham* [149] established that a drunken belief in the victim's consent would not negate the mens rea for rape, and now the Sexual Offences Act 2003 requires defendants to have a reasonable belief in the victim's consent in order to escape liability. [150]

From this it might be thought that the best solution is just to extend the logic of the 2003 Act across the board to all offences, whether sexual or not. At present, non-sexual offences against the person are not subject to the same requirements of reasonableness. Nevertheless, there have been moves recently towards requiring the defendant to ensure that the victim can give "informed" consent in the context of non-sexual offences against the person [151] and it is at least arguable that respect for the victim's autonomy is at the heart of all offences against the person and property. It might thus be better to require a sober and reasonable belief in the victim's consent across the board as part of the mens rea requirements for all offences. [152] Even for someone who prefers the subjective form of recklessness there are good reasons why this should happen. Although the "inexorable logic" of *Morgan* [153] leads to a subjective approach, the ease with which the defendant can ascertain the truth of what he or she believes to be consent may mean that for policy reasons the law should take a more objective approach and that in this particular context it can do so without treating the defendant too unfairly.

Similarly, in the context of self-defence there are various ways in which even the actions of sober defendants are judged against a reasonable standard. First, as Dingwall points out, if a defendant kills as a result of making an unreasonable mistake regarding the need for self-defence there is no reason why the defendant should not be convicted of manslaughter if he or she was grossly

negligent in making that mistake. [154] Second, even outside the context of homicide offences, as Spencer points out, even sober people will only have the benefit of self-defence ***L.Q.R. 286*** if they respond reasonably to the perceived threat. [155] Thus in cases where the defendant kills or acts disproportionately in response to the threat even as he or she perceives it, there is again no need for a special set of rules to deal with intoxicated defendants; the rules as they apply to sober people will already do the necessary work. It is therefore harder in this area to claim that the goalposts are being moved to capture intoxicated defendants in circumstances where a sober person would not be liable. Indeed, given that this is the case it could be argued that use of the proposed offence for such defendants would be unduly lenient; it would lead to their being convicted not of a different offence with different criteria, but arguably a different offence based on the *same* criteria. [156] Nevertheless, there are several reasons why it would still be preferable to adopt the same solution as suggested in the rest of this paper even for those who are mistaken, whether they are mistaken about a circumstance element of the actus reus of an offence, or about the availability of a defence such as self-defence.

The first reason is that at present not all the rules in this context are objective. For example, the defendant seriously injures the victim after making the intoxicated mistake that the victim is about to shoot him, when in fact the victim is only pointing at the defendant with a banana. The defendant cannot be caught by the objectivity of gross negligence because he has not killed the victim, and nor can he be caught by the objectivity of requiring a reasonable response, because the defendant's mistake was about the need for force in the first place, not about the proportionality of his response to that perceived need. Had the victim really been about to shoot, the defendant's response might well have been proportionate. [157] Thus we cannot protect the victim from intoxicated defendant simply by using the objectivity of rules applicable to sober people, which is why the Court of Appeal in *Hatton* , [158] contrary to academic opinion, [159] held that a defendant should not be entitled to be judged on the facts as he mistakenly believed them to be when that mistaken belief was brought about by self-induced intoxication. Thus the result in *Hatton* is precisely the same as that outlined above in other contexts; the law convicts intoxicated defendants when it would not convict sober ones [160] and if it is to do this it should do so openly, with a different conviction.

Secondly, in their research with simulated juries, Finch and Munro discovered that although the law does tend to regard intoxicated mistakes as being unreasonable (and it was suggested above that it seems likely to continue to do so), this is not a view shared by the general public. [161] They tentatively suggest that since juries ***L.Q.R. 287*** apparently do not regard intoxicated mistakes about consent to be sufficiently culpable to warrant the label of rape, they may instead simply be refusing to convict at all in such circumstances. [162] It is not impossible, therefore, that if jurors were asked to convict intoxicated defendants, not of rape, but of "engaging in non-consensual sexual penetration while intoxicated", they might perhaps be more prepared to do so. Not only might the conviction rate then rise, the convictions would also be more accurate, and could, as noted before, help to chart the role of alcohol in such situations. [163] It is this which perhaps best answers the undue lenience point raised above; in principle if it were to adopt this approach the law could indeed allow people to be convicted of the proposed offence when they fulfil the requirements of the full offence, [164] but if in practice they are currently not being convicted at all, conviction of the proposed offence would actually be an improvement.

Finally, it might not have been enough by itself to suggest adoption of the new offence across the board for reasons of simplicity and consistency, but once there are other good, independent reasons for adopting it, the resulting simplicity and consistency are certainly helpful side effects.

It is therefore proposed that for mistakes, whether about circumstances or defences such as self-defence, we should essentially adopt the same approach as was proposed above: (a) the intoxicated defendant did not hold the relevant belief [165] and is thus guilty of the full offence; (b) the intoxicated defendant held the relevant belief and so would a sober and reasonable person in the defendant's position (full defence); or (c) the intoxicated defendant held the relevant belief only because he or she was intoxicated and he or she would not have held the same belief if sober (conviction of the proposed new offence).

Finally it should be noted that while for many offenders this approach will simply lead to conviction of a different offence, or may even be more lenient than the current law, there are also some cases where it will lead to conviction of the new offence when currently the defendant would not be guilty of anything. In *Jaggard v Dickinson* , [166] for example, Jaggard believed that the property she entered belonged to her friend, rather than to the victim, [167] while *Gannon* [168] believed that a parked car was his and thus entered it, started it using his own keys and drove away. Jaggard was acquitted and Gannon might well have been had it not been for the fact that he could not give evidence about the precise form of his mistake because he could not remember anything at all about the incident, whereas now ***L.Q.R. 288*** both would fall under option (c) above; the intoxicated defendant

held the relevant belief only because he was intoxicated and he would not have held the same belief if sober (conviction of the proposed new offence). However, the same arguments apply here as applied above in the context of theft [169] ; intoxication does increase the likelihood of such incidents. And again, if this proposed increase in criminalisation of cases such as *Jaggard* causes concern, we must ask why this is, given that Jaggard would be convicted of the proposed new offence, not the full offence, and yet at present the law is in other circumstances happy to convict *of the full offence* defendants who intoxicatedly lack its mens rea.

Intoxication and Automatism: the Outer Limits of the Proposed Offence

It should, finally, be noted that beyond its extension to offences of specific intent, and some instances such as *Jaggard* just mentioned (where the current differences in treatment are difficult to explain or justify) the offence proposed here would not otherwise operate in wider circumstances than the current rules on intoxication. [170] The case of *Beard* [171] established that "if a man by drunkenness brings on a state of disease which causes such a degree of madness, even for a time, which would have relieved him from responsibility if it had been caused in any other way, then he would not be criminally responsible." [172] Similarly, in *R. v Heard* as noted above, if the defendant had indeed been "flailing" or "stumbling" he would not have been guilty of the offence. As also noted above, this is because in such instances the defendant is not simply denying the mens rea of the relevant offence, he is denying its voluntariness. This distinction has always been assumed to be present in English law and nothing in the rules proposed here would alter that. [173] All the proposed offence seeks to do is to remedy the situation in which at present intoxicated defendants are convicted of the same offence as if they had been sober, notwithstanding that they do not in fact fulfil the mens rea requirements for that offence.

Conclusion

The problem of voluntary intoxication raises in a sharp form three of criminal law's most familiar dilemmas. How can we treat the defendant subjectively and thus fairly while also protecting society at large? How can we respond to the various different impacts of intoxication without overcomplicating the law, and how can we achieve the level of specificity in criminal law that is compatible with fair labelling while at the same time avoiding the problem of split juries? None of ***L.Q.R. 289*** these problems can be solved absolutely, but it has been argued that improvements could be made on the law as it currently stands.

There are two major problems with the current state of affairs. The first is that the *Majewski* rules either constitute an infringement of s.8 of the Criminal Justice Act 1967 , or amount to criminalising intoxication itself. The second is that they can, in any event, only apply successfully to result crimes with a minimum mens rea requirement of recklessness, and yet there are of course many other crimes (sexual offences, dishonesty offences) which do not fit this mould.

In order to avoid these problems it has been suggested that if we are already essentially criminalising the commission of the actus reus of an offence when the defendant was voluntarily intoxicated we should do this openly. Instead of convicting him or her of the full offence in the absence of the full mens rea, it was suggested that there be an offence of "committing [the actus reus of offence X] while intoxicated" which could in principle apply across the board. Although, in order to avoid the pitfalls of the current law, it was necessary to examine how the proposed offence would work in relation to actus reus elements of result, behaviour and circumstances individually, this should not obscure the fact that ultimately it was proposed that essentially the same solution should be adopted in all cases, and in the process the problematic distinction between offences of specific and basic intent could also be abandoned. Of course, if we wanted to create exceptions to this proposed offence it would be possible to do so, [174] but even then the result would be more straightforward and predictable than the current law because such exceptions could be laid down clearly, and would be rationally explicable and limited in number.

In many cases this would simply lead to a different conviction from the one achieved at present on the same facts, but in others it could potentially lead to more lenient or more stringent treatment than defendants receive at present. [175] The point is, however, that in all cases the approach proposed here would be simpler and clearer than the existing rules, it would provide a fairer label for such defendants and it might even help us to provide for and monitor more clearly the role played by intoxication in the commission of crime.

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Footnotes

1 *M. Maguire and H. Nettleton, Home Office Research Study 265: "Reducing alcohol-related violence and disorder: an evaluation of the 'TASC' project"*, available at http://www.homeoffice.gov.uk/rds/pdfs2/hors265.pdf [Accessed January 21, 2013], Table 3.3.

2 Though one of the purposes of this article is to question that assumption.

3 This is a significant point, given that according to the British Crime Survey 2005–2006 in nearly half (44%) of all violent incidents, the victims believed offenders to be under the influence of alcohol, and in cases of "stranger violence" this rose to 54%.

4 This point was raised by the *Law Commission, Law Com CP No.127 Intoxication and Criminal Liability (1993), at para.3.22* as an objection to the current operation of the rules in *DPP v Majewski [1977] A.C. 443* . A discussion of how the sentencing of intoxicated offenders currently operates is beyond the scope of this piece, but for further detail see *N. Padfield, "Intoxication as a Sentencing Factor: Mitigation or Aggravation?" in J. Roberts (ed.), Aggravation and Mitigation in Sentencing (Cambridge: Cambridge University Press, 2011)*.

5 The problem of potential "split juries" has concerned the Law Commission on several occasions. In the context of intoxication the Commission refers to the problem in its consultation on *Intoxication and Criminal Liability CP No.127 (1993)*, at paras 6.22 and 6.25 in considering the proposals for reform suggested by Professor J.C. Smith and Professor G. Williams, and the Butler Committee on Mentally Abnormal Defenders (1975) Cmnd.6244, and in other recent reports. See, e.g. *Inchoate Liability for Assisting and Encouraging Crime Law Com No.300 (2006)*, especially at *para.2.8, "Forensic Considerations"*; and *Murder, Manslaughter and Infanticide Law Com No.304 (2006)*, especially at paras 2.117 onwards.

6 See, for example, G. Williams, "Intoxication and Specific Intent" (1976) N.L.J. 658; G. Virgo, "The Law Commission Paper on Intoxication and Criminal Liability: Part 1: Reconciling Principle and Policy" [1993] Crim. L.R. 415; J. Chalmers, "Surviving without *Majewski*" [2001] Crim. L.R. 258; G. Orchard, "The Law Commission Consultation Paper on Intoxication and Criminal Liability: Part 2: Surviving without *Majewski* —a view from Down Under" [1993] Crim. L.R. 426; A. Gold, "An Untrimmed 'Beard': the Law of Intoxication as a Defence to a Criminal Charge" (1976) Criminal Law Quarterly 34, though for contrasting views see also A. Dashwood, "Logic and the Lords in *Majewski* (1)" and "(2)" [1977] Crim. L.R. 532 and 591 respectively; S. Gough, "Surviving without *Majewski*" [2000] Crim. L.R. 719; and S. Gardner, "The Importance of *Majewski*" (1994) 14 O.J.L.S. 279.

7 *Intoxication and Criminal Liability Law Com CP No.127 (1993), at para.6.31*.

8 *DPP v Majewski [1977] A.C. 443* .

9 *Legislating the Criminal Code: Intoxication and Criminal Liability Law Com No.229 (1995), at para.1.32*.

10 *Intoxication and Criminal Liability Law Com No.314 (December 4, 2008)*.

11 *Intoxication and Criminal Liability Law Com No.314 (2008)*, at para.1.67. See also paras 1.65 and 3.10–3.11.

12 *Ministry of Justice, Report on the Implementation of Law Commission Proposals (March 2012), at paras 49–50*.

13 For example, it must be assumed here that the law will treat voluntary and involuntary intoxication differently.

14 *DPP v Beard [1920] A.C. 479* .

15 See further A. Simester, "Intoxication is Never a Defence" [2009] Crim. L.R. 3.

16 Though in other circumstances the rules of intoxication more generally can also deal with defendants who wish to argue that as a result of intoxication they were mistaken about another issue relating to a defence.

17 There are certainly cases which do interpret *Majewski* as laying down such a rule of evidence, such as *R. v Hardie [1985] 1 W.L.R. 64* in which the Court of Appeal referred to "alcoholic intoxication or incapacity or automatism resulting from the self-administration of dangerous drugs" as raising "a

conclusive presumption against the admission of proof of intoxication for the purpose of disproving mens rea in ordinary crimes".

18 Section 8 provides that 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 reasons 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.

19 *R. v Hatton (Jonathan) [2005] EWCA Crim 2951; [2006] Crim. L.R. 353* , noted Ashworth.

20 The precise way in which intoxicated mistakes should operate will be discussed further below. However, in the meantime it should be noted that mistakes can thus go to either mens rea or to defence issues. There is, of course, also the possibility that issues of self-defence should be regarded instead as going to, e.g. the "lawfulness" or otherwise of violence. Any such difficulty of categorising the issue of self-defence adds further weight to the argument that different rules should not apply to self-defence from those applicable to mens rea elements clearly so defined.

21 This was certainly the view of earlier editions of *Blackstone's Criminal Practice (Oxford: Oxford University Press, 2007)* but see now A3.10 (p.41).

22 Lord Elwyn-Jones L.C. and Lord Edmund-Davies, *DPP v Majewski [1977] A.C. 443* at 476. See also Lord Edmund-Davies at 497. Further support for this substantive interpretation comes from Lord Elwyn-Jones. Lord Salmon begins in a more ambiguous way but it is nevertheless pretty clear that he must have been laying down a substantive rule of law. Lord Diplock and Lord Kilbrandon did not deliver full judgments, but since they also agreed with Lord Elwyn-Jones, support for the substantive interpretation can be regarded as unanimous. In its 1995 report, the Law Commission reached a similar view: *Legislating the Criminal Code Law Com No.229 (1995)*, at para.3.16.

23 *Intoxication and Criminal Liability Law Com No.314 (2008)*, at para.2.14.

24 The first is that to equate intoxication with the normal mens rea (usually recklessness) required for offences of basic intent is to ignore problems of contemporaneity; a defendant's decision to get drunk may precede his harmful actions by some hours. Secondly there are problems of substantive mismatch; the decision to get drunk hardly constitutes foresight of, for example, physical harm (for further detail on the necessity for the actus reus to "correspond" with the mens rea of the crime, see further the debate between J. Horder and B. Mitchell, "A Critique of the Correspondence Principle in Criminal Law" [1995] Crim. L.R. 759 (Horder); "In Defence of a Principle of Correspondence" [1999] Crim. L.R. 195 (Mitchell); "Questioning the Correspondence Principle—a Reply" [1999] Crim. L.R. 206 (Horder). On the question of whether intoxication is the substantive equivalent of subjective recklessness see further A.R. Ward, "Making Some Sense of Self-Induced Intoxication" [1986] C.L.J. 27). Thirdly there are problems of causation in cases where the failure to foresee the harm was independent of the intoxication and would have occurred even had the defendant been sober. Finally, nowhere has it been laid down *how* drunk D must be before his or her intoxication could be taken to constitute the recklessness required for a finding of, for example, assault occasioning actual bodily harm (see, e.g. *Intoxication and Criminal Liability Law Com CP No.127 (1993)*, at paras 4.31–4.33 and G. Virgo, "The Law Commission Consultation Paper on Intoxication and Criminal Liability" [1993] Crim. L.R. 415 at 418). See also *Webster [2006] EWCA Crim 415* , Moses L.J. (I am grateful to Nicola Padfield for bringing this case to my attention.)

25 See *Intoxication and Criminal Liability Law Com No.314 (2008)*, at para.2.19: "even if one does not accept the argument that inadvertence caused by voluntary intoxication is morally equivalent to advertent recklessness … the courts' approach may certainly be justified on public policy grounds. D ought to be aware that, by becoming voluntarily intoxicated, D increases the risk that he or she will cause harm to other persons or damage to property. That is enough to justify liability for the range of violent and sexual offences classified as offences of 'basic intent'. " See also Lord Salmon in *DPP v Majewski [1977] A.C. 443* at 482. For further criticism of the prior fault idea see *D. Husak, "Intoxicants and Culpability", forthcoming*.

26 *[2007] EWCA Crim 125* . See further R. Williams, "Voluntary Intoxication, Sexual Assault and the Future of *Majewski* " [2007] C.L.J. 260.

27 See *R. v Heard [2007] EWCA Crim 125* at [30](v), emphasis added.

28 Particularly given that the dicta of Hughes L.J. in the Court of Appeal in *Heard [2007] EWCA Crim 125* must in any case have been obiter on this point.

29 Above fn.24.

30 See e.g. Lord Salmon, *DPP v Majewski [1977] A.C. 443* at 483, Lord Edmund-Davies at 493 and Lord Russell at 498.

31 *Majewski [1977] A.C. 443* at 482.

32 Judicial Studies Board Specimen Direction No.52.

33 The *Crown Court Bench Book*, available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Training/benchbook_criminal_2010.pdf [Accessed January 21, 2013], similarly recommends that judges ask juries whether the defendant would have realised the risk if sober (p.58).

34 *[1999] 1 Cr. App. R. 392* . See also *Intoxication and Criminal Liability Law Com No.314 (2008)*, at paras 2.64–2.70.

35 The one most obvious occasion on which Parliament has actually expressed its views on the matter.

36 Above *R. v Richardson and Irwin [1999] 1 Cr. App. R. 392* at 397.

37 Clarke L.J.'s question 5(b), *Richardson and Irwin [1999] 1 Cr. App. R. 392* .

38 *Intoxication and Criminal Liability Law Com No.229 (1995)*, at paras 3.19 and 6.25.

39 *Legislating the Criminal Code Law Com No.229 (1995)*, at paras 1.28 and 6.32.

40 *Intoxication and Criminal Liability Law Com CP No.127 (1993)*, at para.3.20. See also Ward, "Making Some Sense of Self-Induced Intoxication" [1986] C.L.J. 27.

41 *R. v Richardson and Irwin [1999] 1 Cr. App. R. 392* . And similarly s.6(5) of the Public Order Act 1986 is defined in subjective terms.

42 *[2003] UKHL 50; [2004] 1 A.C. 1034* , the House of Lords' decision on subjective recklessness.

43 See e.g. Dashwood, "Logic and the Lords in *Majewski* (1)" and "(2)" [1977] Crim. L.R. 532 and 591 respectively; Gough, "Surviving without *Majewski* " [2000] Crim. L.R. 719; and Gardner, "The Importance of *Majewski*" (1994) 14 O.J.L.S. 279. See also Horder, who argues that "to hold that one can be guilty of rape or assault through a crass blunder does not change the nature of the wrong in question in the way it would do with [crimes of specific intent]" ("Sobering Up? The Law Commission on Criminal Intoxication" (1995) 58 M.L.R. 534 at 539). It is true that he made this argument "whether or not it is right to require subjective recklessness as the mens rea in these crimes" and that he had earlier argued that he was not seeking to defend "the unappealing notion that evidence of voluntary intoxication itself constitutes or supplies evidence of mens rea in crimes of basic intent" (at 536). Nevertheless, now that we have established that the mens rea, at least of non-sexual offences against the person and criminal damage *do* require subjective recklessness as their mens rea, it is arguably difficult to maintain the view that such crimes can be committed by "crass blundering" in the *absence* of subjective recklessness without arguing that intoxication is itself the equivalent of and substitute for that recklessness.

44 *R. v Caldwell [1982] A.C. 341* .

45 *DPP v Morgan [1976] A.C. 182* . Note that in fact the subjectivity reasoning in this case was contemporaneous with the decision in *DPP v Majewski [1977] A.C. 443* suggesting that even then the pro-objectivity reasoning was not all in one direction.

46 *R. v Adomako [1995] 1 A.C. 171* .

47 *Law Commission, Murder, Manslaughter and Infanticide Law Com No.304 (2006), at para.3.60* recommends that a person should only be guilty of gross negligence manslaughter where "he or she is capable of appreciating [the risk of death] at the material time". This amendment was proposed to deal with cases like that of *Stone and Dobinson [1977] Q.B. 354* and is to be welcomed.

48 *B. v DPP [2000] 2 A.C. 428* , per Lord Nicholls at 463. In that context he was referring to the move away from a need for "reasonable" belief towards the need for an honest belief.

49 *[2003] UKHL 50; [2004] 1 A.C. 1034* .

50 *[2003] UKHL 50* at [55].

51 Other than in the context of gross negligence manslaughter, the Sexual Offences Act 2003 and a limited number of other examples discussed in more detail below.

52 See also Simester, "Intoxication is Never a Defence" [2009] Crim. L.R. 3 at 4, who similarly argues that the criminal law intoxication doctrine "is a doctrine of *inculpation* not exculpation. … its sole function—is to treat the defendant as if he acted with mens rea when, in fact, he did not." And Cory J., (with whom L'Heureux-Dubé, McLachlin and Iacobucci JJ. agreed) in *Henri Daviault v R. (1994) 33 C.R. (4th) 165* (Supreme Court of Canada), giving judgment that "the substituted mens rea of an intention to become drunk cannot establish the mens rea to commit the assault" (at [40]). See also his conclusion at [42] that this "would be to deprive an accused of fundamental justice". For further discussion of the case see below, fn.173. I am grateful to Marie Manikis for bringing this case to my attention.

53 *R. v G. and R. [2003] UKHL 50* .

54 See further *R. Williams, "The Current Law of Intoxication: Rules and Problems" in J. Herring (ed.), Intoxication and Society (Oxford, Hart Publishing, 2012)*.

55 Support for this suggestion that we take more care over analysing the precise form of actus reus element at issue can be found in the different context of the *Law Commission's consultation paper on Conspiracy and Attempts, Law Com CP No.183 (2007)*, at paras 4.6–4.15.

56 For example, theft and handling are behaviour crimes of specific intent, whereas offences against the person such as assault occasioning actual bodily harm contrary to s.47 of the Offences Against the Person Act 1861 are reckless result crimes and thus are crimes of basic intent.

57 *R. v Heard [2007] EWCA Crim 125* .

58 *Intoxication and Criminal Liability Law Com No.314 (2008)*, at paras 2.15–2.23.

59 See further above fn.54.

60 A. du Bois-Pedain [2007] 2 Archbold News 4.

61 Hughes L.J., *R. v Heard [2007] EWCA Crim 125* at [31]. Thus for murder and s.18 of the Offences Against the Person Act 1861 as well as causing grievous bodily harm or death respectively the defendant must have had an intent to produce the result of (at least) grievous bodily harm. This provides an interpretation of Lord Elwyn-Jones' dictum which is both consistent with the decided cases and explains why it is that murder belongs in the category of specific intent even though intent to do grievous bodily harm is sufficient. However, it has the converse potential to include offences without an element of intent in the mens rea at all, see further Ormerod, comment on *R. v Heard [2007] Crim. L.R. 654* at 658.

62 See, for example, *Pratt [1984] Crim. L.R. 41* , in which the defendant forced two 13-year-old boys at gunpoint to undress and shine a torch on each other. In *R. v Court [1989] A.C. 28* the defendant was described as "causing the boys thus to expose their private parts".

63 In *R. v Court [1989] A.C. 28* , it is true that Lord Goff held that "the mental element must in fact… nearly always be simply intention; and it is not surprising, therefore, to find Lord Lane C.J. in a case of indecent assault (see *Faulkner v Talbot [1981] 1 W.L.R. 1528, 1534*) describing an assault as 'any *intentional* touching of another person without the consent of that person and without lawful excuse'" (at 48). Nevertheless, the old rules on indecent assault did include cases where the victim was caused to fear that the defendant would touch him or her (see e.g. *R. v Rolfe (Kenneth) (1952) 36 Cr. App. R. 4* (this aspect of the offence was unchanged by the 1956 Sexual Offences Act) and *Pratt [1984] Crim. L.R. 41* , above, and *R. v Sargeant [1997] Crim. L.R. 50*) and even Lord Goff conceded that recklessness was "theoretically relevant" albeit that he also found it "difficult to imagine circumstances where it would be relevant in practice".

64 *R. v Heard [2007] EWCA Crim 125* at [32].

65 Ormerod in fact identifies four problems with this approach, only two of which are relevant here. The other two concern s.1(2)(b) of the Criminal Damage Act 1971 and the use of sexual purpose in s.78 of the Sexual Offences Act 2003 , see further Ormerod, *Heard [2007] EWCA Crim 125* .

66 *R. v Heard [2007] EWCA Crim 125* at [22].

67 "To flail about, stumble or barge around in an uncoordinated manner which results in an unintended touching, objectively sexual, is not this offence. If to do so when sober is not this offence, then nor is it this offence to do so when intoxicated … The intoxication, in such a situation, has not impacted on intention. Intention is simply not in question. What is in question is impairment of control of limbs": *R. v Heard [2007] EWCA Crim 125* at [23]. As Ormerod notes, a similar dichotomy between accidental and non-accidental actions was applied in the case of *Brady [2006] EWCA Crim 2413; [2007] Crim. L.R. 564* where again the distinction was not so simple. An analogous case (on the actus reus at least) is that of *K. v DPP (1990) 91 Cr. App. R. 23* . The point about both *Brady* and *K.* is that in those cases the offences in question are result crimes with an attendant mens rea of recklessness. In such cases it is easy to accommodate an intermediate category of recklessly caused harm, because this is contained in the definition of the offence itself. There is thus no problem with applying the *Richardson and Irwin* hypothetical test to such a case. See further D. Ormerod's comments on the deliberateness/accident distinction, [2007] Crim. L.R. 654 at 657.

68 Indeed the Court of Appeal in *R. v Heard [2007] Crim. L.R. 654* at [14] suggested that elements of offences should be classified rather than whole offences. See further below, fn.104.

69 *[1970] 1 Q.B. 152* .

70 Ormerod's example, see *R. v Heard [2007] Crim. L.R. 654* at 657.

71 See Williams, "Voluntary Intoxication, Sexual Assault and the Future of *Majewski*" [2007] C.L.J. 260.

72 In *Lipman* itself, [1970] 1 Q.B. 152 the court cited *R. v Church [1966] 1 Q.B. 59* , which holds that a defendant will be guilty of unlawful act manslaughter where (s)he commits an unlawful act which causes death provided that "the unlawful act must be such as all *sober and* reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm" per Edmund Davies J. (as he then was) *[1966] 1 Q.B. 59* at 70 (emphasis added).

73 As will be explained in more detail below, it is possible to ask whether a sober defendant would have realised that (s)he was touching a human being rather than a dummy, just as it is possible to ask whether a sober defendant would have foreseen the risk of the prohibited result eventuating, but the point is that whereas the failure to foresee a risk can just about be classified as recklessness, albeit objective recklessness rather than the subjective form normally required following *R. v G. and R. [2003] UKHL 50* , there is no equivalent means of arguing that failure to realise a particular circumstance (that the object in question was a human being) is somehow an "objective" form of intent which will suffice to replace the full form of deliberateness normally required.

74 *Intoxication and Criminal Liability Law Com No.314 (2008)*, at para.3.38, first emphasis added.

75 And the Law Commission's rules do not deal with the case of someone who intends to stop short of touching, since they state specifically that intentional conduct should remain subject to the *Majewski* rules: *Intoxication and Criminal Liability Law Com No.314 (2008)*, at para.3.46 and their fn.53. Thus here the problem remains, and it is difficult to see what relevance the defendant's "awareness" has in the context of an offence which requires an intentional touching.

76 Many offences will of course, as the Court of Appeal itself recognised in *Heard [2007] EWCA Crim 125* , be mixed offences. Thus for reasons of analytical clarity it is elements of offences that are being considered here, rather than offences as a whole.

77 *Heard [2007] EWCA Crim 125* .

78 *Heard [2007] EWCA Crim 125* at [11].

79 *R. v Kingston (Barry) [1995] 2 A.C. 355* .

80 Which, it was argued above, can only apply to result crimes with a minimum mens rea of recklessness.

81 See further Ward, "Making Some Sense of Self-Induced Intoxication" [1986] C.L.J. 27.

82 *Intoxication and Criminal Liability Law Com CP No.127* (1993), at para.1.14, citing in its support the findings of the Butler Committee and the Criminal Law Revision Committee.

83 *DPP v Majewski [1977] A.C. 443* at 480.

84 *Intoxication and Criminal Liability Law Com CP No.127 (1993)*, at para.3.18.

85 Which Horder writes "transforms" the wrong in question "from a criminal to—at most—a civil wrong", in "Sobering Up? The Law Commission on Criminal Intoxication" (1995) 58 M.L.R. 534 at 539. See further below, fnn.105–109 and surrounding text where Horder and Simester's views ("Sobering Up? The Law Commission on Criminal Intoxication" (1995) 58 M.L.R. 534 and "Intoxication is Never a Defence" [2009] Crim. L.R. 3 respectively) will be discussed in more detail.

86 *Legislating the Criminal Code Law Com No.229 (1995)*, at para.1.27.

87 See e.g. Gough, "Surviving without *Majewski* " [2000] Crim. L.R. 719 and Chalmers, "Surviving without *Majewski* " [2001] Crim. L.R. 258.

88 For compatibility with s.8 of the Criminal Justice Act 1967 in England this would have to be a rule of substance, rather than a rule precluding the consideration of evidence.

89 See e.g. Virgo, "The Law Commission Paper on Intoxication and Criminal Liability: Part 1: Reconciling Principle and Policy" [1993] Crim. L.R. 415 and Chalmers, "Surviving without *Majewski* " [2001] Crim. L.R. 258. Similar offences have apparently existed in South Africa (s.1 of the Criminal Law Amendment Act 1 of 1988: see further A. Paizes, "Intoxication Through the Looking-Glass" (1988) 105 S.A.L.J. 776) and s.323 (a)(i) of the German Criminal Code (Strafgesetzbuch). See further A. Skeen, "Intoxication is No Longer a Complete Defence in Bophuthatswana: Will South Africa Follow Suit?" (1984) 101 105 S.A.L.J. 707.

90 *Law Commission, Intoxication and Criminal Liability Law Com CP No.127 (1993)*, at para.6.29.

91 Indeed, the argument is more usually made that the outcome produced should have *more*, not less impact on the defendant's overall culpability than the mens rea, see further the discussion concerning the correspondence principle, above fn.24 and *T. Nagel "Moral Luck" in Mortal Questions 24–25 (Cambridge, Cambridge University Press, 1979)*.

92 See further, e.g. *A. Ashworth, Principles of Criminal Law, 5th edn (Oxford: Oxford University Press, 2006), at pp.301–305* and *R.A. Duff, "Criminalizing Endangerment" in R.A. Duff and S.P. Green (eds), Defining Crimes (Oxford: Oxford University Press, 2005)*.

93 Of course, the absolute prohibition on "endangerment" offences would not include circumstances in which the defendant might have a defence of necessity, see, e.g. *Pommell [1995] 2 Cr. App. R. 607* or *Martin [1989] 1 All E.R. 652* ; *Conway [1989] Q.B. 290* and *Willer (1986) 83 Cr. App. R. 225* ; or self-defence.

94 The only exception to this is the possession of articles which are not made or adapted for causing injury contrary to s.1(4) of the Public Order Act 1986 as interpreted in *R. v Simpson (Calvin) [1983] 1 W.L.R. 1494* , such as kitchen knives. The Act does still prohibit the carrying of such weapons if they are carried for the purpose of causing injury, which again we can do absolutely.

95 It might just be possible to criminalise those who deliberately become *dangerously* intoxicated, in the same way as it is possible to criminalise dangerous driving, but the difference is presumably that whereas normal driving has a clear social benefit and can easily be distinguished from dangerous driving, no form of intoxication really has a social benefit and could all be regarded as dangerous in principle. With no such reason to distinguish between "dangerous" and "safe" intoxication, the difficulty of finding such a cut-off point would probably mean that ultimately we had to criminalise all intoxication or none. Since the former option is extremely unlikely the answer must be that we cannot criminalise intoxication in an inchoate manner, unlike dangerous driving. See also Cory J. in *Henri Daviault v R., (1994) 33 C.R. (4th) 165* at [45].

96 Although in that sense the offence is a "drop-down" from the ordinary offence, this is only true in the sense that it can be made out with a lower level of mens rea than the full offence, and in that sense the offence actually represents a step *up* from the fact that a defendant who lacks the mens rea of the full offence would not normally be found guilty at all. Similarly, although the offence has its own label, whether this carries a greater or lesser stigma than that attached to the full offence from which it is derived is obviously a matter for public opinion. The question of sentencing will be dealt with below, see fn.113 and surrounding text.

97 *(1987) 84 Cr. App. R. 7* . For further discussion of the difference between this and recklessness per se, see the *Law Commission's Consultation Paper A New Homicide Act for England and Wales? (2005) Law Com CP No.177, at paras 3.22–3.25*.

98 In most cases the offence in question in a *Shimmen* context will be a result crime, but as noted above, the advantage of the alternative proposed here is that, unlike the rules in *R.v Heard [2007] EWCA* it can cope even with *Shimmen* -style defendants who commit behavioural offences.

99 Indeed it may be thought that this form of liability has something in common with secondary liability, given that there too, traditionally, liability could only be derived from the actus reus, rather than being an inchoate form of liability in itself, (*Thornton v Mitchell [1940] 1 All E.R. 339*) perhaps because secondary liability also covers potentially innocent actions such as lending items to another person. However, over the years various exceptions have been developed to this "derivative" theory of liability: see e.g. *R. v Richards (Isabelle Christina) [1974] Q.B. 776* ; *R. v Burke [1986] Q.B. 626* and Smith and Hogan at 202–205; *R. v Bourne (Sydney Joseph) (1952) 36 Cr. App. R. 125* ; *R. v Austin (Christopher Timothy) [1981] 1 All E.R. 374* ; *Hui Chi-ming v R. [1992] 1 A.C. 34* ; *Cogan and Leak [1976] Q.B. 217* (Williams [1975] C.L.J. 182; *R. v Millward (Sidney Booth) [1994] Crim. L.R. 527* ; and *DPP v K. and B. [1997] 1 Cr. App. R. 36*), and see also the inchoate liability for assisting and encouraging now contained in the Serious Crime Act 2007 .

100 See *Intoxication and Criminal Liability Law Com CP No.127 (1993), at paras 6.24–6.25, "The Minority CLRC Proposal of Professor Smith and Professor Williams"*.

101 See *Intoxication and Criminal Liability Liability Law Com CP No.127 (1993)*, at paras 6.24–6.25

102 In the case of ss.18 and 20 of the Offences Against the Person Act 1861 the situation is a little more complicated, but not much. Since s.18 of the Offences Against the Person Act refers to "causing" grievous bodily harm while s.20 refers to "inflicting" it, for reasons of clarity it would be helpful to specify that the conviction in either case should be "committing grievous bodily harm while intoxicated". However, it is in any case arguable, following *R. v Dica (Mohammed) [2004] EWCA Crim 1103* and *R. v Ireland* and *R. v Burstow [1998] A.C. 147* , that "inflict" and "cause" are now synonymous. Cf. *R. v Mandair (Singh Mandair) [1995] 1 A.C. 208* , and in any case this problem would be solved were the Home Office Bill reforming the Offences Against the Person Act 1861 to be passed. Sections 18 and 20 would then be replaced with offences of intentionally and recklessly "causing serious injury" respectively, see further http://www.homeoffice.gov.uk/documents/cons-1998-violence-reforming-law/ [Accessed January 22, 2013].

103 *D.C. Ormerod, Smith and Hogan's Criminal Law, 13th edn (Oxford: Oxford University Press, 2011), at p.317*.

104 Above fn.103 at 321. See also above fn.68.

105 "Sobering Up? The Law Commission on Criminal Intoxication" (1995) 58 M.L.R. 534. It is arguable, however, that Horder's instinctive desire to acquit such a defendant is based on the premise that at present the intoxication rules are, as discussed above, designed round the paradigm of result crimes for which recklessness, roughly comparable to intoxication, provides the mens rea. As seen above, of course such rules are unable to justify convicting the defendant of a behaviour crime requiring proof of dishonesty and intent permanently to deprive, just as they struggled with the examples discussed previously in relation to SOA 2003 s.3 .

106 "Intoxication is Never a Defence" [2009] Crim. L.R. 3.

107 See further Simester, "Intoxication is Never a Defence" [2009] Crim. L.R. 3 at 1.

108 In the sense that we currently convict defendants in order to protect the public when the application of the strict logic of the criminal law would suggest that we should not do so, since they lack the requisite mens rea.

109 Simester, "Intoxication is Never a Defence" [2009] Crim. L.R. 3 at 11, citing J.C. Smith's Comment on *DPP v Majewski [1975] Crim. L.R. 570* at 574.

110 For further discussion of the issue of intoxication in sentencing, see *Padfield, "Intoxication as a Sentencing Factor: Mitigation or Aggravation?" in J. Roberts (ed.), Aggravation and Mitigation in Sentencing (2011)*.

111 Further support for the need for judges to have access to juries' reasoning can be found in *Ch.11 of the "Review of the Criminal Courts of England and Wales"*, http://www.criminal-courts-review.org.uk/ccr-00.htm [Accessed January 22, 2013] at paras 52 and 53, where Auld L.J. identified six advantages such reasoning would have.

112 As Padfield notes in *"Intoxication as a Sentencing Factor: Mitigation or Aggravation?" in J. Roberts (ed.), Aggravation and Mitigation in Sentencing (2011)*. Currently intoxication can act as either an aggravating or a mitigating factor in sentencing.

113 According to Lord Edmund-Davies in *DPP v Majewski [1977] A.C. 443* at 488, "Aristotle apparently approved of the *double* penalisation of intoxicated harm-doers (*Ethics, Book III, CH 5, 1113b, 31*) and for a long time judges in this country regarded voluntary drunkenness as aggravating culpability rather than as lessening or eliminating it". See also the comments in *R. v Silliker [2008] EWCA Crim 1458* and *Padfield, "Intoxication as a Sentencing Factor: Mitigation or Aggravation?" in J. Roberts (ed.), Aggravation and Mitigation in Sentencing (2011)*.

114 Nevertheless, as Padfield notes in *"Intoxication as a Sentencing Factor: Mitigation or Aggravation?" in J. Roberts (ed.), Aggravation and Mitigation in Sentencing (2011)*, at present there are circumstances in which intoxication is regarded as an aggravating factor in sentencing. See also fn.113.

115 On the contrary, there is some evidence that combining penalties with treatment can reduce re-offending: *Strategy Unit Alcohol Harm Reduction project, Interim Analytical Report* http://www.erpho.org.uk/viewResource.aspx?id=8775 (resource now only available by contacting erpho), citing *Babor, et al., Alcohol: No Ordinary Commodity. Research and Public Policy (Oxford: Oxford University Press, 2003)* and *Department of Transport. Transport Statistics. Road accidents GB: 2001. The Casualty Report, London 2001*.

116 Although, as Padfield also notes (in *"Intoxication as a Sentencing Factor: Mitigation or Aggravation?" in J. Roberts (ed.), Aggravation and Mitigation in Sentencing (2011)*) the "elephant in the room" here is "the extraordinary shortage of prison and community alcohol support and treatment programmes" (citing T. Fowles and D. Wilson "The National Probation Service's Work with Alcohol-Misusing Offenders" (2010) 49 The Howard Journal 182–184 and *T. McSweeney, R. Webster, P. Turnbull and M. Duffy, "Evidence-based Practice? The National Probation Service's work with alcohol-misusing offenders" Ministry of Justice Research Series 13/09*, as identifying huge barriers to successful treatment at present and the improvements which are necessary in this respect). Obviously any comments made here about the ability of the proposed reforms to contribute to the monitoring and rehabilitation of offenders are based on the assumption that such support is available, and no such improvements can be achieved if it is not.

117 See e.g. above fn.1.

118 Crimes of conduct and circumstances will be investigated further below.

119 In the case of a result crime this will usually be because the reasonable person would not have foreseen the risk of harm either, but it could possibly also be because the reasonable person would have had good reason for committing it. For example, under the Criminal Damage Act 1971 , a defendant who causes

damage in order to save property (such as by soaking that property in water to prevent it from catching fire) will have a defence under s.5(2)(b) of that Act .

120 It is true that this may entail some litigation over the characteristics of the defendant to be attributed to the reasonable person "in his/her position", but unlike the current test at least this would be done openly, presumably in the same way as is envisaged by the Law Commission in relation to their proposed amendments to the *Adomako* test for gross negligence manslaughter: *R. v Adomako [1995] 1 A.C. 171* .

121 Also, as will be noted below in the context of mistaken beliefs, there are some circumstances in which the law even as it applies to sober defendants distinguishes between reasonable and unreasonable beliefs. For reasons of clarity it is therefore preferable to keep sobriety and intoxication separate from questions of reasonableness and unreasonableness more generally.

122 See *Intoxication and Criminal Liability Law Com CP No.127 (1993)*, at paras 6.49–6.51 and 6.67–6.70 respectively.

123 See above fn.5.

124 *Intoxication and Criminal Liability Law Com CP No.127 (1993)*, at para.6.27, citing as an example the distinction between ss.18 and 20 O.A.P.A. 1861 . Indeed, even the current intoxication rules give juries the choice between these two sections, or between murder (with intent to do at least grievous bodily harm) and manslaughter (where the jury conclude that the defendant was so intoxicated (s)he did not form the requisite intent to do at least grievous bodily harm).

125 Thus a sober defendant who foresees the risk of a glass smashing would, in the light of that risk, presumably not choose to throw it along the bar. Similarly, a defendant who realises that the thing in front of him is a human being, not a dummy or an animal after all, would for that reason decide not to touch it in the first place. In both instances it is of course assumed, based on the examples discussed previously, that the decisions to throw the glass or touch the object were made only on the basis that it did not occur to the defendant that the glass would smash or that the object was in fact a human being.

126 See above fn.73. It was noted above that it is hard to see how "deliberately touching what D intoxicatedly believed to be a dummy/animal when a reasonable person would have realised it was a human being" can be equated with "deliberately touching a human being". Even *Majewski* , let alone *Heard* , did not claim that intoxication could somehow replace intent.

127 *R. v Heard [2007] EWCA Crim 125* .

128 Or even cannot be so carried out. It is difficult to imagine how penetration with a penis, as required by Sexual Offences Act 2003 s.1 could possibly be carried out unintentionally.

129 See e.g. *Bratty v Attorney General of Northern Ireland [1963] A.C. 386* . See further below, "Intoxication and Automatism: the Outer Limits of the Proposed Offence".

130 Above fn.66 and surrounding text.

131 Such as intent, sexual purpose (Sexual Offences Act 2003 s.78 ; technically this forms part of the actus reus of such offences, but would be better classified as an element of mens rea for all sex offences) or intent to derive sexual gratification (Sexual Offences Act 2003 ss.11 , 12), intent to cause alarm and distress (Sexual Offences Act 2003 s.66) dishonesty, or intent permanently to deprive someone of his or her property (Theft Act 1968), to give just a few examples.

132 Or if preferred, "the reasonable person", per se, though the merits and demerits of this test were outlined above.

133 Theft is one example of a mixed offence of the kind discussed above (behaviour (appropriation) plus circumstances (property belonging to another)). Fraud can be regarded as an inchoate result crime, or alternatively it can be regarded as a behavioural crime (see further D. Ormerod, *"The Fraud Act 2006—Criminalising Lying?"* [2007] Crim. L.R. 193).

134 And of course without falling into ss.6 or 12 of the Theft Act 1968 .

135 As it was noted above would be the case, mistake as to the owner's consent concerns a mistake as to an element of circumstances about which more will be said below. The temporary nature of the deprivation on the other hand is a mens rea element going to the behavioural element of appropriation.

136 Other examples include the inchoate offences under ss.61 and 62 of the Sexual Offences Act 2003 ; going equipped for stealing contrary to s.25 of the Theft Act 1968 ; possessing anything with intent to destroy or damage property contrary to s.3 of the Criminal Damage Act 1971 etc.

137 Where a defendant had done an act more than merely preparatory to the commission of the full offence, but lacked the specific intent to complete the offence as a result of intoxication. Such cases are likely to be rare.

138 See, for example, the Criminal Attempts Act 1981 s.1(4) which sets out a list of offences that cannot be attempted.

139 The mechanism for dealing with inchoate offences will be discussed below.

140 As noted above, fn.102, the label for a charge under ss.18 or 20 would become "committing grievous bodily harm while intoxicated" but this is an very minor change.

141 The question of what constitutes a mistake is obviously a significant one, well beyond the scope of the current discussion. For simplicity, for the purposes of this section, a relatively narrow definition of mistake will be used, which assumes that in order for a defendant to be mistaken, the truth must be in existence at the time (s)he forms his or her view of the matter.

142 For criticisms see *Intoxication and Criminal Liability Law Com CP No.127 (1993)*, at para.3.13 and *Legislating the Criminal Code Law Com No.229 (1995)*, at para.1.37, G. Dingwall "Intoxicated Mistakes about the Need for Self-Defence" (2007) 70 M.L.R. 127 and J. Spencer, "Drunken Defence" [2006] C.L.J. 267. For a discussion of whether the rules currently operate as rules of evidence or substance, see above.

143 *Jaggard v Dickinson [1981] Q.B. 527* .

144 *R. v Hatton (Jonathan) [2005] EWCA Crim 2951* .

145 *R. v O'Grady [1987] Q.B. 995* and *R. v O'Connor [1991] Crim. L.R. 135* .

146 *R. v Richardson and Irwin [1999] 1 Cr. App. R. 392* .

147 *R. v Fotheringham (William Bruce) (1989) 88 Cr. App. R. 206* . See now the requirement for a "reasonable" belief in consent under the Sexual Offences Act 2003 .

148 See Horder, "Sobering Up? The Law Commission on Criminal Intoxication" (1995) 58 M.L.R. 534.

149 *R. v Fotheringham (William Bruce) (1989) 88 Cr. App. R. 206* .

150 Assuming "reasonable" for the purposes of the 2003 Act means "sober and reasonable", on the basis that it is unlikely that Parliament intended a more *lenient* approach to be taken through the 2003 Act , and it is difficult to see what purpose that word could have in the statute if an intoxicated mistake is thought to be reasonable. If this is correct then the Act does treat sober defendants in the same way, holding everyone to an objective standard.

151 See, e.g. *R. v Konzani [2005] EWCA Crim 706* .

152 This would entail amending s.2(1)(b) of the Theft Act 1968 so that only a reasonable belief in consent would negative dishonesty. Similar rules could apply to mistaken beliefs in the right to deprive the other of the property (s.2(1)(a)) and the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps (s.2(1)(c)). Presumably the Criminal Damage Act 1971 s.5 would have to be similarly amended. It would also reverse the result of *Jaggard v Dickinson [1981] Q.B. 527* : see further below.

153 *DPP v Morgan [1976] A.C. 182* .

154 Dingwall, "Intoxicated Mistakes about the Need for Self-Defence" (2007) 70 M.L.R. 127 at 132.

155 Spencer, "Drunken Defence" [2006] C.L.J. 267. "There is no question of allowing a defendant who understands the basic facts to be judged by his own drink or drug-warped perception of what it is reasonable to do in response to them." Therefore the only issue in any case concerns mistakes regarding the need for self-defence in the first place.

156 For example, if a belief in consent to sex which the defendant held only because intoxicated is to be regarded as unreasonable then the defendant has the full mens rea for the full offence. For discussion of whether it should be so regarded, see above.

157 Similarly, the *Church* test for unlawful act manslaughter (per Edmund Davies J. (as he then was) above *R. v Church [1966] 1 Q.B. 59*) does assess the dangerousness of the fatal act according to the standards of "sober and reasonable people", whether D is himself sober and reasonable, sober and unreasonable, or intoxicated, but the act in question must be unlawful, which means that an act taken in perceived self-defence would not necessarily count.

158 *R. v Hatton (Jonathan) [2005] EWCA Crim 2951* .

159 See above fn.142.

160 A sober person would be able to make as unreasonable a mistake as (s)he liked about the need for self defence, as long as his/her response did not did not involve killing (and thus liability for gross negligence manslaughter).

161 E. Finch and V. Munro, (2005) 45 British Journal of Criminology 25 at 32 and the *British Society of Criminology, Vol.6, paper 3, "The Boundaries of Drug Assisted Rape: the Findings of a Pilot Study"*, available at http://www.britsoccrim.org/volume6/003.pdf [Accessed January 22, 2013] at pp.10–11.

162 *British Society of Criminology, Vol.6, paper 3, "The Boundaries of Drug Assisted Rape: the Findings of a Pilot Study" at p.10*: "as it is the jury who determine whether or not a defendant is guilty of the offence charged, it is possible that these strongly held views about the attribution of responsibility when both parties are equally intoxicated indicate that there is a possibility that verdicts are not being returned that are consistent with the law in this regard."

163 Along similar lines it might also be suggested that the reluctance of the Court of Appeal to overturn the results of *R. v O'Grady [1987] Q.B. 995* and *R. v O'Connor [1991] Crim. L.R. 135* might have been reduced had it known that there was another offence of which he could be convicted instead.

164 Assuming that an intoxicated belief in consent will be found to be unreasonable, see above fn.150.

165 Or, in cases where the law takes an objective approach (such as in relation to the belief in consent for the purposes of sexual offences) the defendant held an unreasonable belief which (s)he would equally have held if sober.

166 *[1981] Q.B. 527* .

167 In fact Jaggard made two mistakes, one concerning the ownership of property and one concerning her belief in the owner's consent to her use of that property had he known of her actions. It is the mistake as to ownership of property that is relevant here; the mistaken belief in the owner's consent was discussed above where it was noted that at present this case provides authority for the proposition that outside offences covered by the Sexual Offences Act 2003 a subjective approach prevails. However, it was argued there that perhaps it should not.

168 *R. v Gannon (Kevin) (1988) 87 Cr. App. R. 254* .

169 See above, text to fnn.108 and 109.

170 See also above, text following fnn.66 and 129.

171 *DPP v Beard [1920] A.C. 479* .

172 *Beard [1920] A.C. 479* at 501, approving Stephen J. in *R. v Davis (1881) 14 Cox C.C. 563* at 564.

173 The distinction caused problems in the Canadian case of *Henri Daviault v R. (1994) 33 C.R. (4th) 165*. The Supreme Court of Canada (Sopinka, Gonthier and Major JJ. dissenting) held that if the accused were to establish on the balance of probabilities that he was in such an extreme state of intoxication that it was akin to automatism or insanity, he should have a defence to the charge. The Canadian legislature reversed this decision by enacting s.33.1 of the Canadian Criminal Code. However, in *Daviault* the defendant had in fact sexually assaulted the victim but claimed he was suffering from amnesia-automatism and "blackout". And, significantly, the court treated the defendant's argument as going to mens rea not actus reus, (see in particular [66]). The Canadian legislature was, therefore, responding to a situation more akin to *Majewski* and *Heard* than automatism.

174 It was suggested, for example, that we may wish to create an exception for the inchoate offences.

175 In the context of mistakes where the law applies an objective standard, for example in respect of belief in the victim's consent for the purposes of the Sexual Offences Act 2003 , the treatment might be thought to be more lenient if an intoxicated belief in consent is currently thought to be unreasonable enough to qualify for liability for the full offence. Conversely in the case of offences of specific intent and more lenient mistake cases such as *Jaggard v Dickinson [1981] Q.B. 527* , the defendant would at present be acquitted but under the rules proposed here would be convicted of the new offence.

