Specific and General Nonsense?

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I. Introduction

In a previous article, I dealt with the argument that the present law on the intoxication defence was well-founded on legal authority and concluded that it was not. I then suggested that those wishing to uphold the present law as represented by Leary v. The Queen and D.P.P. v. Majewski would have to find support in other arguments. The purpose of this article is therefore to examine those arguments to see whether they provide sufficient ground for the current state of the law in Canada and England. In particular, the specific-general intent dichotomy will be examined in this light.

The discussion will lead to the conclusion that the present law is indefensible and should be changed in favour of a consistent, principled approach to mens rea. Despite problems that may arise in particular situations, the subjective approach is the one that best meets the criteria of principle, fairness to the accused, and consistency, and the one that is the simplest to apply in practice.

I do not, however, expect that that statement will go unchallenged. There will be those who say that blind adherence to subjectivism leads to grave difficulties in theory and even graver difficulties in practice. They argue that the legitimate concerns of society are not met by allowing self-induced incapacity or lack of intent as an excusing condition in every situation. It can be seen that these objections are primarily founded on the twin heads of "logic" and policy.

I propose therefore to meet these criticisms. First, however, let me enumerate the bases upon which justification of the present distinction between specific and general intent is usually sought. This is not to neglect those other contentious items to do with the intoxication defence. For instance, it is a plausible argument that intoxication contributing to a mistake of fact might be a defence to a general intent offence while simple intoxication would not. However, such concerns as recklessness,
mistake, capacity as opposed to intent in fact, and prior fault through culpable cognitive impairment have their underpinnings, either directly or indirectly, in the partition into different kinds of intent. Thus, I hope to show that an undifferentiated approach to the mental element of crime will lead to much greater clarity and simplicity in the consideration of these other criminal concepts.

But back to specific and general intent. Enthusiasts of these species make two general arguments in their favour. The first is simply that the distinction is "logical" though the cry of logic has several different chords. The second is that, even if the division into specific and general intents isn't strictly "logical", it need not be because the dictates of public policy make it necessary. My thesis, of course, is that the distinction is neither "logical" nor good policy.

It will have been noticed that "logic" has up to now been inserted within quotation marks. It is time for a disclaimer but one with which most proponents of the specific and general intent dichotomy would agree. The meaning accorded "logic" in this context is simply that of "making sense". Whenever the term is used in this article, it is meant as a rough synonym for "making sense", that is, in the same manner as "logic" is rather loosely used in ordinary conversation. It thus denotes consistency and a lack of patent contradictions but with no claim to compliance with the principles of formal logic.

That logical is meant in this sense is indicated by the cases, particularly Majewski, which have dealt with arguments against the "logic" of the present intoxication rules. They have not made any reference at all to what the requirements of strict logic might be. In other words, there has been no indication that the courts intended to use the term in the way that philosophers do. Moreover, critics and proponents alike have shunned any move into a narrow philosophical test.5

As the term "logic" will be used here, it will generally take two forms. The first is to query whether there exist any meaningful criteria by which to distinguish specific from general intent. If such criteria are found, that is not the end of the discussion. There is then the further question of

5. Alan Dashwood, "Logic and the Lords in Majewski", [1977] Crim. L. Rev. 532, at 591, is perhaps the only commentator to have strayed into this area at all and, even then, only to a minor degree.

"Reason, Logic, and Criminal Liability" (1975), 91 L.Q.R. 102, at 118, though relying on different authorities, has come to the same conclusion. The potential anomaly may have been removed by the recent decision in R. v. Moreau (1986), 51 C.R. (3d) 209 (Ont. C. A.) where Martin, J. A., speaking for a unanimous Court held that for policy reasons, a mistake induced by intoxication could not provide a defence to a general intent offence unless the same accused would have made the same mistake if sober. Obviously, we must await some pronouncement from the Supreme Court of Canada. Hopefully, they will reconsider the entire question of specific and general intent in relation to both intoxication and mistake.
whether there are sufficient reasons to sustain the distinction. I will attempt to answer both questions. Note, however, that a negative answer to the first reduces the second to insignificance.

For the sake of the following discussion, I will assume that the general-specific intent distinction applies consistently to all facets of intoxication, including automatous behavior, a lack of capacity to form intent or a lack of actual intent, and for mistakes. Thus, I am ignoring, for the time being, the suggestion made previously that mistakes might be treated somewhat differently. I will, however, allude to that point near the end of the article.

There are several strands to the proposition that specific and general intent are logical beasts. Some of these are to be found in the various judgments in Majewski. The judgments in Majewski are somewhat confusing in their attempt to distinguish the two kinds of intent. In short, however, a summary of the arguments in Majewski that the distinction rests on logical grounds is as follows:

1. The mens rea for specific intent offences extends beyond the actus reus and intoxication can negative that additional mental element; the mens rea for basic intent (or, in Canada, general intent) offences does not extend beyond the actus reus and cannot be negatived by intoxication. The test is actually more complicated than this as later discussion will show. For convenience, this test will be known as The Basic Intent Test.

2. Specific intent involves a purposive element which can be negatived by intoxication; basic intent does not have such a purposive element. This test will be known as The Purposive Test.

3. Specific intent offences have intention but not recklessness as a mental element and permit intoxication to negative intention; self-induced intoxication amounts to recklessness which is sufficient to constitute the mens rea for basic intent offences, thereby preventing intoxication as a defence. This test will be known as The Recklessness Test.

The judgments in Majewski contain various offshoots of those three arguments. Indeed, while most commentators have agreed that those three tests are embodied in the case, others have opined that some

additional approaches are contained in it or are, at least, available in support of the distinction.\(^7\)

At the outset, I will discuss these three approaches. Later, however, I will also deal with some of the broader approaches suggested in the legal literature. In that portion of the article, there will be an examination of the differing schools of *mens rea* theory along with the doctrine of prior fault in getting into an incapacitated condition.

On the policy front, the stance usually taken by those advocating the present position is that the public requires some protection from intoxicated offenders. That simple statement, however, can be broken down into several distinct propositions.

One is an argument for deterrence of such conduct; deterrence then takes its two forms: general and individual (or specific). The suggestion is that, by restricting the intoxication defence, the public and individuals are deterred either from committing general intent offences for which the defence is not available or that they are deterred from getting themselves into an incapacitated condition during which they might commit such an offence. Both propositions will be examined.

On the other hand, protection of the public can simply refer to the danger presented by certain types of intoxicated conduct and the need to thwart such conduct. This approach implies that deterrence of either type is not an important consideration when placed alongside the necessity to punish such activity in a retributive way.

Yet another approach might be seen as vaguely political. The function of the criminal law is "the establishment and maintenance of order",\(^8\) within the ambit of which might be subsumed the preservation of individual liberty and protection of such liberty from personal violence.\(^9\) It obviously overlaps with concern over protection of the public but also includes the political goal of preserving society in its present form. This approach might therefore be seen as an attempt to use the power of the state to maintain the order necessary to the economic, social and political system. Thus, limitations placed upon the intoxication defence assist in the maintenance of the established order.

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7. For example, N. L. A. Barlow, "Drug Intoxication and the Principle of *Capacitas Rationalis*" (1984), 100 *L.Q.R.* 639, focuses on the intoxication equals recklessness test. Alan Dashwood, *supra*, note 5, includes, along with the three tests, a more general *mens rea* approach. John E. Stannard, "The Demise of Drunkenness" (1982), 2 *L.S.* 291, sees Majewski as typifying a resurrection of the older view of *mens rea* that involves moral blameworthiness in contradistinction to the particularized view now commonly held. On the other hand, Eric Colvin, "A Theory of the Intoxication Defence" (1981), 59 *Can. Bar Rev.* 750, posits that there is an implicit logic to the present law on the basis that offences carrying an ulterior intent or having a fixed penalty are specific intent offences, thus allowing the intoxication defence.


9. *Id.*, at 158.
In any case, my aim will not necessarily be to dispute these stated purposes of the criminal law (though I do quarrel with some of them) but, instead, to question whether the existing intoxication rules achieve or are even capable of achieving those purposes.

At the end, I will draw conclusions about the persuasiveness of the various arguments and suggest the direction the criminal law ought to take. This will entail a plea for subjectivism but with concessions, where appropriate, to the legitimate problems that arise from a thoroughly subjective approach to mens rea.

There is one other point to be considered. It could be argued that all of the tests have been shown by the decision in *Swietlinski v. The Queen* to be misconceived. In that case, it was held that where intoxication was in issue in a constructive murder situation and the underlying offence was one of general intent, nonetheless the Crown was required to prove the requisite intent for that underlying general intent offence. Intoxication could be taken into account on this question. As Colvin put it:

*Swietlinski* sounds the death-knell for the idea that the state of mind required to be proved for an offence of specific intent is different in kind from that required for an offence of general intent. The proposition is clearly unsustainable if the same intent can be characterized as specific or general depending on the crime charged.\(^{11}\)

Indeed, the discussion following will show that none of the tests makes sense for murder. Murder, perhaps because of its fixed penalty and/or its special stigma, must be considered an exceptional offence. Having said that, *Swietlinski* nonetheless weakens the argument that any of the tests is an accurate and meaningful way of distinguishing the two types of intent. Murder aside for the moment, let us look at the arguments for and against the various tests.

II. *The Tests in Majewski, Leary and George*\(^ {12}\)

In this section, I will examine the tests that commentators have gleaned from *Majewski* in order to see whether logic prevails in this area of the criminal law. I concede at the outset that whether or not the present law makes sense does not determine the further question of whether it is justifiable that the intoxication defence be restricted in some way. Nonetheless, if the tests laid down in *Majewski* (and seemingly endorsed in *Leary*) fall before the complaint of being inconsistent with logic, it is a powerful criticism of the current state of the law.

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Moreover, if no intelligible criteria exist for determining in which category an offence is to be placed, it is a telling blow to the way the intoxication defence is currently restricted in law. It might then be the case that restrictions on the defence ought to take some other form. Indeed, I should add that a distinction must be drawn between the logic of limiting the defence and the logic of how that should be done. It should be apparent that having limitations may be very sensible even though the present method of accomplishing the restriction may make little sense at all.

1. **The Basic Intent Test**

To recapitulate, this test was espoused in *Majewski* by Lord Elwyn-Jones, L.C. and Lord Simon. The same test was also referred to, though briefly, by the Court of Appeal in *Majewski* and later in the dissent in *R. v. Caldwell*. One initial difficulty with the way the test was advanced in the House of Lords in *Majewski* is that Lords Elwyn-Jones and Simon gave quite different tests!

That statement warrants some amplification. Lord Elwyn-Jones, in fact, quoted Lord Simon’s definition of basic intent in *D.P.P. v. Morgan*. Lord Simon’s *Morgan* definition distinguished basic from specific intent by limiting the **mens rea** of the former so as not to extend it beyond the act and its consequence as defined in the **actus reus**. Presumably, since it was intended that there be a distinction between the two types of intent, the **mens rea** for specific intent must extend beyond the **actus reus**. Unfortunately, Lord Elwyn-Jones did not see fit to define specific intent so we are left to wonder.

In *Morgan*, however, Lord Simon contrasted basic intent with ulterior intent. The latter was an intent that did extend beyond the **actus reus**. Perhaps, then, Lord Elwyn-Jones meant to equate specific intent with ulterior intent. At least that would have been a consistent approach.

But matters become confused by the same Lord Simon in his judgment in *Majewski*. First, he concurred with Lord Elwyn-Jones, then added

14. Lords Kilbrandon and Diplock concurred with Lord Elwyn-Jones. So did Lord Simon but, by adding to the confusing judgment of Lord Elwyn-Jones, he made the entire case even more perplexing.
18. *Id.*, at 364.
19. *Id.*
what he called "marginal comment". This might indicate that he agreed 
with Lord Elwyn-Jones (and himself) that basic intent and specific intent 
were opposites.

Later on, however, he explicitly disagreed with that approach:

But I would not wish it to be thought that I consider "ulterior intent" as 
I defined it in Morgan as interchangeable with "specific intent" 
. . . "Ulterior intent", which I can here summarily describe as a state of 
mind contemplating consequences beyond those defined in the actus reus, 
is merely one type of "specific intent".  .  .  .22

[emphasis mine]

He obviously realized that not all offences which had hitherto been 
categorized as specific intent offences carried with them an ulterior intent, 
for he continued by saying:

"Ulterior intent" does not accurately describe the state of mind in the 
crime of doing an act likely to assist the enemy with intent to assist the 
enemy (R. v. Steane) or causing grievous bodily harm with intent to do 
some grievous bodily harm (Offences against the Person Act 1861, s. 18, 
as amended by the Criminal Law Act 1967) or even murder. None of 
these requires by its definition contemplation of consequences extending 
beyond the actus reus.23

Thus, we are left in this position: Lord Simon in Morgan posited basic 
intent as a contrast to ulterior intent; Lord Elwyn-Jones in Majewski 
adopted this view and, in doing so, implicitly equated ulterior intent with 
specific intent; Lord Simon agreed with Lord Elwyn-Jones and his own 
views in Morgan and, at the same time, disagreed with the proposition 
that ulterior intent and specific intent are the same!

Obviously this is not a satisfactory state of affairs. It is, indeed, a 
powerful criticism of the basic intent theory that two of its major 
proponents cannot agree upon the definitions of the terms. Moreover, if 
not all specific intent offences are ulterior intent offences, by what criteria 
can we discern those specific intent offences which are not of ulterior 
intent? How do we differentiate that category of specific intent offences 
from basic intent offences?

Because of the confusion noted above, it is not possible to be sure just 
what is meant by basic intent. Lord Simon may, in fact, be suggesting a 
new type of basic intent for the purposes of the intoxication rules. On the 
other hand, he may merely have failed to see the implications of both 
agreeing and disagreeing with Lord Elwyn-Jones.

21. Id.
22. Id., at 153-54.
23. Id., at 154.
If ulterior intent and specific intent are equated, then the basic intent theory becomes very like that proposed by Colvin.\textsuperscript{24} In contrast, if Lord Simon meant any variation in his definition of basic intent, as set out in \textit{Morgan}, then obviously his basic intent for intoxication purposes is not the same as Colvin's. Unfortunately, he did not specify any difference and, indeed, at one point in \textit{Majewski},\textsuperscript{25} again adopted the basic intent definition he had suggested in \textit{Morgan}.

The result is that, notwithstanding the apparent contradictions, it must be taken that basic intent means \textit{mens rea} which does not extend past the \textit{actus reus}. On that assumption, it is useful at this point to bring in the Colvin theory. Professor Colvin has presented a novel theory concerning the intoxication defence.\textsuperscript{26} He does not claim that the existing law is correct but maintains that there is, in the categorization of offences, "a largely implicit and unrecognized logic."\textsuperscript{27} Under his theory, the terms "specific" and "general" intent have no content but are mere guidelines indicating when the intoxication defence is available. There are then three main branches to the theory which indicate when the defence is allowed:

1. The defence is available for any charge having an ulterior intent.\textsuperscript{28}
2. The defence is available for any offence having a fixed penalty even if it does not carry with it the requirement of an ulterior intent.\textsuperscript{29}
3. The defence will be permitted when the entire section of the statute "may be characterized as creating an offence of specific intent because of the possibility that the particular charge may allege ulterior intent."\textsuperscript{30}

Let me deal with the last two categories rather quickly. Colvin used the last proposition to answer why all offences under section 228\textsuperscript{31} of the \textit{Criminal Code} and why causing grievous bodily harm with intent to cause grievous bodily harm\textsuperscript{32} have been designated as specific intent offences. In the case of the section 228 offences, causing bodily harm with

\textsuperscript{24} Colvin, \textit{supra}, note 7. One obvious difference is that Colvin accepts that murder is a specific intent offence for a reason different from any of the three \textit{Majewski} tests, namely, that it has a fixed penalty.
\textsuperscript{25} \textit{Majewski}, \textit{supra}, note 3, at 154.
\textsuperscript{26} Colvin, \textit{supra}, note 7.
\textsuperscript{27} \textit{Id.}, at 751.
\textsuperscript{28} \textit{Id.}, at 752. J. C. Smith and Brian Hogan, \textit{Criminal Law} (5th ed. London: Butterworths, 1983) at 59, define ulterior intent as an intent ulterior to, that is, going beyond, the \textit{actus reus}.
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{Id.}, at 762.
\textsuperscript{31} \textit{Criminal Code}, R.S.C. 1970, c. C-34, s. 228 as it was at the time of the article, amended by S.C. 1980-81-82-83, c. 125, s. 17 to delete "causes bodily harm in any way".
\textsuperscript{32} \textit{The Offences Against the Person Act}, 1861, 24 & 25 Vict., c. 100, s. 18 (U.K.).
intent to wound is, in fact, an ulterior intent offence,\textsuperscript{33} meaning that the third rule need not be used. As for the other offence, it is plausible that judges have interpreted it as being one of specific intent because the intent is clearly specified in the enactment and is strikingly similar to the "with intent to" offences which otherwise are often of ulterior intent. It is impossible, of course, to know why judges have decided that the offence is a specific intent offence, hence, the Colvin proposition may indeed be correct. In any case, the basic intent test provides no answer for this offence.

However, under this criterion, because an assault under section 244(1)(b)\textsuperscript{34} of the Code (an attempt to apply force . . . causing the victim to believe . . . that he has present ability to effect his purpose) requires an ulterior intent, all assaults should be considered specific intent offences. They have, in fact, been construed as general intent offences.\textsuperscript{35} It is unlikely that the intoxication defence would be permitted for this particular subsection even though it is an ulterior intent offence.\textsuperscript{36}

In advancing the second proposition, Colvin pointed out that murder does not usually require an ulterior intent.\textsuperscript{37} Thus, in its more common forms of requiring an intent to kill or to cause grievous bodily harm known to be likely to cause death,\textsuperscript{38} murder has been cited as an offence not correctly categorized by the basic intent test.\textsuperscript{39} It thus makes sense to see it as a special case. Whether this is wholly due to its fixed penalty is a matter of conjecture; as I have previously attempted to show,\textsuperscript{40} whether the intoxication defence was accepted as a device to mitigate the harshness of the law and/or because of increasing recognition of the

\textsuperscript{33} This is because "wound" has a particular legal meaning distinct from bodily harm. It requires an actual breaking of the skin: \textit{R. v. Innes and Brotchie} (1972), 7 C.C.C. (2d) 544, at 551. (B.C.C.A.)

\textsuperscript{34} \textit{Code, supra}, note 31, s. 244(1)(b).

\textsuperscript{35} \textit{George, supra}, note 4 held common assault, presumably as defined in the present s. 244(1)(a), to be a general intent offence. \textit{Majewski} and many other cases also have held assault to be a basic or general intent offence.

\textsuperscript{36} This is because of it being defined as an attempt which, according to the Colvin theory, is always an ulterior intent offence: \textit{supra}, note 7, at 761. At 762, note 64, Colvin answers this by suggesting that, where "the accusation of ulterior intent" is exceptional, the defence may be permitted for the exceptional form though excluded for other forms.

\textsuperscript{37} \textit{Id.}, at 764. He lists Code ss. 212(c), 213(a) and 213(d) as containing an element of ulterior intent. S. 214(4) might also be an ulterior intent form of murder. By analogy with \textit{R. v. Shand} (1971), 3 C.C.C. (2d) 8 (Man. C.A.) (which dealt with now-repealed capital murder) it would seemingly require knowledge on the part of the accused that the victim was a prison guard, police officer, etc. Doubt has now, however, been shed on \textit{Shand} by \textit{R. v. Munro and Munro} (1983), 8 C.C.C. (3d) 260 (Ont. C.A.).

\textsuperscript{38} \textit{Id.}, s. 212(a)(i) and (ii).

\textsuperscript{39} \textit{Smith, supra}, note 6, at 377.

\textsuperscript{40} \textit{Supra}, note 1.
mental element is a matter of controversy. Nonetheless, whatever the reason, it seems right to consider murder exceptional. Thus, even if it cannot correctly be categorized by the basic intent test, it is a specific intent offence.\footnote{41}{Swiellinski, supra, note 10.}

In fashioning his last two propositions, Colvin was obviously cognizant that some amendment of the basic intent theory was required. Otherwise, a number of offences could not be explained. The fact that exceptions are required may weaken his claim that it is, after all, a theory.\footnote{42}{This is because, instead of some unifying logic, it has several components. It therefore is somewhat akin to the "i" before "e" except after "c" rule, which, while explaining the spelling of a great many words, does not explain the correct spelling of several others, such as "weight" and "neighbour". Adding the rider "and for words rhyming with 'weight'" still does not explain "height", "foreign", or "science".} That, of course, depends upon the definition accorded "theory", a topic with which I am not concerned here.

Leaving that question aside, it is to be noticed that his first proposition is the same as the basic intent theory advanced by Lord Elwyn-Jones. In other words, basic intent and ulterior intent are opposites, the latter requiring an intent going beyond the *actus reus* which can be negatived by evidence of intoxication.

At an initial glance, that first proposition seems to provide a useful guide. However, there are offences for which it does not provide the correct answer. In addition to those perhaps now covered by Colvin's second and third propositions, some of these are: (1) attempts; (2) possession of stolen property; (3) joyriding; and (4) causing bodily harm with intent to cause bodily harm. Some commentators have also mentioned others to which I shall briefly allude further on in this section.

Attempts are a source of much confusion in this area. To begin with, Colvin states that all attempts are ulterior intent, the further intention being to complete the *actus reus* of the full offence.\footnote{43}{Colvin, supra, note 7, at 757, so states and, further, at 758, cites, at note 45, Smith, supra, note 6, at 377, as stating that all ulterior intent offences are specific intent offences. Examination reveals, however, that Smith did not so state explicitly.} On that basis, the intoxication defence ought to be permitted for all attempts. But there is a substantial body of case law suggesting an attempt is to be categorized in the same way as the completed offence.

One such offence is attempted rape which, in Canada, was seen as a general intent offence.\footnote{44}{R. v. Boucher, [1963] 2 C.C.C. 241. (B.C.C.A.). Rape and attempted rape are no longer offences, having been replaced by sexual assault.} In *Boucher*,\footnote{45}{Id.} there were two issues at trial: whether penetration had taken place and whether intoxication was a defence to rape and/or attempted rape. Without considering whether an
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... attempt ought to be treated differently from the full offence, the British Columbia Court of Appeal ruled out the intoxication defence. The case was explicitly approved of by the majority in Leary,\(^46\) again without any suggestion that attempts might be treated in a different way. Leary clearly held rape to be a basic intent offence.

There are therefore competing "logics" at play here. The logic of the basic intent test or the Colvin theory would suggest that, since attempts are ulterior intent, the intoxication defence should be available. The counter-argument is best illustrated by the Boucher situation. Where there is an issue as to whether the offence was completed plus an issue of whether the intoxication defence is to be allowed, how is a jury to be charged? Should they be told that, if penetration is proven, to ignore evidence of intoxication but, if there is a doubt with respect to penetration, they are then to consider evidence of intoxication on the question of whether the accused intended to commit rape? In Australia, for instance, the anomaly of allowing the intoxication defence for attempted rape but not for rape was explicitly disapproved in R. v. Hornbuckle.\(^47\) The same argument could be applied to any other offence where the full offence is of basic (general) intent. The person on the street would not find this approach very "logical"! Nor, I imagine, would most judges.

What little case law there is in the area suggests the opposite approach, namely, that the attempt is of the same type of intent as the complete offence. Boucher implicitly adopts this approach as does R. v. Pagee.\(^48\) R. v. Triller\(^49\) has done the same for attempted bestiality and so has R.v. Bartlett\(^50\) for attempting to unlawfully cause bodily harm. It is noteworthy that there is no judicial authority in support of the proposition that all attempts are specific intent, thus permitting the intoxication defence.

It is true that the Supreme Court decision in R. v. Ancio\(^51\) could alter the law in this area. It was not an intoxication case but held that the intent for attempted murder was only the intent to kill, not any of the other intents for murder as set out in the Criminal Code.\(^52\) In Ancio, the Court traced the history of attempts and concluded that attempts had evolved

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\(^{46}\) Leary, supra, note 2, at 56.
\(^{52}\) Code, supra, note 31, s. 212(a)(ii), (b), (e), s. 213 and s. 214(5) extend the definition of murder to include constructive intents.
much later than had the mental element for murder.\textsuperscript{53} An attempt consists of some act directed toward the completed \textit{actus reus} with the intention to commit the full offence.\textsuperscript{54} For attempted murder, this was interpreted to mean an intention to kill because the completed offence required a death. It is possible, however, that \textit{Ancio} could be distinguished for the purposes of the intoxication rules on the basis that murder, unlike most offences, has constructive intents. Moreover, it did not deal at all with the intoxication rules.

There is an apt analogy here with the English law on the same point. \textit{R. v. Whybrow}\textsuperscript{55} settled the law in England that the intent for attempted murder was the intent to kill. It was relied upon in \textit{Ancio}. Yet this has not meant that all attempts have been held to be specific intent. In \textit{R. v. Pigg},\textsuperscript{56} again not an intoxication case, the Court of Appeal held that the \textit{mens rea} for attempted rape consisted of both intent to have intercourse without consent and intent to have intercourse with recklessness as to consent. In \textit{Caldwell},\textsuperscript{57} it was decided that all offences having recklessness as a mental element did not allow the intoxication defence, \textit{i.e.} were not specific intent offences. The conclusion is that attempted rape is not a specific intent offence. If that is the case, there is no reason why all attempted assaults should not be treated the same way,\textsuperscript{58} or, indeed, any attempt for which the full offence has recklessness as a mental element.

The point is obviously still open even though the existing authority lies in the direction of attempts following the completed offence. Nonetheless, attempts pose a grave problem for the basic intent and Colvin theories. Ultimately, this point will likely be decided on the basis of which approach makes more sense. It is far from clear that the basic intent test makes greater sense.

Another problem area is handling stolen goods or, in Canada, possession of property knowing that is was obtained by the commission of an indictable offence.\textsuperscript{59} Both of these offences have been held to be specific intent offences even though neither has any obvious ulterior

\textsuperscript{53} \textit{Ancio}, supra, note 51, at 18.
\textsuperscript{54} \textit{Code}, supra, note 31, s. 24(1).
\textsuperscript{57} \textit{Caldwell}, supra, note 16. Smith and Hogan, supra, note 28, at 59-60, define ulterior intent as excluding recklessness. This is in line with the majority in \textit{Caldwell} and both are counter to Colvin, supra, note 7, at 757, which, after all, was written prior to the decision in \textit{Caldwell}. The minority in \textit{Caldwell}, like Colvin, would have permitted the intoxication defence for offences of ulterior recklessness.
\textsuperscript{58} Since assaults have the same element, lack of the victim’s consent, which can be satisfied by either intention or recklessness.
\textsuperscript{59} \textit{Code}, supra, note 31, s. 312.
An argument could be made that there is, however, an ulterior intent involved where the property was obtained by theft. This is in the sense that the possessor must know the property was stolen and, included in knowledge of theft, is knowledge that it was taken with intent to deprive the owner of lawful possession. It is this latter connection with the taker’s state of mind that would be considered an ulterior intent on the possession offence. It must be said that this ulterior intent is not obvious. There is no requirement for a conviction for possession that the actual thief be convicted. Accordingly, if the thief was acquitted on account of intoxication, it is not apparent that a subsequent possessor having knowledge of the intoxicated taking would be acquitted simply because of the taker’s lack of intent.

On the other hand, possession of property knowing it was obtained by the commission of an indictable offence arguably could be considered, under the basic intent test, a basic intent offence because the knowledge required does not extend past the *actus reus.* This is because theft is not the only way for the property to be obtained. For example, laundering money that was obtained from drug trafficking can be charged under the same section. Then there is clearly no ulterior intent. All the same, the offence has been categorized as specific intent.

On the other hand, the offence known colloquially as “joyriding” has, in England, been held to be a basic intent offence even though the statutory offence apparently contains a purpose ulterior to the actual taking of the conveyance. The counterpart in Canada to this offence requires an intent to drive, use, operate or navigate which should be, by the theory, an ulterior intent. In view of the English case *MacPherson,* however, it might well be held to be a general intent offence.

Smith has pointed out that the offence of causing grievous bodily harm with intent to cause grievous bodily harm has been wrongly categorized by the basic intent test. Quite clearly the *mens rea* does not


63. Section 12 of the *Theft Act,* 1968, c. 60, creates the offence of “taking a conveyance for his own or another’s use”, certainly a purpose, hence intent, ulterior to the taking.

64. *Criminal Code, supra,* note 31, s. 295.

65. Smith, *supra,* note 6, at 377.
extend at all beyond the *actus reus* but it has nonetheless been described as a specific intent offence. The offence is not one known to Canadian law. However, Smith's point is well-taken. Moreover, the offence is worthy of consideration for a reason perhaps not so palatable to Smith, one of the proponents of ulterior intent as an analytical tool.

It may be conjectural but the classification of the offence as specific intent could have resulted from the fact that the intent required is specified in the statutory enactment in clear terms. Yet, the language used is identical to that used in most ulterior intent offences. These offences very often can be discerned by the phrase "with intent to", hence, the similarity of language for the present offence may have resulted in it being judicially lumped in with ulterior intent offences. This offence shows that judges are apt to be influenced by the language used in the statute. Language which clearly demonstrates the mental element intended by Parliament is more likely to be construed as specific intent, regardless of whether the *mens rea* extends beyond the *actus reus* or not.

The charge in *Steane* of doing an act likely to assist the enemy with intent to assist the enemy also causes difficulty. The Colvin theory holds that it is an ulterior intent offence because the word "likely" means that the act need not be proven or actualized but that the specified intent must be. It is therefore, on that argument, conduct in process that is being penalized rather than conduct completed. It is again conjecture but it would appear that Parliament injected the word "likely" in order to assist the Crown in establishing the *actus reus* rather than out of any regard for ulterior intent as a theoretical tool. To accept the ulterior intent theory, one would have to say with certainty that excision of the word "likely" would convert it into a basic intent offence. The precedent of causing grievous bodily harm with intent to case grievous bodily harm suggests otherwise. Moreover, one of the leading proponents of ulterior intent, Lord Simon, has expressed the opinion that the *Steane* offence is not an ulterior intent offence.

The foregoing discussion illustrates the lack of unanimity that prevades the categorization of offences. Even among the most avid adherents of ulterior intent, there is disagreement. Colvin has said that all attempts are ulterior intent, Smith and Hogan say they are all specific intent (without

66. *Majewski, supra*, note 3, at 154; Smith, id.
67. For example, break and enter with intent to commit an indictable offence therein.
69. Colvin, *supra*, note 7, at 759 uses this terminology.
citing any authority)\textsuperscript{71} while the very same Smith has opined that attempted suicide is, according to the basic intent theory, a basic intent offence.\textsuperscript{72} Added to that is the possible difference in the meaning of basic intent between Lord Elwyn-Jones and Lord Simon. While the basic intent test and the Colvin theory do explain how most offences are identified, they do not do so in all cases. Moreover, there is sufficient confusion to cast doubt on their validity.

Nevertheless, it must be admitted that these tests are helpful. However, even if it is conceded that the tests provide accurate ways of categorizing offences, that does not answer the question whether there is any good reason for allowing intoxication for ulterior intent offences but not for basic intent offences. Colvin answers this objection by stating that is is permissible to impose absolute liability for the prohibited act in the case of basic intent offences. On the other hand, to impose such liability for ulterior intent offences "would be to impose absolute liability for what might have happened rather than what did happen."\textsuperscript{73} It is not clear why it is necessarily more acceptable to attach responsibility to one who, without intent, recklessness or volition, has committed a basic intent offence. After all, voluntariness and the mental element are cardinal precepts of culpability. Further discussion on that point must await the examination of the doctrine of prior fault later in this chapter. For now, it should be noted that one of the strongest advocates of the concept of ulterior intent, Smith, before \textit{Majewski}, stated that:

\ldots a rule based on the distinction between basic and ulterior intents would be unacceptable because there is no reason in it. If a drunken person takes my vase under the impression that it is his own and smashes it, why should he be guilty of criminal damage, which does not require an ulterior intent, but not guilty of theft, which does? The mistake as to ownership negatives \textit{mens rea} in both cases and it would be quite irrational to impose liability in the one case and not the other.\textsuperscript{74}

The basic intent test is, after all, a rather arbitrary way to limit the intoxication defence. There is no readily apparent justification for imposing culpability for doing a particular criminal act while alleviating responsibility where the statutory enactment specifies an additional mental element. In each case, the actor may not have had the requisite mental state for the act itself.\textsuperscript{75} Smith's hypothetical show the inadequacy of the basic intent test.

\textsuperscript{71} Smith and Hogan, \textit{supra}, note 28, at 194.
\textsuperscript{72} Smith, \textit{supra}, note 6, at 377.
\textsuperscript{73} Colvin, \textit{supra}, note 7, at 760.
\textsuperscript{74} J. C. Smith, "Commentary", [1975] \textit{Crim. L.R.} 572, at 574.
\textsuperscript{75} Schabas, \textit{supra}, note 6 has also made this point.
2. The Purposive Test

This test was first advanced in *George* by Justice Fauteux who said:

In considering the question of *mens rea*, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts considered apart from their purposes. A general intent attending the commission of the act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act.

It may be that Justice Ritchie, in the same case, advanced a similar test but that is of no concern in the present context. The purposive approach to distinguishing specific from general intent was approved in both *Majewski* and *Leary*. Indeed, Lord Simon reckoned that it was "the best description of 'specific intent' in this sense" that he knew.

There are problems in interpreting what really was meant by these definitions. Consider first the traditional view of a voluntary act as propounded by Austin and most later criminal law writers. In this perspective, an act consists of (1) a muscular contraction and (2) a desire or volition for the muscular contraction. It can therefore be seen that every act that is "voluntary" within the meaning of the law is purposive in the sense that the physical movement was accompanied by some desire or will to make that movement. It is impossible therefore to say that one type of intent involves a purpose where another does not: any voluntary act is purposive.

Hart's modification of the Austinian approach leads to the same conclusion. He described a voluntary act as being subordinated to the actor's conscious plan of action. Surely a conscious plan of action involves purposive action. If that is so, the purposive approach to intent fails under the Hartian theory as well.

There is, however, another and probably better interpretation of the Fauteux definitions, and that is to confine the meaning of purposive to

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77. *Id.*, at 877.
78. *Id.*, at 890.
80. *Leary*, supra, note 2, at 50.
84. *Id.*, at 97.
85. Schabas, *supra*, note 6 and Walker, *supra*, note 6 make this point as well.
86. *Supra*, note 82 at 105.
the mens rea. In other words, the mens rea must be directed to achieving some purpose. In this sense, purpose might be loosely equated with ulterior intent. There is support for this view in the comments by Lord Simon about the Fauteux test. There is then little point to repeating the arguments made in the last section about the ulterior and basic intent distinction.

I will therefore limit the discussion to particular offences. Applied in that way, how does the purposive test fare? Several commentators have demonstrated that it does not correctly categorize murder as a specific intent offence. It is not essential for a murder conviction for the prosecution to show any purpose in the sense of a desire to kill or cause grievous bodily harm; it is enough that the accused was willing for death to occur though her actual purpose was something else. As was pointed out in the introduction, Swietlinski has demonstrated that murder cannot be explained by any of the tests except the Colvin test. Murder is therefore a special case.

Other offences, however, also do not fit within the purposive test. One such example in England is, again, the offence of taking a conveyance without the consent of the owner. It would seem to require a purposive element but has been tagged as a basic intent offence. Though there is no comparable authority in Canada, given the similarity of the wording in our counterpart offence, it is quite probable that it would be categorized as a general intent offence here as well.

One form of assault can involve a purpose to cause apprehension on the part of the victim. If the purposive test were used to explain this offence, it would be seen as a specific intent offence. George, however, is authority for the proposition that assault is a general intent offence; it is extremely doubtful that assaults under s. 244(1)(b) would be treated

87. Supra, note 3.
88. Smith, supra, note 6; Schabas, supra, note 6; Dashwood, supra, note 5; Walker, supra, note 6; Sellers, supra, note 6; Orchard, supra, note 6; Majewski, supra, note 3, all criticize the purposive test as failing to account for murder. Long before Majewski, Stanley M. Beck and Graham E. Parker, "The Intoxicated Offender—A Problem of Responsibility" (1966), 44 Can. Bar Rev. 563 also criticized the purposive test.
89. D.P.P. v. Hyam, [1974] 2 All E.R. 41. (H.L.) In Canada, under the Criminal Code, supra, note 31, s. 212(a)(ii), according to Don Stuart, Canadian Criminal Law (Toronto: The Carswell Company Limited, 1982) at 206, the same result is achieved. See also: R. v. Buzzanga and Durocher (1979), 49 C.C.C. (2d) 369, at 384-85, which, though not a murder case, makes the same point.
90. Swietlinski, supra, note 10.
91. Supra, notes 62 and 63; Smith, supra, note 6, at 378; Majewski, supra, note 3, at 152.
92. Code s. 295 would seem to also require a purpose: "with intent to drive . . . ."
differently from the other forms of assault for the purposes of the intoxication rules.

To constitute theft, there is a requirement that the accused must have intended to deprive the owner of the property.\(^9\) That intention may not, however, have been the purpose of the accused. It is sufficient for theft that the accused had foresight that deprivation of the owner was the virtually certain consequence of the taking. The result is that, while theft is a specific intent offence, it may not involve any purpose to deprive.\(^9\) Instead, the accused might simply have the purpose in mind of acquiring the stolen item. The purposive test does not, then, correctly classify theft, mostly because "purpose" has a more restricted meaning than "intention."

Some of the academic writers have failed to distinguish the two interpretations I have accorded the Fauteux definitions. This may point to difficulties in the test itself, rather than necessarily to errors by these writers. For instance, Smith\(^9\) has suggested that rape is a purposive crime in that there is a purpose to have intercourse, even though there may only be recklessness on the question of consent. This may be a result of confusion as to whether purpose applies to the act (in this case, of intercourse) or to the mental element in relation to the surrounding circumstances. The question ultimately boils down to a semantical dispute. Smith is certainly right that there is a mental element associated with having intercourse. This mental element would appear to be purposive\(^9\) but the offence as a whole is a basic or general intent offence.\(^9\)

Similarly, it has been suggested that indecent assault connotes a purpose.\(^9\) To the contrary, Swietlinski has held that no indecent purpose is required for conviction on such a charge.\(^10\) But, notwithstanding Swietlinski, an indecent (or, now, a sexual assault)\(^10\) could take place that involved the inducing of apprehension by the victim in the same way

\(^{94}\) Code, s. 283(1)(a).
\(^{95}\) Eric Colvin, "Codification and Reform of the Intoxication Defence" (1983), 26 Crim. L.Q. 43, at 60-62, points out that the accused need not have the purpose to deprive. Several cases hold theft to be a specific intent offence: Ruse v. Read, [1949] 1 K.B. 373; George, supra, note 4; Majewski, supra, note 3; R. v. Regehr (1952), 13 C.R. 53 (Sask. Mag. Ct.)
\(^{96}\) Smith, supra, note 6, at 378.
\(^{97}\) Justice Dickson in Leary, supra, note 2, at 44, pointed out that "cases where a man will have had intercourse without intending to do so must be rare."
\(^{98}\) Leary, id.
\(^{100}\) R. v. Resener, [1968] 4 C.C.C. 129 (B.C.C.A.) and Swietlinski, supra, note 10 have held indecent assault to be a general intent offence.
\(^{101}\) Code, supra, note 31, s. 246.1 as amended by S.C. 1980-81-82-83, c. 125, s. 19. The offences of indecent assault and rape were repealed at the same time..
as for common assault.\textsuperscript{102} It would then have a purposive element. Moreover, it could be argued that the usual form of assault, which requires an intentional application of force, is also purposive in the sense that intention implies purpose. Of course, purpose is often thought to be a particular form of intention, referring to the reasons for having done the act.\textsuperscript{103} But the use of the term “purpose” is an ambiguous one.

It should also be pointed out that the purposive test can be construed as confusing the question of motive and intention.\textsuperscript{104} Motive is not required to be shown for an accused to be found culpable but the purposive definition seems to inject motive into the culpability equation for specific intention offences. This is particularly so if purpose is thought to refer to the reasons for doing the act.

The purposive definition is, at the least, an imprecise definition. At worst, it is quite meaningless. As a means of differentiating one type of act from another, it is utterly devoid of content. As a means of distinguishing the two types of intent, aside from failing to account for some offences, it is so confusing as to be practically worthless. The language used is, unfortunately, responsible for much of this confusion: “purpose” is a nebulous word and, consequently, it is not clear from the definition just what is meant.

Finally, as with the basic intent and Colvin theories, the purposive test gives no convincing reason why certain types of offences should permit intoxication to negative the mental element while others do not. Again, the question is this: Does it make sense to allow evidence of drunkenness to shed doubt on the intent to steal but not for an assault committed at the same time? That is the result in \textit{George}. But is it “logical”?

3. \textit{The Recklessness Test}

Canada and England have taken somewhat divergent paths in defining recklessness as a general feature of culpability. In Canada, with some exceptions,\textsuperscript{105} recklessness is considered to be confined to the situation where the actor chooses to take an unjustifiable risk.\textsuperscript{106} There is therefore a requirement that the accused advert to the risk of the particular harm.

\textsuperscript{102} \textit{Code, id.}, s. 244(1)(b) applies to all assault offences. This, in fact, was Parker’s point.

\textsuperscript{103} Alan R. White, “Intention, Purpose, Foresight and Desire” (1976), 92 \textit{L.Q.R.} 569, at 574.

\textsuperscript{104} Beck and Parker, \textit{supra}, note 88, at 586.


England has, in recent years, departed from advertent recklessness. The leading case, *Caldwell*, defined recklessness as including both advertent recklessness and failure to give thought to a risk in circumstances where, if thought were given, the risk would be obvious. The decision was controversial and has, to some extent, been whittled down.

This, the first of the two propositions for which *Caldwell* stands, has not been adopted in Canada. The recent Supreme Court decision in *Sansregret v. The Queen* re-affirmed the advertent approach to recklessness in Canada. Although the judgment introduces, arguably, a new approach to the concept of wilful blindness, it can be seen as an implicit rejection of *Caldwell* recklessness.

However, when the intoxication defence is considered, the English and Canadian positions are much closer together. The House of Lords in *Majewski* used differing recklessness tests but the common approach in their judgments was to ascribe recklessness to one who reduced herself through the voluntary ingestion of drink or drugs to a state where she lacked the mental element for a basic intent offence. At the point that *Majewski* was decided, an objection could have been raised that the term "recklessness" had more than one meaning in England.

The second proposition from *Caldwell* changed that. It was that the intoxication defence could not apply to any offence having recklessness

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107. *Caldwell*, supra, note 16.
108. *Pigg*, supra, note 56, at 599 modified *Caldwell* recklessness by adding a requirement of "indifference", perhaps meaning that the accused would have taken the risk even if thought had been given to it. This approach has been taken by the Court of Appeal in a line of rape cases and re-injects a note of subjectivism into the definition of recklessness.
110. *Id.*, at 713-14. The concept of wilful blindness is different from its usual application as a limited extension of actual knowledge where the accused almost knows (i.e., is at least reckless) and choose to maintain ignorance. *Sansregret* wilful blindness is, on the other hand, a substitute for recklessness rather than being dependent upon recklessness already being present. See: Eric Colvin, *Principles of Criminal Law* (Toronto: The Carswell Company Limited, 1986) at 103-108.
111. *Caldwell* was never mentioned in *Sansregret*.
112. Lords Elwyn-Jones, L.C., Diplock, Kilbrandon, Simon of Glaistede, and Edmund-Davies agreed that self-induced intoxication amounts itself to recklessness which is sufficient to itself to constitute the *mens rea* for basic intent offences. Lord Edmund-Davies added that drunkenness amounting to recklessness of probable consequences was basic intent. Lord Russell stated that, because of its moral turpitude, intoxication amounted to recklessness as to possible consequences. It is submitted that in view of the subsequent decision in *Caldwell*, these differences in language are not material.
113. In other than intoxication cases, recklessness meant taking a conscious risk that was unjustifiable: *R. v. Cunningham*, [1957] 2 All E.R. 412, at 414 (C.A.). *Majewski* devised a new sort of recklessness in intoxication cases: self-induced intoxication plus the commission of the *actus reus* of a basic intent offence equals recklessness. It is a general type of recklessness not requiring advertence to the risk of that particular *actus reus*.
as its mental element. Despite a vigorous dissent, this is so even where
the recklessness requirement is ulterior to the actus reus. The act of
getting intoxicated combined with the commission of the actus reus of a
basic intent offence amounts to criminal recklessness; and recklessness
can never be negatived by intoxication: these are the results of Majewski
and Caldwell. It is therefore an objective test in the sense that it is an
attribute of a mental state: if a reasonable (that is, sober) person in the
place of the accused would have adverted to the risk, the accused is
deemed to have been reckless.

Canada, in Leary, adopted Majewski but has not adopted Caldwell. Leary
quoted extensively from the various judgments in Majewski, making it difficult to know which of the tests advanced there were
approved for Canada. On the supposition that Leary has in some measure adopted the recklessness test, the Canadian position is that
there are two types of recklessness: advertent recklessness and
recklessness supplied by being intoxicated and committing a general
intent offence. Support for the recklessness test may also be seen in R. v.
Schmidtke. That case held that all offences, other than murder, which
have recklessness as a mental element are general intent offences.

England therefore has adopted a more or less consistent approach to
recklessness, an objectivist standard which subsumes within it situations
where the accused was too intoxicated to perceive the risk. If the accused,
when sober, would have adverted to the risk, she is deemed to have been
reckless. Canada's position does not have that attribute of consistency
since recklessness, absent any issue of intoxication, usually imports
foresight of the particular risk; assuming that Canada has adopted the
recklessness test, when intoxication is involved, recklessness is simply
attributed to the accused. The Canadian position might therefore be justly

114. Caldwell, supra, note 16, at 968-973. Lord Edmund-Davies, using the basic intent test, would have permitted the intoxication defence for ulterior recklessness.
(C.A.). In both cases, the Court of Appeal seemed to be attempting a reinstatement of some
requirement of advertence to a risk of the taking of a substance. The distinction lies in the
nature of the substance itself. Alcohol or dangerous drugs are to be treated differently from
other substances not generally known to be dangerous. Whether this is a maintainable
distinction will be discussed later in the chapter.
116. There may yet be some inroads by Caldwell v. Tutton and Tutton, supra, note 105, seems
to say, in cases of criminal negligence, that advertence to the risk is necessary in the case of an
omission but not for a commission. Note also wilful blindness in Sansregret, supra, note 109.
117. Leary, supra, note 2, at 52, quotes Lord Elwyn-Jones, in Majewski, supra, note 3, at 150,
a passage which uses the recklessness test.
118. There is abundant authority for a requirement of advertence: Sansregret, supra, note 109;
City of Sault Ste. Marie, supra, note 106; Pappajohn, supra, note 4.
120. Admittedly, Schmidtke, at 397, also seemed to apply the basic intent test.
criticized on that ground alone: it is plainly silly that a single word should be defined in different ways in the criminal law.

That preliminary point aside, can the ascription of recklessness to a person intoxicated to the extent of in fact lacking the mental element be logically justified?

The first difficulty with the recklessness test is that it provides no way of determining what offences have recklessness as a mental element. To say that all recklessness offences are basic or general intent offences is to beg the question. It is true that sometimes Parliament defines an offence in such a way as to disclose the mental element and, indeed, on occasion expressly includes recklessness. Examples such as the extended definition accorded "wilfully" in our Criminal Code\(^1\) and in the very section considered in Caldwell illustrate this. But, for many other offences, we only learn whether recklessness is a mental element after it is judicially determined to be so. Thus, in England, the act of applying force in an assault can be committed either recklessly or intentionally\(^2\) while in Canada the act itself must arguably be done intentionally.\(^3\) However, in both countries, recklessness as to the victim's consent will suffice for culpability. The same position applies to rape\(^4\) and sexual assault.\(^5\)

It is true that some authority has held that recklessness is a mental element for any offence for which no particular mens rea is specified in the enactment. For instance, it has been said:

> The general mens rea which is required and which suffices for most crimes where no mental element is mentioned in the definition of the crime, is either the intentional or reckless bringing about of the result which the law, in creating the offence, seeks to prevent . . . \(^6\)

[emphasis mine]

Nonetheless, precise criteria have not been established for determining when recklessness is one of the mental elements for an offence. That is a telling criticism of the recklessness test for only ex post facto can we determine when it is or is not part of the offence.

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1. Criminal Code, supra, note 31, s. 386.
2. Criminal Damage Act 1971, c. 48, s. 1(1). (U.K.)
5. Morgan, supra, note 17; Sansregret, supra, note 109. Rape is no longer an offence in Canada.
6. R. v. Alderton (1985), 44 C.R. (3d) 254. (Ont. C.A.) held sexual assault to be an assault with some element of sexual gratification. The "without consent" aspect of assault is common to that of rape and must import the same mental states. This is not, however, specified in the definition of assault in s. 244 of the Code.
7. Buzzanga and Durocher, supra, note 89, at 381.
There is another reason why not allowing the intoxication defence for recklessness offences is problematic. Why is the line drawn at recklessness? In dissent in *Caldwell*, Lord Edmund-Daview was alive to the harshness that would result from excluding the intoxication defence where the offence was one of ulterior recklessness. But the same argument can be made with much force in respect of "basic" recklessness. Take the well-known hypothetical wherein the accused has placed a bomb on a crowded airplane with the desire, not to kill the passengers, but to blow up the plane. Most commentators have had no difficulty in nonetheless finding the intention to kill the passengers on the basis that the actor knows that death of the passengers is a virtual certainty and she is willing to accomplish those deaths in the course of achieving her purpose.

It can be seen, however, that a "virtual certainty" is marginally less certain than a "certainty". In other words, intention encompasses something more than absolute intention. As a result, it impinges, however slightly, upon the concept of recklessness which involves (in Canada) advertence and the taking of an unjustifiable risk. "And 'intention' and 'recklessness' are more than birds of a feather; they are blood-brothers." That being so, why does the intoxication test assume that there is a marked difference in culpability between an intentional act and a reckless one? That is the implicit "logic" of the recklessness test. But is it a valid distinction? There is apt to be a difference of opinion about whether a particular risk was virtually certain, highly probable, probable or merely possible. To maintain a culpability distinction on such shifting ground is extremely arbitrary.

There is a further argument that the recklessness test is inconsistent with general principle and hence unfair. In Canada, general principle requires a subjective test of *mens rea*, which in the case of recklessness means advertence to the particular risk. Perhaps it was stated best by Justice Dickson in *Leary*:

131. Smith and Hogan, supra, note 28, and Stuart, supra, note 89, at 129-30 note the controversy. *R. v. Moloney*, [1985] 1 All E.R. 1025. (H.L.) has now, in England, restricted intention to the virtually certain category; *Buzzanga and Durocher*, supra, note 89, does the same here but that does not answer when something is virtually certain as opposed to highly probably or probable. In any case, *Buzzanga and Durocher* has not been explicitly adopted by the Supreme Court.
132. England via *Caldwell* and subsequent cases has, of course, departed from subjective recklessness.
Recklessness in a legal sense imports foresight. Recklessness cannot exist in the air; it must have reference to the consequences of a particular act. In the circumstances of a particular case, the ingestion of alcohol may be sufficiently connected to the consequences as to constitute recklessness in a legal sense with respect to the occurrence of the prohibited act. But to say that everyone who gets drunk is thereby reckless and therefore accountable is to use the word "recklessness" in a non-legal sense and, in effect, in the case of an intoxicated offender, to convert any crime into one of absolute or strict liability.\(^\text{133}\)

It can be seen that this criticism is founded upon the maxim \textit{actus non facit reum nisi mens sit rea} and upon both principles involved in the maxim: the recklessness test violates subjective \textit{mens rea} and contemporaneity of \textit{actus reus} and \textit{mens rea}.

The majority of the Australian High Court in \textit{R. v. O'Connor}\(^\text{134}\) raised the same points. Justice Murphy of that Court showed that the test represents an anomaly because an intoxicated offender is guilty by virtue of a constructive mental element where, for the same offence, a sober person lacking the requisite mental element would be acquitted.\(^\text{135}\) Thus, once intoxication is proved, the prosecution is relieved altogether from the burden of proving a mental element. This led Justice Murphy to muse that, where intoxication was involved, the Crown might very well lead evidence of it in order to head off attempts by the defence to show a lack of the requisite mental element. In other words, the defence might allege not intoxication to the point of negating the mental element, but a lack of the mental element \textit{simpliciter} and the Crown would rebut this with evidence of intoxication. Thus, an intoxicated person would be much worse off than a sober person who had done the same act: the latter could rely upon a lack of \textit{mens rea} while the former, who might have lacked the \textit{mens rea} even if sober, would be convicted because of being intoxicated.\(^\text{136}\) Never has it been suggested that an intoxicated offender is more culpable than a sober one. Yet that is the effect of the recklessness test. Indeed, if mitigation of punishment was the reason for the gradual acceptance of the intoxication defence,\(^\text{137}\) that reason is quite perverted by

\(^{133}\) \textbf{Leary, supra}, note 2, at 46.  
\(^{135}\) \textit{Id.}, at 485. \textit{See also:} note 214, infra.  
\(^{136}\) It is conceded that this result would not evitably follow. It might be that the pragmatic approach adopted in the case of insanity being raised by the Crown would be applied to only allow the evidence to be considered once it had been determined that the accused had done the act with the requisite \textit{mens rea}. \textit{See: R. v. Simpson} (1977), 35 C.C.C. (2d) 337, at 363. (Ont. C.A.) for the analogous point in relation to insanity.  
\(^{137}\) Although I do not necessarily agree that it was. \textit{See: supra}, note 1.
the attribution of recklessness to persons who have committed a criminal act while sodden.\textsuperscript{138}

One might conclude from the leading cases that only crimes whose sole mental element is intention would allow the defence. But, as Glanville Williams has pointed out,\textsuperscript{139} this is not the case for murder. Once again, murder cannot be accounted for by the recklessness test. In some of its forms, the mental element can be supplied by recklessness,\textsuperscript{140} yet the intoxication defence is always allowed for murder.\textsuperscript{141} Again, murder can only be explained as a special case.

There are other, perhaps more telling arguments against the recklessness test. Underlying all of the various tests for determining whether an offence is of specific or general intent is an acceptance that a person is culpable, for general intent offences, by becoming intoxicated. I have already pointed that this violates both the principle of contemporaneity and subjective notions of \textit{mens rea}. In the interests of brevity, I will deal with the question of justification for this underlying doctrine, prior fault, later in the article.

4. \textit{Conclusions About the Various Tests}

To recapitulate, the tests set out in \textit{Majewski} and accepted in \textit{Leary} provide no reliable way of differentiating one type of offence from another. The major offences for which difficulty is encountered are: murder, attempts, possession of property obtained by the commission of an indictable offence, joyriding, doing an act likely to assist the enemy with intent to assist the enemy, certain assaults, and causing grievous bodily harm with intent to cause grievous bodily harm. Though many other offences can be answered by reference to one or more of these tests, the fact that there is no effective method points to a flaw in the respective theories. In short, rather than attempt to analyze offences by the use of any of these tests, it is just as simple to memorize the offences which have been placed in either category.\textsuperscript{142} For those offences not yet categorized, it remains to be seen how these tests will apply.

There are, in addition, other difficulties with these tests. If the dichotomy of specific and general intent is meant to limit the intoxication defence, it does not always accomplish that end. It is true that there is

\begin{itemize}
\item \textsuperscript{138} Justice Dickson, in \textit{Leary, supra}, note 2, at 41, made this point.
\item \textsuperscript{139} \textit{Supra}, note 6.
\item \textsuperscript{140} \textit{Code, supra}, note 31, ss. 212(a)(ii), 212(b), 212(c) and, for ss. 213 and 214(5), where the underlying offence has recklessness as a mental element.
\item \textsuperscript{141} \textit{Swiętliński, supra}, note 10.
\item \textsuperscript{142} Gold, \textit{supra}, note 6; Stuart, \textit{supra}, note 89, at 361; Smith and Hogan, \textit{supra}, note 28, at 193-94, have done just that.
\end{itemize}
frequently a lesser included general intent offence for which an accused is liable even if acquitted of the more serious specific intent offence. But this does not happen in all cases.\textsuperscript{143} For example, theft has no lesser included offence. Neither does possession of property knowing it to have been obtained from the commission of an indictable offence,\textsuperscript{144} break and enter with intent to commit an indictable offence therein\textsuperscript{145} or bribing a peace officer.\textsuperscript{146} These may in isolation be minor criticisms but the cumulative effect of the objections is telling.

Furthermore, to withhold the intoxication defence for general or basic intent offences is a violation of both subjectivist principle and the principle of contemporaneity of \textit{mens rea} and \textit{actus reus}. Whether those departures from principle can logically be justified in some other fashion will be discussed in conjunction with the concept of prior fault and different approaches to \textit{mens rea}. For now, it is enough to note the apparent inconsistencies with principle and to suggest that this raises a \textit{prima facie} case of "illogicality".

5. \textit{Ulterior Intent}

It will have been noticed that lurking beneath both the basic intent and purposive tests was the concept of ulterior intent. Indeed, since \textit{Caldwell} ruled out the intoxication defence for any offence having recklessness as a mental element, most of the offences permitting the intoxication defence are ulterior intent offences. (The previous discussion hopefully demonstrated, however, that some specific intent offences do not require an ulterior intent.) Some of the difficulties with the different tests arise from ulterior intent itself. Glenville Williams\textsuperscript{147} has noted the confusion between motive and intention that can occur with the use of the term. That was conceded by the originator of the term, Stroud, who seems to have been the first to use it in his book \textit{Mens Rea}.

But the complaint is much more deep-seated: if there were no division into specific and general (or basic) intent, there would be no need for the concept of ulterior intent. To use \textit{Steane}\textsuperscript{149} as an example, if there were no such

\begin{itemize}
\item \textsuperscript{143} This argument was made by Justice Stephen in \textit{O'Connor, supra}, note 134, at 476, and by Glenville Williams, \textit{supra}, note 6.
\item \textsuperscript{144} \textit{Criminal Code, supra}, note 31, s. 312.
\item \textsuperscript{145} \textit{Id.}, s. 306(1)(a).
\item \textsuperscript{146} \textit{Id.}, s. 109(b), held to be specific intent in \textit{R. v. Dees} (1978), 40 C.C.C. (2d) 58 (Ont. C.A.).
\item \textsuperscript{147} \textit{Williams, supra}, note 129, at 75, 87.
\item \textsuperscript{148} Douglas Aikenhead Stroud, \textit{Mens Rea} (London: Sweet & Maxwell, Ltd., 1914) at 112-15.
\item \textsuperscript{149} \textit{Steane, supra}, note 68. See also notes 69 and 70: Colvin and Lord Simon disagree as to whether the offence is of ulterior intent or not.
\end{itemize}
concept as ulterior intent, would it really matter? It seems unnecessary to engage in the debate about whether or not the offence in that particular case is ulterior intent or not. What is important is the meaning of intention or of recklessness. The disputes arising out of those terms are quite sufficient to complicate the criminal law without further clouding it with a concept that has utility only if the dichotomy between specific and general intent is accepted.

Take break and enter with intent to commit an indictable offence therein as an example. This is an offence for which the intoxication defence is permitted, on the Colvin theory because it contains an ulterior intent, the intent to commit an indictable offence therein. But the accused, absent intoxication, to be convicted must have two different thoughts on her mind, that of intentionally breaking and entering and that of intending to commit some offence inside. Once these two thoughts are differentiated into two different kinds of intent, it is a very short step back into the specific and general intent dichotomy. There is no sound reason why the liability of the accused should only depend upon the intent to commit an offence inside the premises. Worse than that, because of the antecedents of ulterior intent and its potential confusion with motive, there is the danger of the criminal law reverting once more to that older school of mens rea advocated in Prince, by Stroud, and resurrected in Majewski.

Under this theory, ulterior or specific intent (though they are not always synonymous) are counterposed to mens rea, which corresponds roughly with a general intention to break the law. The latter has, however, in the intoxication cases, nothing whatever to do with "intention" to do the particular prohibited act and everything to do with transposing the fault involved in getting into an incapacitated condition into the kind of culpability required by the criminal law. Those advocating ulterior intent as a concept, Smith and Hogan and Colvin, do not, of course, agree with this older view of mens rea; indeed, they oppose it vigorously. Nevertheless, the use of the term gives credence to the differentiation into different sorts of intent, thus running the risk of it providing support for that other, largely discredited concept of mens rea.
This is an opportune point at which to embark upon a discussion of the concept of prior fault as it is very much founded upon that other view of mens rea. In closing off the present discussion, it should be emphasized that the myriad tests carry with them the potential association with and, hence, justification for a view of mens rea that is incompatible with the modern concept of particularized mens rea. Whether this return to a former approach to mens rea is appropriate and tenable is a topic to which I will now turn.

III. Prior Fault and Mens Rea Theory

Transferring the fault requirement from the actual doing of the act to the act of becoming cognitively impaired underlies the concept of prior fault. This concept, not unique to the intoxication defence, holds that where an accused is at fault for being in an incapacitated condition, it is no answer that her subsequent act was involuntary or without mens rea. Because it has somewhat wider application than in intoxication cases, and because it is bound up with the possible resurrection of an older form of mens rea, I propose to devote some discussion to the concept.

The two major issues associated with the prior fault doctrine were alluded to previously. The first involves the age-old debate between objective and subjective tests for the mental element. In the context of the prior fault theory, this translates into whether the accused must, at some point in time, have intended to become or been reckless about becoming incapacitated or intoxicated or whether simple negligence will suffice. Indeed, as will be seen, there are good grounds for the view that the law imposes absolute liability once self-induced incapacity or intoxication is shown.

There are cases on either side of this debate. Majewski and Leary both proceeded on the assumption that the particular accused intended to become intoxicated; hence, neither case discussed whether the fault should be judged by a subjective or an objective test. Perhaps that is because both cases involved alcohol consumption with Majewski also having taken some other drugs for other than medical reasons. Since Majewski, however, two cases in England, Bailey and Hardie, have interpreted the fault requirement in a subjective sense.

In Bailey, the accused, a diabetic, may have gone into a hypoglycaemic state by failing to eat after taking insulin. Automatism had not been put to the jury because the trial judge considered the condition to have been self-induced. The Court of Appeal disagreed, saying that automatism

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156. Bailey, supra, note 115.
ought to have been considered by the jury (although the appeal was dismissed for evidentiary reasons). A distinction was made between dangerous drugs or alcohol and a failure to eat food after taking insulin. For the latter, it would be necessary to show that the accused was subjectively reckless about becoming automatous, "aggressive, unpredictable or uncontrolled". For alcohol or dangerous drugs, this would be assumed since

[it] is common knowledge that those who take [such substances] may become aggressive or do dangerous or unpredictable things; they may be able to foresee the risks of causing harm to others, but nevertheless persist in their conduct.159

The decision in Hardie extended this holding somewhat. There, the accused had taken valium that had not been prescribed to him. Nonetheless, the Court of Appeal held that subjective recklessness was required:

There was no evidence that it was known to the appellant or even generally known that the taking of valium in the quantity taken would be liable to render a person aggressive or incapable of appreciating risks to others or have other side effects such that its self-administration would itself have an element of recklessness. It is true that valium is a drug and it is true that it was taken deliberately and not taken on medical prescription, but the drug is, in our view, wholly different in kind from drugs which are liable to cause unpredictability or aggressiveness.160

Thus, it would seem that, in England, whether the test for fault in getting into an incapacitated condition is subjective or objective depends upon whether the cause for the condition is generally known to have that result. If it is, so long as the condition was self-induced, culpability will lie. If it is not, there is an inquiry into the accused’s state of mind.

Canada could have adopted the same approach but has not. R. v. King161 is the leading case. The accused had been given an anaesthetic drug by his dentist, resulting in an impaired condition during which he was involved in a motor vehicle accident. The Supreme Court upheld acquittal but for differing reasons. Justice Taschereau imposed a subjective test for fault162 but Justice Ritchie, with whom Justice Martland concurred, used an objective test.163 Interestingly, Justice Ritchie made the same distinction made in Hardie concerning common

158. Bailey, supra, note 115, at 507.
159. Id.
162. Id., at 750.
163. Id., at 763, 764.
knowledge about particular drugs. The distinction has not been maintained through other cases. Canadian courts have applied negligence as the fault requirement for all intoxication and automatism cases.

This really indicates that, in Canada, the recklessness test is not a test of recklessness at all but of negligence. A reasonable person would not get into such a state of intoxication; the standard of care has not been met, therefore the actor is deemed reckless and guilty of a general intent offence. There is no inquiry into the actor’s state of mind at all.

The threshold question is therefore whether a negligent standard is justifiable at all. The distinction between subjective and objective tests is often found to be on the basis that, under a subjective test, all of the personal factors of the accused can be taken into account. On the other hand, a completely objective test would judge a 14-year-old mentally deficient child by the same standard as an average adult of normal intelligence. As a result, some have proposed that individual factors should be taken into account in determining negligence. Unfortunately, the case law has limited the factors that can be considered. Age has been held to be a permissible factor for adjusting the objective standard but several others, such as the “character, background, temperament, idiosyncrasies or the drunkenness of the accused” have been ruled out. Presumably, therefore, a lack of experience would not be taken into account in assessing negligence. Thus, as an example, a first-time drinker could be found negligent even though that particular individual had no

164. Id., at 764. I have taken the position that the Court of Appeal in Hardie, supra, note 115, at 853, adopted a subjective test. However, the language used might be susceptible of another interpretation that would bring it very much in line with the approach taken by Ritchie, J. in King; if a particular drug is “generally known” to produce aggressive or incapacitated behavior, this might suffice to constitute recklessness. The result might well be that the tests laid down in King and Hardie are much alike in that the test used will vary according to the nature of the drug ingested and the general knowledge by society of its effects.

166. Stuart, supra, note 89, at 120 and 184.
167. Id., at 184.
168. Among them, Hart, supra, note 82.
169. R. v. Cadwallader, [1966] 1 C.C.C. 380 (Sask. Q.B.). The case dealt with self-defence which has an objective component. R. v. Hill (1986), 25 C.C.C. (3d) 322 (S.C.C.) may have changed the objective standard in provocation to reflect the age and sex of the accused, but it has not been made a mandatory direction to a jury.
170. Wright v. The Queen, [1969] 3 C.C.C. 258 (S.C.C.). The case involved provocation. In England, the position is somewhat different. D.P.P. v. Camplin, [1978] 2 All E.R. 168 (H.L.) allowed such other characteristics as age, race and personal idiosyncrasies to be considered but excluded bad temper and drunkenness. On the other hand, in the recent case of Elliott v. C., [1983] 2 All E.R. 1005 (Div. Ct.), the Court, in applying an objective standard, struggled with but rejected taking into consideration the mental deficiency of a young girl.
prior personal knowledge upon which to rely in deciding to choose whether to drink.\textsuperscript{171}

Hart, among others,\textsuperscript{172} has attempted to modify the negligence standard:

(i) Did the accused fail to take those precautions which any reasonable man with normal capacities would in the circumstances have taken?

(ii) Could the accused, given his mental and physical capacities, have taken those precautions?\textsuperscript{173}

Hart's test is slightly more favourable to the accused than the usual negligence test because it leans more to subjectivism. He has allowed room for the accused's mental and physical attributes to provide excuses for not having exercised the care that a reasonable person would have taken. Nonetheless, the scope for the excuses is necessarily narrow when confined only to mental and physical capacities. Hart himself has recognized this:

It is of course quite arguable that no legal system could afford to individuate the conditions of liability so far as to discover and excuse all those who could not attain the average or reasonable man's standard. It may, in practice, be impossible to do more than excuse those who suffer from gross forms of incapacity, \textit{viz.} infants, or the insane, or those afflicted with recognizably inadequate powers of control over their movements, or who are clearly unable to detect or extricate themselves from situations in which their disability may work harm.\textsuperscript{174}

It is a conundrum for those who wish to use an objective standard but try to individualize it: if it is individualized too far, it becomes, in reality, a subjective test. On the other hand, to alleviate only for gross forms of incapacity renders culpable all those who through inexperience, cultural differences or mere ignorance have failed to meet a mythical standard of care.

\textsuperscript{171} An example noted by, \textit{inter alia}, Justice Dickson in \textit{Leary, supra}, note 2, at 46 and Justice Stephen in \textit{O'Connor, supra}, note 134, at 475. Such a result would be analogous to what occurred in \textit{R. v. Lynch} (1982), 69 C.C.C. (2d) 88 (Nfld. C.A.), where, due to a medical condition unknown to the accused, his blood alcohol level exceeded the legal limit after consumption of an amount of alcohol which, for a normal person, would not have resulted in that blood alcohol level. Despite his lack of intention or recklessness in exceeding the legal limit, the Court found him liable on the basis of his voluntary consumption of alcohol!

\textsuperscript{172} \textit{E.g.:} Toni Pickard, "Culpable Mistakes and Rape: Relating \textit{Mens Rea} to the Crime" (1980), 30 \textit{U. of T. L.J.} 75; George Fletcher, \textit{Rethinking Criminal Law} (Boston: Little, Brown and Company, 1978).

\textsuperscript{173} Hart, \textit{supra}, note 82, at 154. Hart speaks generally of the application to criminal law of negligence. Others have expressed similar views. For a summary, see: Stuart, \textit{supra}, note 89, at 184-88. Prior fault is usually advocated only in narrower circumstances such as incapacity or continuing transactions.

\textsuperscript{174} Hart, \textit{id.}, at 155.
Hall has given several reasons why negligence should not generally be extended into the criminal law. Among these are the following:

1. Criminal law is meant to cover only the most serious harm to social values and, because it involves punishment, should be restricted to only the most culpable forms of fault — that is, voluntary wrongdoing. Moreover, there is a large element of chance to inadvertent harm. Since negligence is not a condition voluntarily produced, to punish for negligence is to punish only because the actor had the capacity to take care, not for harm voluntarily caused.\(^{176}\)

2. In determining culpability in a criminal sense, we should not confuse "blame expressed in a judgment for damages and the blame implied in punishing a criminal."\(^{177}\)

3. It becomes an impossible function for a judge or jury to determine whether a particular accused had the competence to appreciate the risks in the specific situation.\(^{178}\) It is, first, an artificial test and, second, there may not be sufficient information available to the trier of fact to make the determination in any event.

4. There is no evidence nor has any reason been advanced to show why it is thought that a negligent person could have been more careful in the particular situation.\(^{179}\) In cases of thoughtlessness, for instance, the mere fact of thoughtlessness suggests that the person, by virtue of not thinking, could not have taken more care.

5. Closely tied to this is the notion of the utility of punishment. It is generally thought that punishment has a deterrent effect. Hall dealt with both specific and general deterrence of negligent behavior. Insofar as specific deterrence is concerned, he pointed out that the efficacy of deterrence even for intentional or reckless conduct has not been proven.\(^{180}\) As for general deterrence:

The utilitarian thesis of general deterrence rests on the assumption that newspaper reports that such persons have been punished will cause an otherwise careless person to be careful. But what does that mean? If it means that he will be aware of or alert to risks we deal with recklessness. If knowledge of possible penal liability does not make him sensitive to danger, inadvertency is not reduced.\(^{181}\)

\(^{175}\) Jerome Hall, Law, Social Science and Criminal Theory (Littleton, Colo.: Fred B. Rothman & Co., 1982).
\(^{176}\) Id., at 248, et. seq.
\(^{177}\) Id., at 255.
\(^{178}\) Id., at 257.
\(^{179}\) Id., at 260.
\(^{180}\) Id., at 262.
\(^{181}\) Id.
Specific and General Nonsense?

While these complaints were directed against the application generally of negligence to the criminal law, it is suggested that they are apposite to the present discussion. Negligent fault in becoming intoxicated is too severe a departure from the usual standard of culpability in criminal law to be warranted. Since there are few cases of involuntary intoxication,\textsuperscript{182} it is apparent that fault through negligence in practice verges on absolute liability. That is, once intoxication is shown, there is absolute liability for any general intent offence committed.\textsuperscript{183} Moreover, if subjective culpability is the usual criminal standard, there is no justification for a departure from this standard only for intoxicated or automatous offenders.

But is it any more justifiable to adopt a subjective test for fault in getting into an incapacitated condition? The concept of prior fault has been argued as a principled exception to the contemporaneity rule.\textsuperscript{184} But is it?

One problem with ascribing fault to one who chooses not to avoid incapacity or who fails to take precautions is to know what constitutes subjective fault. Normally, on a subjective test, there is a requirement that the particular accused have foresight. It is important to be able to pinpoint some time when there was this foresight in order to constitute fault. Otherwise, the entire prior fault doctrine could be justly criticized on the ground that it is far too uncertain and remote from the eventual criminal act to constitute \textit{mens rea}.\textsuperscript{185} The question of remoteness goes to the foreseeability, not just of the prohibited act, but also of the condition of incapacity. By definition, in cases where the intoxication defence is advanced, there is at least some doubt as to the accused's intention or awareness of the act being committed. Whatever "fault" the accused may have had could be far back in time to the later event.

For instance, in \textit{Majewski}, the accused began taking the intoxicants some two days before. Though there must be considerable doubt on the facts whether Majewski, at the time of the commission of the acts, lacked intent or foresight, there surely must be doubt about his foresight when

\textsuperscript{182} Hall has said they are virtually non-existent: Jerome Hall, \textit{General Principles of Criminal Law} (2nd. ed. Indianapolis: Bobbs-Merrill Company, Inc., 1960) at 539. He may have been overlooking the matter of ingestion of prescription drugs where the person lacks knowledge of the effects — the \textit{King} situation.

\textsuperscript{183} Colvin, \textit{supra}, note 7 states this to be the standard of liability.

\textsuperscript{184} Colvin, \textit{supra}, note 7; Dashwood, \textit{supra}, note 5; Ashworth, \textit{supra}, note 4; Mark T. Thornton, "Making Sense of \textit{Majewski}" (1980-81), 23 \textit{Crim. L.Q.} 464; Barlow, \textit{supra}, note 7; Sellers, \textit{supra}, note 6; Stannard, \textit{supra}, note 7, all generally take this line. Either explicitly (in the cases of Colvin, Ashworth, Thornton and Dashwood) or implicitly, the logical and philosophical support for the theory arises from Hart, \textit{supra}, note 82.

\textsuperscript{185} O'Connor, \textit{supra}, note 134, at 464.
he consumed the drugs and alcohol. This foresight extends both to foresight of the prohibited acts and to foresight of getting into a condition where he was not in control of his faculties.

In intoxication cases, there is a continuum of foreseeability. It begins on the one end with the situation described by Lord Denning in *Gallagher*. The actor intends an act but ingests alcohol or some other drug in order to fortify her courage to do the act. By accomplishing the act, she demonstrates that she still had the requisite intent at the time of doing it. It is therefore not an example of either intoxication or prior fault at all. Ordinary subjective principles would suffice to find her culpable.

If it were possible to have pre-existing *mens rea* and a later lack of intention or volition, to impose culpability might be warranted as an exception to the contemporaneity principle but that is a point I need not consider here (nor is it conceded). If so, however, it would presumably be justifiable on the basis that the accused did have the *mens rea* for the particular offence even if at a time earlier than the act was committed.

Close to that situation would be the one, for instance, where a person hypnotized herself or had someone else do so in order to plant a hypnotic suggestion to do the prohibited act. Any later claim by her that the act was involuntary or done without *mens rea* would be treated with skepticism by subjectivists and objectivists alike. Using subjective principles, she would be culpable on the basis of the *mens rea* at the time of being hypnotized; thereafter, her own hypnotic actions would be the acts of an “innocent” agent, herself. It is really no different from the situation where she hypnotized some innocent third party to do the same act or, indeed, used an innocent third party as her unwitting agent.

These are applications of the prior fault doctrine which are consistent with a subjective approach to *mens rea*. They are not unlike the situation in cases such as *Fagan*, *Thabo Meli*, and *Bernard*. Curiously, little has been written about the problems with the contemporaneity principle presented by those cases and almost none at all consider the intoxication rules in that light. Nonetheless, the cases are similar in the sense that

187. Smith and Hogan, *supra*, note 28, at 119-20 discuss this concept. Those authors are certainly subjectivists. See also: *R. v. Michael* (1840), 9 C. & P. 356.
192. Geoffrey Marston, “Contemporaneity of Act and Intention” (1970), 86 *L.Q.R.* 208, for instance, discusses continuing transactions as in the previous three notes but never mentions intoxication as an exception to contemporaneity.
the actor has set in motion a chain of events at a time when she had *mens rea* or had *mens rea* at some time during the chain of events. In either case, because subjectively she had *mens rea*, it was within her power to make a conscious choice whether or not to do the act. This is arguably a principled exception to the contemporaneity rule because there is still subjective *mens rea* and it is connected with the precise act that is criminalized.

One step down from this situation is the one where the accused knows of her propensity for violent or criminal behavior while intoxicated yet ingests intoxicants. Justice Dickson in *Leary*¹¹³ and, in *O’Connor*, Justices Stephen¹¹⁴ and Aickin¹¹⁵ all considered that subjective recklessness could be found in such a situation. It would require a finding that the accused had foresight of the risk of committing the particular offence charged but culpability could be found on ordinary subjective principles. Nonetheless, even this situation would present some difficulty. It is not implausible to imagine an accused who knows she is likely to commit offences when intoxicated but still does not foresee the particular act. First of all, even with the known propensity, there may not be any great probability that, on this particular occasion, she would commit the offence. Second, it would be unlikely that she could even foresee the risk of any particular offence. At bottom, notwithstanding these potential difficulties, it is possible to apply subjectivism and the prior fault doctrine together in order to find culpability in appropriate circumstances.

Further still down the line is where the accused has generalized knowledge of the propensity of intoxicated individuals to commit a criminal act. The particular accused may never before have acted in such a manner but it might be plausible to say that her general knowledge is sufficient to constitute awareness. The first time drinker must fall into this category. However, with the exception of criminal negligence cases,¹¹⁶ this sort of standard has not been applied to Canada. In this country, positive awareness of the specific risk is required to constitute recklessness.¹¹⁷ Thus, this approach does not answer the problem that the vast majority of sodden people do not commit criminal offences when intoxicated or the question of foreseeability of the particular offence charged. On a subjective test, application of the prior fault theory in these circumstances should not be warranted.

¹¹³ *Leary*, supra, note 2, at 46.
¹¹⁴ *O’Connor*, supra, note 134, at 477.
¹¹⁵ Id., at 492-93.
¹¹⁶ This is an explanation advanced for such cases by Eric Colvin, “Recklessness and Criminal Negligence” (1982), 32 U. of T. L.J. 345.
¹¹⁷ *Supra*, note 118.
If that is so, what of the person who has consumed alcohol on some previous occasions without incident but, on this occasion, has after consuming a small or moderate amount, become pathologically intoxicated and committed the \textit{actus reus} of an offence? Such cases are rare but known to medical science.\textsuperscript{198} In \textit{O'Connor}, Chief Justice Barwick cited the example of a diner who might not have noticed the frequency with which the waiter topped up his glass\textsuperscript{199} as another example of where the resulting state of intoxication was inadvertent. Can it be said that these accused would have foreseen getting into such a state or committing any offence, much less the commission of the particular offence?

Nor is it feasible to attempt to draw a distinction based on the sort of drug being used. This distinction was made in \textit{Hardie} and by Justice Ritchie in \textit{King} but it is difficult to maintain. Drugs have rather different effects upon different people and upon the same person on different occasions. Much depends upon the setting and the mood of the drug user. In addition, there is the added complication of trying to determine the combined effects of multiple drugs. Moreover, attitudes towards drugs vary widely. Some drugs would be considered dangerous or the taking of them reckless by some people where others would consider such use benign. For instance, such soft drugs as marijuana have many adherents. It would be stretching matters to suggest that there is a consensus that marijuana is dangerous. In the case of prescription drugs, as \textit{Hardie} demonstrates, many of these drugs are in common use but the dividing line between proper use and misuse is not at all clear. Valium is a commonly used drug. Why should it be treated differently from alcohol and some other drugs? Would it be feasible to decide culpability upon an accused’s generalized knowledge of a particular substance when there is no consensual generalized knowledge? In short, there are simply too many variables to attempt to ascribe fault by differentiating between types of drugs.

The present law presents another problem. It is conceivable that the incapacity might have multiple causes.\textsuperscript{200} For instance, a person might have received a concussive injury, taken prescription drugs, drunk

\textsuperscript{198} See, e.g.: Dr. Donald Blair, “The Medico-Legal Problems of Pathological Alcoholic Intoxication: An Illustrative Case” (1969), \textit{9 Medicine Science and the Law} 94 for a description of just such a case. The accused had consumed two double whiskeys and two single whiskeys over a five hour period.

\textsuperscript{199} \textit{O'Connor}, supra, note 134, at 456.

\textsuperscript{200} \textit{R. v. Cullum} (1973), 14 C.C.C. (2d) 294 (Ont. Co.Ct.) where the automatous state was caused by a combination of alcohol and psychological stress is an example of automatism with more than one cause. It is unlikely that Cullum would now be acquitted in view of the decision in \textit{Rabey}.
alcohol and been subjected to a psychological blow, all of which contributed in some way to her resulting automatous condition. The different tests for culpability make the law extremely perplexing. In the example, if the primary cause of the automatous condition is the self-induced state of intoxication, it will only be a defence if the offence is one of specific intent. If the blow on the head was the primary cause, an acquittal will lie no matter the type of offence. In the case of the prescription drugs, there must be a further inquiry into whether she was properly warned of the effects of the drugs, probably in isolation and in combination with alcohol. Assuming no fault or negligence in respect of following doctor's orders and in the circumstances of ingestion, culpability would not lie for either a specific or general intent offence.

For the psychological blow, much will depend upon the nature of the blow, that is, whether it was a blow beyond that expected from the ordinary stresses of life and, possibly, whether the actor was without fault or negligence in exposing herself to the psychological blow.

The legal position is therefore complicated enough so long as these causes are distinct. In combination, they present an almost impossible task for culpability theory to rationally handle. Is it rational to have to consider three different defences when what is at issue is a lack of either voluntariness or mens rea? Moreover, even if there is a way out of the confusion, why should the law stop where it does? Why, for instance, should there not be an inquiry into the cause of a concussive blow to determine whether the accused was at fault in getting herself into that situation? If she was aggressive toward another so that a fight resulted in which she received the head injury, how is she less culpable than a person who meekly drank alcohol for the first time in her life?

In the case of the psychological blow, if room is left in the law for an extraordinary blow to allow the defence of automatism, is there or should there be an inquiry into whether or not the accused contributed to the blow by her own actions? For instance, if an accused had driven a car recklessly or even negligently, resulting in an accident in which her child was killed, would she be liable for any resulting criminal act committed while in an automatous state brought on by the shock of her child's

203. King, supra, note 161.
204. King, id., dealt with a general intent offence.
205. Rabey, supra, note 165.
206. Id., at 260. Justice Dickson, in dissent, stated that an automatous condition would only exculpate if the accused was without fault or negligence. It is not clear if he would apply this to psychological blow automatism. It is also not clear if the majority would agree.
death? This is not clear from *Rabey*. If such a test is not required, there is an inconsistency in the law in requiring an absence of fault for the ingestion of drugs but not for other forms of incapacity.

In short, the prior fault doctrine is applied in a haphazard and illogical way. It does not cover all incapacity in the same way and it does not apply the same standard of fault. Furthermore, it does not cover all offences since a self-induced incapacity will still exculpate for a specific intent offence. The argument that exculpation for specific intent offences is warranted because some are ulterior intent offences in which there is conduct in process rather than conduct completed, 207 does not meet this objection because of the fact that not all specific intent offences are of ulterior intent. 208 Therefore, while it is possibly a principled exception to the contemporaneity rule to apply prior fault where the actor had the requisite *mens rea* at some point in the chain of events, the other situations on the continuum do not fall into this category.

Prior fault extends the concepts of *actus reus* and *mens rea* to impermissible limits. With respect to the first, the inquiry into the act extends at least to the point when the accused took the first actual step towards incapacity and perhaps beforehand to some earlier circumstances leading towards the first step. The first-time drinker who gets drunk on very little alcohol might be at fault, not in taking the first drink which led to the incapacity, but in even being in the company of more experienced drinkers, knowing that drinking was a likelihood. Insofar as *mens rea* is concerned, the inquiry into it is expanded into the accused’s entire character at worst and, even at best, into her prior experience and, likely, her general knowledge of the human condition. The law is therefore extremely uncertain in its application, if not its meaning, and far too complex to be effective.

The proposition that *mens rea* for basic or general offences is supplied by the voluntary ingestion of intoxicating substances has been thought of as a completely new variety of *mens rea*. 209 This theory is bound up with the prior fault doctrine because it involves equating the wrongfulness of incapacitating oneself with the actual *mens rea* required for a general intent offence. 210 It is, however, a throwback to the older view of *mens rea* held to in *Prince* 211 and by Stroud 212 in which the mental attitude of

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208. *E.g.*, Murder, possession of stolen property. See previous discussion in Section B.
210. Sellers, *id.*, at 257, especially in note 76, makes this point.
211. *Prince, supra*, note 152.
the actor is not referrable to the eventual prohibited act. Instead of requiring proof that the accused adverted to the particular act, all that is required is that the accused be shown to have known that her act was illegal or morally wrong.\textsuperscript{213} In other words, the accused may never have meant to do the criminal act even though, beforehand, she may have known that it was illegal or immoral. Note how close this is to the second branch of the Hartian test\textsuperscript{214} for there is a need to inquire into the ability of the accused to assess the illegality or immorality of her act. It is, in other words, simply a test of the capacity of the accused to conform to the law, rather than an inquiry into her actual state of mind.

This test, in effect, equates morality with intent. Thus, one who is "immoral" in consuming an intoxicating substance is deemed to have the requisite intent. As Stannard rightly pointed out, this "new" form of \textit{mens rea} is no \textit{mens rea} at all.\textsuperscript{215} The end result is a new form of \textit{mens rea} which is \textit{deemed} rather than existing, and a virtual requirement that an accused demonstrate good character, that is, that she knew what was moral and legal and attempted to comply with those standards. All of this is "in the air"\textsuperscript{216} in the sense that it is not connected with the eventual act in any direct way. That is to say, the operating mind of the accused is not in any way connected with the doing of the act.

The danger of this was highlighted by Justice Murphy in \textit{O'Connor}:

If \textit{Majewski} were followed, so that intoxication could be used to establish guilt in the absence of intent, evidence of intoxication must be admissible and available. Indeed, one would expect the prosecution to lead the evidence, otherwise it may be left with an acquittal based on no intent (because that is the fact) and no intoxication because evidence of it was not introduced.\textsuperscript{217}

In \textit{Starratt},\textsuperscript{218} a police officer was acquitted of assaulting a person because he was able to shed doubt that it was his intention to apply force when he swung his handcuffs. But, if a drunken person were charged with the same act, Justice Murphy's concern could become reality. Evidence of intoxication would effectively prevent the accused from arguing that the Crown had not proven the requisite intent. This, I submit, is unacceptably unfair to an accused.

\textsuperscript{213} Stannard, \textit{supra}, note 7, at 297.
\textsuperscript{214} Hart, \textit{supra}, note 173.
\textsuperscript{215} Stannard, \textit{supra}, note 7, at 300.
\textsuperscript{216} Leary, \textit{supra}, note 2, at 46.
\textsuperscript{218} \textit{Starratt}, \textit{supra}, note 124.
The alternative would be to do as pointed out by Justice Dickson in *Leary*\(^{219}\) ask the judge or jury to ignore the evidence of intoxication and attempt to assess the state of the mind absent that factor. This is, of course, a complete fiction and one almost impossible to apply in practice. This approach would, in fact, ignore the "fault" of becoming intoxicated, presumably because it is "fault", and hence does not even use the prior fault doctrine except as a way of excluding evidence.

To summarize, the prior fault doctrine constitutes a violation of the rule of contemporaneity. That, in itself, might be defensible, provided that it is done in a principled, consistent way. Prior fault as it is usually applied in cases of self-induced intoxication or of automatism through some fault of the accused does not meet these requirements. The result is a disjointed, incoherent approach to criminal culpability.

IV. *Deterrence*

The previous discussion leads naturally into further examination of the broader aims of the criminal law and whether these are met by the present intoxication rules. One of the principal aims of criminal law is to deter certain types of conduct.\(^{220}\) The deterrence argument, in relation to the debate about the intoxication defence, is a bridge between strict logic and policy. On the one hand, the theory of deterrence has behind it certain logical premises, the chief one being the ability to choose to act. On the other hand, there are other aims sought to be achieved by the criminal law — retribution, rehabilitation and protection of the public being among them. Thus, to the extent that these aims may contradict one another, and in the weight accorded each in arranging the criminal law, policy prevails.

The deterrent aim of the criminal law is founded on the premise that individuals can choose whether to act or not. This section is not meant to stray into a discussion of free will versus determinism or, indeed, any broad philosophical debate about the merits or demerits of deterrence as a goal. It is, however, meant to deal with the argument which might be advanced that the present intoxication rules have, or are capable of having, the effect of deterring the commission of general or basic intent offences.

At the outset, a distinction must be drawn between the two types of deterrence, individual (or specific) and public (or general). The former seeks to inhibit the particular individual from repeating the prohibited conduct. The latter is directed more generally at society. By punishing the

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220. N. Morris, "Impediments to Legal Reform" (1966), 33 U. Chi. L. Rev. 627, at 631.
particular individual for a certain type of conduct, it is hoped that other persons will be deterred from acting in that way. The discussion immediately following deals first with specific deterrence.

It is important at the outset to distinguish what is sought to be deterred by the present intoxication rules. Since, by definition, there is a lack of the requisite mental element at the time of the commission of a general intent offence (the intoxication rules would not otherwise be at issue), it would seem obvious that the criminal law does not really seek to prevent the commission of the actual offence. This point has been made by Justice Dickson in *Leary*\(^{221}\) and by Justice Stephen in *O'Connor*.\(^{222}\) In other words, the fact of intoxication to the extent of lacking the requisite *mens rea* militates heavily against that person being deterred from committing the offence. The only exceptions might be the situation outlined in *Gallagher*\(^{223}\) (intoxication superimposed on pre-existing *mens rea*) or where the accused has previously demonstrated a known propensity for criminal behavior while intoxicated.

As a result, any deterrent effect of the present law must relate to deterring that degree of intoxication or, perhaps, intoxication in general.\(^{224}\) This at once presents difficulty. First of all, there is no good reason why deterrence should not be attempted for specific intent offences as well. Since, by means of the prior fault doctrine, we are dealing with attributed intent, why not attribute specific (or ulterior) intent as well?

The concept of deterrence is based in large part on the certainty of the law and of punishment for wrongful conduct.\(^{225}\) Since intoxication is what is punished in respect of a general intent offence and since intoxication is not otherwise an offence, the certainty principle is violated by the present intoxication rules.

The second branch of certainty, that of punishment, is also not achieved by the present rules. Only where the intoxication has led ultimately to the commission of a general intent offence is the actor liable to be punished. Other episodes of extreme intoxication where an *actus reus* was not committed do not give rise to punishment. These difficulties must have contributed to Justice Dickson's description of the present law

221. *Leary*, supra, note 2, at 45.
224. Though this broader goal would be open to the objection that Parliament ought simply to make intoxication *simpliciter* an offence.
225. C. Beccaria, “On Crimes and Punishments” in *Theories of Punishment*, S. E. Grupp, (Bloomington, Indiana: University Press, 1971) at 122. Although Beccaria's theory of deterrence has been greatly modified since the 18th century when he devised it, it is submitted that certainty of the law and of punishment are still prerequisites of effective deterrence.
as "both uncertain and inconstant."\textsuperscript{226} This renders any attempt at specific deterrence a dismal failure.

Hart's criticism of Jeremy Bentham was that, while specific deterrence cannot be effective in such circumstances, nonetheless there can be effective general deterrence because normal people will become more careful.\textsuperscript{227} There is a gross contradiction of principle involved here. Our criminal law system is founded upon the tenet that an accused has the ability to choose to act or not. Even those propounding negligence as culpable acknowledge this.\textsuperscript{228} Yet, negligence, by definition, is inadvertence, hence, is not a condition voluntarily produced.\textsuperscript{229} It therefore is a negation of choice.

The counter-argument is that people can and do choose whether to take care. But take the situation where a person negligently knocks a vase from a table, causing it to break. Would punishing such negligence necessarily lead to any greater care? If the passage of such a law did have that effect, then it would have caused the careful person to have adverted to the risk. Then any resulting damage is reckless rather than negligent damage. On the other hand, if passing such a law did not make the person more careful, it would not have been successful in its aim. It has not been demonstrated why it is thought that a negligent person could have been careful.\textsuperscript{230} If the counter-argument is that the negligence standard in tort law has or can have a deterrent effect, the rejoinder is that a comparison with tort law is not valid since different considerations apply. While deterrence may be a factor in tort liability, the overriding concern is to compensate the victim of a tort. Criminal law has no such paramount concern.

Indeed, the efficacy of the criminal law would be jeopardized if the threshold of culpability were lowered so as to generally encompass negligence. Criminal offences are largely those which the majority of the population consider morally as well as legally wrong. In contrast, most strict and absolute liability offences, while meant to protect the public welfare, are usually considered to be legal wrongs but with little or no moral stigma attached to their commission. (There is bound to be some

\textsuperscript{226} Leary, supra, note 2, at 47.
\textsuperscript{227} Hart, supra, note 82, at 19. Jeremy Bentham, one of the early propounders of deterrent theory, thought that the criminal law could not hope to deter offenders who were insane, children, intoxicated, under duress or operating out of necessity. Hart accepted this point but maintained that there could still be a general deterrent effect.
\textsuperscript{228} Hart, \textit{id.}, at 154, for example, implicitly recognizes that choice is involved in the taking of reasonable precautions.
\textsuperscript{229} Jerome Hall, \textit{supra}, note 175, at 253, \textit{et seq.} suggests that to find negligence as a voluntarily produced condition would involve inquiry into the actor's entire past history.
\textsuperscript{230} \textit{Id.}, at 262.
disagreement with this latter statement, particularly for offences such as pollution offences; nevertheless, in general, it seems fair to say that there is greater moral stigma attached to true criminal offences than to most public welfare offences.) If we punished for the negligent commission of criminal acts, we would run the risk of reducing or removing this moral stigma, thus lessening the deterrent effect of the law. As well, punishing inadvertence could lead to a general disrespect for the law because of its resulting unfairness. Again, this could result in the disintegration of the deterrent effect of the criminal law. The long and the short of it is that the criminal law and its concommitant severe penalties must be reserved for the most severe transgressions against societal values. The most serious conduct is advertent conduct. Hart has suggested that the individual has some claim to security and well-being against society’s right to punish for a breach of the law.231 Surely that claim is best protected by punishing only for the highest degrees of culpability — intention and recklessness.

There is nevertheless some validity to Hart’s claim for deterrence but it is dependent, at least in part, upon public knowledge that engaging in a particular sort of activity might lead to punishment. In other words, the law (and punishment flowing out of penal prohibitions), to act as a deterrent must have a moralizing and educative effect upon the populace.232 But, if intoxication is not normally punishable, either as an offence itself or as a culpable state of mind, it is difficult to see how the public can develop an attitude against intoxication. Only if intoxication supplied the requisite mens rea for any offence, whether general or specific intent, could there be any chance of deterrence being accomplished. Hart himself has elsewhere stated:

... there is very little evidence to support the idea that morality is best taught by fear of legal punishment.233

After all, what we are really talking about with the intoxication rules is the instilling in the public mind of a moral stance against intoxication. This is not to denigrate the notion of public deterrence or even Hart’s conception of it. It is instead to illustrate the impossibility of achieving

231. Hart, supra, note 82, at 21-22.
232. G. Hawkins, “Punishment and Deterrence: The Educative, Moralizing and Habituative Effects” (1969), 2 Wisc. L. Rev. 550. A practical illustration might be the various offences under our Criminal Code prohibiting drinking and driving. Though the prohibitions have been in effect for some years, it has taken the passage of time for deterrence of such conduct even to begin to take place. Arguably, what deterrent effect now being achieved can be attributed, in part, to the moralizing and educative process that has occurred.
233. H. L. A. Hart, Law, Liberty and Morality (London: Oxford University Press, 1963) at 58. The passage deals with fear of punishment which is one of the premises upon which the deterrent aim is based.
deterrence of intoxicated conduct through the mechanism of the specific and general intent dichotomy.

It might be arguable to try to accomplish deterrence by refusing intoxication as a defence altogether. There are, however, other compelling reasons why this should not be done. In the first place, it would be open to the same charge of uncertainty since the deterrence would still be directed against intoxication rather the offence itself. More important, it would constitute a gross exception to the subjective approach to \textit{mens rea} that our criminal law system has, in most other respects, adopted. The same arguments mounted earlier would apply — inconsistency, violations of contemporaneity, etc. It would, however, be more consistent than under the present dichotomy.

I will, in the last section of this article, give reasons why we ought to advance towards a more subjective approach in cases of intoxication. At this time, let it be noted that there is merit in seeking to deter the commission of offences while intoxicated. What is at issue is whether the present restrictions on the intoxication defence have or are capable of having that effect. Since there is considerable doubt as to the efficacy of deterrence as a justifying aim of the criminal law,\footnote{234. Hart, \textit{supra}, note 82, uses the term \textquote{justifying aim}.} \footnote{235. \textit{Majewski, supra}, note 3, at 155-59. Gold, \textit{supra}, note 6, at 65, describes it as the most honest judgment. Martin, J. A. in \textit{Moreau, supra}, note 4, at 230, \textit{et seq.}, seems to ascribe to this view in holding that the specific-general intent dichotomy is based on policy.} it is necessary to employ means that maximize the chances of deterrence being accomplished. This, I submit, is not achieved under the present law.

V. \textit{Policy}

At the beginning, I mentioned that the arguments in favour of the present law were founded on the twin heads of logic and policy. Deterrence has been seen as the connecting link between these two. In addition, different reasons have been advanced for penalizing certain types of conduct. Aside from attempting to deter such behaviour, other reasons include protection of the public from intoxicated offenders, retribution against them, the establishment and maintenance of order and the preservation of individual liberties by protecting them from attack by such offenders. I do not propose to debate whether these are valid policy goals. What will be examined is whether the present law does meet or is capable of meeting those goals.

Perhaps the most intellectually honest judgment in \textit{Majewski} was that of Lord Salmon.\footnote{235.} He stated his position quite succinctly:

\begin{quote}
... I accept that there is a degree of illogicality in the rule that intoxication may excuse or expunge one type of intention and not another. This
\end{quote}
illogicality is, however, acceptable to me because the benevolent part of
the rule removes undue harshness without imperilling safety and the
stricter part of the rule works without imperilling justice. It would be just
as ridiculous to remove the benevolent part of the rule (which no one
suggests) as it would be to adopt the alternative of removing the stricter
part of the rule for the sake of preserving absolute logic. Absolute logic in
human affairs is an uncertain guide and a very dangerous master. The law
is primarily concerned with human affairs. I believe that the main object
of our legal system is to preserve individual liberty. One important aspect
of individual liberty is protection against physical violence.236

The context suggests that what worried Lord Salmon the most was the
thought of a person like Lipman237 going scot-free should the law be
completely logical.

There is, of course, legitimate concern that an automatous killer will be
let loose if ordinary subjective principles are applied. However, despite
the prevalence of intoxicated conduct, the intoxication defence is seldom
raised and is even less often successful. This statement, it must be
admitted, is based largely upon anecdotal evidence rather than hard data.
Little data, unfortunately, exist to show the frequency with which the
defence is advanced or is successful. In one study, however, the
conclusion was that the defence was argued in only 11 out of 510 cases
and was clearly successful in just one case.238

The available anecdotal evidence also suggests that the fear of
dangerous persons being let loose is greatly exaggerated. The worst fears
of O'Connor have not materialized:

... the decision in O'Connor's case, far from opening any floodgates has
at most permitted an occasional drip to escape from the tap.239

Judges at both the Full Court of Victoria level240 and the High Court241
in the O'Connor case made this point. Their views ought to carry
considerable weight because they drew on the long experience in the
State of Victoria where intent had not been separated into the specific and
general categories for many years.242 There was nothing to suggest that

236. *Id.*, at 158.
237. In *R. v. Lipman*, [1970] 1 Q.B. 152, the accused was found guilty of manslaughter on the
application of the present intoxication rules. He had arguably acted involuntarily and without
*mens rea* when he caused the death of a woman after ingesting LSD. He was under the illusion
that he was fighting off snakes. His condition provided a defence to the specific intent offence,
murder, but not to the general intent offence, manslaughter.
One should be hesitant, of course, to rely too much on such statistics which are based on
an admittedly small sample.
239. *Id.*, at 277.
242. The specific-general intent distinction had been ignored in Victoria since well before
the state of the law in Victoria had contributed to any outbreak of intoxicated crime or increased danger to the public.

Much of the fear can be attributed to a misunderstanding of what the intoxication defence is all about. It clearly only comes into play when there is a doubt about the requisite intent or voluntariness. Yet, judges and likely the public persist in the concern that intoxication alone will suffice to provide a defence. From that position, it is then reasoned that steps must be taken to limit the defence. This very thing happened in Majewski. It would be most plausible to conclude, on the facts, that Majewski was able to and did form the intent to do his acts. He did, after all, seem to act in a purposeful intentional way. Therefore, ordinary subjective principles should have been sufficient to convict him.243

In addition, there seems to be, on the part of appeal judges, a fear that juries will too readily accept a spurious defence of intoxication. Lord Elwyn-Jones, in Majewski, demonstrated this fear:

... I do not think that it is enough to say . . . that we can rely on the good sense of the jury or of magistrates to ensure that the guilty are convicted.244

Yet, as had been pointed out,245 our legal system relies upon juries (and judges and magistrates, sometimes even lay magistrates) to decide all manner of difficult questions. There is absolutely no reason why we should single out intoxication as being too difficult for such people to decide. Indeed, this is all the more so when, as has been so aptly stated:

The inferences to be drawn from intoxication are not all one way: evidence of intoxication may result in absence of proof beyond reasonable doubt of mens rea, or in a more ready acceptance that mens rea exists on the supposition that intoxication reduces inhibitions.246

It is, in short, a misplaced and perhaps elitist concern that the triers of fact will not be able to distinguish the meritorious defence from the spurious. Moreover, the potential malingerer puts herself at a disadvantage because recollection of any of the events might adversely affect her credibility while an inability to recall means she cannot

243. Glanville Williams, supra, note 6, at 658, argues, convincingly, that the House of Lords could simply have dismissed Majewski's appeal by holding that the trial judge was in error not to put intoxication to the jury but applying the proviso on the basis that there was no miscarriage of justice. Orchard, supra, note 6, at 137, makes the same point.
244. Majewski, supra, note 3, at 151.
245. Orchard, supra, note 6, at 137; Beck and Parker, supra, note 88, at 607; Glanville Williams, Criminal Law The General Part (2nd. ed. London: Stevens & Sons Limited. 1961) at 565.
challenge the evidence against her.\textsuperscript{247} Finally, even in a case of genuine intoxication to the point of negating the mental element, an accused might have partial recall of the events, yet not be malingering;\textsuperscript{248} such a person runs the grave risk of being disbelieved simply because she remembers some of the events. Thus, the cards are stacked against the successful intoxication defence.

The twin fears that someone will go unpunished for having committed a criminal offence and that juries will be manipulated by unscrupulous defendants are, in themselves, over-emphasized. It is true that the rare case like \textit{Lipman} illustrates some potential danger to the public but the infrequency of such cases is sufficient to make the point.\textsuperscript{249} At other points in our criminal justice system, we are willing to risk freeing guilty people in favour of protecting civil liberties and in fairness to accused persons. Why should we not take that risk in connection with the intoxication defence, especially when the risk is minute? Moreover,

\ldots a lack of confidence in the ability of a tribunal correctly to estimate evidence of states of mind and the like can never be sufficient ground for excluding from inquiry the most fundamental element in a rational and human criminal code.\textsuperscript{250}

Even accepting that it is good policy to attempt to protect the public by restricting the intoxication defence, there are some serious objections to the present law. First, why should the law not protect the public from the commission of specific intent offences by intoxicated persons?\textsuperscript{251} Furthermore, if retribution is an end to be sought, there is arguably a greater need to punish those committing specific intent offences while intoxicated since such offences are, generally speaking, more serious than are general intent offences: murder is more serious than manslaughter, attempted murder more serious than assault.

At the beginning of this article, I indicated the discussion would proceed on the footing that mistakes are accorded the same treatment as simple intoxication, that is, a drunken mistake would provide no defence to a general intent crime. But, if an argument can be made that mistakes induced by or bound up with intoxication might still be a defence to a

\begin{itemize}
\item \textsuperscript{247} Schabas, \textit{supra}, note 6, at 153.
\item \textsuperscript{248} Kenneth G. Gray, "Alcoholic Amnesia" (1958-59) 1 \textit{Crim. L.Q.} 483, at 484. Gray was both a lawyer and a psychiatrist. This opinion was based on clinical experiments.
\item \textsuperscript{249} I must confess to having acted as counsel on such a case myself. The accused was acquitted of murder but convicted of manslaughter. I am convinced that it was a true case of automatism caused by intoxication. Even in \textit{Lipman}, a jury might well have concluded that the accused had at least minimal awareness of what he did inasmuch as he fled the country.
\item \textsuperscript{250} \textit{Thomas v. R.} (1937), 59 C.L.R. 279, at 309 (Aust. H.C.), \textit{per} Dixon, J.
\item \textsuperscript{251} A point made by Barwick, C. J. in \textit{O'Connor, supra}, note 134, at 465.
\end{itemize}
general intent offence, there is a further damning blow to the present intoxication rules. Such a position, if it has some plausibility, represents a striking inconsistency in both logic and policy. It should be apparent that a complete lack of intent is likely closer to an incapacity to form intent, that is, probably akin to automatism, while a drunken mistake might have resulted from a much lesser degree of intoxication. There would seem to be more danger to the public from a person so intoxicated as not to be in conscious control of her limbs than from one able to exercise some cognition, albeit impaired. Yet, there is at least doubt that the law treats the threat as a more serious one.

Finally, it can be argued that the specific-general intent dichotomy has been a delaying action by the judiciary. In other words, judges have devised the dichotomy largely because of the policy influence that intoxication could be equated with moral blameworthiness and, hence, mens rea. Had they not done so, it is quite conceivable that legislatures would have filled any resulting vacuum with appropriate legislation. Usurping the legislative function has therefore had the double effect of “adoption of a legal fiction which cuts across fundamental criminal law precepts” and of delaying consideration by legislatures of the problem represented by persons who, acting involuntarily or without mens rea, may nonetheless represent a danger to the public.

VI. Conclusion

There is, in the result, a minor tragedy for criminal culpability theory. The specific and general intent division is fraught with inconsistencies and is illogical. It does not meet these charges with any policy considerations other than those based on emotive responses. The law could have gone another way as it has in Australia for some years without serious incident. To apply subjective principles would not necessarily result in anarchy and disrespect for the criminal law. It is undeniably true that an automatous homicide should not go unchecked, unpunished or untreated. But it can be done in another way — through the passage of appropriate legislation to deal with dangerous intoxication or other incapacity. That is a topic I shall deal with in a later article.

However, let me conclude with a short recitation of the advantages of a subjectivist approach. First, it has the advantage of limiting the scope of the criminal law to situations where the actor was sufficiently culpable. Intention and recklessness are acceptable states of culpability for

252. Supra, note 4 and surrounding text.
254. Leary, supra, note 2, at 47, per Dickson, J.
criminality. Negligence is not, because it is both unfair and non-utilitarian.\textsuperscript{255} It may have its place in tort law, where the concern is to compensate the victim of the tortious act. It may be justifiable for strict liability offences since these are matters of public welfare but are not criminal in the real sense of being morally repugnant to most people. Negligence may even, in a very limited way, be justified for certain types of criminal offences where the activity is dangerous to the public but may take place without conscious thought because of its repetitive nature.\textsuperscript{256} Certain driving offences might fall into this category but, even there, if that were to happen, the level of punishment would have to be lowered to compensate for the lesser culpability. But negligence has no place generally in the criminal law and certainly not, where intoxication is concerned, as an exceptional state of culpability not related at all to the prohibited act.

Second, while there are apt always to be problems in determining the state of mind of an accused person, the subjective approach is by far the simplest. Those who think that it would be easier to find the state of mind of a mythical reasonable person or even of the actual accused absent the factor of intoxication are only deluding themselves.

If one of the purposes of the criminal law is to attempt to deter crime, the chances of doing so are maximized when the law is simple, certain and known to the public. That the present intoxication rules can satisfy any of these criteria is unlikely. When lawyers and judges are basically reduced to memorizing lists of those offences which have been categorized, the law is not simple. When it is only discovered that an offence is of either category once it has been so determined judicially, the law is not known. When some offences can be slotted into either category\textsuperscript{257} the law is not certain.

This is not to suggest that subjectivism has all the answers. Principled exceptions to contemporaneity, for example, may have their place. But this should be where the actor did possess the requisite \textit{mens rea} at some time during the course of the events in question.\textsuperscript{258} It should not be used to impose a type of \textit{mens rea} that is incompatible with the more generally accepted form. If the criminal law is to have a theory of \textit{mens rea}, it must

\textsuperscript{255} See note 227 and surrounding text.
\textsuperscript{256} Stuart, \textit{supra}, note 89, at 194-95, makes this concession to a negligent standard.
\textsuperscript{258} As, for instance, in \textit{Fagan, supra}, note 189; \textit{Thabo Meli, supra}, note 190; and \textit{Bernard, supra}, note 191.
be one that is consistently applied. It is simply not appropriate to have a mixture of *mens rea* theories.

It must be conceded that the subjective approach also does not have a way of protecting the public from or deterring dangerous intoxication. That is where a dangerous intoxication offence is required. On balance, however, the subjective determination of voluntariness and *mens rea* best, though imperfectly, achieves most of the ends sought to be achieved.

There is another advantage in restoring subjective principles. It might assist the criminal law in getting away from the absurd compartmentalization of defences that seems presently to pervade it. There is no sound reason, for example, to slot defences into the categories of intoxication or mistake — each is a denial of *mens rea*. Likewise, automatism is a denial of voluntariness. If the law were to rid itself of the prior fault doctrine and, instead, simply determine whether or not the act in question was done consciously and voluntarily, it can easily be seen that automatism and intoxication would be indistinguishable as defences where voluntariness was in doubt.

Insanity, that is to say, diseases of the mind, could also be considered on the questions of *mens rea* and voluntariness. This would leave aside the larger question of responsibility on the part of one suffering from such a disease. But this approach would have the advantage of determining, in fact, whether that person acted voluntarily and with *mens rea*. In addition, in combination with the passage of legislation dealing with other incapacitated offenders, it would assist in removing the rigid lines separating automatism, insanity and intoxication.

A purely subjective approach would do away with the confusion, in intoxication cases, between the issue of capacity to form intent and actual intent. The actual state of mind of the accused would be the sole issue.\(^{259}\) In this respect, the issue of capacity to form intent would still, of course, be important in determining voluntariness. But it would result in a simpler test for the mental element, rather than, as is often the case now, having a test of capacity and then, once capacity is proven, deciding the issue of actual intent. Again, the result would be greater simplicity and certainty in the law.

What would then be required would be some way for the criminal law to protect the public, sometimes to treat the “offender”, and, if possible, to deter people from getting themselves into potentially dangerous conditions. This could be better accomplished by legislation.

The subjective approach is not a panacea. But it would enhance the criminal law by streamlining it considerably. Its adoption would also afford an opportunity for the criminal justice system to assess the need for a dangerous intoxication offence. That is not, however, to suggest that consideration should not be given now to such an offence in order to meet both real and perceived concerns. It is simply to suggest that, if the Australian experience is indicative, the scope for such an offence will be very small.