The Law Commission

Consultation Paper No. 127

Intoxication and Criminal Liability

HMSO

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INTOXICATION AND CRIMINAL LIABILITY
CONTENTS

Abbreviations

Ashworth	Ashworth, *Principles of Criminal Law* (1991).
Butler Report/ Butler	Report of the Committee on Mentally Abnormal Offenders (Chairman: Lord Butler of Saffron Walden) (1975), Cmnd. 6244.
Caldwell	*Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341.
CLRC	Criminal Law Revision Committee.
Draft Code	Law Commission, Draft Bill in "A Criminal Code for England and Wales: volume 1, Report and Criminal Code Bill", Law Com. No. 177 (1989).
Code Report	Law Commission, "A Criminal Code for England and Wales", volume 1, "Report and Draft Code Bill" (except the draft Bill itself) and volume 2, "Commentary on Draft Criminal Code Bill", Law Com. No. 177 (1989).
LCCP 122	Law Commission, "Legislating the Criminal Code: Offences against the Person and General Principles", Consultation Paper No. 122 (1992).
Majewski	*Director of Public Prosecutions v Majewski* [1977] AC 443.
MPC	Model Penal Code of the American Law Institute.
Smith & Hogan	Smith and Hogan, *Criminal Law,* 7th ed. (1992).

PART I

THE NATURE OF THIS INQUIRY

A. INTRODUCTION

1.1 This Consultation Paper is concerned with the effect on criminal liability of the intoxication of the defendant by alcohol or drugs. The subject is controversial, because it involves a direct clash between basic principles of liability that are widely regarded as being of central importance in the criminal law; and arguments of prudence and social policy that have been thought, in the particular case of harm or damage caused by an intoxicated person, to demand a departure from those principles.

1.2 The principle of liability that comes into issue here is the basic principle of mens rea, that an offender should not be convicted of a serious offence unless he was, at the minimum, aware when he acted that his conduct might cause damage of the type forbidden by the definition of the offence with which he is charged: a requirement sometimes expressed more expansively by saying that he must intend, or be reckless as to, the forbidden consequences. There are of course very many offences, some of them of considerable gravity, which do not have that requirement as part of their definition, and those offences therefore do not give rise to problems when committed by persons in a state of intoxication.[1] However, in respect of a wide range of serious offences[2] awareness on the part of the defendant in relation to the harm which he is accused of causing is regarded as crucial. This basic belief, stressing the importance of the autonomy and liberty of the individual, and the proper limits of the infliction of punishment, is of course very familiar to criminal lawyers.[3] However, we do not apologise for reverting to it at the very beginning of this Consultation Paper, because the principle has to be kept firmly in mind when assessing the criminal law's attempts to deal with persons who, when in a state of intoxication, commit the harm forbidden by the "mens rea" offences just referred.

1.3 The particular difficulty that English law, and some other systems, have perceived is this. Cases can be envisaged[4] in which the defendant commits the harm forbidden by a

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[1] See para. 2.34 below. This is also the case in respect of offences to which the "*Caldwell*" ([1982] AC 341) definition of recklessness applies: see paras. 2.19-2.21 below.

[2] Including, in particular, all serious offences against the person, apart from the offence, sometimes regarded as anomalous, of involuntary manslaughter. The principle has recently been reasserted, in the case of wounding under section 20 of the Offences of the Person Act 1861, in the speeches of the House of Lords in *Savage* [1992] 1 AC 699, particularly at p. 751D.

[3] For a recent clear and helpful summary of the principle and its application see Ashworth, *Principles of Criminal Law* (1991) (hereinafter "*Ashworth*"), at pp. 128-129.

[4] We adopt this cautious statement because, as will become apparent from the discussion later in this paper, the extent and indeed the practical reality of the problem is far from clear. The important consideration for immediate purposes, however, is that the problem has been thought by lawyers and judges to exist, and the normal rules of law have been adapted to meet that problem.

particular offence but, because he acts in a state of intoxication, he does not have, or plausibly claims that he does not have, the degree of awareness of the consequences of his actions that is required to convict him of committing that harm. Where the defendant's intoxication is voluntary or self-induced, it has seemed to English law potentially dangerous to the public that he should thereby avoid the controls imposed by the criminal law; and unjust that he should escape punishment for the harm that he has caused.

1.4 These policy considerations are clearly expressed in the leading case on intoxication, *DPP v Majewski*.[5] We may cite, as to the protection of the public, Lord Simon of Glaisdale:

> "One of the prime purposes of the criminal law, with its penal sanctions, is the protection from certain proscribed conduct of persons who are pursuing their lawful lives. Unprovoked violence has, from time immemorial, been a significant part of such proscribed conduct. To accede to the argument on behalf of the appellant would leave the citizen legally unprotected from unprovoked violence where such violence was the consequence of drink or drugs having obliterated the capacity of the perpetrator to know what he was doing or what were its consequences";[6]

and, as to the perceived justice and morality of convicting an intoxicated offender, Lord Elwyn-Jones LC:

> "If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of mens rea, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary mens rea in assault cases ... ."[7]

1.5 It will be a major issue in this inquiry whether those concerns are valid and, if so, what is the right way for the law to reconcile them. At present, however, the law implements the policy objectives referred to in paragraph 1.4 above by seeking to ensure that an offender who is voluntarily intoxicated does not escape liability just because of his intoxication. That is done not by the creation of special *offences* related to intoxication, but by the adaptation of the existing rules of the mens rea offences so that those offences apply in a special and particular way where a defendant is intoxicated. As a result, the law as laid down in

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[5] [1977] AC 443: hereinafter simply "*Majewski*".

[6] *Ibid.*, at p. 476F-G.

[7] *Ibid.*, at pp. 474G-475A.

Majewski is as follows.[8]

1.6 Where a defendant has committed an offence with the mens rea normally required for that offence, it is no defence that he was voluntarily[9] intoxicated. Beyond that relatively straightforward rule, however, the current law, as expressed by the House of Lords in *Majewski*, prevents the defendant from relying on evidence of voluntary intoxication to establish that he lacked subjective fault in certain, but not all, "mens rea" offences. As we have said, this part of the law is based on the policy conclusion expressed in *Majewski* itself, that it is wrong that the criminal law should not punish the causing of certain types of harm by persons who are intoxicated. If the normal rules of subjective mens rea were allowed to prevail in a case where the defendant was, through voluntary intoxication, unaware of the risk of harm resulting from his conduct, he would have to be acquitted. It is to prevent that result that *Majewski* in effect requires his awareness to be adjudicated on by ignoring any evidence of his intoxicated condition.

1.7 However, the *Majewski* approach does not apply to all offences that require subjective mens rea, but only to what the courts have determined to be offences of "basic", as opposed to "specific", intent. The differences between these two types of offence, the policy reasons for the distinction, and the basis on which the distinction is made, are all obscure.[10]

1.8 Further, as an expansion of the basic *Majewski* rule, the law prohibits reliance on evidence of voluntary intoxication not only to negative mens rea, but also if the defendant seeks to establish any common law defence based on his mistake; and this rule, it has recently been held, applies even where the offence charged is one of "specific" intent. [11]

1.9 The, in effect, judicial legislation involved in this solution, and its divagation from the basic principle of mens rea described above, have given rise to frequent expressions of concern.[12] Before descending into those controversies, however, it may be helpful if we sketch out some background issues affecting this subject.

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[8] The present law is in fact complex, very difficult to state with complete accuracy, and subject to substantial controversy as to its proper interpretation. That is one of the aspects of this subject that has caused us, and many other observers, particular concern. The summary that follows is intended merely to give readers a general outline of the law, as a background to the rest of this Introduction. A much fuller analysis of the law and of its difficulties is provided in Parts II and III of the paper.

[9] The concept of voluntariness is explained in paras. 2.27-2.28 below, but the basic requirement is that the defendant should in some way have chosen to become intoxicated. When his intoxication is not self-induced the present rules do not apply, and his liability is judged taking his intoxication into account, because he does not fall under the moral criticism expressed by Lord Elwyn-Jones LC in the passage cited in para. 1.4 above.

[10] As to these mysteries, see paras. 2.5-2.9 and 3.9-3.16 below.

[11] See paras. 2.24-2.26 below.

[12] An outspoken, but by no means untypical, comment expressed shortly after *Majewski* was decided was that of a leading textwriter: "Whether or not the decision in *Majewski* was required by policy, it is impossible to reconcile with legal principle" (Williams, *Textbook of Criminal Law*, 1st ed. (1978), p. 424).

B. SOME BACKGROUND CONSIDERATIONS

1.10 It hardly needs demonstrating that the incidence of intoxication in connection with criminal activity is very great indeed. So far as alcohol is concerned, both day-to-day experience[13] and theoretical study[14] confirm that alcohol is present as a factor in a very large number, and wide range, of criminal acts.[15] So far as drugs are concerned, whilst it is well recognised that psychedelic drugs of various types can cause effects similar to those associated with alcohol, and other drugs may cause violence or paranoia, the number of recorded cases of damage caused by an unaware person under the influence of drugs seems very low.[16] Even in regard to LSD, which has been thought by lawyers to have demonstrated, by the facts of the case of *Lipman,*[17] serious danger of hallucinatory violence, commentators have pointed out that the actual incidence of LSD-induced or related attacks on others seems to be very small.[18]

1.11 The law applies the same rules to all cases of intoxication, whether by alcohol or by drugs. That is understandable both because the great weight of the cases concern alcohol; and because the question for the law is the same in all cases, namely, as a matter of fact was the awareness of the defendant relevantly impaired or sufficiently impaired by a substance that he had voluntarily consumed. Further, as a practical matter, cases often concern the use of drugs in combination with alcohol, a practice that can produce serious consequences.[19]

1.12 Although the point may at first sight seem aridly technical, it is important to be clear as to how intoxication, of all sorts, affects criminal liability. The acknowledged general

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[13] "No police officer needs to be told of the part drink plays in vandalism and violence - in the home, at nightclubs and soccer games, among teenagers and against the police, not to mention sex offences, child abuse and road accidents. The link between alcohol and violence is undeniable": Sergeant G Payne, *Police Review*, 28 February 1992, at p. 388.

[14] e.g., Murphy, "Alcohol and Crime", in Home Office Research Bulletin No. 15 of 1983, pp. 8-11; Walmsley, "Personal Violence", Home Office Research Study No. 89 (1986), at pp. 15-17.

[15] It should be emphasised that this is a different proposition from a claim that in such cases the ingestion of alcohol has *caused* the criminal behaviour. That is a much more complex, and as yet unresolved, matter, that involves consideration of the extent to which drunkenness is merely the context in which criminal behaviour occurs; or is a predisposing but not decisive factor; or is but one result of more general factors, which latter also cause criminal behaviour. We are concerned here only with the objective fact that, for whatever reason, persons who commit crimes are often in a state of some sort of intoxication.

[16] For a very brief summary of the possible effects of drugs of various types see Williams, *Criminal Law*, 2nd ed. (1983), pp. 464-465.

[17] [1970] 1 QB 152.

[18] Laurie, *Drugs* (1967), p. 117.

[19] Commentators have recently emphasised that abuse of even common medicinal compounds, such as aspirins or sleeping pills, if combined with alcohol, can produce serious results: Prins, *Dangerous Behaviour, The Law and Mental Disorder* (1986), at p. 206; Paul (1975) 15 *Medicine, Science and Law*, pp. 16-21. *Majewski* itself was a case in which the defendant had indulged in a combination of barbiturates, amphetamines and alcohol.

defences in the criminal law, such as duress by threats, duress of circumstances, and use of force in public or private defence,[20] only arise once it has been established that the defendant committed the actus reus of the offence with which he is charged, *and* did so with the necessary mens rea. Then, notwithstanding that he fulfils all those requirements of guilt, in certain limited circumstances he can rely on other factors to excuse him from liability. To take the example of duress, as we explained in paragraph 18.4 of LCCP 122, the actor does the act prohibited by the definition of the offence with the relevant state of mind; but he is saved from liability by the existence of an excuse recognised by law.[21] Intoxication, however, does not in law play that (comparatively) simple role. There are good grounds of justice and social policy for coercion or self-protection being regarded as at least a potential ground of proper excuse from criminal liability; but it would be very odd, and it has never been the law, if a person who was proved to have had the relevant state of mind for the commission of an offence, in particular intention or subjective recklessness, could nonetheless claim to be *excused* from liability for that offence solely because he made himself drunk. The person who commits criminal acts while he is intoxicated, at least when he is voluntarily so intoxicated, does not therefore appeal to excuse; but rather raises the prior question of whether, because of his intoxicated state, he can be proved to have been in the (subjective) state of mind necessary for liability. Issues of intoxication are, thus, intimately bound up with the prosecution's task of proving the primary guilt of the defendant: that he did indeed do the act prohibited by the definition of the offence with the relevant state of mind.

1.13 It would therefore be possible to regard intoxication as raising only a simple question of fact, as one piece of evidence to be taken into account in deciding whether the defendant intended, or was subjectively reckless as to, the prohibited result of his conduct; and where the intoxication is involuntary, or where the offence is one of "specific intent", that indeed is the view that is currently taken by English law.[22] But, as we have seen, in general it has been thought too dangerous, or too unjust, in terms of unmerited acquittals or failure to control drunkards who threaten their fellow citizens, to allow evidence of intoxication to be taken into account in that way. The major part of the present law of the "defence" of intoxication, as expounded in *Majewski,* is therefore taken up with constructing rules to ensure that a jury that is obliged by the definition of a particular crime to determine the subjective intention or recklessness of the defendant does not take account, in deciding that question, of any evidence that the defendant was intoxicated.

1.14 Nevertheless, it remains questionable why it has been thought necessary to establish an elaborate body of law to achieve that end. The fact that taking an intoxicant may have affected the defendant's restraint or self-control is irrelevant to his liability.[23] Therefore,

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[20] For a recent exposition of these defences, and some modest proposals for their reform, see LCCP 122, at pp. 52-69.

[21] Citing *DPP for Northern Ireland v Lynch* [1975] AC 689, at p. 712. The formulation of the three general defences in clauses 26(1), 27(1) and 28(1) of the Bill annexed to LCCP 122 clearly reflects this theoretical basis.

[22] See paras. 2.5-2.6 below.

[23] "It is well known that people who have taken intoxicants tend to say or do things which they would not say or do when sober ... . But ... the criminal law's conception of fault has tended to concentrate on cognition rather than on volition": *Ashworth,* p. 186.

"[a] drunken intent is nevertheless an intent",[24] and in most cases it might be thought obvious that the defendant, intoxicated though he may have been, possessed the comparatively modest degree of awareness of the likely results of his acts that suffices to establish subjective liability.[25] Thus, in *Majewski* itself, the defendant, despite the ingestion of some 20 Dexadrine tablets, about 8 sodium nembutal tablets, and (probably) some barley wine or whisky, was able to perform fairly complex and, it would seem, directed acts, and to have been able to realise that the persons whom he was accused of assaulting were police officers;[26] and in Canadian cases where specific consideration has been given to whether the defendant had the *capacity* to form an intent, formidable levels of alcoholic consumption have been accepted, after hearing medical evidence, as leaving that capacity if not unimpaired then at least still in existence.[27]

1.15 The materials just quoted seem to suggest that, where an intoxicated man has committed the actus reus of a crime, the fact of his intoxication is not likely to affect any conclusion as to his necessary mens rea. Why, then, is there such concern, at least in English law,[28] at allowing the jury to take his intoxication into account when adjudicating on that mens rea?

1.16 This is a puzzling issue, which may perhaps be illuminated by respondents to this Consultation Paper. For our immediate purposes, the most important fact is that that concern is clearly held, and presently forms the basis of the English law. However, if we may briefly speculate, it has to be remembered that in any case the prosecution bears the burden of persuading at least 10 members of the jury to be satisfied that the defendant when he committed the prohibited act possessed the degree of awareness specified by the crime charged. Jurors often do not have direct personal experience of matters ventilated in a criminal trial; but it is likely to be within the experience of every member of the jury that

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[24] *Sheehan* [1975] 1 WLR 739, 744C.

[25] See the views of both the Butler Committee (Appendix A to this Paper, para. 18.52) and the Criminal Law Revision Committee (hereafter the "CLRC") (Appendix B to this Paper, para. 265).

[26] See [1977] AC 443, 467G-468C, in particular at p. 468B.

[27] *Davis* (1977) 35 CCC (2d) 464: 3 bottles of wine and 6 bottles of beer consumed by a 16-year-old found, after hearing medical evidence, to have been insufficient to deprive him of an intent to kill. *Fisher* (1961) 34 CR 320: psychiatrist testified that a man who had consumed 25 bottles of beer in one evening would still have the capacity to form an intent to cause death or grievous bodily harm. We mention these cases merely by way of illustration; in both of them, and elsewhere, it is stressed that the effect of given levels of consumption varies very greatly from person to person, and that the fact of that effect must be judged more by the person's actual behaviour and conversation than by his consumption. It has however been strongly urged that the effect of intoxication is characteristically amnesia after the event, rather than lack of intention during that event: see Mitchell, (1988) 11 *International Journal of Law and Psychiatry*, p. 77. It may be recalled that the defence medical evidence in *Majewski* was to the effect that amnesia, rather than automatism, was the much more likely result of intoxication by a combination of barbiturates and alcohol: [1977] AC 443, 468G-469A.

[28] Other jurisdictions, and in particular the Australian common law states, have succeeded in overcoming this inhibition: see paras. 5.10ff below. In particular, jurisdictions that have for some time allowed intoxication to be taken into account in adjudicating upon the defendant's state of mind do not seem to have experienced a spate of acquittals on that basis: see paras. 5.15-5.17 and 5.21-5.22 below.

intoxicants, and more particularly alcohol, have in the past been associated with uncharacteristic and anti-social behaviour, if not by himself then on the part of others. Although one may claim with confidence that most drunks still possess a (drunken) intention, there is sufficient uncertainty about the exact effect of intoxicants, and sufficient variation in that effect from case to case,[29] for prosecutors perhaps to fear that at least some jurors will allow their own experience of the unpredictability of alcohol to create enough doubt as to the defendant's mens rea to produce an acquittal.

1.17 These latter doubts may, therefore, cause some to have difficulty in accepting that a criminal law that made no special provision with regard to intoxicated defendants would not lead to many drunkards who commit antisocial acts escaping criminal sanctions. If, as at present is the case at least within our own jurisdiction, there are such fears; and it is accepted that some method of social protection is needed against criminal acts committed by persons who, rightly or wrongly, might be acquitted of criminal liability because of evidence of their intoxication; then exceptional rules need to be introduced to bring such persons nonetheless within the range of the criminal law. The present English law possesses one such set of rules, broadly those confirmed in *Majewski*. In this Consultation Paper we consider whether such exceptional rules are required at all; and, if they are, whether the present English rules, or some other set of rules, would be the most just and efficient method of achieving the objectives of social defence and control referred to above. As a leading commentator has put the issue:

> "[I]t is undeniable that the intoxication rules in English law rest on fictions and apparently illogical legal devices. Is it the policy of restricting the defence of intoxication which is wrong, or merely the legal devices used to give effect to the policy?"[30]

1.18 It is for these reasons that we have concluded, after reconsidering the provisional view that we adopted when preparing our Draft Code,[31] that a thorough review of the law of intoxication is now required in an attempt to provide rational and understandable provisions, suitable for immediate use, and also suitable for incorporation in an eventual complete Criminal Code. We are reinforced in that conclusions by three further considerations.

1.19 First, as will be demonstrated in Part II of this Paper, the present law is extremely complex. This law has to be explained to, understood by, and at least in theory applied by,[32] juries and lay magistrates. Even though the number of cases where the rules on intoxication cause the result to be different may be small, the number of cases in which

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[29] See n. 27 above.

[30] *Ashworth*, p. 189.

[31] See Law Com.No.177, *A Criminal Code for England and Wales* (hereinafter "Code Report"), para. 8.33.

[32] It is necessary to express this, very disturbing, suspicion, entertained by a number of observers, that juries may not be applying the law as pronounced by the courts and set out in the books because the law is so complex and, in many cases, artificial that common sense if nothing else suggests that juries may not be able to, or think it necessary to, follow that law through in all its detail. This point is further developed in para. 3.17 below.

intoxication, at least that caused by alcohol, is present, and thus the rules have at least to be potentially considered, is vast.[33] If it is the case that the rules are tacitly ignored,[34] the proper course is to replace them with a legal regime that properly reflects reality. But if the lawyers obey their obligation to try to apply the law as laid down in the authorities, the present complex rules have always to be in their minds. Quite apart from any threat of miscarriage of justice, the cost in court and judge time, and other legal energy and skills, of the present law on intoxication is potentially very considerable. Economy alone urges that we should try to find a simpler way of dealing with the problem.

1.20 Second, without anticipating the fuller discussion that follows of the present law, that law acts through purportedly technical rules, and not by the direct application of the considerations of social policy that are thought to demand the criminalisation of intoxicated conduct.[35] As a result, it achieves the application of that policy only in an erratic and incomplete manner.[36] It is very desirable that there should be further consideration of whether those policy considerations are valid and, if they are, whether they can be implemented in a more consistent and thorough manner.

1.21 Third, the solution that English law has reached with regard to intoxication has been seriously challenged in other jurisdictions. When the English law was put into its present form in *Majewski* a different solution already represented the law in New Zealand,[37] and remains the present law in that jurisdiction.[38] Even more pressingly, *Majewski* has been specifically rejected by courts of high authority in Australia[39] and South Africa,[40] and in the Supreme Court of Canada has, on the two occasions when it has been questioned, only been followed by a 4-3 majority, with powerful arguments deployed by dissenting minorities that have included Laskin CJC and Dickson J, his successor as Chief Justice.[41] Moreover, even judges who support the policy embodied in *Majewski* have indicated that it might be preferable to pursue those policy objectives by different mechanisms.[42] As we hope this Consultation Paper will demonstrate, the close attention that the law of intoxication has received in these other common law jurisdictions provides a fruitful source of arguments of legal and social policy against which the current English law can and should be tested. The

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[33] See para. 1.10 above.

[34] See n. 32 above.

[35] See paras. 1.5-1.9 above.

[36] See paras. 3.2-3.8 below.

[37] *Kamipeli* (1975) 2 NZLR 610 (NZCA).

[38] See para. 5.19 below.

[39] *O'Connor* (1980) 54 ALJR 349, a majority decision of the High Court of Australia.

[40] *Chretien* (1981) 1 SA 1097 (SA Appellate Division).

[41] *Leary* (1977) 33 CCC 473; *Bernard* (1988) 45 CCC (3d.) 1.

[42] See para. 6.2 below.

experience of other jurisdictions also demonstrates that even if the actual incidence of decided cases is not high, any system of criminal law must pay close attention to, and is likely to experience substantial difficulty in resolving, the effect of intoxication on criminal liability.

C. THE STRUCTURE OF THIS PAPER

1.22 We therefore proceed as follows. In Parts II and III of the Paper we give an outline of the present English law, and set out the criticisms that have been made of it. In Part IV we review some solutions that have been suggested to the dilemma of the intoxicated offender. In so doing we draw heavily on experience in other jurisdictions, and give a substantial account of the relevant parts of the law in those jurisdictions. We however explain that the solutions expounded in Part IV are not such as we can recommend. In Part V we review the two solutions that we provisionally see as being the only two ways of solving the present problem. The first, adopted in Australia and New Zealand, is in effect to have no special rule at all, but simply to treat intoxication as one piece of relevant evidence affecting the defendant's mens rea. That in effect involves accepting either that the policy concerns expressed in *Majewski* are misplaced; or that they are not sufficiently pressing in weight or incidence to justify the creation of special rules to accommodate them. The second solution is to accommodate the policy concerns expressed in *Majewski*, not by the method adopted there, but by the creation of a special offence of causing damage when intoxicated. Because it is important to make as clear as possible to readers the terms and implications of such an offence, we explain in some detail in Part VI what the content of the offence might be. Part VII contains a summary of our conclusions and provisional proposals, and lists the matters on which we particularly invite comment.

1.23 We emphasise now, as we do throughout the Paper, that our conclusions at this stage are only provisional, and advanced with the more diffidence because of the difficulty that courts and commentators have continued to see in the law of intoxication, and the considerable range of other solutions that have been proposed. We therefore invite comment on all aspects of our treatment of the subject.

PART II

AN OUTLINE OF THE PRESENT LAW

A. INTOXICATION AND THE MENTAL ELEMENT

1. Introduction

2.1 As we pointed out in Part I, intoxication[1] is not itself a defence to a criminal charge if, despite the defendant's intoxication, the legal requirements of guilt are still present.

> "[I]n cases where drunkenness and its possible effect upon the defendant's mens rea is an issue, ... the proper direction to a jury is, first, to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. A drunken intent is nevertheless an intent."[2]

2.2 There may, however, be cases in which the defendant's intoxication gives rise to doubts as to whether he possessed the mental element of the offence charged. These cases are dealt with in different ways according to the offence involved. Sometimes, the defendant's intoxicated state is taken into account, with the other circumstances, in determining whether he had the relevant state of mind; but in other crimes the defendant's mental state, and hence his liability, are determined as though he had not been intoxicated. The latter principle applies, according to which offence is in point, because of the general *Majewski* approach, discussed in paragraphs 2.3-2.18 below. In addition, special considerations affecting the impact of intoxication apply where the offence charged is subject to the *Caldwell* definition of recklessness, as discussed in paragraphs 2.19-2.21 below; a statutory rule applies to offences under the Public Order Act 1986; and there may be a separate rule in the unusual case in which a person becomes intoxicated *for the purpose* of giving himself "Dutch courage" to commit a criminal act.

2. The *Majewski* approach

(a) Introduction

2.3 *Majewski*,[3] the leading authority in English law on the effect of intoxication on criminal liability, did not make, and necessarily could not have made, a complete survey of all aspects of the law of intoxication. In particular, that case is in terms concerned only with

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[1] The rules relating to intoxication apply to a wide range of drugs, as well as alcohol. However, a distinct, less rigorous, rule applies to drugs whose effect is merely soporific or sedative; see para. 2.29 below.

[2] *Sheehan* [1975] 1 WLR 739, 744B-C. This would apply, *a fortiori*, to recklessness.

[3] [1977] AC 443.

the effect of intoxication on the application of the rules as to the mental element in particular crimes, and does not address the effect of intoxication on general defences;[4] and, even within those limits, much of its argumentation is directed to the particular offences then before the court, of assaults under sections 20 and 47 of the Offences against the Person Act 1861.[5] Nonetheless the case also contains many statements that discuss the effect of intoxication on criminal liability generally, and not merely in relation to those offences of assault; and it has been regarded by subsequent courts and commentators in England and Wales, and by courts in other jurisdictions, as the authoritative source of our rules on intoxication.

2.4 Some difficulty has, however, been experienced in determining what exactly *Majewski* decides. There are at least three possible explanations of the case and of subsequent authoritative expositions of it, all three of which it is necessary for us to mention in this section. This has required a somewhat extended treatment; but we have to say that we find it difficult to give an accurate account of the matter in any shorter compass.

(b) Offences of basic and of specific intent

2.5 The most common statement of the effect of *Majewski* depends on a division of offences between crimes of basic and of specific intent. In respect of offences that are classified as ones of "basic intent" evidence of the defendant's voluntary[6] intoxication by alcohol or another drug (other than a mere soporific or sedative,[7] or one taken as medical treatment[8]) cannot be relied on to support a claim that he did not act with a required state of mind. Broadly the same way of putting this rule is to state, as did the CLRC, that it is

> "a rule of substantive law that where an offender relies on voluntary

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[4] For a reference to such defences, see para. 1.12 above. A version of the *Majewski* approach, or at least a rule similar in aspiration to that adopted in *Majewski*, has however been adopted to deal with cases where such a defence is based on an intoxicated mistake: see paras. 2.24ff. below.

[5] It may be noted that the certified question before the House in *Majewski* [1977] AC 443, 457C-D, was limited as follows:

> "Whether a defendant may properly be convicted of assault notwithstanding that, by reason of his self-induced intoxication, he did not intend to do the act alleged to constitute the assault."

[6] The meaning of "voluntary" in this context is considered at paras. 2.27-2.28 below.

[7] See para. 2.29 below.

[8] This seems correct in principle, although there is little direct authority on the point. However, in *Majewski*, at p. 471F, Lord Elwyn-Jones LC referred to a man who

> "consciously and deliberately takes alcohol and drugs *not on medical prescription*, but in order to escape from reality, to go 'on a trip', to become hallucinated, whatever the description may be and thereby disables himself from taking the care he might otherwise take and as a result by his subsequent actions causes injury to another ... ." (Emphasis added.)

intoxication as a defence[9] to a charge of a crime not requiring 'specific' intent, he may be convicted notwithstanding that the prosecution has not proved any intention or foresight, or indeed any voluntary act."[10]

2.6 Accordingly all offences have, under this approach, to be allocated to one of two categories: crimes of basic intent, to which *Majewski* applies; and crimes of specific intent to which the approach of that case does not apply. Where the charge is of a crime of specific intent, evidence of intoxication is taken into account in deciding whether the defendant had the necessary mens rea, and thus intoxication can be regarded as a "defence": in the sense that the prosecution has to establish the actual intent of the defendant, taking into account the fact that he was intoxicated. Where, however, the offence with which the defendant is charged is categorised as one of basic intent the *Majewski* approach appears on the present view to apply to every mental element that the prosecution has to prove in order to obtain a conviction: to put the matter simplistically, the fact that intoxication was self-induced provides the necessary mens rea.[11]

2.7 The allocation of crimes between the categories of basic and of specific intent is therefore crucial to this approach, and many offences have been judicially allocated to one or other category. Nevertheless, there has been no agreement on the test to be applied for that purpose;[12] and a leading textbook concludes that the designation of crimes as requiring, or not requiring, specific intent is based on no principle.

> "In order to know how a crime should be classified for this purpose we can look only to the decisions of the courts."[13]

2.8 Examples of crimes that have been held to be of specific intent are: murder;[14]

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[9] This formulation might appear to suggest that where, as in respect of crimes of specific intent, evidence of intoxication can be taken into account, the role of the intoxication is potentially to provide a "defence" in the sense of an excuse from otherwise established criminal liability: see para. 1.9 above. That is not so. Where evidence of intoxication, whether adduced by the defence or by the prosecution, is permitted to be taken into account, it serves precisely and only as *evidence*, relevant to the existence of the defendant's actual state of mind that the prosecution bears the burden of establishing.

[10] CLRC, Fourteenth Report (1980), para. 257: see Appendix B to this Paper. As to the lack of need to prove any voluntary act, see paras. 2.32-2.33 below.

[11] That assumption accords with the view expressed in respect of rape, a crime of basic intent, that intoxication cannot be relied on by a defendant "whether the issue be intention, consent, or, as here, mistake as to the identity of the victim": *Fotheringham* (1989) 88 Cr App R 206, 212.

[12] There has been a variety of judicial opinion on this categorisation and much academic criticism of it; see paras. 3.4-3.7 below.

[13] Smith and Hogan, *Criminal Law*, 7th ed. (1992) (hereafter "*Smith & Hogan*"), p. 221. See further paras. 3.3-3.6 below.

[14] e.g., *Sheehan* [1975] 1 WLR 739.

wounding or causing grievous bodily harm with intent;[15] theft;[16] offences involving an intent to deceive or defraud;[17] and handling stolen goods.[18]

2.9 Offences that have been held to be of basic intent include: "constructive" manslaughter based upon the commission of a criminal and dangerous act;[19] rape;[20] maliciously wounding or inflicting grievous bodily harm;[21] and various assault offences, including[22] assault on a constable and assault occasioning actual bodily harm.

(c) Majewski: *a new analysis*

2.10 Quite apart from the long-recognised difficulty of finding any principled explanation of the distinction between crimes of specific intent and crimes of basic intent, doubts have more recently been expressed as to whether the classification of all crimes as offences of either specific or of basic intent may not be over-simplified.[23] Rather, it has been suggested, the correct approach may be to consider whether a particular *allegation* is one of "specific" intent, and to apply the *Majewski* approach not according to the legal definition of the offence with which the defendant is charged, but according to the state of mind that has to be proved against him in the particular case. Thus, in an offence of wounding with intent to resist arrest under section 18 of the Offences against the Person Act 1861, "so far as wounding goes, s. 18 is an offence of basic intent but the intent to resist lawful apprehension seems a clear case of specific intent";[24] or, in a case of indecent assault where, following *Court*,[25] the prosecution has to prove an indecent purpose on the defendant's part, the assault

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[15] Offences against the Person Act 1861, s. 18; *Pordage* [1975] Crim LR 575.

[16] See, e.g., *Majewski* [1977] AC 443, 482D (*per* Lord Salmon).

[17] *Durante* [1972] 1 WLR 1612.

[18] *Ibid.*

[19] *Lipman* [1970] 1 QB 152 (CA), in which the defendant killed a woman when he was on a hallucinatory "trip" induced by the drug LSD. The law was stated, at p. 157A, in general terms, not restricted to cases in which the unlawful act that founded the charge was an offence of basic intent. In fact, however, the unlawful act in *Lipman* was a battery, a crime of basic intent; and subsequently, in *O'Driscoll* (1977) 65 Cr App R 50, 55, the Court of Appeal stated, obiter, that the *Majewski* rule did not apply if the underlying offence was one of specific intent.

[20] e.g., *Fotheringham* (1989) 88 Cr App R 206.

[21] Offences against the Person Act 1861, s. 20; *Bratty* [1963] AC 386, 410, *per* Lord Denning; *Aitken* [1992] 1 WLR 1006, 1016G-1017A.

[22] As in *Majewski* itself.

[23] *Smith & Hogan*, pp. 222-223. The passage in question is a new addition to the treatment of intoxication in the sixth (1988) edition of that work.

[24] *Smith & Hogan*, p. 223.

[25] [1989] AC 28.

is a matter of basic intent but the indecent purpose a matter of specific intent.[26]

2.11 What exactly counts as a "specific" intent is a matter of some obscurity. However, the analysis just mentioned seems to assume that a "specific" intent is one that is specifically alleged by, and thus has to be proved by, the prosecution; as opposed to, for instance, an allegation of assault or of wounding under section 20 of the Offences against the Person Act, which is established if the prosecution proves that the defendant was merely reckless as to the forbidden physical consequences of his actions. Some support is provided for that view of specific intent by the speech of Lord Diplock expressing the opinion of the majority in *Caldwell*.[27] The case concerned section 1(2) of the Criminal Damage Act 1971.[28] Lord Diplock considered that if the *only* mental state capable of constituting the mens rea of section 1(2) had been expressed by the words "intending by the destruction or damage to endanger the life of another", then the offence would be one of specific intent for *Majewski* purposes.[29] That analysis was, however, in his Lordship's view not relevant where recklessness was capable of constituting the mens rea of the crime with which the defendant was charged;[30] and he answered the questions put to the House by saying that where a charge under section 1(2) of the Criminal Damage Act was framed only in terms of "*intending* by the destruction or damage [of the property] to endanger the life of another" evidence of self-induced intoxication can be relevant to the accused's defence, but where the charge is, or includes, a reference to recklessness that evidence is not relevant.[31]

2.12 This approach, at least to the extent that it depends on the specific terms of the charge brought against the defendant, may accord with the analysis referred to in paragraph 2.10 above. However, the point is not clearly discussed either in *Caldwell* or in any other case;

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[26] *C* (1992) 156 JP 649, 654F; [1992] Crim LR 642 (commentary by Professor J C Smith). It should however be noted that in *C* the Court of Appeal, which did not have the benefit of the argument here referred to, stated unequivocally, though obiter, that "what was the law prior to the decision in *Court* remains the law and indecent assault remains an *offence* of basic intent with the consequence that ... the self-induced voluntary intoxication does not amount to a defence." (Emphasis added.)

[27] [1982] AC 341. The case is principally of importance for the meaning it adopted of "recklessness" in the definitions of certain specific crimes: see paras. 2.19-2.21 below. Lords Keith of Kinkel and Roskill agreed with the whole of Lord Diplock's reasoning: [1982] AC 341, at p. 362D-F.

[28] "A person who without lawful excuse destroys or damages any property, whether belonging to himself or another -

(a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and
(b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered;

shall be guilty of an offence."

[29] See [1982] AC 341, at p. 355C.

[30] *Ibid.*, at p. 355D.

[31] *Ibid.*, at p. 356D, Lord Diplock's emphasis.

Caldwell itself may be directed not at the present point but at the issue of whether *Majewski* applies only to questions of recklessness, which we discuss in paragraphs 2.15ff. below; and an analysis that does not treat the *Majewski* approach as applying according to whether the *crime* involved is one of basic intent would seem to be inconsistent both with views expressed in the House of Lords in that case[32] and with dicta in the cases of *Fotheringham* and of *C.*[33]

2.13 Nevertheless, as already observed, *Majewski* does not purport to contain a fully worked-out scheme for all offences; and the apparent simplicity of the approach through asking whether the offence in question is one of basic intent breaks down when confronted with an offence some of the elements of which involve issues of "intention", but some of which do not. Examples are the version of the offence of burglary that involves entering a building as a trespasser with intent to commit a specified offence therein;[34] or attempt, which involves doing an act more than merely preparatory to the commission of an offence with intent to bring about the commission of that offence.[35] There is, at present, no authority as to whether these offences are offences of basic or of specific intent. It may well be that, if the question had to be faced, with a charge of burglary or attempt being brought against a person who had acted in a state of intoxication, it would be thought prudent to modify the approach that assumes that once a crime has been allocated to the category of basic intent every question of mens rea that it raises is subject to the *Majewski* approach. It may be thought, rather, necessary to say, for instance in the case of burglary, that whilst intoxication could not be taken into account in determining whether the defendant had the necessary awareness to have acted as a trespasser, it would be wholly artificial not to take his intoxication into account when asking whether he intended, for instance, to commit theft in the building.

2.14 Accordingly, at least when dealing with an offence that has not yet been allocated to one or other of the categories of offence of basic intent or offence of specific intent, under the process described in paragraphs 2.7-2.9 above, such a more sophisticated analysis may still be open to the courts; but it is impossible to extract from *Majewski* and *Caldwell* any conclusive guidance in terms of principle as to how that issue might be resolved.

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[32] "[I]f there is a substantive rule of law that in crimes of basic intent, the factor of intoxication is irrelevant (and such I hold to be the substantive law), evidence with regard to [intoxication] is quite irrelevant": [1977] AC 443, 476A, *per* Lord Elwyn-Jones LC. The Lord Chancellor's speech was concurred in by Lords Diplock (at p. 476D-E); Simon of Glaisdale (at p. 476E-F); and Kilbrandon (at p. 480B). Other of the Law Lords, while not expressing specific concurrence with the terms of the Lord Chancellor's speech, appear to have discussed the matter on the assumption that the question was whether the offence in question was an "offence of basic intent": see Lord Salmon at p. 484C and Lord Russell of Killowen at p. 500B.

[33] Cited respectively in n. 11, para. 2.6 and n. 26, para. 2.10, above.

[34] Theft Act 1968, s. 9(1)(a).

[35] Criminal Attempts Act 1981, s. 1(1); and, as to the nature of the intent that has to be established, *Mohan* [1976] QB 1, 11B-C.

(d) Majewski *limited to allegations of recklessness?*

2.15 There are some grounds for arguing that *Majewski* lays down a rule different from, and simpler than, either of the foregoing, that rule being that the *Majewski* approach applies, and applies only, to allegations of "recklessness". On this view, where recklessness is in issue, *Majewski* always applies; but, by contrast, evidence of intoxication can be taken into account in assessing *any* allegation of "intention".

2.16 Some support for this approach can indeed be found in *Caldwell*, since at one point Lord Diplock in that case said[36] that "[t]he speech of Lord Elwyn-Jones LC in [*Majewski*], with which Lord Simon of Glaisdale, Lord Kilbrandon and I agreed, is authority that self-induced intoxication is no defence to a crime in which recklessness is enough to constitute the necessary mens rea", and endorsed Lord Elwyn-Jones' acceptance, as a correct statement of English law, of section 2.08(2) of the American Model Penal Code:

> "When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial."

This section of the Model Penal Code clearly applies only to allegations of recklessness. That was noted by the CLRC, in their Report on Offences against the Person that was produced in 1980, before the judgment in *Caldwell*, the MPC model being used by that Committee as strong support for their own recommendations, that equally sought to limit the effects of the *Majewski* approach to issues of recklessness.[37]

2.17 The effect of Lord Diplock's observations in *Caldwell*, read with his answers to the certified questions that are cited in paragraph 2.11 above, may therefore be that *Majewski* applies, and applies only, to issues of recklessness. Against that, however, a number of the Law Lords in *Majewski* envisaged the *Majewski* approach as applying to at least some questions of intention.[38] There must, therefore, be considerable doubt whether English law currently incorporates the Model Penal Code rule, despite the reliance apparently placed on that rule in *Majewski* itself.

(e) *Conclusion*

2.18 In the event, therefore, the statement of the *Majewski* rule that apparently attracts the highest degree of support would seem to be that offered in paragraphs 2.5ff above, turning

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[36] [1982] AC 341, at p. 355D-E.

[37] For a full account of these developments, see paras. 4.11ff. below.

[38] Lord Elwyn-Jones LC at p. 471A-G, whose speech was concurred in by Lords Simon of Glaisdale and Kilbrandon and, significantly, by Lord Diplock himself, who said, at p. 476D-E, that he agreed not only with Lord Elwyn-Jones' conclusions but also with the speech in which they were expressed. Lord Simon, at pp. 478G-479G, added some further passages that clearly seem to envisage the application of *Majewski* to issues of intention. It should also be noted that the question before the House in *Majewski* specifically dealt with the effect of intoxication on issues of intention: see n. 5, para. 2.3 above.

on the distinction between crimes of basic and of specific intent. We adopt this approach in the discussion in the remainder of this Paper. It will, however, have been observed that we are very far from being able to state that conclusion with complete certainty.

3. *Caldwell* recklessness

2.19 In *Caldwell* and in *Lawrence*,[39] the House of Lords defined recklessness in terms different from the sense of consciously running an unreasonable risk in which it had been traditionally understood. According to those cases, the defendant was reckless if (1) his conduct created a risk (of the relevant harm) that would have been, *to an ordinary prudent individual*, obvious and serious and (2) the defendant either (a) gave no thought to the possibility of there being a risk or (b) recognised the existence of the risk and unjustifiably went on to take it. *Caldwell* concerned offences of criminal damage under section 1 of the Criminal Damage Act 1971[40] committed by the defendant when drunk;[41] *Lawrence* (which concerned the offence of causing death by reckless driving[42]) did not involve intoxication.

2.20 The *Caldwell* definition of recklessness, though envisaged originally as applying to allegations of recklessness in any offence,[43] has in the event been adopted only in relation to involuntary manslaughter,[44] criminal damage, and the road traffic offences (which have

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[39] [1982] AC 341 and [1982] AC 510 respectively. Lord Diplock delivered a detailed speech in both cases. In *Caldwell* Lord Keith and Lord Roskill agreed with Lord Diplock, but Lord Edmund-Davies, with whom Lord Wilberforce agreed, dissented. In *Lawrence*, in which the House was unanimous, Lord Hailsham LC delivered a detailed speech. Lord Fraser, Lord Roskill and Lord Bridge concurred with Lord Diplock and Lord Hailsham.

[40] The "simple" offence, under subsection (1), consists in intentionally or recklessly destroying or damaging property belonging to someone other than the defendant; the aggravated offence, under subsection (2) (which applies also to the defendant's own property), requires, in addition, intention or recklessness as to whether the life of someone other than the defendant would be endangered. If the damage or destruction is caused by fire, the offences are described as arson: s. 1(3).

[41] *Caldwell* concerned the aggravated offence under s. 1(2) of the 1971 Act. The defendant, who bore a grudge against the owner of a residential hotel where he had been employed, got very drunk and, to revenge himself on the proprietor, broke a window and succeeded in starting a fire in a ground floor room, which, however, was discovered and extinguished before causing any serious damage. According to the defendant's evidence, he intended to damage the hotel but was so drunk that it did not occur to him that there might be people there whose lives might be endangered.

[42] Contrary to what became the Road Traffic Act 1988, s. 1. This offence has now been abolished. For the present relation between intoxication and road traffic offences, see paras. 2.36-2.37 below.

[43] In *Seymour* [1983] 2 AC 493, 506B, which concerned manslaughter (the death having been caused by reckless driving), Lord Roskill said:

> "'Reckless' should today be given the same meaning in relation to all offences which involve 'recklessness' as one of the elements unless Parliament has otherwise ordained."

Subsequently, however, the Court of Appeal held that Lord Roskill's statement was obiter: *Spratt* [1990] 1 WLR 1073, 1082F.

[44] See, e.g., *Seymour* [1983] 2 AC 493.

now been abolished by section 1 of the Road Traffic Act 1991) of reckless driving and causing death by such driving.[45] The courts have declined, in particular, to apply the *Caldwell* definition of recklessness to offences against the person.[46]

2.21 The effect of *Caldwell*, in a case of intoxication, is broadly the same as that of *Majewski*. However *Caldwell*, unlike *Majewski*, does not lay down a special rule for cases of intoxication, but rather redefines generally the requirements of the offences to which it applies. It therefore goes much further than merely preventing voluntary intoxication from being taken into account. It extends, for example, to giving no exculpatory effect to lack of awareness caused by rage or excitement;[47] and *Caldwell* has also been interpreted, though with expressed reluctance on the court's part, so as to exclude from account the fact that the defendant is a young person or mentally handicapped.[48]

4. The Public Order Act 1986

2.22 Section 6(5) of this Act provides in relation to the mental element of offences under the Act that in general[49] "a person whose awareness is impaired by intoxication shall be taken to be aware of that of which he would be aware if not intoxicated".

5. "Dutch courage"

2.23 There is a dictum of Lord Denning that suggests that if a person brings about his own intoxication in order to steel himself to commit an offence (including one of specific intent), he is liable even if, because intoxicated, he lacks the appropriate mental element at the time of the performance of his subsequent actions.[50] It is, however, remarkably difficult to

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[45] *Reid* [1992] 1 WLR 793 (HL).

[46] *Savage* [1992] 1 AC 699, 742-751: see LCCP 122, at para. 7.23.

[47] [1982] AC 341, 352A-E.

[48] e.g., *Elliott v C* [1983] 1 WLR 939. The defendant, a 14-year-old girl of low intelligence, had been out all night without sleep. She entered a garden shed, where she found white spirit, which she poured on to an old carpet and lit to keep herself warm. The fire spread, and the shed was destroyed. The justices acquitted her, finding that she gave no thought to the risk that the shed would be destroyed; and that, even if she had given thought to the matter, the risk would not have been obvious *to her*. The Divisional Court (Robert Goff LJ and Glidewell J) allowed the prosecutor's appeal, on the ground that it sufficed that the risk would have been obvious to a reasonably prudent person of mature years. These and other problems have given rise to a barrage of criticism, described by Professor J C Smith ([1989] Crim LR, at p. 214) as a "welter of writing on recklessness in the criminal law (a jungle into which only those with infinite time, stamina and patience should willingly enter) ... ."

[49] The subsection excludes the case in which "the defendant shows" that his intoxication was involuntary or occurred in the course of medical treatment. Sect. 6(6) provides that "'intoxication' means any intoxication, whether caused by drink, drugs or other means, or by a combination of means."

[50] *Gallagher* [1963] AC 349, decided on a different point, at p. 382:

> "If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it

envisage a case where the defendant has sufficient and sufficiently directed motor control to carry out a *pre-arranged* plan, but was so intoxicated as to lack intention or awareness in relation to that plan. So far as we are aware there is no example, anywhere in the common law world, of such a case actually occurring.

B. INTOXICATION AND MISTAKE

1. At common law

2.24 Intoxication apart, a defendant's mistaken belief as to fact may operate to prevent a conviction: whether directly by preventing the prosecution from proving the elements of the offence; or by giving him the benefit of a specific defence,[51] -where the accused admits the prosecution's allegations but relies on further facts to excuse his conduct.[52] Where, however, the mistake arises by reason of voluntary intoxication, the *Majewski* principle applies, so that the defendant cannot rely on his mistake.[53]

2.25 Recent authority indicates that, by contrast with intoxication in relation to the mental element, the *Majewski* rule applies in the present context even if the offence is one of specific intent. In *O'Grady*[54] the defendant, when drunk, killed a man in the mistaken belief that he was being attacked. His appeal against his conviction for manslaughter, an offence of basic intent, was dismissed. In the course of delivering the judgment of the Court of Appeal, Lord Lane CJ stated,[55] obiter, that a defence of mistake caused by voluntary intoxication would fail even in offences (including murder) that required specific intent. That statement was adopted in *O'Connor*,[56] in which the Court of Appeal held, in relation to murder, that

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> is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on this self-induced drunkenness as a defence to a charge of murder, nor even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that he was incapable of an intent to kill."

[51] As where, e.g., a man has sexual intercourse in the false belief that the woman consents to it. He is not guilty of rape, because lack of belief in her consent is an ingredient of the offence: Sexual Offences (Amendment) Act 1976, s. 1(1)(b), which incorporates the common law.

[52] For instance, where he contends that he acted in self-defence: *Williams* (1983) 78 Cr App R 276, approved in *Beckford* [1988] AC 130 (PC), in which, at p. 144D-E, Lord Griffiths stated:

> "If then a genuine belief, albeit without reasonable grounds, is a defence to rape because it negatives the necessary intention, so also must a genuine belief in facts which if true would justify self-defence be a defence to a crime of personal violence because the belief negatives the intent to act unlawfully."

[53] *Woods* (1982) 74 Cr App R 312. In *Fotheringham* (1988) 88 Cr App R 206 the defendant had sexual intercourse when drunk with a 14-year-old girl, under the mistaken impression that she was his (consenting) wife. His mistake was held to be incapable of founding a defence.

[54] [1987] QB 995.

[55] At p. 999G.

[56] [1991] Crim LR 135.

intoxication was not relevant to the question whether the defendant believed he was acting in self-defence. However, the Court quashed the conviction on another ground - namely, that the trial judge had failed to direct the jury to take intoxication into account when considering whether the defendant had formed the requisite intent. Thus, the jury has to consider intoxication in relation to one subjective element of the offence, but are prohibited from considering it in relation to the other subjective element, in relation to self-defence.

2. Statutory defences

2.26 The *Majewski* approach does not apply where statute provides that a particular belief should be a defence, as in *Jaggard v Dickinson,*[57] which concerned the defence, under section 5(2)(a) of the Criminal Damage Act 1971, of belief that:

> "the person ... whom [the defendant] believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he ... had known of the destruction or damage and its circumstances."[58]

The defendant, when drunk, went to a house which she mistakenly thought belonged to someone who had invited her to it at any time; she gained entry by breaking windows and damaging curtains. She was held entitled to rely on her intoxicated condition as evidence of her belief. Donaldson LJ explained:[59]

> "The law in relation to self-induced intoxication and crimes of basic intent is without doubt an exception to the general rule that the prosecution must prove the actual existence of the relevant intent ... . And in section 5 Parliament has very specifically extended what would otherwise be regarded as 'lawful excuse' by providing that it is immaterial whether the relevant belief is justified or not provided that it is honestly held. The justification for what I may call the *Majewski* exception ... is said to be that the course of conduct inducing the intoxication supplies the evidence of mens rea ... [T]o hold that this substituted mens rea overrides so specific a statutory provision involves reading section [5(2)] as if it provided that 'for the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held and the honesty of the belief is not attributable only to self-induced intoxication.' I cannot so construe the section ... ."

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[57] [1981] QB 527 (Div. Ct.).

[58] Under s. 5(3) of the Act, "it is immaterial whether a belief is justified or not if it is honestly held".

[59] [1981] QB 527, 533B-E. Mustill J (at p. 532D-E) expressed a similar view.

C. EXCEPTIONAL CASES

1. Involuntary intoxication

2.27 Intoxication is normally a knowingly self-induced condition; but that is not always the case. A person may, for example, consume a non-alcoholic drink which, without his knowledge, has been "laced" with alcohol. In these cases the intoxication would clearly not be voluntary.[60] However, the fact that a drink (or drug) known by the defendant to be an intoxicant had a greater effect than he expected would not render his intoxication involuntary.[61]

2.28 Involuntary intoxication is always taken into account in determining the existence of a subjective mens rea. We are not aware of direct authority on the related question of whether, and in what circumstances, intoxication arising in consequence of the defendant being forced (by, say, a threat of violence) to take an intoxicant would be regarded as voluntary.

2. Drugs to which the general rule does not apply

2.29 There are certain drugs, of a soporific or sedative character, to which *Majewski* does not apply.[62] In cases of intoxication resulting from such drugs[63] the jury should be directed that if they conclude that as a result of taking the drug the defendant was unaware of the relevant risk, they should go on to consider whether the taking of the drug was itself "reckless".[64] This principle applies, it would seem, even to offences to which *Caldwell* recklessness applies.[65]

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[60] In *Eatch* [1980] Crim LR 650 (Judge Skinner QC, Nottingham Crown Court) the defendant gave evidence that he had smoked a small amount of cannabis and then drunk a can of beer to which another drug had been added without his knowledge, so that he experienced hallucinations. The judge directed the jury in general terms that it was for them to determine whether the defendant's condition was "due solely to voluntary intoxication".

[61] *Allen* [1988] Crim LR 698. The defendant consumed some alcoholic drink in a public house. Later, a friend gave him home-made wine, which the defendant did not realise had a high alcoholic content. His intoxicated state was held to have been voluntary.

[62] *Hardie* [1985] 1 WLR 64 (in which the drug was valium, described by the Court of Appeal as being "wholly different in kind from drugs which are liable to cause unpredictability or aggressiveness").

[63] There is no fixed list of the drugs to which this rule applies. Courts presumably have to reason by analogy with the very general principles enunciated in *Hardie*; it is unclear whether expert evidence is ever adduced to assist that process.

[64] "Reckless" thus has, here, a special meaning, distinct from traditional and *Caldwell* recklessness alike. The defendant must be actually aware of the risk of "aggressive, unpredictable and uncontrollable conduct" as a result of intoxication (*Bailey* [1983] 1 WLR 760, 765A); but he need not foresee the actus reus of the particular offence.

[65] *Hardie* ([1985] 1 WLR 64) itself concerned the aggravated offence under s. 1(2) of the 1971 Act: see n. 40, para. 2.19 above. The Court accepted however, at p. 70A, that in some cases, such as reckless driving, the taking of a soporific or sedative drug "would be no answer", citing, at p. 69C-H, its judgment in *Bailey*

D. INTOXICATION AND INSANITY

2.30 The M'Naghten Rules,[66] together with statutory provisions,[67] produce a special verdict, "not guilty by reason of insanity",[68] where, because of "a defect of reason, from disease of the mind", the defendant either -

(i) did not know the nature and quality of the act he was doing; or
(ii) did not know what he was doing was (legally[69]) wrong.

2.31 If intoxication produces insanity, the M'Naghten Rules apply.[70] In a crime of basic intent, where the defendant did not know what he was doing partly because of voluntary intoxication and partly through disease of the mind, it would seem that he must be found *either* guilty *or* "not guilty by reason of insanity".[71]

E. INTOXICATION AND AUTOMATISM

2.32 Automatism is a "modern catch-phrase" to describe an involuntary movement of a person's body or limbs;[72] it includes both an act which is done by the muscles without any control by the mind (such as a reflex action) and an act done by a person who is not

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[1983] 1 WLR 760, 764-765, in which the Court had pointed out that a diabetic who failed to take insulin (or proper food after it) would not be a danger unless he "put himself in charge of some machine such as a motor car, which required his continued conscious control". *Hardie* seems inconsistent with the reasoning in *Elliott v C* (n. 48, para. 2.21 above): it is difficult to discern, for the purpose of explaining why the defendant did not give thought to an obvious and serious risk, a principled distinction between reliance upon innate incapacity and reliance on incapacity caused by taking (even a non-dangerous) drug.

[66] (1843) 10 Cl & Fin 200, 8 ER 718.

[67] Trial of Lunatics Act 1883, s. 2, as amended by the Criminal Procedure (Insanity) Act 1964, s. 1.

[68] See the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991. Sect. 1 of the Act provides that a jury shall not return a verdict of "not guilty by reason of insanity" except on the evidence of two (or more) medical practitioners of whom at least one is approved by the Home Secretary as having special experience in this field.

[69] *Windle* [1952] 2 QB 826.

[70] *Beard* [1920] AC 479, 501; *Gallagher* [1963] AC 349. In *Bromley*, Winchester Crown Court, 15 January 1992 (reported by Stephen Gold, "Litigation", New Law Journal, 31 January 1992, p. 116), the defendant suffered from brain damage which could induce him to act violently after consuming a small quantity of alcohol. Charged with attempted rape, he was found to have been (temporarily) insane. Pursuant to the court's power under s. 5(2)(b)(iii) of the Criminal Procedure (Insanity) Act 1964 (as substituted by the Criminal Procedure (Insanity and Unfitness to Plead) Act 1991), he was given an absolute discharge.

[71] Notwithstanding that in *Burns* (1973) 58 Cr App R 364, the Court of Appeal appears to have accepted that in such circumstances the defendant was entitled to an unqualified acquittal.

[72] *Watmore v Jenkins* [1962] 2 QB 572, 586, *per* Winn LJ.

conscious of what he is doing (because, for instance, he is suffering from concussion).[73] In general, the fact that an act is done in a state of automatism negatives criminal liability.[74] Exceptionally, however, in an offence of basic intent *Majewski* extends to such actions if that state is the result of voluntary intoxication.[75] That that should be the law is understandable: it would be very odd, granted the general *Majewski* approach, if a person could escape liability for an offence of basic intent if he drank so much as to render himself an automaton, but not if he indulged only to a lesser degree. However, the basis, and the extent, of this exception has not been clearly spelled out.

2.33 That intoxication could not have an effect through a defence of automatism that it did not enjoy under the intoxication rules themselves appears to have been taken for granted in *Majewski*, Lord Simon of Glaisdale applying the *Majewski* rule to every mental state short of insanity,[76] and Lord Salmon drawing an express distinction between cases of "pure accident" such as fits or sleep-walking (which in his Lordship's view would ground a defence) and, by contrast, insensibility through drink or drugs.[77] That followed the approach assumed in *Lipman*;[78] and has since been confirmed in *Bailey*,[79] where automatism resulting from voluntary intoxication was characterised as a form of recklessness, and also (obiter) in *Sullivan*.[80] The position is less clear when intoxication is one of a number of factors alleged to have combined, either sequentially or concurrently, to have produced an automatic state. *Stripp*[81] is sometimes[82] regarded as authority for the surprising[83] proposition that *Majewski* only applies where the automatic state is produced by voluntary intoxication *alone*. We doubt whether *Stripp* goes that far.[84] The case suggests, obiter, the possibility that where there is a cause of the automatism clearly separable in time or effect

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[73] *Bratty* [1963] AC 386, 409, *per* Lord Denning.

[74] Including cases of *Caldwell* recklessness: *Bell* [1984] 3 All ER 842, 846j-847b.

[75] e.g., *Lipman* [1970] 1 QB 152; see n. 19, para. 2.9 above.

[76] [1977] AC 443, 479G.

[77] At p. 482A-C. See also Lord Elwyn-Jones LC at p. 476C.

[78] [1970] 1 QB 152; see n. 20, para. 2.9 above.

[79] [1983] 1 WLR 760, 764.

[80] [1984] AC 156, 172H, *per* Lord Diplock, who referred to the possibility of acquittal because of non-insane automatism "in cases where temporary impairment (not being self-induced by consuming drink or drugs) results from some external physical factor such as a blow on the head ... ."

[81] (1978) 65 Cr App R 318.

[82] e.g., Smith and Hogan, *Criminal Law*, 6th ed. (1988), p. 190, to which the current edition of *Smith & Hogan* makes reference at p. 201; Williams, *Textbook of Criminal Law*, 2nd ed. (1983), p. 680.

[83] Rightly so characterised by Williams, *loc. cit.* in the previous footnote.

[84] The case, and its supposed inroad on the *Majewski* principle, was not mentioned in the judicial statements of the law made in *Bailey* and (obiter) in *Sullivan*.

from the intoxication, and supported by a foundation of evidence,[85] then a defence of automatism may be available; but where the causal factors are less easily separable, it would seem that the presence of intoxication will, on the policy grounds adopted in *Majewski*, exclude reliance on automatism.[86]

F. MATTERS OUTSIDE THE SCOPE OF *MAJEWSKI*, AND OF THIS PAPER

1. Offences not requiring intention or subjective recklessness

2.34 Intoxication causes no problems in relation to crimes that may be committed without intention or recklessness:[87] where the prosecution is under no obligation to establish a subjective mental element, no question arises of the admission or exclusion of evidence that might go to disprove such an element. This consideration also applies in relation to *Caldwell* recklessness. As we have explained above,[88] such recklessness has been judicially defined for the purpose of certain offences in terms that, in many cases, exclude consideration of the defendant's state of mind. Those cases, too, are outside the scope of this exercise.

2. Voluntary manslaughter

2.35 In certain circumstances a person who kills with the mens rea of murder - intending (that is) to cause either death or serious personal harm - is guilty only of manslaughter. The cases concern diminished responsibility; provocation; and suicide pacts.[89] We have excluded these cases, of voluntary manslaughter, from the present exercise. No question as to the effect of intoxication on the defendant's mens rea is in issue in such cases, because cases of voluntary manslaughter only arise when it is established that the defendant formed the normal mens rea of murder. In voluntary manslaughter, therefore, intoxication concerns different issues from those in the instant exercise, and cannot be considered in isolation from a general review of the policy governing the whole of the law of voluntary manslaughter.

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[85] There was no such foundation in *Stripp* itself, in which the defendant merely asserted, with no supporting evidence, that after becoming drunk he had sustained a concussive blow to the head which had rendered him an automaton.

[86] It will be noted that the foregoing discussion does not enter upon, any more than the authorities referred to enter upon, the much debated theoretical issue of whether the "defence" of automatism is an issue of actus reus or of mens rea. Like much else in the law of intoxication, the decision to exclude automatism as a possible means of recourse for a defendant is ultimately a matter of policy; in executing which it has not been thought necessary to examine the theoretical basis of the automatism doctrine.

[87] e.g., the Medicines Act 1968, s. 58(2)(a), provides that it is an offence to sell specified medicinal products by retail except on prescription given by an "appropriate practitioner". It is immaterial that the defendant did not act dishonestly or improperly (or even negligently): *Pharmaceutical Society of Great Britain v Storkwain Ltd* [1986] 1 WLR 903 (HL), in which a pharmacist supplied drugs on a forged prescription.

[88] paras. 2.19-2.21.

[89] *Smith & Hogan*, pp. 350-1.

3. Road traffic offences

2.36 We are not concerned in this Paper with the law relating to road traffic offences, which has recently been reviewed[90] and amended.[91] Offences concerned with the driving or use of vehicles do not in general require a mental element beyond an intention to drive or ride the vehicle. For example, it is not an ingredient of the offence of careless driving[92] that the defendant must be aware of any risk. Formerly, indeed, the more serious offences, of reckless driving and of causing death by such driving,[93] were construed as containing a mental element; and the difficulties to which that element gave rise were a significant reason for their replacement with offences based on *dangerous* driving.[94]

2.37 Furthermore, the socially dangerous implications of intoxication when the intoxicated party is involved with motor vehicles have been recognised and provided for by a specific code of detailed legislation,[95] on which there is a large body of case law.[96] That authority is quite distinct from the courts' general approach to intoxication in the criminal law. For instance, in an intoxication offence under road traffic law, the question whether the defendant's intoxicated state was self-induced is immaterial to liability,[97] whereas under the general law, and hence in this Paper, the distinction between voluntary and involuntary

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[90] See the Road Traffic Law Review Report (1988), and the government White Paper, "The Road User and the Law", Cm 576 (1989). The Review, chaired by Dr Peter North, was set up in 1985 under the joint aegis of the Home Office and the Department of Transport.

[91] Road Traffic Act 1991. See, e.g., the new offence of causing danger to road-users considered at para. 3.5 below.

[92] The offence consists in driving "a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place": Road Traffic Act 1988, s. 3 (substituted by the 1991 Act, s. 2).

[93] Road Traffic Act 1988, ss. 1 and 2.

[94] 1988 Act, ss. 1-2A, substituted by the 1991 Act, s. 1. The substituted offences were based on the recommendations of the North Report (n. 90 to this para., above). The offence of dangerous driving was considered at length at paras. 5.1-5.23 of the Report, which concluded (at para. 5.22(i)):

> "We see as the first requirement [of a new very bad driving offence] that the definition should ensure that the test is fully objective. It should look directly and objectively at the quality of the driving. It would thus concern itself first and foremost with the essence of the offence - was the driving really bad? - without needing to consider how or what the driver had thought about the possible outcome of this particular course of driving before it had even occurred."

[95] Road Traffic Act 1988, ss. 4-11.

[96] See, e.g., *Wilkinson's Road Traffic Offences*, 15th ed. (1991), vol. 1, pp. 211-302.

[97] e.g., *Armstrong v Clark* [1957] 2 QB 391. The defendant was under treatment for diabetes. While he was driving, the insulin overacted and, by causing a deficiency of blood-sugar, rendered him semi-comatose. He was convicted of driving under the influence of a drug, insulin. However, had he been charged with an offence under the general law, the court would have taken into account the effect of taking too much insulin in determining whether he had formed the mental element of the offence charged: see para. 2.29 above.

intoxication is crucial.[98] There is every reason to think, after the North proposals, that this specific code adequately meets the specific aspects of intoxication that it addresses, and we do not seek to disturb that conclusion.[99]

[98] See paras. 2.27-2.28 above.

[99] However, the new offence introduced by the Road Traffic Act 1991, of causing danger to road-users, stands on a different footing (it does not concern the driving or use of a vehicle) and is relevant to this exercise; see paras. 3.5 and 6.41(9) below.

PART III

CRITICISMS OF THE PRESENT LAW

A. COMPLEXITY AND OBSCURITY

3.1 We suggested in Part II of this Consultation Paper that the present law on intoxication is difficult to state with any certainty. That is demonstrated, in particular, by the conflicting views as to the exact implications of *Majewski*;[1] and by the lack of any satisfactory explanation of the grounds of the important distinction between crimes of basic and of specific intent on which much of the present law turns.[2]

3.2 As we point out in Part I of this Paper, these difficulties are the direct result of the courts being forced to achieve specific policy ends not through the legislation that is not open to them, but by adapting or, in some respects, overriding the orthodox rules of criminal liability.[3] These policy objectives are reiterated many times in *Majewski* itself. They are most succinctly summed up by the argument of Lord Simon of Glaisdale, referred to in paragraph 1.4 above, that it would be unacceptable to

> "leave the citizen legally unprotected from unprovoked violence where such violence was the consequence of drink or drugs having obliterated the capacity of the perpetrator to know what he was doing or what were its consequences."[4]

3.3 Put in these terms, the policy argument appears irresistible; but that policy has not been implemented directly, by providing simply that to commit certain acts whilst intoxicated is itself an offence. The policy is at present implemented by what purport to be technical rules of law. As we have seen, a distinction is drawn between crimes of basic and of specific intent, and the special intoxication rules of *Majewski* are applied to the former but not to the latter offences. The problems of that distinction have already been mentioned, but here we indicate in somewhat greater detail not only the difficulty of applying the distinction but also the recurrent uncertainty as to how it operates in practice.

3.4 There is no agreed criterion for classifying an offence as of specific or basic intent; there is a variety of judicial opinion on the matter. Perhaps the most widely favoured view

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[1] See paras. 2.3-2.18 above.

[2] See para. 2.7 above.

[3] "[A]rguments of social defence have been used to prevent the simple acquittal of those who cause harm and who lack awareness at the time because of intoxication. And ... this has caused various doctrinal difficutlies for English criminal law": *Ashworth*, p. 186.

[4] [1977] AC at p. 476F-G. Similar sentiments were expressed by other of the Law Lords: see [1977] AC 443, 469F, 471G, 474G-475F (Lord Elwyn-Jones LC); 482C, 483G-484F (Lord Salmon); 495B-E, 496B-C (Lord Edmund-Davies); 498E-G (Lord Russell of Killowen).

is that a crime of basic intent is one that may be committed recklessly;[5] another is that in a crime of specific intent "the *purpose* for the commission of the act extends to the intent expressed or implied in the definition of the crime".[6] It may be argued that the lack of a clear theoretical basis for the distinction between crimes of specific and of basic intent does not matter, once, as is broadly the case, most offences have been allocated by judicial decision into one or other of the categories.[7] However, that leaves at least two problems.

3.5 First, trial courts have no guidance as to how to treat new offences, or offences that happen so far to have escaped judicial consideration at appellate level. An example is the new offence, causing danger to road-users, under section 6 of the Road Traffic Act 1991.[8] This offence can only be committed intentionally, not recklessly, and thus on one view cannot be a crime of basic intent;[9] but it contains no element of purpose of the kind that, on another view,[10] is required for it to be a crime of specific intent. There is no obvious way in which a trial judge can resolve that dilemma. Second, since the distinction between crimes of specific and of basic intent is or appears to be arbitrary, courts cannot use the grounds of that distinction to obtain guidance as to the effect that putting cases into one or other of the categories has on the way in which those cases are decided. We drew attention in paragraphs 2.10-2.14 above to the uncertainty as to the effect of a decision that the *Majewski* approach applies to a given offence: that is, whether the *Majewski* rule necessarily applies to *all* elements of a crime deemed to be one of basic intent. That uncertainty cannot be resolved by any principled deduction from the original decision that the *Majewski* approach applies to the offence in question: because the authorities in which those decisions are expressed do not

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[5] This view was expressed by Lord Elwyn-Jones LC in *Majewski* [1977] AC 443, 475A (in relation to assault, which can be committed recklessly). On this view, it seems that if any element of an offence requires intention (as distinguished from recklessness), the offence is one of specific intent. That practical effect is not always given to this view appears from the judicial classification of rape as an offence of basic intent, even though that offence requires that the defendant intended to have sexual intercourse with the woman.

[6] This was the view of Lord Simon of Glaisdale: *Majewski* [1977] AC 443, 479B, emphasis added.

[7] See the examples given in paras. 2.8-2.9 above.

[8] Introducing a new section, 22A, into the Road Traffic Act 1988. Sect. 22A(1) provides:

> "A person is guilty of an offence if he intentionally and without lawful authority or reasonable cause -
>
> (a) causes anything to be on or over a road, or
> (b) interferes with a motor vehicle, trailer, or cycle, or
> (c) interferes (directly or indirectly) with traffic equipment,
>
> in such circumstances that it would be obvious to a reasonable person that to do so would be dangerous."

Under subsection (2) the term "dangerous" refers to the danger of personal injury or of serious damage to property; and circumstances within the defendant's knowledge may be taken into account in determining what would be obvious to a reasonable person. The maximum sentence of imprisonment following conviction on indictment (the offence is triable either way) is 7 years: 1991 Act, s. 26, Sch. 2, para. 13.

[9] See n. 5, para. 3.4 above.

[10] See n. 6, para. 3.4 above.

contain any clear policy, or any principled analysis of the ingredients of the offence, but rely simply on what appear to be dogmatic conclusions that particular offences are of "basic intent".

3.6 Although the distinction between crimes of specific and basic intent has been justified by some writers,[11] the overwhelming majority of commentators think it unsatisfactory. In 1980 the CLRC stated:[12]

> "Another weighty objection [to the *Majewski* rule] is that it is not always clear what crimes are crimes of 'basic' and 'specific' intent. In some areas the distinction is clear but in others it is not. ... It is this latter defect, as we see it, that is most in need of attention and that our proposals seek to repair."

The CLRC's proposals for reform accordingly rejected that distinction. They were based not on the categorisation of *offences*, but upon the nature of the mental element to be proved in a particular case: that is, on the distinction between intention and recklessness.[13]

3.7 The concept of "specific intent" was criticised even before *Majewski*,[14] and that case has certainly not illuminated the problem.[15] A particularly outspoken critic is Professor Williams, who finds the concept "highly artificial", and criticises the courts for "making a meaningless distinction of language yield legal results"; he suggests that in *Majewski* the House of Lords

> "approved the dichotomy of criminal intent notwithstanding that they had reached no agreement between themselves on its basis, and notwithstanding

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[11] e.g., Colvin, "A Theory of the Intoxication Defence", (1981) 59 Can BR, p. 750. In summary, he suggests that the distinction reflects the requirement in certain offences of an "ulterior intent" (that is, an intent to produce some *further* consequence beyond the actus reus, such as causing grievous bodily harm with intent to resist lawful apprehension, contrary to the Offences against the Person Act 1861, s. 18). In his view, such intention is an indispensable element of the offence in the absence of which (even through intoxication) the offence has, by definition, not been committed. Similarly, Ward, "Making Some Sense out of Self-Induced Intoxication", [1986] CLJ, p. 247, argues that "specific intent" is narrower than intention in a general sense, in that it calls for a "purposive intention", thus avoiding the suggestion that intention may include no more than foresight of the harm. This argument is, however, subject to the difficulty that "intention" in the criminal law is now most commonly understood simply in terms of purpose: LCCP 122, at paras. 5.4ff.

[12] Fourteenth Report (1980), "Offences against the Person", para. 258; see Appendix B to this Paper.

[13] The CLRC's proposals are considered at paras. 4.11-4.19 below. The relevant passages in the Report are set out in full in Appendix B to this Paper.

[14] Most conspicuously, by Professor J C Smith. In one case note he described specific intent as "a thick, judicially generated fog ... a meaningless expression ... a discredit to English law": see [1975] Crim LR, p. 157. In another case note ([1972] Crim LR, p. 224), he observed: "The expression 'specific intent' seems dear to the hearts of our judges ... but unfortunately they never tell us what it means, and any meaning it may have is shrouded in obscurity." Earlier criticism had come from Professor Sir Rupert Cross: "Specific Intent", [1961] Crim LR 510.

[15] See for instance para. 2.7 above.

that no definition of the two intents explains the purported applications of the distinction made by the courts and approved in *Majewski*."[16]

3.8 The objection to this law is, however, not merely that it is complex and difficult. In addition, the law is erratic in its operation and, if applied according to its terms, difficult to administer. We deal with those two points in the next following sections.

B. THE ERRATIC OPERATION OF THE *MAJEWSKI* APPROACH

3.9 As *Majewski* operates through what purport to be rules of technical law and not by the direct implementation of that policy, it produces an erratic implementation of the policy which is alleged to justify it.

3.10 The treatment of the distinction between crimes of basic and of specific intent as an issue of abstract law, rather than directly in policy terms, means that there is no necessary connection between the seriousness of the offence involved and its categorisation as an offence of specific intent, in respect of which latter offences evidence of intoxication *can* be adduced in the accused's defence. Thus, murder and wounding under section 18 of the Offences against the Person Act 1861 are crimes of specific intent, whilst manslaughter and malicious wounding under section 20 of the 1861 Act are crimes of basic intent.[17] And there are many comparatively serious offences whose definitional structure is such that it seems impossible to apply the *Majewski* approach to them. Examples are burglary,[18] handling stolen goods[19] and forgery.[20]

3.11 In the case of some of the most serious crimes that appear, contrary to the policy of ensuring that criminal acts by intoxicated persons should not go unpunished, to be exempted from the reach of the socially protective *Majewski* rule, there will be another, related, crime of basic intent of which the intoxicated accused can be safely convicted: for instance, a person who sets out to persuade the jury that his intoxication prevented his having the mens rea required by the crime of specific intent created by section 18 of the Offences against the Person Act 1861 will thereby succeed in establishing his guilt, under *Majewski*, of the lesser offence of basic intent created by section 20 of that Act. There is, however, no general principle that ensures that in relation to crimes of specific intent it will always be possible to convict of *some* offence; and in relation to, for instance, burglary, there is no such "fall-

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[16] *Textbook of Criminal Law*, 2nd ed. (1983), pp. 471-473. Other critics include: Stuart, *Canadian Criminal Law*, 2nd ed. (1987), pp. 150-153; Dashwood, "Logic and the Lords in *Majewski*", [1977] Crim LR, p. 532; Quigley, "Specific and General Nonsense?", (1987) 11 Dalhousie LJ, p. 75. The former Chief Justice of Canada has described "specific intent" as "not a concept known to psychology" and "an elusive cerebration": *Leary* (1977) 33 CCC 473, 490 (Dickson J, as he then was, dissenting).

[17] See paras. 2.8-2.9 above.

[18] Cf. para. 2.13 above.

[19] Sect. 22(1) of the Theft Act 1968 requires knowledge or belief that the goods are stolen.

[20] Sect. 1 of the Forgery and Counterfeiting Act 1981 requires an intention to use the false instrument to induce another to accept it as genuine.

back" offence if the defendant's intoxication prevents his having the specific intent required in that crime.

3.12 It is a matter for decision on grounds of policy whether the law can or should do anything about people who "burgle", that is, enter premises as trespassers with intent to commit a specific offence therein, in a state of intoxication:[21] the point should not be resolved, in effect *sub silentio* on the policy issues, by reliance on the apparently technical nature of the offence as one of "specific intent". Somewhat similarly, in cases of homicide and of wounding, the present law ensures that intoxicated actors are convicted of *some* offence; but that, and the reduced penalty entailed by conviction only of the lesser offence, is achieved in effect only in an accidental manner.

3.13 The present law of intoxication also operates erratically in relation to issues not covered by the main specific intent/basic intent distinction. Two particular examples may be cited.

3.14 First, where the defendant's mistaken belief is concerned, *Majewski* apparently applies to any offence, without regard to whether it is of specific or basic intent;[22] though the rule may not apply at all where a specific statutory provision identifies a particular belief as a defence.[23] *O'Connor*,[24] which concerned a charge of murder, affords a recent and striking instance of the complexity caused by the different operation of intoxication in relation to matters of primary liability and in relation to matters of defence. The Court of Appeal stated that, murder being a crime of specific intent, the jury should be directed to take into account the defendant's intoxicated state in deciding whether he had the mental element of that offence (namely, an intention to kill or to cause serious bodily harm); but the jury should be instructed to exclude intoxication from consideration in deciding whether the defendant thought he was acting in self-defence.[25]

3.15 Second, we would cite the distinction, in the offence of criminal damage,[26] between a mistaken belief that the owner of the property would have consented to the damage done by the defendant (where intoxication may be taken into account[27]) and a mistaken belief that

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[21] See para. 6.40 below.

[22] para. 2.25 above.

[23] para. 2.26 above.

[24] [1991] Crim LR 135. The Court adopted a statement by Lord Lane CJ (delivering the Court's judgment) in *O'Grady* [1987] QB 995, 999G: see para. 2.25 above.

[25] The Court's approach differed from the opinion of the majority of the CLRC, Fourteenth Report (1980), para. 277 (see Appendix B to this Paper): "... evidence of voluntary intoxication adduced in relation to a defence should be treated in the same way as evidence of voluntary intoxication adduced to negative the mental element."

[26] Criminal Damage Act 1971, s. 1(1).

[27] *Jaggard v Dickinson* [1981] QB 527; see para. 2.26 above.

the defendant owned the property (where it may not[28]).

3.16 We are not aware that any principled reason has been advanced for these distinctions, nor can we think what such a reason might be. The distinctions are, we suggest, the result of the *ad hoc* adaptation of the rules of criminal liability to try to meet particular problems caused by intoxicated offenders.

C. THE PRACTICAL DIFFICULTY OF APPLYING THE *MAJEWSKI* APPROACH

3.17 Opinions differ as to the matters that the jury must consider in cases to which the *Majewski* approach applies. On one view, the practical effect of *Majewski* is that

> "It is fatal for a person charged with a crime not requiring specific intent who claims that he did not have *mens rea* to support his defence with evidence that he had taken drink or drugs. By so doing he dispenses the Crown from the duty, which until that moment lay upon them, of proving beyond reasonable doubt that he had *mens rea*. *Mens rea* ceases to be relevant."[29]

Another view however is that, since *Majewski* requires, and indeed permits, the jury to ignore *only* intoxication, they must have regard to all the evidence except that of intoxication in deciding whether the defendant formed the mens rea of the offence.[30]

3.18 The importance of this question can be illustrated by an example. The defendant is charged with inflicting grievous bodily harm under section 20 of the Offences against the Person Act 1861, an offence in respect of which his subjective recklessness as to the infliction of at least some harm has to be established by the prosecution.[31] The injury was caused when, on his way back from a public house late at night, he picked up a dustbin in the street and threw it across the road. The dustbin hit the victim of the offence; the defendant claims not to have been reckless as to injury to the person because he never appreciated that there was any other person present whom the dustbin might hit. He was intoxicated; but he says that his lack of awareness was not caused, or not wholly caused, by his intoxication, but by a combination of the darkness of the night, his lack of judgment through drink, and also his fatigue and stupidity.

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[28] Because the question does not involve a question of statutory *defence*. Rather, the issue is: does the mistaken belief negative the mental element of recklessness whether the property belongs to someone other than the defendant? Since the offence is one of basic intent, intoxication cannot be taken into account in determining that issue.

[29] *Smith & Hogan*, p. 223.

[30] Williams, *Textbook of Criminal Law*, 2nd ed. (1983), pp. 474-475, who observes, however: "[T]here are indications that the rule in *Majewski* is misunderstood by some judges and magistrates, who assume that when evidence of intoxication is given there is nothing to be decided on the question of intention."

[31] *Savage* [1992] 1 AC 699.

3.19 The stress laid in *Majewski* upon the rule in that case being *only* about intoxication[32] indicates strongly that the second view mentioned in paragraph 3.17 above is the correct one, and that therefore the jury in a case such as that just mentioned must still consider the actual awareness of the accused; leaving out of account the fact that he was intoxicated, but only that fact. It would seem therefore that, consistently with the rule laid down in *Majewski*, juries should be asked to consider whether the defendant *would* have formed the mens rea of the offence had he not been intoxicated.[33] Although in extreme cases the answer may be clear,[34] the issue is hypothetical and artificial;[35] and common sense[36] suggests that, in addressing that issue, there is a substantial risk that the jury will be confused and fall into error.

3.20 It would seem that in a case such as that just described the jury should be told that they must decide what *this* defendant foresaw or was aware of, whilst however omitting from that consideration one factor, intoxication, that they may well think to be obviously likely to have affected his perception. It will readily be seen that their task is not merely difficult, but impossible. An enquiry into the subjective mental state of the defendant can only be into his actual mental state, and not into what that state might or would have been in different circumstances. In reality, therefore, the enquiry will either be into the objective state of mind of a reasonable man circumstanced as the defendant was, but without his intoxication; or, more likely, the complex and hypothetical question will be glossed to a general conclusion that "intoxication is no defence",[37] or even that intoxication "dispenses" with the need to prove mens rea.[38] It might be argued that that would, in fact, be a simple way of dealing with the problem of intoxication;[39] but that is not what the law at present purports to be. Quite apart from the importance of the general principle that the law as applied in practice

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[32] As we point out in paras. 2.19ff above, the *Majewski* approach does not apply in offences of *Caldwell* recklessness, since there the meaning of "recklessness" as used in the definition of the offence in effect excludes any consideration of the defendant's awareness. However, the offence under consideration has been specifically decided by the House of Lords not to be one of *Caldwell* recklessness: *Savage* [1992] 1 AC 699.

[33] The question is not: if not intoxicated, would the defendant have *acted* as he did? The issue is one of cognition, not of volition or self-control: see para. 2.1 above.

[34] As in, e.g., *Lipman* [1970] 1 QB 152, in which the defendant killed a woman by cramming a sheet into her mouth and striking her while on an LSD "trip", believing he was being attacked by snakes in the centre of the earth.

[35] This criticism of the *Majewski* approach was made in the leading Australian case, *O'Connor* (1980) 54 ALJR 349, 368E-G, by Murphy J; see para. 5.14 below. A similar point is made in *Smith & Hogan*, p. 224.

[36] Actual knowledge of how particular cases were decided is unlikely to be forthcoming, since the deliberations of a jury cannot be revealed (Contempt of Court Act 1981, s. 8); a defendant is unlikely to appeal successfully against conviction if the jury were directed in accordance with *Majewski*; and no appeal lies against acquittal.

[37] Cf. the formulation of the Court of Appeal in *Fotheringham* (1988) 88 Cr App R 206, cited at n. 11, para. 2.6 above.

[38] See *Smith & Hogan*, p. 223.

[39] See paras. 4.31ff below.

should be the same as that laid down by authority, the cost in complexity and uncertainty of putting these impossible questions to the jury must be enormous.

3.21 There is a further and very substantial difficulty of practice, and indeed of principle, that is inherent in these aspects of the *Majewski* rule. Where the crime charged is an offence of basic intent, the intoxicated state of the defendant is, at least in most cases, sufficient to establish his guilt: his culpability in effect consists in becoming intoxicated, and not, as in the normal case, of acting when aware that he might cause the harm prohibited by the particular offence. However, he is actually convicted of that very offence, and thus has to be punished for committing that offence.

3.22 The jury therefore return a single verdict, of guilty of the offence charged. The judge will not know whether they have found that the defendant did not have the usual mens rea because he was prevented from being aware of the consequences of his actions by his intoxicated state; or whether alternatively they have found that he was indeed guilty of the offence with the normal mens rea, his state of intoxication notwithstanding. In the latter case, it is well established that it is no mitigation that an offence was committed in drink.[40] That, however, leaves untouched the question, which under the present law cannot even arise, of whether there should be special sentencing arrangements, and if so what arrangements, for intoxicated persons who, without having the mens rea of a particular offence, commit the harm proscribed by that offence.

3.23 That issue is not an easy one, as we will demonstrate in Part VI of this Paper when we consider what the sentencing policy should be under rules of law that do separately identify cases where the offence is the commission of criminal harm when intoxicated. However, the objection to the present law is that it prevents those issues from even being considered, and requires the judge to assume in *all* cases that the defendant had the mens rea of the substantive offence.

D. OUR APPROACH TO THESE PROBLEMS

3.24 The present law is therefore objectionable on three levels. It is very complicated and difficult to explain, to the extent that it is difficult to think that it operates in practice other than by its detailed rules being substantially ignored; it purports to apply a clear social policy, of ensuring that intoxicated people who commit criminal acts do not escape criminal sanctions, but only does so in an erratic and unprincipled way; and if taken seriously it creates many difficulties of practical application. It is therefore understandable that in other jurisdictions, and under the rational scrutiny of law reformers, other solutions have been sought to the problem of protecting society from those who commit criminal acts when in a state of intoxication.

3.25 These solutions take, broadly, two different forms. One approach is to adopt some version of the *Majewski* approach, by implementing the basic policy concerns lying behind *Majewski* through special rules to limit or even exclude consideration of evidence of voluntary intoxication when adjudicating upon the defendant's mens rea in specific crimes. In Part IV

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[40] Thomas, *Encyclopaedia of Sentencing Practice*, para. C3.2(d).

of this Paper we refer to a number of such solutions, all of which are in actual operation in some, and in some cases many, common law jurisdictions. Our provisional view is that none of these solutions is satisfactory, for the reasons that we give in Part IV, though we recognise that those reasons may not be shared by consultees, and we invite comment on them.

3.26 It may be convenient for our readers if we summarise here the various solutions that are discussed, as Options 1-4, in Part IV. They are:

Option 1: Do nothing (notwithstanding our criticisms of the *Majewski* approach).

Option 2: Codify the *Majewski* approach.

This option takes three, somewhat different, possible forms:

(i) Codify the present law without amendment.

(ii) Adopt the proposals of the CLRC and the rule in the American Model Penal Code to apply *Majewski* only to issues of recklessness.

(iii) Adopt a simplified version of (ii), under which a state of voluntary intoxication would itself constitute recklessness in law.

Option 3: Disregard the effect of voluntary intoxication in *any* offence, with the effect that the defendant could in no case rely on voluntary intoxication to negative mens rea.

Option 4: Disregard the effect of voluntary intoxication in *any* offence (as under option 3), but subject to a statutory defence whereby it is open to the defendant to prove, on the balance of probabilities, that he lacked the mens rea of the offence.

3.27 The second and more radical possibility is to abandon the *Majewski* approach altogether. That could take two alternative and different forms, which we discuss in Parts V and VI of the Paper. Under Option 5, *Majewski* would simply be abolished, without replacement, so that there was no special law on intoxication. Under Option 6, *Majewski* would similarly be abolished, but there would be introduced a special offence of committing certain acts whilst in a state of intoxication. Our provisional view is that the choice lies between those two options, but again we seek the views of consultees in the light of the detailed discussion in Parts V and VI of the Paper.

PART IV

SOME POSSIBLE OPTIONS FOR REFORM

A. OPTION 1: DO NOTHING

4.1 After the strictures levelled at the present law in Part III of this Paper, it may seem surprising that this option is even discussed. However, there are undoubtedly arguments for retaining the present law, based mainly on the view that it has acquired practical efficacy with the passage of time. Although admittedly no judge or commentator has offered a wholly convincing explanation of the distinction between crimes of specific and basic intent,[1] the great majority of offences have now been placed in one category or the other,[2] making it comparatively easy to handle those offences. This has led to a low incidence of appeals on questions concerning the relevance of intoxication to certain offences, and indicates that, in spite of theoretical objections, the *Majewski* approach "works".

4.2 To maintain the status quo would give effect to the view that it is contrary to the interests both of public order and of public perception of justice to allow intoxicated defendants to be acquitted of serious offences because of self-induced intoxication. This argument was expressed in the speeches in the House of Lords in *Majewski*,[3] and has been strongly advanced elsewhere.[4] It is also noteworthy that many jurisdictions in the USA have a law very similar to that in *Majewski*.[5] In addition, in Canada[6] the Supreme Court has adopted the same approach as in England and Wales.

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[1] See paras. 2.5 and 3.4-3.8 above.

[2] See the lists of crimes in paras. 2.8-2.9 above.

[3] [1977] AC 441, 469F-G (Lord Elwyn-Jones LC), 476G (Lord Simon of Glaisdale) and 484 (Lord Salmon).

[4] e.g., in Canada:

> "Intoxication, whether by alcohol or drugs, lies at the root of many if not most violent assaults: intoxication is clearly a major cause of violent crime. What then is preferable, a recognition of this fact and the adoption of a policy aimed at curbing the problem, or the application of what is said to be logic by providing in law that he who voluntarily partakes of that which is the cause of the crime should for that reason be excused from the consequences of his crime? If that is logic, I prefer policy."
>
> (*Bernard* (1988) 45 CCC (3d.) 1, 36, *per* McIntyre J.)

[5] 13 jurisdictions have the "specific/general intent" approach embodied in their common law, namely: District of Columbia, Florida, Maryland, Massachusetts, Michigan, Nebraska, New Mexico, North Carolina, Ohio, Rhode Island, Tennessee, West Virginia and the Federal Jurisdiction. See McCord, (1990) Journal of Legal History 372, 389, for the relevant authorities in these states. 14 more states have codified versions of this "specific/general intent" approach: see n. 13, para. 4.8 below.

[6] *Bernard* (1988) 45 CCC (3d.) 1, though on this issue by only a 4-3 majority and with powerful dissenting judgments; following *Leary* (1977) 33 CCC (2d.) 473, in which there was a similar division of the Court and strongly expressed dissenting judgments.

4.3 Related to this view is a fear that, in offences of basic intent, a "pure" subjective approach would lead juries too readily to acquit an intoxicated defendant where the evidence of intoxication produced even a slight doubt about whether he acted with the requisite mens rea.[7] At present, provided the offence in question has been allocated to one or other of the categories of offence of basic or of specific intent,[8] defendants and juries, and judges, know clearly where they stand: in offences of basic intent, evidence of intoxication *cannot* be relied on at all to negative mens rea.

4.4 However, even if these opinions are well founded, it does not follow that the present law is the only, or best, response to them. Only if there is no alternative ought practical problems of this sort to be met by a rule that is difficult to expound, and is admitted to be illogical by the judges who formulated it.[9] If there is a better, more rational way of achieving the same policy objectives, it would be unduly cautious to retain the present law merely because it is firmly entrenched and familiar. Even some members of the House of Lords in *Majewski* recognised that the common law principle they were laying down might not be the ideal solution to the problem, but was the best that could be done without legislation.[10]

4.5 As to the argument that the present approach is "working", the complexity of the question that, in offences of basic intent, the jury are asked to decide should be borne in mind. In deciding whether the defendant acted with mens rea, they may have to take into account factors other than voluntary intoxication. This "severance" of intoxication from the jury's consideration would seem to pose an artificial, unreal question: it requires them, on the one hand, to decide whether the defendant had mens rea, while, on the other hand, it excludes from their consideration what may be the single most likely factor to cast doubt on its presence.

4.6 The strong possibility is, therefore, that the *Majewski* rule works only because it is not properly applied; and that juries deal with cases not by applying the full complexities of the rule, and asking the hypothetical questions that it seems to demand, but by a more simple approach.[11] This outcome is, however, achieved not directly, and on a basis of principle, but at the cost of introducing into the formal law complex and uncertain rules, that are

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[7] See paras. 1.16-1.17 above.

[8] For the problems facing a trial judge when dealing with an offence that has not been so allocated, see para. 3.5 above.

[9] See, in *Majewski*, Lord Salmon at pp. 483G-484H, Lord Edmund-Davies at p. 495C-E and Lord Russell of Killowen at p. 498E-G; and, for instance, the observations of McIntyre J in *Bernard*, cited in n. 4, para. 4.2 above.

[10] [1977] AC 443, 475E, *per* Lord Elwyn-Jones LC; 477, *per* Lord Simon of Glaisdale. In the Australian case, *O'Connor* (1980) 54 ALJR 349, 378F, Wilson J (one of the dissenting judges who upheld the *Majewski* approach) preferred "to see the courts assert and maintain the traditional approach to intoxication so as to adequately preserve the Queen's peace *pending any legislative action that may be considered appropriate.*" (Emphasis added.)

[11] See paras. 3.17-3.23 above.

extremely burdensome to understand; and which, if they are to be loyal to their obligation to obey the law, the lawyers must struggle to rationalise and explain to the laymen, juries and lay magistrates, who have to apply them.

4.7 It should also be noted that *Majewski* only erratically implements the policy concerns that it purports to meet: see paragraphs 3.9-3.16 above. That is a further reason why other approaches to the problem of intoxication need to be seriously considered.

B. OPTION 2: CODIFY THE *MAJEWSKI* APPROACH

1. General

4.8 Under this option the present law would be put into legislative form, which would, where necessary, clarify any uncertainties in the present common law rules. The objective would, therefore, be not reform, but rather a more positive statement of the position produced by the common law. Codified versions of the *Majewski* approach which retain some distinction between crimes of specific and basic (or general) intent already exist in the Criminal Codes of Queensland, Western Australia and Tasmania[12] and in several states in the United States,[13] including, in a modified form, California.[14]

4.9 The Australian Attorney-General's Review Committee[15] recently recommended that the law of intoxication throughout Australia should uniformly correspond to the "codified *Majewski*" approach of Queensland and Western Australia, and expressly rejected other

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[12] Queensland and Western Australia share the same Code, s. 28 of which provides:

> "When an *intention to cause a specific result* is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed." (Emphasis added.)

This Code has been said to state the law in accordance with *Majewski* and *Beard*: *O'Connor* (1980) 54 AJLR 349, 378, *per* Wilson J. It is clear from the authorities that "intention to cause a specific result" is synonymous with "specific intent"; and the categorisation of offences appears to be similar to that of England and Wales: see O'Regan, *Essays on the Australian Criminal Codes* (1979), pp. 79-82. The Tasmanian Code, s. 17(2), retains the phrase "specific intent", and is also accepted as stating the law in accordance with *Beard*: *Snow* (1962) Tas. SR 271, 280.

[13] These states are: California (see n. 14 to this para., below), Colorado, Idaho, Illinois, Kansas, Louisiana, Nevada, Oklahoma, South Dakota and Wyoming. See McCord, *op. cit.* at n. 5, for the authorities. In addition, some states have statutes which are worded more generally, and which do not expressly mention a specific/general intent distinction, but which have nevertheless been interpreted as maintaining this distinction: this is true of Minnesota (*State v Kjeldahl* 278 NW.2d. 58 (1979)), Washington (*State v Welsh* 508 P.2d. 1041, 1044 (1973, Wash. Ct. Apps.)), Iowa (see Anderegg, (1988) 73 Iowa LR 935) and Wisconsin (*State v Strege* 343 NW.2d. 100, 103 (Wis. Supreme Ct., 1984)).

[14] §22 of the California Code refers to "any particular purpose, motive or intent ... necessary ... to constitute any particular species or degree of crime", rather than to "specific intent".

[15] A.G.'s Dept.: Review of Commonwealth Criminal Law Interim Report: Principles of Criminal Responsibility and Other Matters (July 1990).

options such as creating a separate intoxication offence. The Committee did not express great enthusiasm for that approach, but they saw difficulties both in the rule adopted in the four common law states of Australia[16] and in the creation of a special offence of dangerous or criminal intoxication.[17] However, more recent law reform proposals in Australia have withdrawn from this position, and supported instead the radically different approach of the common law states.[18]

4.10 Merely to codify *Majewski* would remove some of the uncertainty as to the exact content of the *Majewski* rule, but it would meet no other of the problems of that rule. It is not a course that we can recommend.

2. The CLRC proposals: *Majewski* applied to recklessness only[19]

4.11 The CLRC supported the retention of the substance of the *Majewski* approach, but the Committee considered unsatisfactory the existing distinction between offences of specific and of basic intent. Instead, the CLRC proposed that the *Majewski* approach should apply in relation to recklessness but not to intention; irrespective of whether the question of intention arose as the sole question of mens rea in a given case, or only as one of the questions that had to be determined.[20] It will be recalled that, on one view, such is already the position of the English common law.[21]

4.12 The CLRC proposed that:

1. The common law rules should be replaced by a statutory provision on the following lines:

   (a) that evidence of voluntary intoxication should be capable of negativing the mental element in murder[22] and the intention required for the commission of any other offence; but

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[16] See paras. 5.10ff below.

[17] See Part VI below.

[18] See para. 5.18 below.

[19] CLRC Fourteenth Report (1980), Cmnd 7884, "Offences against the Person", paras. 257-279. The passages in the Report relating to intoxication are reproduced in Appendix B to this paper, and the CLRC's proposals, which were summarised at para. 279 of the Report, are also summarised, for ease of reference, in para. 4.12 below. Despite the title of the Report, its proposals concerning intoxication are not restricted to offences against the person.

[20] Fourteenth Report, paras. 266-275; cf. para. 2.16 above.

[21] See paras. 2.15-2.17 above.

[22] At the date of the CLRC's Report, in 1980, it was generally thought that the mens rea of murder extended to (some forms of) recklessness: see, e.g., Williams, *Textbook of Criminal Law*, 1st ed. (1978), at pp. 213-218. It is now clear, however, that "the mental element in murder is a specific intent, the intent to kill or to inflict serious bodily harm. Nothing less suffices": *Hancock and Shankland* [1986] AC 455, 471.

(b) that in offences in which recklessness constitutes an element of the offence, if the defendant owing to voluntary intoxication had no appreciation of a risk which he would have appreciated had he been sober, such a lack of appreciation is immaterial.

2. Voluntary intoxication should be defined on the lines recommended by the Butler Committee.[23]

3. In murder or in any other offence in which intention is required for the commission of the offence, a mistaken belief arising from voluntary intoxication should be a defence to the charge if such a mistaken belief held by a sober man would be a defence. However, in offences in which recklessness constitutes an element of the offence, if the defendant, because of a mistake, due to voluntary intoxication, holds a belief which, if he had been sober, would be a defence to the charge, but which he would not have held had he been sober, the mistaken belief is immaterial.

4.13 The CLRC proposals would, in effect, automatically treat as "reckless" a defendant who relies on evidence of voluntary intoxication and it would therefore produce, and was intended by the CLRC to produce, a result in relation to issues of recklessness similar to the present rule governing crimes of basic intent. Of the criticisms of the present law set out in Part III of this Paper, it would adequately meet only the complaint of undue complexity caused by the current elaborate law distinguishing between crimes of specific and of basic intent.[24]

4.14 The CLRC proposals would apply in relation to the reckless (as distinguished from the intentional) commission of an offence. It would therefore avoid the difficulties inherent in applying *Majewski* to questions of intention;[25] but it does so at the price of preserving, and indeed extending, the present anomaly that an offence that could *only* be committed intentionally (for example, under the law now in force, murder[26]) would fall outside the *Majewski* approach. That would seem to be a derogation from the policy objectives thought to justify special rules in the first place; but perhaps even more dubiously, *Majewski* under the CLRC's proposals would cease to apply even to an element of intention in an offence of basic intent.

4.15 In some such cases, it may be very doubtful whether a special rule preventing the consideration of evidence of intoxication in relation to the defendant's intention is justifiable or, indeed, makes sense: an example is the version of burglary in which it is necessary to prove that the defendant entered a building as a trespasser with intent to commit a specified

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[23] See Appendix A, para. 18.56.

[24] paras. 3.4-3.8 above.

[25] See para. 3.10 above.

[26] n. 22, para. 4.12 above.

offence therein.[27] The policy difficulties caused by limiting the *Majewski* approach to issues of recklessness are, however, more obvious in respect of some other offences. For instance, in rape "the mens rea is an intention to have sexual intercourse with P, (i) knowing that P does not consent, or (ii) being aware that there is a possibility that she does not consent."[28] A man so intoxicated as to raise sufficient doubt about his intention to have intercourse would on the CLRC's test seem to be exculpated. Such a case might be rare, but in such cases a serious anomaly arises if this ground of exculpation is compared with the fact that intoxication could not as a matter of law be taken into account when considering the defendant's state of mind as to the victim's consent. Such a rule also differs from the view, no doubt widely held on policy grounds, that in relation to rape intoxication should be *no* defence.[29]

4.16 There are two further respects in which the CLRC's proposals would in our view cause difficulty; the first is a matter of practicality, the second raises questions of principle of some importance.

4.17 First, the CLRC's proposals assume quite generally that juries will be directed to take account of evidence of intoxication in relation to any element of intention, but to ignore that evidence when considering recklessness. That obligation might arise in relation to different elements of the same offence, as suggested in paragraph 4.15 above; or in relation to different counts on the same indictment. The task of taking such evidence into account for one purpose but not for another seems inherently likely to be confusing for a jury: particularly when the jury remains obliged, in respect of issues of recklessness, to give weight to all evidence, apart from that of intoxication, that throws light on the actual state of the defendant's mind.[30]

4.18 Second, under the CLRC's rule an intoxicated defendant would in effect automatically be reckless, and thus guilty of any offence of which recklessness was a sufficient mens rea. The rule would thus continue all the obscurity as to punishment for such offences that is contained within *Majewski* itself.[31] Whilst, as we have stressed, the issues as to punishment of intoxicated offenders are of some difficulty, it nonetheless seems desirable that the law should confront the problem of sentencing the intoxicated defendant in specific terms, rather than assume that his culpability is, and thus his punishment should be, on exactly the same basis as that of a sober but reckless man.

4.19 The CLRC's proposals are advanced in the context of the policy objective recognised in *Majewski* of extending the criminal law to those who, having chosen to become

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[27] See the analysis in para. 2.13 above. To assume the presence of intent in the case of a "burglar" too intoxicated to know what he was doing produces an offence of very wide and, indeed, wholly uncertain content: see para. 4.44 below.

[28] *Smith & Hogan*, p. 458.

[29] See the observations in *Fotheringham* (1989) 88 Cr App R 206, cited in n. 11, para. 2.6 above.

[30] See paras. 3.17-3.20 above.

[31] See para. 3.22 above.

intoxicated, commit the harm proscribed by an offence without its mental element.[32] The shortcomings of the CLRC's proposals that we have identified strongly suggest, however, that the *Majewski* rule fails because the techniques available to the common law are inherently inadequate for dealing with the problem of intoxicated offenders; and that if it is sought to give real effect to that policy objective, what is needed is thoroughgoing replacement of the common law rule, rather than any attempt at marginal reform.

3. The US Model Penal Code as adopted in US Jurisdictions

4.20 However, despite what appear to be these substantial drawbacks, a solution that is in fact that of the CLRC Report discussed above is in force in a number of jurisdictions in the United States. The CLRC was greatly influenced by the American Law Institute Model Penal Code provisions on intoxication, which provide first that "... intoxication of the actor is not a defense unless it negatives an element of the offense", then in addition that:

> "When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is material."[33]

4.21 The Model Penal Code approach to intoxication has been adopted in 14 jurisdictions in the USA.[34] The largest, and most notable, of these jurisdictions is New York. The intoxication provisions of the Model Penal Code are adopted in the following form in New York:

> "§15-25: Intoxication is not, as such, a defence to a criminal charge; but in any prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant whenever it is relevant to negative an element of the crime charged.
>
> "§15-05(3): A person acts recklessly with respect to a result or circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. ... A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto."[35]

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[32] See para. 1.4 above.

[33] §2.08(1) and (2). The Institute positively defended the policy behind this approach: see n. 63, para. 4.34 below.

[34] Alabama, Connecticut, Kentucky, Maine, Montana, New Hampshire, New Jersey, New York, North Dakota, Oregon, Utah, Vermont. Alaska and Arizona slightly extend the policy of the Code, and, in addition to recklessness, do not allow intoxication to negate the culpable mental state of "knowingly" (although it may negate "intention"). See McCord, *op. cit.*, n. 5, para. 4.2 above for authorities.

[35] *McKinney's Consolidated Laws of New York*, Vol. 39 (Penal Law). All § references in paras. 4.22-4.24 below are to this work.

4.22 New York also adopts the four culpable mental states defined in the Model Penal Code[36] for the purposes of criminal liability, "purposely", "knowingly", "recklessly" and "negligently", in §15.05 of its Penal Law. §15.15 provides that when an offence requires a particular mental state, this state is designated by the use of one of these four terms, and that when only one of these mental states is mentioned in a statute defining an offence, that state is presumed to apply to every element of the offence.

4.23 These provisions were relied on in *People v Register*,[37] in which it was held that the sole mens rea requirement of the offence of "depraved mind murder"[38] was designated by the word "recklessly", with the effect that intoxication could not be relied on to disprove the mental element of the offence.[39] It was held, despite strong dissent, that the "depraved indifference to human life" element which distinguishes this offence from mere reckless manslaughter referred merely to the factual setting in which the conduct must occur, and was not an extra element of mens rea which intoxication could negative.

4.24 The New York Penal Law avoids any confusion over whether the intoxication rule applies only when recklessness is specifically *charged*, or generally to offences *capable* of reckless commission, by separating out the different degrees and species of each crime with reference to one particular mental state in each case. There are no offences which, as many English offences do, express the mens rea for *one* offence as "intentionally or recklessly".[40] For example, there are separate offences of, on the one hand, recklessly causing serious physical injury with a weapon[41] and, on the other, *intentionally* so doing.[42]

4.25 However, the Model Penal Code approach has not been free from criticism in the USA. It has been suggested that the MPC approach differs only in limited respects from the traditional specific/general intent rule.[43] In addition, the widening of the concept of recklessness which this approach involves has been criticised; for example, it was said of the

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[36] §2.02.

[37] 457 NE 2d. 704 (1983) (Court of Appeals of NY).

[38] §125.25(2): a defendant must "under circumstances evincing a depraved indifference to human life ... recklessly engage in conduct which creates a grave risk of death to another person, and thereby cause the death of another person."

[39] In accordance with §15.05(3); see para. 4.21 above.

[40] As in, e.g., the Criminal Damage Act 1971, s. 1(1).

[41] §120.05(4).

[42] §120.10(1).

[43] Perkins and Boyce state that "For the most part the Model Penal Code follows the general pattern of existing law as to intoxication": *Criminal Law*, 3rd ed. (1982). Peterson observes that "The traditional analysis of general-versus-specific intent ... takes the same approach [as the Model Penal Code]. The only difference is the terminology ... . The concept of general intent is analogous to the Code concepts of 'reckless' and 'negligent' ... ": (1984) 13 Stetson LR 649, 667.

New York provisions on intoxication, described at paragraphs 4.21-4.24 above, that:

> "an actor might not in fact foresee a substantial and unjustifiable risk when he chooses to become intoxicated. Thus the proposed rule will allow the imposition of liability for recklessness - a mental state that by definition requires awareness and disregard of such risk. In this case, liability will exceed culpability; the special rule on recklessness will present a significant exception to the scheme that proportions punishment to the mental culpability of the accused."[44]

One jurisdiction, Hawaii, expressly rejected the Model Penal Code recklessness provision for this reason: "It equates the defendant's becoming drunk with the reckless disregard by him of risks created by his subsequent conduct and thereby forecloses the issue."[45]

4.26 This criticism reflects the view, set out more generally in paragraphs 4.32 and 4.34 below, that it is wrong both in principle and in policy to equate the moral, non-legal, "recklessness" of becoming intoxicated with the subjective awareness of risk required by the definition of certain specific offences; and that it is factually false[46] to "postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk", as did the authors of the Model Penal Code.[47] H L Packer, commenting on the Code immediately after it was initially published, also found the Model Penal Code rationale unpersuasive, and argued that, at most, there should merely be an *evidential* rather than legal presumption of recklessness in intoxication cases:

> "If common experience does suggest the existence of a normal but not invariable relationship between drunkenness and recklessness, the appropriate solution seems to be to give special evidentiary weight to the fact of drunkenness as the basis for an inference of recklessness ... What seems to be called for is a rule of evidence, not a rule of substantive law."[48]

4.27 Another criticism made of the Model Penal Code approach, and of other approaches

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[44] Note, "The proposed penal law of New York", (1964) 64 Columbia LR 1469, 1484.

[45] Hawaii Rev. Stat. §702-230, commentary: see further, para. 5.23 below.

[46] As one writer says: "Most North Americans take alcohol and millions regularly become intoxicated without putting themselves or others at serious risk ... to judge whether intoxication is reckless we require the ... statistic [of] the portion of drunken events that involve serious criminal activity. This figure is certainly below 1%": Mitchell, (1988) Int. Journal of Law and Psychiatry 77, 89. See also n. 27, para. 1.14 above.

[47] See MPC, commentary to §2.08, p. 353 (1985 ed.). It is interesting to note that perhaps the most distinguished of the original drafters of the Code, Judge Learned Hand, considered this part of the Code's approach to be "devoid of principle": see Wechsler, (1963) 63 Columbia LR 583, 591.

[48] Packer, "The Model Penal Code and Beyond", (1963) 63 Columbia LR 594, 600-601. Even some of the MPC's supporters did not see the provision as the perfect solution, but primarily as an improvement on what had gone before. Herbert Wechsler, the Chief Reporter of the MPC, has said: "I was myself so eager to dispel the current mumbo-jumbo that drunkenness may rebut 'specific' but not 'general' intent, that I was willing to concede the substance of the point to gain the clarity the Code achieves": (1963) 63 Columbia LR 583, 591.

in the USA which do not allow voluntary intoxication to negate a particular (or any) mental element, is that such provisions may be unconstitutional.[49] Since the "due process" clause of the Fourteenth Amendment of the US Constitution[50] has been interpreted as guaranteeing that a defendant cannot be found guilty of an offence unless the state proves all the elements of the offence beyond reasonable doubt,[51] it is arguable that any legislation that precludes a class of defendants from contending that the state has failed to prove beyond a reasonable doubt the existence of a required mental state violates this guarantee.

4.28 This point is of significance beyond the special constitutional problems of the USA, because the debate also illustrates the theoretical difficulties caused by a law that (as in England and Wales) seeks in cases of intoxication to introduce special rules or glosses to subjectively-defined offences. At first sight, complaints of unconstitutional limitation of defendants' rights might have been thought to apply doubly to laws which preclude voluntary intoxication from negativing *any* mental element, whether recklessness or intention. However, laws in states which have adopted this strict approach[52] have been held, at state level, to be constitutional. This result appears to have been reached by two routes. In Pennsylvania, it was held that the state's strict intoxication rule had effectively redefined the mens rea requirement of crimes, but that such redefinition was a permissible part of the legislature's role in framing its criminal laws.[53] In Delaware, however, voluntary intoxication was categorised as a "defence" which states are empowered to allow, disallow or control as they please, rather than as an evidential factor whose disallowal would unconstitutionally ease the prosecution's burden of proof of the subjectively-defined mental element of a crime.[54]

4.29 The Model Penal Code rule, and versions of it incorporated by jurisdictions, might be argued to be compatible with the view taken in Pennsylvania: on one view, the Model Penal Code rule merely qualifies what is meant by "recklessness" and so amounts to no more than a partial, and legitimate, redefinition of the mens rea required by the definitions of particular crimes. However, the more realistic view is that a unique exception has been made to a declared subjective principle. The principle has been constitutionally guaranteed that all elements of a crime must be proved; but in cases of intoxication, while subjective fault is still required, that "fault" can be established in specially-defined terms, on only a selective range

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[49] Professor T O'Neill, in (1990) 39 DePaul LR 15, argues that an Illinois provision which precludes defendants charged with offences not requiring a "specific intent" from relying on voluntary intoxication to negative the requisite mental element of the offence charged may be unconstitutional. This conclusion has already been reached in Indiana: see para. 5.23 below.

[50] This clause provides "... nor shall any State deprive any person of life, liberty or property without due process of law".

[51] In *Mullaney v Wilbur* 421 US 684 (1975), and *Patterson v New York* 432 US 197 (1977).

[52] See paras. 4.36-4.39 below.

[53] *Commonwealth v Rumsey* 454 A.2d 1121, 1122 (Penn. Superior Court, 1983).

[54] *Wyant v State* 519 A.2d. 649, 660 (Del. Supreme Ct., 1986). The court expressed this by saying that voluntary intoxication was not a "constitutionally protected defense to criminal conduct".

of all the evidence in the case. That creates the type of artificial rule that is difficult to reconcile with constitutional principle.

4.30 As we have said, these criticisms are not irrelevant to the position in England and Wales. It would be generally accepted that the common law contains a principle similar to that formally adopted in the United States Constitution as described in paragraph 4.27 above. In cases of intoxication, the trial of offences that purport to require proof of subjective recklessness on the basis of a dogmatic rule that such recklessness has been established infringes that principle.

4. Voluntary intoxication as *constituting* recklessness

4.31 We have explained above[55] that, on one view, the effect of *Majewski* is to render mens rea irrelevant in any charge of an offence of basic intent committed when the defendant was in a state of self-induced intoxication. This view prompts the suggestion that the apparent policy of the CLRC proposals could be implemented expressly, by providing that a defendant who commits the physical element of an offence is automatically reckless if voluntarily intoxicated;[56] so that, if charged with the reckless commission of an offence (capable of being committed recklessly), he would be guilty without more. This would meet the practical difficulty of deciding hypothetical issues that may now be faced by juries;[57] and it would be free from the difficulties, considered below,[58] to which the creation of a separate offence of intoxication could be thought to give rise.

4.32 There are, however, powerful objections to this approach. In the first place, its application would automatically result in the conviction of an intoxicated defendant even if he was unaware, for *any* reason, of the possible consequences of his acts. Since many serious crimes - including manslaughter, unlawful wounding and assault offences - are capable of reckless commission, the principle would be of wide application. A rule that produced the conviction of offences of this seriousness of a person who lacked the mental element that their legal definition requires could rightly be called harsh, even draconian.[59] The prosecution would be relieved of the need to prove the existence of a mental element

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[55] para. 3.17.

[56] Along the lines, perhaps, of the draft Criminal Code proposal made in 1971 by the United States National Commission on Reform of Federal Criminal Laws, §502(2):

> "A person is reckless with respect to an element of an offense even though his disregard thereof is not conscious, if his not being conscious thereof is due to self-induced intoxication."

[57] See paras. 3.19-3.21 above.

[58] Part VI, paras. 6.29ff below.

[59] In *Caldwell* [1982] AC 341, considered at para. 2.19 above, Lord Edmund-Davies observed in his dissenting speech, at p. 362A, that, in consequence of the definition of recklessness adopted by the majority, "however grave the crime charged, if recklessness can constitute its mens rea, the fact that it was committed in drink can afford no defence"; and that it was "a very long time since we had so harsh a law in this country."

wherever the defendant relied on voluntary intoxication, even, presumably, in part.[60] Secondly, it would be arbitrary for such a rule to apply to an offence merely because it may be committed "recklessly". That term normally signifies that the defendant must foresee a particular risk;[61] but the intoxicated defendant envisaged by this rule would have been "reckless" in a moral, rather than a technically legal, sense.[62] In our view, whatever the policy reason for a special rule relating to voluntary intoxication, the criterion that determines the crimes to which the rule applies should be arrived at by a more rational method than mere semantic coincidence.

4.33 There is, further, a practical difficulty about formulating a provision of this kind - namely, that of defining the requisite *degree* of intoxication that would trigger the proposed new rule. It would, for example, seem inappropriate that a defendant charged with the reckless commission of an offence who denied that he foresaw the relevant risk of his actions should be convicted just because he had, say, drunk a glass of beer. It would therefore be necessary to restrict the rule to serious or substantial cases of intoxication: but that would severely reduce the supposed practical benefit of the rule, that in *any* case of intoxication the court does not have to enquire further into the defendant's mental state.

5. "Recklessness": semantic confusion in the foregoing proposals

4.34 As we have observed, the CLRC's proposals, whether in their original or in a modified form, apply only to "recklessness"; the same is true of the proposals of the Model Penal Code. That approach would seem to be based on the view expressed under the present law by Lord Elwyn-Jones LC in *Majewski*:

> "If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of mens rea, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary mens rea in assault cases ... ."[63]

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[60] Cf. paras. 3.18-3.20 above.

[61] The different, *Caldwell*, definition of recklessness (para. 2.19 above) raises issues of mens rea that are independent of, and go beyond, the question of intoxication.

[62] Cf. para. 4.35 below.

[63] [1977] AC 441, 474G-475A. Similarly, the American Law Institute Model Penal Code Tentative Draft No. 9 (1959), pp. 8-9, justified the treatment of voluntary intoxication as recklessness on the ground that:

> "it is not unfair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor's powers of perception and of judgment is conduct which plainly has no affirmative social value to counterbalance the potential danger. The actor's moral culpability lies in engaging in such conduct."

4.35 However, it has been widely urged that the use of the term "reckless" in this broad sense is confusing. At least when used in its traditional sense as part of the mens rea of a particular crime,[64] the term has a technical meaning in the criminal law. It signifies the defendant's awareness of the risk of what might result from his conduct;[65] and "in most cases it is far-fetched to argue that a person who is getting drunk is aware of the type of conduct he or she might later indulge in."[66] However, the effect of using the ambiguity of "recklessness" as the justification for this rule is that the proposals apply only to recklessness in the technical legal sense, and thus have no effect upon the present law relating to offences of intent (as opposed to recklessness). Although it would of course be possible to adopt those views as a matter of *policy* (as distinguished from analysis), it is in our view difficult to justify a rule, purporting to have been introduced to control all undesirable intoxicated conduct, that however applies only to the reckless, and not to the intentional, commission of an offence. Options 3 and 4 below therefore address possible methods of controlling *all* intoxicated conduct.

C. OPTION 3: DISREGARD THE EFFECT OF VOLUNTARY INTOXICATION IN *ANY* OFFENCE

1. The nature of this option

4.36 A more radical way to meet the policy concerns about intoxicated offenders expressed above[67] would be to provide that defendants cannot rely on evidence of intoxication to negative mens rea for *any* offence. This would dispense with the need to distinguish between offences: for instance, as to "specific intent" or recklessness as a fault element. On this approach, whatever the offence charged, even one now classified as of "specific intent", a defendant would not be able to rely on evidence of voluntary intoxication to negative the mental element of the offence. This would be an exception to the general rule, that the prosecution must prove mens rea beyond reasonable doubt. This approach has indeed been adopted in some other jurisdictions, whose law we now review.

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[64] Special considerations apply to the (now abolished) offence of reckless driving: *Reid* [1992] 1 WLR 793 (HL).

[65] See, e.g., *Smith & Hogan*, pp. 60ff.

[66] *Ashworth*, p. 188, who describes Lord Elwyn-Jones' argument as involving "a manifest confusion between a general, non-legal use of the term 'reckless' and the technical, legal term". In the Canadian Supreme Court case of *Leary* (1977) 33 CCC (2d.) 473, 494, Dickson J said in the course of his dissenting judgment:

> "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 'reckless' 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."

[67] para. 4.2.

2. The United States; and Scotland

(a) The United States

4.37 Such an approach has been adopted in nine states in the United States. In Arkansas, a special emergency Act[68] was passed in 1977 to repeal a previous "codified specific/basic intent" approach and thus procedurally bar defendants from arguing or adducing evidence that they lacked *any* requisite mental element by reason of voluntary intoxication.[69] Delaware has recently adopted a similar position.[70] In these two states, the question of intent is, in theory, still put to the jury, but in terms which exclude evidence of intoxication as a basis for negativing intent: it was said in the leading Delaware case that "the elimination of voluntary intoxication as a defense did not relieve the State of its burden of proving that the defendant *otherwise* possessed the requisite intent".[71]

4.38 In Pennsylvania and Virginia, evidence of intoxication cannot be relied on to negative the mental element of any offence except first degree murder, although the conceptual basis of this rule is slightly different from that of Delaware and Arkansas. In Pennsylvania, the rule has been explained as a "redefinition of the kind and quality of mental activity that constitutes the mens rea element of crimes"; in other words, "mens rea" is expanded to include cases where the intent or awareness normally required may not have been present solely by reason of intoxication.[72] In Virginia, the principle is explained to juries as that:

> "[A person] may be perfectly unconscious of what he does and yet be responsible. He may be incapable of specific intent, but the law imputes specific intent ... from the nature of the act and the circumstances under which the act was committed."[73]

4.39 Missouri, Georgia[74] and Texas have had a similar approach for a long time: in Texas it has been suggested that "intoxication is substituted for the intent or knowledge required by the definition of an offense".[75] More recently, South Carolina and Mississippi

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[68] Arkansas Statutes Annotated, §41-207 (1977).

[69] The legislation was upheld by the Arkansas Supreme Court: *White v State* 717 SW. 12d 784 (1986).

[70] *Wyant v State* 519 A.2d 649 (Delaware 1986).

[71] 519 A.2d 649 at p. 660, emphasis added.

[72] *Pennsylvania Statutes Annotated*, title 18, §.00308 (Purdon, 1983) and *Commonwealth v Rumsey* 454 A.2d. 1121, 1122 (1983).

[73] Double, Emroch and Merhige, Virginia Jury Instruction, §103.061. See also *Chittum v Commonwealth* 174 SE.2d. 779 (1970).

[74] See McCord, (1990) Journal of Legal History 372, 388.

[75] Texas Codes Annotated, Title 2, §8.04, and accompanying Practice Commentary by Searcy and Paterson, p. 223 (Vernon 1974). In *Evers v State* 20 SW 774 (1892), the Penal Code then in force was construed to mean that evidence of intoxication was not admissible to disprove the mental element of an offence, and was only

have also adopted this approach.[76]

(b) Scotland

4.40 On one view, this is also the approach adopted in Scotland, although the law is uncertain. It was held in *Brennan*,[77] the leading case, that evidence of intoxication was not admissible to reduce a charge of murder to culpable homicide. The English distinction between crimes of specific and basic intent was expressly rejected; and it was said that "in crimes of basic intent we understand the law of England to be at one with the law of Scotland in refusing self-induced intoxication as *any* kind of defence."[78] This has been interpreted by some to mean that voluntary intoxication cannot be relied on to negative mens rea for *any* crime;[79] but a contrary view has been expressed.[80] In the absence of direct authority since *Brennan*, the position remains uncertain, but a recent dictum (in a case concerned mainly with automatism) supports the former view.[81]

3. Arguments in favour of the option

4.41 This approach is admittedly severe, but it represents a clear and uncompromising policy to deal with the problem of intoxication-related crime.[82] By *never* allowing

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admissible to establish temporary insanity, which itself may only mitigate punishment. This construction has been followed ever since.

[76] McCord, *op. cit.*

[77] 1977 SLT 151.

[78] *Ibid.*, at p. 155, emphasis added.

[79] e.g., Gray, [1979] Crim LR, p. 369, 379, concludes that "in effect, all intent in Scotland is to be regarded as basic and not specific", i.e., that intoxication can never be relied upon to disprove mens rea.

[80] Gordon, *Textbook on Criminal Law*, 2nd ed. (1978), p. 411, suggests that "There are some situations in which the Crown has to prove a specific aim or purpose, and clearly evidence of intoxication can negative the existence of that aim or purpose." He cites *Kinnison* [1870] 1 Couper 457, in which the accused was acquitted of wilfully making false entries in a register, on the ground that he was intoxicated and did not intend to make a false entry; and a dictum in *Alex Winchester* (1955), unreported, that the accused must be acquitted if too intoxicated to form the requisite intention for assault; and he suggests that:

> "It is fairly plain that *Brennan* accepts that even voluntary intoxication can be a defence to a crime which requires a particular intention, such as theft, where it will be a defence to show that the accused was so drunk that the inference that he intended permanently to deprive the owner of his property cannot be drawn."

[81] "... a person who voluntarily and deliberately consumes known intoxicants cannot rely on his own action ... as a basis for the argument that he did not have the mens rea necessary for a finding that he was guilty of the crime charged": *HM Advocate v Ross* [1991] SCCR 823, 828-829, *per* the Lord Justice-General.

[82] e.g., the Arkansas legislature, in enacting the emergency Act referred to above, made a declaration that any criminals being "excused from the consequences of their criminal acts merely because of their voluntary intoxication" would be "detrimental to the welfare and safety of citizens in this state", and that the Act was

defendants to rely on voluntary intoxication to help their case, an unequivocal deterrent message is given: that all who take intoxicants to excess do so entirely at their own legal risk, and are fully responsible for whatever harm they do once intoxicated. Moreover, this approach is less susceptible than others to misapplication by jurors. As we have pointed out,[83] it seems likely that the vast majority of intoxicated offenders possess some form of awareness or intent, even if it is transient and subsequently forgotten. If that view is correct, a rule that *never* allowed a defendant to rely on intoxication to negative mens rea would eliminate the risk of acquitting any intoxicated defendants who had in fact formed the requisite mental element: albeit at the possible price of convicting the very few (if any) defendants who cause harm while lacking even momentary awareness or intention.

4. Arguments against the option

4.42 The instant approach may be thought draconian in a society which tolerates the consumption of alcohol (if not other drugs). The argument of principle against the *Majewski* approach, restricted as it is to crimes of basic intent, applies *a fortiori* to this even stricter approach.[84] Correspondingly, if the concern addressed by *Majewski* (the fear of intoxicated defendants being acquitted) is thought to be misplaced and of insufficient practical significance[85] to justify even the present *partial* departure from the principle of assessing liability on a subjective basis, then a *complete* departure from that principle would be even less justifiable.

4.43 Moreover, this approach, if applied to all crimes, could well produce unforeseen and, in practice, intolerable consequences. We see force in the observations of an American commentator that:

> "Complete elimination of the mental element would not work too badly with some specific *mens rea* crimes. ... It would not be patently unfair to punish a drunken defendant for robbery who takes property by violence or intimidation from the person or presence of another without regard to the defendant's intent. Even though he may lack one of the usual requisites for robbery, a specific intent to rob or steal, the residual conduct of the 'robber' entails substantial harm and danger. Punishment would serve a retributive function, would get an individual who appears dangerous - at least when drunk - off the streets, and might deter others. ...
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> "Elimination of the mental element, however, would work very badly with

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"necessary for the immediate preservation of the public peace, health and safety" (s. 3, Ark. Stat. Ann. §41-207 (1977)).

[83] para. 1.14 above.

[84] Critics of the approach of the jurisdictions in the United States considered at paras. 4.37-4.39 above (e.g., Wagoner, 9 U. Ark. LR.LJ 657) have argued that it equally violates the "Due Process" requirements of the US Constitution: see paras. 4.27-4.29 above.

[85] See paras. 5.15-5.17 (Australia) and paras. 5.21-5.22 (New Zealand) below.

> many other specific *mens rea* crimes. ... The gravamen of burglary is the specific intent to commit a crime when the building is entered. If this element were eliminated our defendant would be punished without having the contemporaneous blameworthy mental state or culpability ordinarily required for true crimes. ... His only real blameworthiness would be the relatively minor defect of getting drunk some time earlier. There is little culpability, harm or danger inherent in a simple entry into a building. ... Subjecting an individual who has not really been proven to be anything but a drunken trespasser to the stigma and potential sanctions of a [conviction for burglary] would not be appropriate under any conventional theory of penology."[86]

4.44 These observations show in fact that it is not merely odd, but wholly inappropriate, to convict of burglary one who drunkenly enters another's premises, without it being shown that the "burglar" had an intent to commit an offence therein. The essence of the offence of burglary, in those cases where a crime is not actually committed in the premises entered, is indeed the intention with which the entry is made: otherwise, there is nothing to distinguish the defendant's conduct from a non-criminal trespass. Opinions may differ as to the degree of culpability, harm or danger inherent in a (drunken) entry upon another's premises: but where the entrant's drunkenness prevents the formation of an ulterior intent, it is simply impossible to characterise the entry as a burglary, and thus similarly impossible to use a conviction for burglary as a sanction against such entry.

4.45 The present option also continues, but in an acute form, the difficulties as to punishment that we have referred to above.[87] The gravamen of the charge against a defendant caught by this option will simply be that he became intoxicated and, without the normally required mental state, committed a criminal harm. He will, however, be convicted of the offence for which he did not have that normally required mental state, but for which the range of punishments assumes that he did. The possibility of convicting of and thus punishing for burglary one who merely drunkenly enters another's property is but an extreme illustration of the difficulties that would be caused by the present option.

4.46 There would seem, therefore, to be very serious difficulty in the present option. It may, however, perhaps be noted that the option is no more than the logical extension of the principle of the *Majewski* approach to all and not merely to some particular offences.

D. OPTION 4: DISREGARD THE EFFECT OF VOLUNTARY INTOXICATION IN *ANY* OFFENCE, SUBJECT TO A STATUTORY DEFENCE

4.47 This option addresses the practical concern of those who concede *in principle* that a person who did harm but who, even through self-induced intoxication, lacked the requisite intention or recklessness ought not to be convicted; but fear that if the *Majewski* rule were abolished a defendant could too easily raise a doubt in the minds of the jury, and so gain an unmerited acquittal. On this view, it is more important to obviate the latter danger than to

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[86] Murphy (1977), 81 Dick L Rev 199, at pp. 204-205.

[87] paras. 3.21-3.23 and 4.18.

avoid the risk of convicting someone who caused harm but lacked mens rea because of voluntary intoxication. This concern might be met by reversing the normal burden of proof and requiring the defendant to satisfy the jury, on a balance of probabilities, that by reason of intoxication he lacked the mens rea of the offence charged. A statutory defence along those lines would seem to require the defendant to make clear that he relied on the defence before the trial began. If he chose not to rely on the statutory defence or if he relied on but failed to establish it, the position would be, as under option 3, that his intoxication was incapable of negativing mens rea.

4.48 In trials for offences of specific intent, this option would be less favourable to defendants than the present law, under which the judge (after warning the jury that, if the defendant had mens rea, it is immaterial that he was induced to act as he did by intoxication) should direct them that they are

> "to have regard to all the evidence, including that relating to drink, to draw such inferences as they think proper from the evidence, and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent."[88]

In at least some of those cases this option would operate in a way that some might consider unacceptably harsh. It would mean, for example, that a defendant charged with murder who relied on the proposed defence as negativing intent to kill would be convicted if the jury, though doubtful whether he had that intent, were not *satisfied* that he lacked it. On the other hand, however, in offences of basic intent the instant option would be more favourable to the defendant than the present, *Majewski*, rule, since it would allow the jury at least to give *some* consideration to the effect of intoxication on his state of mind.

4.49 We are not aware of any jurisdiction where this approach has been fully adopted. It has been partially adopted by some jurisdictions in the USA, but only in respect of offences of specific intent: for offences of basic intent intoxication cannot be taken into account.[89] In Arkansas, the revised criminal code of 1976,[90] adopting the culpable mental states used in the Model Penal Code,[91] provided for a reversed burden[92] to be placed on the defendant on the issue of intoxication for offences committable "intentionally" or "purposely", whereas

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[88] *Sheehan* [1975] 1 WLR 739, 744C-D.

[89] In Minnesota, defendants who seek to argue that they lacked "specific intent" for an offence by reason of voluntary intoxication must establish this "on a fair preponderance of evidence": *Minneapolis v Altimus* 238 NW 2d. 851, 858 (1976). Ohio had such an approach for a short time: *State v Hunley* 167 NW 2d. 645, 649 (1969), overruled in *State v Templeton* 258 NW 2d. 380 (1980).

[90] Arkansas Statutes Annotd., §41-203 (1977).

[91] See para. 4.22 above.

[92] Intoxication was made an "affirmative defense",, which indicated that defendants bore the burden of persuasion on this matter. See Jeffries and Stephan, (1979) 88 Yale LJ 1325, in which these "burden-shifting" defences are discussed and surveyed. Arkansas appears to be the only state ever to have provided by legislation that intoxication should be subject to such a reversed burden: see the table at the end of the article just cited.

for offences committable "recklessly" or "negligently" intoxication could not be relied on at all (as in the Model Penal Code).[93] However, as is described in paragraph 4.37 above, this rule was replaced shortly afterwards by a strict approach which disregards intoxication when *any* crime is charged.

4.50 In our view, there are several objections to this option. The proposed statutory defence would mean that in some cases the law would be more favourable to the defendant than if the defence was not available at all; but the result would be that where the defence was established someone who had caused harm would walk free. That would defeat the policy objective of ensuring that there should be control by the criminal law of those who, when intoxicated, cause harm. The outcome in any given case would thus not be based on any ground of policy, but on the perhaps erratic ability of the defendant to discharge the burden of proof placed on him.

[93] See paras. 4.20ff above.

PART V

ABOLITION OF THE *MAJEWSKI* APPROACH

A. INTRODUCTION: OPTION 5 (ABOLITION WITHOUT REPLACEMENT), AND OPTION 6 (ABOLITION COMBINED WITH A NEW OFFENCE)

5.1 We indicated in paragraph 3.25 above that we saw serious objections to all of options 1-4, objections that we have sought to explain when discussing those options in Part IV of this paper. We therefore now turn to consider two further options that appear to us not to be open to such serious objection. These are *Option 5*, that the *Majewski* approach should simply be abolished without replacement; and *Option 6*, that also envisages the abolition of *Majewski*, but proposes the adoption, in effect to achieve the policy ends sought by the present *Majewski* approach, of a new offence of the commission of some categories of harm proscribed by the criminal law when in a state of intoxication.

5.2 In this Part V we outline some policy and practical considerations that lie behind these two options, and then explain in some detail the background and justification for option 5. In Part VI we deal in some detail with the possible new offence, since we appreciate that commentators will not be able to assess its merits as a possible solution without being clear as to its detailed terms and operation.

5.3 The effect of the abolition of *Majewski* would simply be that, in trying any offence that requires the prosecution to prove subjective *mens rea* on the part of the defendant, and not only in the case of offences of specific intent, the defendant's intoxication will be merely one piece of evidence used in determining his actual intent, awareness or foresight. There would thus be no special rule deeming an intoxicated person to have fulfilled the requirements of subjective recklessness when in fact he did not; or excluding evidence of his intoxicated state from consideration when adjudicating on his subjective state of mind. It would remain the law that a drunken intent is still an intent, as drunken awareness is still awareness;[1] and if such intent or awareness were established the defendant's lack of self-control or uncharacteristic behaviour because of intoxication would be no defence.

5.4 As will be demonstrated below, that, and no more, is the law in the common law states of Australia and in New Zealand. There are, it seems to us, two separate types of reason why such a law might be adopted.

5.5 First, the present assumption in the law of England and Wales that there should be special provision in respect of intoxication is based on the policy considerations that lie behind the *Majewski* approach and which were set out in, inter alia, paragraph 1.4 above. These are thought to outweigh the normal principle that the defendant should before conviction have a degree of subjective awareness of the risk of committing the forbidden

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[1] See para. 2.1 above.

harm.[2] Others, however, consider that that principle should be paramount[3] and will not be persuaded that such policy considerations should be allowed to set it aside.

5.6 Second, however, a large part of the policy considerations urged in support of the *Majewski* approach appeals not so much to the culpability of the intoxicated person as to the social danger of leaving the citizen legally unprotected from unprovoked violence where such violence was the consequence of drink or drugs.[4] It is however entirely possible to accept as a matter of principle that need to protect the public, albeit at the expense of divagation from otherwise important rules of the criminal law, whilst doubting whether abolition of the *Majewski* approach, without more, would in practice put the public at risk. This view is based on the consideration, which we examine in detail below, that the ordinary rules of mens rea as described in paragraph 5.3 above would in any event secure the conviction of all but a very small number of intoxicated offenders. Those who are so persuaded would conclude that it was not justifiable, in order to secure the conviction of that very small number of offenders, to take special measures: whether those measures be the complex and difficult *Majewski* rule, or the creation of a new offence that, as Part VI of this paper will demonstrate, will inevitably involve fairly elaborate treatment.

5.7 We first deal, therefore, with Option 5, simple abolition of *Majewski* without replacement, drawing in particular on the experience of the common law states in Australia and of New Zealand, in which jurisdictions the law takes that form.

B. ABOLITION OF THE *MAJEWSKI* APPROACH WITHOUT REPLACEMENT

1. General

5.8 As we pointed out in paragraph 5.3 above, under this option, the jury would be able to take into account intoxication (even if voluntary), together with the other circumstances, in deciding whether the defendant had the prescribed mental element of the offence, whether intention or recklessness.[5] Similarly, intoxication could be taken into account in order to determine whether the defendant held a belief which would negative liability for the offence;[6]

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[2] See paras. 1.2-1.3 above.

[3] e.g., the Chief Justice of the Canadian Supreme Court; see para. 5.9 below.

[4] As expressed in these terms by Lord Simon of Glaisdale, [1977] AC, at p. 476F.

[5] This is the present law in relation to offences of specific intent: see para. 2.6 above. In this context, "recklessness" has its traditional meaning, which requires the defendant to be aware of the risk: abolition of *Majewski* would not affect offences to which *Caldwell* recklessness applies (see paras. 2.19-2.21 above), where the defendant is liable because (through intoxication or for whatever other reason) he gave no thought to an obvious and serious risk.

[6] This would change what appears to be the present law, that the mistaken belief of an intoxicated defendant that he was being attacked cannot found a plea of self-defence unless he would have held that belief had he not been intoxicated; *O'Connor* [1991] Crim LR 135, considered at para. 2.25 above.

or whether he acted in a state of automatism that would negative liability for the offence.[7]

5.9 This approach would not only be the simplest method of reforming the law; it would, on one view, be right in principle. The Chief Justice of Canada expounded this view as follows:

> "The burden of proving all of the elements in the definition of the crime charged, including the mental element, is always upon the Crown. The presence or absence of intoxication in no way affects that burden. ... On principle, it would seem that evidence of intoxication should be relevant in determining the presence of the requisite mental element, inasmuch as intoxication undoubtedly affects a person's ability to appreciate the possible consequences or circumstances. Consumption of alcohol affects mental state. The state of mind of the accused being in issue it would seem reasonable to ask - what was his actual state of mind at the time? If the evidence in the case discloses some degree of intoxication, one might think, consistent with fundamental principles of criminal responsibility, that such evidence would be relevant to any consideration of the mental state of the alleged offender."[8]

2. The law in Australia

(a) The judicial rejection of Majewski *in* O'Connor

5.10 This option has been adopted in the Australian states[9] whose law of intoxication is not part of a Criminal Code, but is derived from the common law. The law in these states was authoritatively settled in 1980 by the majority judgments of the High Court of Australia in *O'Connor*,[10] which contain a comprehensive critique of the *Majewski* approach.

5.11 In *O'Connor* the defendant stabbed a police officer who was trying to arrest him after seeing him break into the officer's car and remove certain articles. According to the defendant's evidence at the trial, he had no recollection of the events; he had been drinking and taking a hallucinogenic drug that, medical evidence established, was capable of rendering him incapable of reasoning and of forming an intent to steal or wound. The trial judge, following *Majewski*, directed the jury that they could take the defendant's intoxicated state

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[7] See para. 2.32 above. This approach would also involve the repeal of s. 6(5) and (6) of the Public Order Act 1986 (para. 2.22 above).

[8] Dickson J, as he then was, was one of the three dissenting members of the Canadian Supreme Court in *Leary* (1977) 33 CCC (2d.) 473, 486-487. Of the case in which the defendant's intoxication resulted in a state of automatism, he stated, at pp. 492-493:

> "When an accused, in answer to a criminal charge, says that he was so sodden as to be virtually an automaton, incapable of knowing what he was about, his defence is not drunkenness but an absence of voluntariness caused by excessive drinking."

[9] Namely: Victoria, New South Wales, South Australia and the Australian Capital Territory.

[10] (1980) 54 ALJR 349.

into account when considering the charges of wounding with intent to resist arrest;[11] but not when considering the third charge, of unlawful wounding,[12] which was not an offence of specific intent. The defendant was convicted of the unlawful wounding, but the Court of Criminal Appeal of Victoria quashed his conviction without ordering a retrial. The High Court of Australia, by a majority of 4-3, upheld the decision of that court, on the ground that voluntary intoxication might be relied on to support the defendant's contention that his actions were committed without the requisite mens rea. The Court confirmed that the onus is always on the Crown to prove all the elements of the offence, including the mental element, beyond reasonable doubt, whether or not the offence required "specific intent".

5.12 The majority judges[13] criticised *Majewski* both for its distortion of the fundamental mens rea principle and for its misplaced public policy concerns. The concepts of "specific" and "basic" intent were dismissed as "inappropriate" and "neither clearly defined nor easily recognizable". Barwick CJ pointed out that *all* crimes require an element of "actual intent to do a physical act".[14] He criticised *Majewski* for creating an unjustified exception, in the case of self-induced intoxication, to "those principles of the common law evolved over a period of time ... [which] have been established bearing in mind and not disregarding the need of society for protection from violent and unsocial behaviour."[15]

5.13 Stephen J doubted the value of the *Majewski* rule as a deterrent to preserve public order,[16] and whether its rejection would lead to public disorder and outcry. Victoria, he pointed out, had survived without such a rule for some time.[17] He cited examples of injustice which might occur if, in cases of basic intent, evidence of self-induced intoxication

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[11] The ingredients of the offence are similar to those of the English offence under s. 18 of the Offences against the Person Act 1861.

[12] Contrary to a statutory provision similar to s. 20 of the English Offences against the Person Act 1861.

[13] Barwick CJ; Stephen, Murphy and Aickin JJ.

[14] At p. 355A-G.

[15] At p. 358B.

[16] At p. 364D. "Cases of 'Dutch courage' and a known tendency to be violent when intoxicated aside, the possibility of the commission of any crime will not normally be contemplated when the drink and drugs are taken ... ."

[17] Stephen J said, at p. 363A:

> "Since at least some time prior to 1964 some, perhaps many, Victorian judges have acted as did Monahan J. in *R. v. Keogh* [1964] VR 400. There his Honour, founding himself upon what was, in fact, his own long experience as counsel in criminal cases in Victoria, upon his own experience on the bench and upon his knowledge of the practice of other judges of his Court, said that he held 'firmly to the view that a state of automatism, even that which has been brought about by drunkenness, precludes the forming of the guilty intent which is the fundamental concept in criminal wrongdoing'."

was sufficient to dispense with the requirement of proving mens rea;[18] and he suggested that judicial attitudes such as those of the House of Lords in *Majewski* reflected a mistrust of juries' ability to estimate evidence correctly, with the result that juries will "in effect be told to find an intent where none existed or where none was proved to have existed."[19]

5.14 The speeches of Murphy and Aickin JJ were along the same lines, focusing in particular on the irrationality and artificiality of the courts' invention of such "constructive crimes". Murphy J criticised the situation in the instant case where:

> "the trial judge directed that evidence of intoxication was irrelevant to the consideration of the charge of unlawful and malicious wounding. The jury were then required to determine artificially, and on a basis which was false because it excluded relevant material, whether the accused was guilty because he had the requisite mental element, not whether he was guilty because he either had that element or was intoxicated. Having been directed to ignore intoxication, the jury may have found the accused guilty on the basis that he had criminal intent, although if they had been allowed to consider evidence of intoxication, they may have found intoxication but no criminal intent. Such artificiality should have no part in the criminal law."[20]

O'Connor has been followed in subsequent decisions.[21]

(b) The practical impact of O'Connor

5.15 One of the most common arguments advanced against the approach adopted in *O'Connor* is that public safety and respect for the law would be threatened if offenders could gain acquittals by reason of their voluntary intoxication.[22] However, experience in jurisdictions where the *O'Connor* approach has been followed does not appear to provide justification for such fears.

5.16 We have referred above[23] to Stephen J's observations in *O'Connor* that Victoria had lived with "precisely that view of the law which is denied by *Majewski*" at least since, and

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[18] e.g., "the young man or woman who under peer-group pressures, perhaps in the armed forces, perhaps after a sporting success, or at some reunion or initiation ceremony, for the first time drinks grossly to excess" not being allowed to have evidence of intoxication affecting mens rea left to a jury (p. 363A-B).

[19] Citing Lord Hailsham of St Marylebone in *Morgan* [1976] AC 182, 213F.

[20] At p. 368E-G.

[21] e.g., *Martin* (1984) 58 ALJR 217, in which the High Court made clear that *O'Connor* applied to any form of manslaughter.

[22] See *Majewski* in general; and *O'Connor* pp. 360A-B, p. 378D (*per* Gibbs and Wilson JJ dissenting).

[23] para. 5.13.

probably before, *Keogh*,[24] and that he was aware neither of a higher incidence of intoxication-related crime nor of any public outcry in that time. Empirical research has been undertaken in Victoria since *O'Connor*, as part of the 1986 Report of the Law Reform Commission of Victoria, "Criminal Responsibility: Intention and Gross Intoxication". In the light of a questionnaire survey of Victoria judges, magistrates, prosecutors, solicitors, barristers and the DPP office, the Commission stated that:

> "evidence of intoxication is rarely such that the accused is acquitted because there is doubt whether the proscribed act was done voluntarily or intentionally ... About thirty authenticated cases were discovered in which the accused was totally acquitted, apparently due to lack of voluntariness or intent by reason of gross intoxication. Most were in magistrates' courts. The cases were generally minor but that was not always so. For example, they included charges of assault with a weapon, infliction of grievous bodily harm, theft, assault, wilful damage and resisting arrest ... In another case, the accused was acquitted of rape in the County Court. With most serious offences, however, particularly in the higher courts, intoxicated defendants are generally convicted of the offence charged or at least of a lesser offence.
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> "The reason for the small number of acquittals, particularly in the higher courts, is apparent. In order to avoid criminal responsibility, the accused must be in a state of such extreme intoxication as to have acted involuntarily or unintentionally. If the offence charged is a serious offence, particularly an indictable offence, the jury, judge or magistrate hearing the case would be reluctant to accept that the intoxication precluded the accused acting voluntarily and intentionally. The community concern at the time when *O'Connor* was decided has, to that extent, not been justified."

5.17 Similar research was undertaken by a judge in New South Wales, who examined District Court criminal trials for a period of a year after *O'Connor*, by means of a survey distributed among his judicial colleagues, which supplied "reasonably accurate" figures in relation to "approximately 510 trials".[25] He concluded:

> "Those figures disclose that a 'defence' of intoxication which could not have been relied upon pre-*O'Connor* was raised in eleven cases or 2.16% of the total. Acquittals followed in three cases or 0.59% of the total, but only in one case or 0.2% of the total could it be said with any certainty that the issue of intoxication was the factor which brought about the acquittal.
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> "It seems to me that no-one with any experience of the criminal courts should be greatly surprised at this result for the simple practical reason that any 'defence' of drunkenness poses enormous difficulties in the conduct of a case. To name but one, if the accused has sufficient recollection to describe relevant

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[24] [1964] VR 400.

[25] Judge George Smith, "Footnote to O'Connor's Case", (1981) 5 Crim LJ, p. 270.

events, juries will be reluctant to believe that he acted involuntarily or without intent whereas, if he claims to have no recollection, he will be unable to make any effective denial of facts alleged by the Crown. ...

"Certainly my inquiries would indicate that the decision in *O'Connor*'s case, far from opening any floodgates has at most permitted an occasional drip to escape from the tap."

(c) Law reform proposals in Australia

5.18 Those Australian states whose criminal law is codified rather than derived from the common law have, in essence, codified versions of the *Majewski* approach. The law in those states is thus distinct from, and unaffected by, *O'Connor*. The Attorney-General's Review Committee recommended the extension of the *Majewski* approach of these states to all the Australian states,[26] thus abrogating the rule in *O'Connor*. However, a newly constituted committee, the Criminal Law Officers Committee of the Standing Committee of Attorneys-General, has recently proposed instead that the *O'Connor* approach be extended to all Australian jurisdictions.[27]

3. New Zealand

(a) The law: Kamipeli

5.19 The effect of intoxication on criminal responsibility under New Zealand's common law is essentially similar to that in the non-Code states of Australia. In New Zealand, however, the law was confirmed before *Majewski*, by the New Zealand Court of Appeal in *Kamipeli*,[28] and has not been fully reconsidered by that court since *Majewski*; so that, unlike in Australia, *Majewski* has not been specifically reviewed. Although it has been suggested judicially[29] that the law remains open in the light of *Majewski*, the courts in New Zealand appear to be following *Kamipeli* rather than *Majewski*.[30]

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[26] See para. 4.9 above.

[27] *Model Criminal Code, Chapter 2: General Principles of Criminal Responsibility* (Discussion Draft, July 1992), pp. 16, 17, 45. The Committee concluded that "the distinction between offences of specific and basic intent does not provide a principled basis for determining when arguments based on intoxication should be allowed", and that "the need to base the Code on a consistent and rational set of principles - especially in the fundamentals of criminal responsibility - was of paramount importance".

[28] [1975] 2 NZLR 610. In *Kamipeli*, the defendant had drunk about 8 quart bottles of beer before he violently kicked and punched the victim, who subsequently died. He was convicted of murder, but the Court of Appeal quashed the conviction on the grounds that there had been a misdirection on the issue of drunkenness. A retrial was ordered, and the defendant was eventually convicted of manslaughter.

[29] *Roulston* [1976] 2 NZLR 644, 652-653.

[30] e.g., *Steinberg*, unreported, 18/8/83, High Court, Christchurch (cited in n. 22, NZCLRC Report on Intoxication 1984); *Henderson*, Court of Appeal, 25/10/84 (cited in NZ Current Law 1984-88).

5.20 Essentially, the view taken in *Kamipeli* was that intoxication, whether voluntary or involuntary, is an evidentiary matter to be taken into account in deciding whether all the elements of the offence have been proved beyond reasonable doubt.[31] There are few references in *Kamipeli* to policy concerns about public safety or contempt for the law. The court's judgment, like those of the majority in *O'Connor* in Australia five years later, was apparently based solely on principle:

> "The alternative is to say that when drunkenness is raised in defence there is some special exception to the Crown's general duty to prove the elements of the charge. We know of no sufficient authority for that, nor any principle which justifies it."[32]

The Court added:

> "It is also proper, and often it will be necessary, for the Judge to say that an absence of intent because of drunkenness is not a conclusion to be lightly reached. And if there is no evidence of intoxication which could reasonably be thought to have affected an accused's capacity to form an intent, a trial Judge should so rule and thereby exclude drunkenness from the jury's consideration. But if drunkenness is truly raised by the evidence, the jury must be left free to decide whether intent has been established on all the evidence, including that of intoxication."[33]

(b) The practical effect of Kamipeli

5.21 In 1984, the New Zealand Criminal Law Reform Committee produced a detailed report on intoxication, which set out the existing law, discussed various possible reforms, and concluded that the existing law should not be changed.[34] As in Australia, the Committee found little evidence of a spate of cases in which the defendant walked free on the ground that, through intoxication, he lacked mens rea:

> "In practice ... the defence is seldom raised and if raised is unlikely to succeed. In some cases an offender may be convicted of a lesser offence than that originally charged (for example, manslaughter rather than murder), and it may not be uncommon for the evidence which leads to this result to include evidence of intoxication. But it is most unusual for such evidence to result in acquittal of all available charges. We have not discovered any instance in New Zealand where a jury appears to have acquitted of all charges because of lack of intent as a result of voluntary intoxication, and we have details of only

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[31] "... whether it be a general or particular intent the burden is the same; the Crown must prove the intent required by the crime alleged." (At p. 614, line 26.)

[32] At p. 616, line 17.

[33] At p. 619, line 13.

[34] Conclusion, para. 76. Part II of the Report contains arguments for retaining the status quo.

some six or seven cases where such a result has followed trial by judge alone."[35]

5.22 The Committee also doubted the arguments that the *Majewski* rule was required as a matter of social and moral policy; it not only considered that there was a lack of evidence that the existing law caused a threat to public safety, but thought implausible the view that a stricter rule on intoxicated offenders would have a deterrent effect. The Committee also questioned the argument that, since becoming voluntarily intoxicated was normally culpable in itself, it was socially unacceptable for voluntary intoxication to be capable of supporting a complete acquittal:

> "... the consumption of alcohol is widely accepted in our society ... . Moreover views such as those cited above are open to the objection that they draw no distinction between those who should have foreseen the harmful consequences of their ingestion of intoxicants and those who could not have been expected to have anticipated them. Some such distinction would seem important when it is sought to attribute responsibility for a serious offence to a defendant."[36]

4. US jurisdictions

5.23 Two jurisdictions in the USA also adopt this approach. Hawaii provides that intoxication can negate the mental states of intention *and* recklessness,[37] and recently the Supreme Court of Indiana held that an Indiana statute which allowed intoxication to be used as a defence only to crimes defined with the words "with intent to" or "with intention to" was unconstitutional, since it violated the "firmly ingrained principle" that the jury had to consider all factors affecting mens rea. It thus followed that "a defendant in Indiana can offer a defense of voluntary intoxication to any crime".[38]

5. Objections to abolition, without more, of the *Majewski* approach

5.24 It can be argued that if the *Majewski* approach was abolished, acquittals founded on voluntary intoxication would in practice be rare,[39] bearing in mind the crucial difference between the relatively few cases of "mens rea-destroying" intoxication and, on the other hand, crimes that the defendant was merely *induced* to commit by alcohol or other drugs. In the latter category of case, juries would, as now, be directed that "a drunken intent is still an

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[35] *Ibid.*, para. 36.

[36] *Ibid.*, para. 47. The argument has less force in relation to the consumption of illegal drugs.

[37] Hawaii Revised Statutes, §702-230 (1985).

[38] *Terry v State* 465 NE 2d. 1085 (1985), 1088. Cf. para. 4.28 above.

[39] See paras. 5.15-5.17 and 5.21 above.

intent",[40] and that it by no means follows from the intoxicated state of the defendant that he lacked mens rea.

5.25 By contrast, however, with the law in the non-Code states of Australia and in New Zealand, the abolition of the *Majewski* approach without replacement would *alter* our law; and it would re-open the concern referred to above that both public safety and respect for the law would suffer if a voluntarily intoxicated defendant could be acquitted, in effect, on the ground of self-induced intoxication. These considerations have been voiced judicially not only in this country[41] but also, significantly, in Australia by judges of the majority in *O'Connor* (including Barwick CJ[42]) as well as by those who dissented. It is in order to accommodate those concerns, whilst at the same time avoiding the arbitrary, complex and erratic nature of any version of the *Majewski* approach, that support has been expressed for combining the abolition of *Majewski* with the creation of a completely new offence to address cases where certain types of harm are caused by intoxicated persons. We review the terms and implications of such an offence in Part VI below.

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[40] *Sheehan* [1975] 1 WLR 739, 744C; para. 2.1 above.

[41] *Majewski* [1977] AC 443, 469F-G (Lord Elwyn-Jones LC), 484E (Lord Salmon), 476G (Lord Simon of Glaisdale).

[42] Barwick CJ favoured the creation of an alternative statutory offence carrying a "substantial penalty", to deal with an offender who lacked mens rea due to intoxication, having however "brought himself to a state where he was not responsible for his acts".

PART VI

OPTION 6: A NEW OFFENCE

A. INTRODUCTION

6.1 This Part is concerned with the possible creation of a new offence, to meet cases of the commission of criminal harm by an intoxicated offender.

6.2 That a new offence might be created is not a new suggestion, a proposal along these lines having commended itself both to the Butler Committee[1] and to a minority of the CLRC.[2] The Butler proposal has received judicial support. It was referred to favourably in *Majewski* by Lord Elwyn-Jones LC[3] and by Lord Edmund-Davies.[4] Similar judicial views have been expressed in Australia;[5] and, though less specifically, in Canada.[6] There

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[1] Committee on Mentally Abnormal Offenders (Chairman Lord Butler of Saffron Walden) (1975): see in more detail paras. 6.13ff below, and Appendix A to this Paper.

[2] Strictly speaking, the minority of the CLRC only proposed an alternative verdict, that the defendant was "not guilty of the offence charged but guilty of doing the act while in a state of voluntary intoxication": see Appendix B to this Paper, para. 263.

[3] [1977] AC 443, 475D-F:

> "Acceptance generally of intoxication as a defence (as distinct from the exceptional cases where some additional mental element above that of ordinary mens rea has to be proved) would in my view undermine the criminal law and I do not think that 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. It may well be that Parliament will at some future time consider, *as I think it should*, the recommendation in the Butler Committee Report ... that a new offence of 'dangerous intoxication' should be created. But in the meantime it would be irresponsible to abandon the common law rule, as 'mercifully relaxed' [for offences of specific intent], which the courts have followed for a century and a half." (Emphasis added.)

[4] Lord Edmund-Davies, at p. 496A-B, after referring to a proposal of Professor Williams in 1961 for the creation of an offence of being drunk and dangerous, and to the Butler Committee's proposal which Professor Williams' proposal "anticipated", observed: "Such recommendations for law reform may receive Parliamentary consideration hereafter but this House is concerned with the law as it is." And later in his speech, at p. 497C, Lord Edmund-Davies said:

> "It may be that Parliament should look at it, and devise a new way of dealing with drunken or drugged offenders. But, until it does, the continued application of the existing law is far better calculated to preserve order than the recommendation that [the appellant] and all who act similarly should leave the dock as free men."

[5] *O'Connor* (1980) 54 AJLR 349; see paras. 5.11ff and 5.25 above. Barwick CJ, at p. 358E-F, though he did not specifically refer to the Butler proposal, suggested the introduction of statutory provision along similar lines, with a substantial penalty. Stephen J, at p. 364E, referred in terms to the proposal, for which there might be "a strong case". Murphy J observed: "No doubt over-use of alcohol and other drugs is a serious social problem and the infliction of serious injuries [on the public or on the police] is part of that social problem. ... However, if getting into such a condition, or an act done when in such condition, is to be made criminal, it is

is also academic support for a new offence.[7]

6.3 Our own proposals for the new offence differ in some considerable detail from those of our predecessors; but the suggestions of the Butler Committee, in particular, are a most valuable introduction to the principles and elements of a new offence, and we therefore review these earlier formulations in some detail before indicating, for the purpose of consultation, how we think such a new offence should be formulated.

6.4 The Butler proposals, and those of the minority of the CLRC, and the more detailed offence that we describe below, all have various *broad* characteristics in common. They all require that the defendant, while in a state of self-induced intoxication, should have caused the harm prohibited by the definition of a criminal offence requiring *mens rea*. As an introduction to the detailed discussion of the specific offence with which this option 6 is concerned, therefore, it may be helpful to mention some general considerations that it is in our view important to bear in mind in reviewing whether such an offence is required or justifiable; and, if so, what its detailed provisions should be.

6.5 We have already emphasised that a new offence is only necessary if it is thought that the simple abolition of the *Majewski* approach, without more, would or might produce unacceptable consequences; and thus it is thought that broadly the *effect* of *Majewski* should be retained.[8] The creation of a new offence however carries a number of, somewhat differing, implications. We particularly ask for comment on the next following paragraphs, since these considerations are of great importance to the decision as to whether a new offence should be created at all.

6.6 The considerations to some extent overlap, but they can broadly be categorised between arguments of prudence or social protection (paragraphs 6.7-6.8); considerations of justice (paragraphs 6.9-6.10); and reasons why, if it is sought to achieve broadly the same policy goals as are pursued by the present *Majewski* approach, those goals should be pursued through a specific offence and not by *ad hoc* divagations from the usual common law rules.

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for the legislature to do so and to prescribe appropriate penalties."

[6] *Leary* (1977) 33 CCC (2d.) 472, 495, *per* Dickson J (dissenting):

> "If sanctions against drinking to excess be thought necessary then, in my view, they ought to be introduced by legislation - as in a crime of being drunk and dangerous. ... If the point be deterrence from drinking then such deterrence ought to be specific and precise, in the form of a legislative command."

Dickson CJC repeated this suggestion in his dissenting judgment in *Bernard* (1988) CCC (3d.) 1, 18.

[7] e.g., Ashworth, (1975) 91 LQR 102, at pp. 117-118 (a new offence of causing the actus reus of an indictable offence though lacking, through intoxication, the required mental element); Fingarette, (1974) 37 MLR 264, at p. 279 (an offence, analogous to road traffic offences, of "causing death or bodily harm by reason of voluntarily-induced mental incapacity"); Quigley, (1987) 33 McGill LJ 1 (offenders to be immediately retried for "dangerous incapacitation" if acquitted of main offence "by reason of lack of mens rea due to voluntary incapacitation").

[8] See para. 5.25 above.

6.7 First, whatever protection it is that the criminal law provides against dangerous and unlawful acts should be afforded in the case of such acts committed by intoxicated people, just as much as in the case of such acts committed by sober people. That view, which was very influential in *Majewski*, was stressed in the speech of Lord Simon of Glaisdale.[9] It should be noted that this opinion takes no position as to the mechanism whereby the criminal law, and the punishment that the application of that law entails, operates to protect society; but considers that the intoxication of the offender is no good reason for withholding that legal protection in the case of criminal harm committed by him.

6.8 Further, a new offence, demanding as it would do the actual causing of a specified harm by the intoxicated defendant, is not based solely on his intoxicated state. Simply becoming intoxicated is not in itself an offence; nor should it be, in view of the lack of any evidence of a necessary connection between intoxication and harm to others.[10] However, the actual causing of harm when in that state can be argued to transform the case from one of socially undesirable behaviour to conduct in respect of which the criminal law should intervene.[11]

6.9 The offences to which the present special rules of intoxication apply[12] are all ones that, by their definitions, require the defendant to intend, or to be subjectively reckless as to, the commission of acts forbidden by the particular offence. That requirement fulfils the principle referred to in paragraphs 1.2-1.3 above that, in very broad terms, criminal punishment operates most rationally and justly when it is imposed on offenders who are guilty of some sort of subjective fault. In the case of the intoxicated offender, the type of fault required by the definition of the offence is not present; but at least some, though a rather different, element of fault is provided by the defendant having, in the words of Lord Elwyn-Jones LC cited in paragraph 1.4 above, taken a substance that causes him to cast off the restraints of reason and conscience. Although we are not able to adopt the detailed conclusions that, within the straitjacket of the present law, the Lord Chancellor drew from that observation, it might be thought that there is considerable force in the general view expressed there that a person who chooses to become intoxicated cannot legitimately complain if he is punished for the criminal harm into which that intoxication leads him: that, it will be appreciated, being a quite different point from whether those considerations dictate or

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[9] See para. 1.4 above.

[10] See, e.g., para. 1.10 above, and Mitchell, cited in n. 46, para. 4.26 above.

[11] The Law Reform Commission of Canada, Working Paper No. 29 (1982), p. 62, has suggested that limiting liability to cases where harm has actually occurred is correct (i) in principle; (ii) for reasons of evidence (only the occurrence of harm is sufficiently conclusive evidence that a person was in a state of *dangerous* intoxication); and (iii) for reasons of prosecutorial resources and civil liberties.

[12] It may be convenient to reiterate here the point stressed in paras. 2.34-2.37 above that intoxication causes no problems in relation to crimes that may be committed without intention or subjective recklessness on the defendant's part. If, for instance, the defendant gave no thought to an obvious and serious risk of causing the harm proscribed by an offence to which *Caldwell* recklessness applies, his state of mind, and hence any question of intoxication, will be immaterial.

justify the particular technical solution at present adopted in the law of intoxication.[13]

6.10 That an intoxicated person is, in the sense just mentioned, at fault meets the objection that creation of an offence of committing criminal harm whilst intoxicated would involve the imposition of liability simply for causing damage, unrelated to that person's responsibility for his acts. Fault is, however, relevant in another respect. It might well be thought both morally wrong, and to convey an uncertain message in deterrent terms, if a person who had chosen to become intoxicated could escape all liability for criminal harm that he committed whilst in that state.

6.11 A new offence can be tailored by legislation to achieve more precisely the objective of the *Majewski* approach without the faults of *Majewski* itself, and in particular without the practical difficulties that attend its present operation. A new offence can implement directly and overtly the policy considerations discussed in the preceding paragraphs, by laying down clear rules in the light of that policy. That will enable the policy-making operation to be recognised for what it is, and thus the various elements of the policy to be rationally discussed, and to be reflected in the detailed terms of the new offence; rather than, as at present under the *Majewski* approach, for those elements of policy to be hidden amongst rules that, misleadingly, purport to be only an application of technical legal doctrine.

6.12 In this Part VI we therefore set out what we consider the elements should be of a new offence, scrutinised in the light of the considerations of principle just set out. First, however, we subject to similar scrutiny the previous proposals that have been made for an offence of criminal intoxication.

B. PREVIOUS PROPOSALS FOR AN OFFENCE OF CRIMINAL INTOXICATION

1. The Butler Committee

6.13 The Committee on Mentally Abnormal Offenders, which was set up in 1972 under the chairmanship of Lord Butler, published its final Report in 1975.[14] The Report included a short section on "Offences Committed while Intoxicated".[15] The Committee was concerned only with "dangerous offences", defined as those that involve injury to the person or death, or consisting of a sexual attack, or involving the destruction of or causing damage to property so as to endanger life.[16]

6.14 The Report was published a few months before *Majewski*; and the Committee proceeded on the assumption (shown by *Majewski* to be false for offences of basic intent) that under the existing law the jury could take evidence of intoxication into account in deciding

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[13] On this point, see further paras. 4.34-4.35 above.

[14] Cmnd. 6244.

[15] paras. 18.51-18.59, which are reproduced in Appendix A to this Paper. The body of the Report comprises 237 pages, of which only three are devoted to the instant topic.

[16] para. 18.55.

whether the defendant had formed the mental element of the offence charged.[17] The Committee, though believing this to be "clearly right in principle", thought that the courts should be given power to convict those who became violent by reason of "voluntary intoxication".[18] The Committee perceived a problem arising because, if what they understood to be the law was applied logically, a person who was "habitually violent when in drink" might escape conviction. The Committee accepted that intoxication did not generally prevent the formation of mens rea; but "occasionally" it might create a doubt.

6.15 The Committee recommended[19] that if evidence of intoxication was given for the purpose of negativing the mental element of the offence charged, the jury should be directed that they could acquit the defendant of that offence, but find him guilty of a proposed new offence of dangerous intoxication, if (i) satisfied that intoxication was voluntary and (ii) not sure that he had the state of mind necessary for the commission of the offence charged.

6.16 The Butler Committee found "not altogether easy" the question of the penalty for the proposed new offence: if too severe, the penalty would be unfair, but if too light,

> "then in cases such as wounding with intent to cause grievous bodily harm (where in everyday experience in the courts the vast majority of defendants blame drink for their actions) the existence of a 'fall-back' verdict will encourage time-consuming unsuccessful defences to be run in inappropriate cases."[20]

The Committee proposed a maximum penalty, in trials on indictment, of 3 years' imprisonment (one year for a first offence) and, in summary trials, of 6 months' imprisonment.

6.17 Although an offence of this kind has not been adopted anywhere in the common law world, it is of interest that the Criminal Codes of Germany, Austria and Switzerland all contain separate offences of committing illegal acts while lacking "criminal capacity"[21] by reason of self-induced intoxication. Those offences, notwithstanding that the criminal procedure of these countries differs substantially from that of common law jurisdictions, are

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[17] paras. 18.52-18.53. The Committee accepted that manslaughter was an exception, on the ground that the offence did not require proof of intent to kill or even to attack; but it criticised as "illogical" the rule developed by the courts that "assault does not require a 'specific intent' that can be rebutted by evidence of intoxication."

[18] The Butler Committee proposed, at para. 18.56, that "intoxication" (which they did not define) should be regarded as "voluntary" if "resulting from the intentional taking of drink or a drug knowing that it is capable in sufficient quantity of having an intoxicating effect; provided that intoxication is not voluntary if it results in part from a fact unknown to the defendant that increases his sensitivity to the drink or drug."

[19] para. 18.54.

[20] para. 18.58.

[21] "Criminal capacity" is, roughly translated, the Romano-Germanic systems' equivalent of mens rea. See Daly, "Intoxication and Crime: A Comparative Approach", (1978) 27 ICLQ 378, 398-399.

similar in some respects to the Butler proposal.[22]

6.18 We have also referred in paragraph 6.2 above to the support, both judicial and academic, expressed at least for the principle of a new offence. There has not, however, been any detailed scrutiny of the precise terms of the Butler proposal; and we consider that it is deficient in several respects. One of them is the requirement that the defendant should give notice of his intention to rely on his intoxication as negativing the mens rea of the offence with which he was charged[23] (subject to a dispensing power for the court[24]). The Committee apparently appreciated that either step, giving notice of intention to adduce evidence of intoxication *or* seeking the court's leave to do so, would be in effect an admission of the new offence: that was because commission of a "dangerous" crime under *any* degree of intoxication would suffice for the new offence.[25] The Committee justified this approach on the ground that

> "there would be no injustice to the defendant in providing for the possibility of conviction of dangerous intoxication as an alternative charge, because the evidence of intoxication would have been produced by him at the trial in answer to the main charge."[26]

6.19 In practice, however, either side may adduce, or elicit in cross-examination, evidence of intoxication: for example, the prosecution might do so in order to explain the background of the case, or to show that the defendant's inhibitions were removed by drink or drugs. The Butler Committee did not address this point; nor did it consider the position of a defendant who (after implementation of its proposal) contended that, because of several factors taken together, of which intoxication was just one, he lacked the mental element of the offence charged.[27]

6.20 The Committee gave no indication of what should be the sanction where the defendant, though relying on intoxication alone as negativing mens rea, did not give notice of intention to adduce evidence in support of his contention, and did not seek the exercise of the court's dispensing power. Since the giving of such notice was likely to serve as an admission of the

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[22] Germany, *Strafgesetzbuch* s. 323(1)(a) (maximum penalty 5 years' imprisonment); Austria, StGB s. 287 (maximum penalty 3 years' imprisonment); Switzerland, StGB s.263 (maximum penalty 6 months' imprisonment). See South African Law Commission Report, "Offences Committed under the Influence of Liquor and Drugs" (1986), pp. 78-82, for details and translations. For history and details of the German intoxication offence, see Farrar, (1984) SAJCLC 109; Daly, (1978) ICLQ 378; Silving, *Essays on Mental Incapacity and Criminal Conduct* (1967), "Intoxicants and Mental Incapacity", pp. 284ff.

[23] para. 18.58.

[24] para. 18.58, in conjunction with para. 18.49.

[25] See n. 28, para. 6.21 below.

[26] para. 18.58

[27] The Committee proposed no other change in the law; so presumably it intended that a defendant who raised doubt in the jury's mind about the issue would go free. Any other conclusion would seem plainly unjust.

new intoxication offence, there would in practice be substantial inhibitions against giving that notice in any case where the defendant thought that he had a chance of a complete acquittal. But if, not having given that notice, he nonetheless sought to suggest that he lacked the mens rea of the offence with which he was charged because of intoxication, it is difficult to see how that evidence could be excluded; and even more difficult to see how the jury could be prevented from considering such evidence if it had been adduced by the prosecution. The concentration on prior notice makes it unclear whether a conviction for the special offence would still be available, in the event of an acquittal on the indictment; or what, then, the criteria for such conviction would be.

6.21 There are other respects in which we think the details of the Butler proposals need reconsideration. First, they are cast in extremely wide terms, since it would appear that intoxication of *any* degree, however slight, would be sufficient to ground the offence.[28] That apparently severe rule is mitigated in the Committee's proposals by confining the offence to cases where the defendant in effect invites its application; but, as we have pointed out, there are serious practical difficulties about that course.

6.22 Second, the Butler Committee did not address the question of a divided jury[29] - as where, for example, six jurors decided that the defendant was so intoxicated as to lack mens rea, the other six that he was not (although agreeing that he was severely intoxicated). It would seem that, logically, the defendant should be acquitted in such a case, since the jury has not convicted him either of the offence charged or of the new offence. Thus, a dangerous drunkard would escape the criminal law, contrary to the Committee's aim in proposing the new offence.

6.23 Finally, the Butler Committee intended its proposal to extend to a defence founded on the defendant's mistaken belief. The Committee was concerned that a drunkard might escape conviction "on the argument that in his fuddled condition he wrongly believed he was being attacked";[30] and accordingly proposed that:

> "A mistaken belief in a circumstance of excuse (such as that the victim was about to attack so that the force was necessary by way of defence, or that the victim consented) would not be a defence unless a sober person might have made the same mistake."[31]

The Committee did not, however, enlarge on this aspect, which stands on a different footing from the Committee's general approach. In cases not involving a defence, the proposed new

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[28] It should be noted that the expression "dangerous intoxication" used by the Butler Committee in para. 18.58 of its Report as a shorthand title for its new offence implies the commission of one of the Committee's "dangerous offences" whilst intoxicated, rather than anything further about the nature of that intoxication.

[29] This objection was subsequently raised by the CLRC, Fourteenth Report (1980), para. 264 (see Appendix B to this Paper), in relation to the minority proposal of Professor Smith and Professor Williams (set out at para. 6.24 below); but it seems equally applicable to the Butler proposal.

[30] para. 18.52.

[31] para. 18.57.

offence was intended to apply only to a defendant who, through voluntary intoxication, lacked the mens rea of the offence charged.[32] In the case of a defence, however, the defendant, notwithstanding his intoxicated state, *did* have mens rea in the sense that he intended, say, to strike his perceived attacker as a means of defending himself, but claims to be excused from liability.[33] By invoking a special rule for such cases, based on the criterion of a notional person who is not intoxicated, this part of the Butler proposal resembles the *Majewski* approach. Careful reflection is required before perpetuating this element of artificiality, and thus of difficulty for the jury; we revert to this undoubtedly difficult question in paragraph 6.62 below.

2. The minority CLRC proposal of Professor Smith and Professor Williams

6.24 We set out this proposal here for ease of reference:[34]

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

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[32] See para. 6.15 above.

[33] See para. 2.24 above.

[34] For the passages in the CLRC Report relating to this proposal, see Appendix B, paras. 262-264.

which, in the case of a sober person, would be a defence to the offence charged, then, if:

(a) the jury are of opinion that he held that belief or may have held it, and

(b) are satisfied that the belief was mistaken and that the defendant would not have made the mistake had he been sober,

the jury shall find him not guilty of the offence charged but guilty of doing the act while in a state of voluntary intoxication.

(4) Where the offence charged consists of an omission, the verdict under (2) and (3) above shall be of making the omission while intoxicated.

(5) A person convicted under (2) or (3) above shall, where the charge was of murder, be liable to the same punishment as for manslaughter; and in any other case shall be liable to the same punishment as that provided by the law for the offence charged.

6.25 This proposal was intended by Professors Smith and Williams to be an "improved version" of the Butler scheme. We venture to suggest, however, that the proposal remains unsatisfactory in several respects. It would, in the first place, give rise to the same kind of difficulty as the Butler proposal where the jury are divided.[35] Secondly, the proposal, like the solution proposed by the majority of the CLRC,[36] is limited to questions of recklessness,[37] and thus does not provide any criminal sanction where the defendant is acquitted of an offence because his intoxication prevented him from forming a necessary element of intention. Third, as to punishment, the instant proposal differs from the Butler proposal by providing for the same maximum punishment as for the offence charged:[38] but it could be argued, with some force, that since a conviction of the alternative verdict proposed is likely to produce a sentence similar to that which would follow on a conviction of the offence charged, there is little point in a forensic investigation of the question of intoxication.[39] Finally, the new formulation would still require the jury to address

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[35] para. 6.22 above.

[36] See para. 4.15 above.

[37] In relation to a mistaken belief founding a *defence*, however, the minority proposal differed from the majority's in applying whether or not recklessness would suffice for the offence charged. Cf., in Appendix B to this Paper, para. 263(3) and para. 279(3).

[38] Exceptionally, for murder the punishment was to be the same as for manslaughter.

[39] Professors Smith and Williams suggested that the sentence actually imposed for the alternative verdict that they proposed ought often to be different from that which would be imposed on conviction of the principal offence; but justified their approach on the ground (para. 262) that, "exceptionally, an intoxicated offender may be such a public danger as to require the imposition of the maximum". In principle, however, the maximum penalty for an offence should inform the level of sentences for that offence generally. Professor Smith has

hypothetical questions as to what the defendant would have been aware of or believed had he not been intoxicated. We have already explained how such questions create unnecessary difficulty and artificiality.[40]

C. THE CLRC'S OBJECTIONS TO THE CREATION OF A NEW OFFENCE

6.26 We have considered two objections expressed by the majority of the CLRC to the creation of *any* new offence. The first is the likelihood that:

> "there would be many more trials in which defendants would raise the issue of drunkenness, and [we] foresee cases where there is overwhelming proof of the commission of the *actus reus* but in which many defendants might seek to plead to the special offence rather than the offence charged (as for example rape), or because the special offence might tend to be regarded as a less serious offence. Such pleas would place the prosecution, and the judge, who have to consider whether to accept them in great difficulties."[41]

6.27 A somewhat similar objection was expressed by the Australian Attorney-General's Review Committee,[42] which said that the creation of an offence of dangerous or criminal intoxication "may lead to compromises in jury verdicts so that persons who ought to be convicted of more serious offences will be convicted only of the statutory alternative."[43] This would appear to be a concern not so much that juries will be over-impressed by evidence of intoxication,[44] but that, faced with doubts sown in their minds by such evidence, they will fall back on the less serious intoxication offence. We have to say, with respect, that we find this view, and that expressed by the CLRC, unduly pessimistic. As a matter of principle, if in fact the jury, or a sufficient number of its members, are in doubt as to whether the accused had the mens rea of the more serious offence, then it is right that he should not be convicted of that offence. It is also right that that issue should be considered by the jury, who would seem as capable of handling the decision between the two offences as they are of handling the many other cases where, at present, a defendant may be convicted of alternative offences

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subsequently revealed that he concurred in this opinion in order to avoid a split between "the two dissenters"; in fact, he would prefer

> "that the distinction should be marked by a lower maximum sentence in the case of the special verdict, not simply to mark the distinction, but because the defendant lacks the mens rea which the law requires, so that, in the generality of cases, he is less blameworthy; and the maximum [sentence] should reflect this."

("Intoxication and the mental element in crime", *Essays in Memory of F. H. Lawson* (1986), p. 119, at p. 131.)

[40] See paras. 3.19ff above.

[41] See Appendix B to this Paper, para. 264.

[42] See para. 4.9 above.

[43] Report, para. 10.22.

[44] Cf., e.g., paras. 1.15-1.16 above.

of different degrees of seriousness. To take an obvious example, an indictment may contain alternative counts under section 18 and section 20 of the Offences against the Person Act 1861. The jury are trusted to deal with the case responsibly and not by compromise, and in particular not to return a verdict of not guilty on the more serious count if it would be inconsistent with their oaths so to do.

6.28 As for practical considerations, the CLRC did not enlarge on the nature of the "great difficulties" that they feared; and we do not understand how they would arise. We accept that a defendant charged with an existing offence who was intoxicated at the material time might wish to plead to the offence that we propose; but we do not believe that this would give rise to greater difficulty for the prosecution or the judge than in any other case, quite frequent in practice, in which the defendant offers to plead to a lesser offence. The prosecution may be content to accept the defendant's plea; but it need not do so.

6.29 The CLRC also objected to the creation of a new offence on the ground of nomenclature: the Committee considered it unfair that a defendant who had inflicted relatively minor harm should be "labelled as having committed the same offence as a defendant who has killed".[45] We submit that this objection is misconceived. The essence of the new offence is causing any kind of proscribed harm *when deliberately intoxicated*, and the defendant's fault in respect of his intoxication will be similar in each case. That does not mean, however, that the harm caused by the defendant is irrelevant to the issue of the relationship between such harm and the appropriate punishment for the offence. We return to this question in paragraphs 6.43-6.47 below.

D. OUR PROPOSALS FOR A NEW OFFENCE

1. Preliminary

6.30 We propose that, in any offence (other than the new one that we propose), the jury should be able to take into account the evidence of intoxication, together with the other circumstances, in deciding whether the defendant acted with the requisite mental element, whether intention or recklessness;[46] in deciding whether the defendant held a belief which, if true, would negative liability for the offence;[47] and in deciding whether he was in a state of automatism.[48] We further propose, consequentially, the repeal of section 6(5) and (6) of the Public Order Act 1986.[49] However, if the jury, having considered that evidence, are not satisfied of the defendant's guilt, they will be able to proceed, in cases of intoxication,

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[45] See Appendix B, para. 261.

[46] "Recklessness" here does not include *Caldwell* recklessness in the case where the defendant did not advert to the possibility of an obvious and serious risk; see para. 2.19 above.

[47] This would, in particular, reverse the present rule that the mistaken belief of an intoxicated person that he was being attacked cannot found a plea of self-defence unless he would have held that belief had he not been intoxicated; see para. 2.25 above.

[48] See para. 2.32 above.

[49] See para. 2.22 above.

to consider the defendant's liability for the new offence.

2. The nature of the offence of criminal intoxication

6.31 It may help readers in assessing the discussion that follows if we set out here what we provisionally consider should be the terms of a new offence. In summary, the offence would be committed by a person who, when deliberately intoxicated to a substantial extent, caused the harm proscribed by a "listed" offence; it would be immaterial that he lacked the mens rea of the offence in question or even that at the material time he was in a state of automatism. More fully, the elements of the offence would be as follows:

1. The offence is committed by a person who, while "deliberately intoxicated", does an act or makes an omission that causes the harm proscribed by an offence (a "listed offence") referred to in subparagraph 2 below; whether or not he formed the mens rea of that listed offence. For this purpose it is immaterial (subject to subparagraph 7 below) that the act was done or the omission made in a state of automatism.

2. The listed offences will be those listed in paragraph 6.41 below: a full explanation of the basis on which the selection has been made is given in paragraphs 6.35-6.40 below.

3. Subject to subparagraph 4 below, a person is "intoxicated" if he has taken anything ("an intoxicant") that causes his awareness, his understanding or his control to be substantially impaired. The question whether his awareness, understanding or control was substantially impaired is one of fact.

4. A person is *deliberately* intoxicated only if:

   (a) he took the intoxicant of his own will, and

   (b) he was aware when taking it that, in the quantity that he took knowingly, it would or might cause him to become intoxicated (in the sense of substantial impairment referred to in subparagraph 3 above), and

   (c) he did not take the intoxicant solely for medicinal, sedative or soporific purposes.

5. Intoxication is presumed to be deliberate unless evidence is adduced that might lead the court or jury to conclude that there is a reasonable possibility that it was not.

6. Where the defendant seeks to rely on a defence based on an intoxicated mistake, he may not rely on such mistake unless it was one that, viewed objectively, would have been reasonably made by a person who was not intoxicated (in the sense referred to in subparagraph 3 above) but was otherwise circumstanced as the defendant.

7. Nothing herein affects the law relating to insanity.

6.32 The new offence differs significantly from that proposed by the Butler Committee, in that it will be capable of commission even if the defendant formed the mens rea of an existing offence. There are substantial practical advantages in that approach.[50] On the other hand, like the Butler proposal and unlike the wide range of offences to which *Majewski* extends, the new offence will be limited to the commission of certain carefully-defined kinds of harm by a person when in a state of self-induced intoxication. By further contrast with the *Majewski* approach, the offence will specifically apply only to those who are intoxicated to a substantial degree, and will carry a lesser maximum punishment than for similar harm committed under an existing offence requiring mens rea.[51]

6.33 We regard as an important feature of the new offence that it cannot be committed without fault on the defendant's part - namely, his free decision, unrestrained by considering the possible consequences of his conduct, to drink alcohol (or to take some other drug) in a quantity that he knows is liable to impair his awareness or control to a substantial extent.[52]

3. The harm founding the new offence

6.34 The Butler Committee proposed that the following offences should found the proposed offence of dangerous intoxication - namely, those,

> "involving injury to the person (actual bodily harm) or death or consisting of a sexual attack on another, or involving the destruction of or causing damage to property so as to endanger life [under section 1(2) of the Criminal Damage Act 1971]".[53]

6.35 It is important to note that this approach does not depend on any vague or general characterisation of the intoxicated defendant's conduct as "dangerous", but rather requires the identification of specific conduct on his part that falls within the definition of an identified crime. We have some degree of confidence that that general approach is correct. Although the social objective of the new offence is to respond to violent or dangerous conduct, the offence is likely to become oppressively wide unless the conduct to which it applies is clearly defined; it being remembered also that acting in a "dangerous" manner is not, in itself, an offence.

6.36 It is however less easy to determine how the conduct to which the new offence should apply ought to be defined. One possibility, on which we invite comment, is that in order to limit the new offence to comparatively serious events of harm or damage it should be necessary to show that the accused had committed the actus reus of an indictable offence.

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[50] See paras. 6.35ff below.

[51] Unlike the proposal made by Professors Smith and Williams: see paras. 6.24(5)-6.25 above.

[52] See paras. 6.8-6.10 above.

[53] See Appendix A to this Paper, para. 18.55.

However, the category of indictable offences does not directly address the question of the types of damage most obviously needing to be dealt with by an intoxication offence. An alternative way of approaching the matter would therefore be to identify specifically for this purpose the kinds of damage most likely to be committed by intoxicated persons and for which the new offence, if it is to be created at all, is most appropriate.

6.37 We recognise that that exercise involves matters of policy and of judgement, and we therefore particularly invite comment not only on whether that is the right approach, but upon the types of damage that we provisionally suggest for inclusion within the new offence. However, in the interests of clear definition, we suggest that there should be retained the general approach of the Butler Committee, that the intoxication offence should be defined in terms of those who cause the physical harm prohibited by a limited number of specified crimes. To qualify, the harm in question would have to fulfil all the requirements of the definition of the actus reus contained in the listed offence on which the prosecution relied: for instance, in murder the year and a day rule, and in rape the partial definition of sexual intercourse given in section 44 of the Sexual Offences Act 1956.

6.38 However, although we agree with the general principle adopted by the Butler Committee, our present view is that the harms envisaged by them as the subject of the new offence were too restricted. We suggest the following approach. First, we agree with Butler that all cases of harm to the person, except minor assaults, and all cases of sexual assault should be included. Second, however, we would include the intoxicated person who damges or destroys property[54] within the ambit of the new offence. We recognise that that could cause the offence to be extended to quite trivial incidents; we invite comment on whether that outweighs the desirability of ensuring that anyone who damages another's property when in an intoxicated state is brought within the criminal law. Third, it seems particularly appropriate to include certain public order offences within the new offence. The public offence and disquiet caused by conduct amounting to, for instance, the offence of affray exists just as much, perhaps even more so, when those making the affray are intoxicated; and since the offence is often, perhaps even characteristically, committed in drink there would seem to be strong pragmatic reasons for exposing those who make affrays when intoxicated to the threat of conviction for the new offence.

6.39 We do not however include within the ambit of the new offence attempts to commit the listed offences. Some persons who commit attempts undoubtedly perform very dangerous acts. But where the defendant's intoxication prevents the formation of an intention[55] that element of intention will by definition be missing. In the normal case that vagueness is cured, and the criminal nature of the defendant's conduct is established, by the parallel requirement to prove intention on the defendant's part to commit the completed crime. But, in the case of the intoxicated behaviour to which the new offence will apply, that element will by definition be missing. A general provision that the new offence extended to the actus reus of attempt would, therefore, be extremely, indeed unacceptably, wide, since many acts that, given the presence of criminal intention, count as attempts are completely neutral in their

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[54] Contrary to the Criminal Damage Act 1971, s. 1(1).

[55] Criminal Attempts Act 1981, s. 1(1).

inherent nature.[56] Nor in our view would it be right to try to make the new offence apply to cases of "attempt" that could be characterised as, for instance, clearly culpable and dangerous: as where the defendant in a bout of drunken aggression throws a bottle at another person, but narrowly misses. That would be to fall back on the general criterion of "dangerousness" which, we have argued, is too vague a basis for the definition of a crime. It may perhaps however be noted that cases of the sort just mentioned will quite frequently fall within the definition of affray, since such a defendant's general behaviour is likely to be such as to cause a person of reasonable firmness who might be present at the scene to fear for his personal safety.[57]

6.40 For reasons somewhat similar to those applying to attempts, we include within the new offence neither acts of dishonesty, such as those founding certain of the offences under the Theft Acts, nor cases of burglary.[58] Where the actor is intoxicated to the extent that it is impossible to characterise his conduct as dishonest, for instance when a drunken person in a supermarket blindly picks up and walks off with the goods on display, his acts are in themselves legally neutral. The actus reus of theft involves simply the assumption of the rights of an owner, and there will be many cases where, absent dishonesty, it is legitimate for a person to assume such rights over another's property.[59] And the objection to bringing such conduct within the intoxication offence is not merely one of definition, but also one of policy, since it would in our view make the law unduly vague and oppressive if it sought to include drunken interference with, as opposed to damage to, another's property. By contrast, *damage* to another's property is likely to be objectionable in itself: which is why we have, as at present advised, included criminal damage within the intoxication offence.

6.41 The new offence should therefore in our view be limited to substantial harms to the person, to the physical safety of property, or to public order. That will include conduct of the kind most likely to be committed by intoxicated persons, and harm that it is right the law should take action against if committed by people who have deliberately chosen to become intoxicated.[60] On that basis, we provisionally suggest that the commission of the harm proscribed by the following, "listed", offences should be an ingredient of the intoxication

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[56] Thus, for instance, a man who throws a cricket ball towards another many be doing something more than merely preparatory to a serious assault, but may simply be playing a lawful game.

[57] Public Order Act 1986, s. 3. It is recognised that the offence of affray does not encompass every case of assault (see e.g. *Davison* [1992] Crim LR 31); but when the defendant is in drink there is likely to be sufficient suggestion of general aggression in his behaviour to bring him within the harm defined by the offence of affray.

[58] For the conceptual difficulties of characterising as burglarious a trespass by a person whose state of intoxication has prevented him from forming an intent as to the end to be achieved by that entry, see para. 4.44 above.

[59] Theft Act 1968, ss. 1 and 3. To give a further instance, when A sits on a chair owned by B, without B's consent, he assumes the rights of an owner over the chair. It would not be right to convict of a specific intoxication offence every drunken guest who slumps insensibly on his host's furniture. It will be reacalled that, for reasons not dissimilar to those expressed here, theft is under the present law a crime of "specific intent": see n. 17; para. 2.8 above.

[60] For the background to this approach see para. 6.8 above.

offence:

(1) Homicide.
(2) Bodily harm.[61]
(3) Criminal damage.[62]
(4) Rape.[63]
(5) Indecent assault.[64]
(6) Buggery.[65]
(7) Assaulting a constable, and resisting or obstructing a constable, in the execution of his duty.[66]
(8) The offences, under the Public Order Act 1986, of (i) violent disorder; (ii) affray; and (iii) putting in fear of, or provoking, violence.[67]
(9) Causing danger to road-users.[68]

We however invite comment on whether these, or any other, offences should be such "listed offences".[69]

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[61] Under ss. 18, 20 and 47 of the Offences against the Person Act 1861. In the event of the adoption of the reforms recently provisionally proposed by us, this concept would be replaced by that of "personal injury", in the sense defined in LCCP 122, draft Bill, p. 79, clause 1(6) - namely:

> "(a) physical injury, including pain, unconsciousness, or any other impairment of a person's physical condition; or
>
> "(b) impairment of a person's mental health."

The definition of injury is considered at pp. 33-36, paras. 8.16-8.33 of that Paper.

[62] Criminal Damage Act 1971, s. 1(1).

[63] Sexual Offences Act 1956, s. 1; Sexual Offences (Amendment) Act 1976, s. 1.

[64] Sexual Offences Act 1956, ss. 14 and 15. This would in our view apply only where the assault is inherently indecent, and not (in view of the mental element there involved) where the assault is indecent because of the defendant's motive, under the rule laid down in *Court* [1989] AC 28.

[65] 1956 Act, s. 12.

[66] Police Act 1964, s. 51.

[67] Contrary to ss. 2-4 respectively.

[68] Road Traffic Act 1988, s. 22A (introduced by the Road Traffic Act 1991, s. 6): see para. 3.5 above.

[69] It may be appropriate to recall that intoxicated driving is addressed by special statutory provisions: see paras. 2.36-2.37 above.

4. The punishment for the new offence

6.42 Both the Butler Committee[70] and the minority of the CLRC[71] found the question of punishment for the new offence a matter of difficulty. We also acknowledge those difficulties, and will welcome the help on this issue of readers of this Paper. We suggest, however, that the question has to be reviewed in the light of the reasons and justification for the creation of this offence in the first place. We set out in the following paragraphs how we suggest the matter should be addressed.

6.43 First, we regard as unacceptable the suggestion that there should be the same maximum punishment for the intoxication offence as for the particular listed offence on which the defendant's conviction of the intoxication offence is based. There are practical objections to that policy;[72] but, more pressingly, it seems objectionable in principle. Although the basis of the intoxication offence is that the defendant was at fault in becoming intoxicated in the first place, that fault is of a more general and less obviously culpable nature than the fault, the intentional or reckless commission of a defined criminal act, that founds liability for the listed offence.[73] It would not be right to put the two cases on the same level in respect of punishment.

6.44 Nor would it be acceptable to provide the same maximum punishment on the assumption that judges would take the consideration just mentioned into account in sentencing the defendant. We have already pointed to the difficulty caused under the present law by the assumption in many cases that a wholly intoxicated offender nonetheless commits, and is subject to the same sentencing arrangements as for, the offence with which he is charged.[74] If under the new offence the maximum punishment provided by Parliament were the same as for the listed offence underlying the defendant's conviction of the intoxication offence, there would in fact be no justification for judges to assume that, as a category, the intoxication offence should be treated less severely than the listed offence. The only guidance provided to judges as to the relative seriousness of offences is through the admittedly somewhat crude method of the maximum punishment stated by Parliament for each offence. If, as we think, the intoxication offence should, as a matter of principle, be treated in general less severely than the underlying listed offence, that rule has to be made explicit in the maximum sentence that is laid down for the intoxication offence.

6.45 Second, we do not think that it would be appropriate to provide a "flat rate" maximum

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[70] See para. 6.16 above.

[71] See n. 39, para. 6.25 above.

[72] *Ibid.*

[73] See para. 6.9 above.

[74] para. 3.22 above.

for all cases under the new offence.[75] There is the substantial practical difficulty of deciding what that maximum should be. But that difficulty also underlines the consideration that whilst part of the justification for the conviction is that the defendant was deliberately intoxicated, another element in his offence, which justifies the imposition of criminal sanctions in his particular case of intoxication, is the harm that he has caused.[76] It seems inevitable that the punishment that he receives should be related to the nature and extent of that harm.

6.46 It should be borne in mind that, unlike the Butler offence, the offence now under consideration will not be limited to cases where the defendant has been shown to have lacked the mens rea of the underlying listed offence.[77] In respect of the new offence, therefore, the harm actually caused plays a particularly important role in defining the defendant's culpability, and that role should be acknowledged in determining the punishment for the offence.

6.47 We have therefore provisionally concluded that the nature of the defendant's culpability, and the justification for imposing criminal sanctions upon him, will be best reflected by linking the punishment for the new offence more specifically to the harm suffered. It would be feasible, for example, to provide a maximum penalty of, say, two-thirds of that for the underlying listed offence, with perhaps a maximum of ten years' imprisonment where, as in homicide, the maximum for the underlying offence is life imprisonment.[78] We particularly invite views on this proposal.

5. The definition of "deliberate intoxication"

(a) Introduction

6.48 Our approach to this element in the present offence differs in some significant respects from the rules of the present law as to "voluntary" intoxication.[79] That is because under the present law the principal concern is to identify types of evidence that cannot be taken into account in adjudicating upon the defendant's mental state, and it is therefore of little significance that, in particular, "intoxication" is given a very wide meaning. Under the new

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[75] The Butler Committee proposed that the maximum punishment for the new offence should be one year for a first offence and three years for a second and subsequent offence: Appendix A hereto, at para. 18.58. The CLRC considered those maxima to be inadequate for cases in which the defendant had inflicted serious harm, instancing killing and rape: Appendix B hereto, at para. 261.

[76] See para. 6.8 above.

[77] See para. 6.32 above.

[78] Some precedent for a provision of this sort is to be found in the proportionate range of punishments for the offence of impeding the apprehension or prosecution of those who have committed a specific offence, that is laid down in s. 4(3) of the Criminal Law Act 1967.

[79] See para. 2.27 above.

offence, however, proof of intoxication will serve a specifically inculpatory purpose;[80] so the definition of intoxication needs to be limited to that which will legitimately serve that purpose.

(b) "Intoxication"

6.49 We propose that a person should be regarded as intoxicated for the purpose of such a new offence if he has taken, or had administered to him, anything ("an intoxicant") that causes his awareness, his understanding or his control to be substantially impaired.[81] Thus not only alcohol and other drugs but also, for instance, the vapour inhaled by a glue sniffer would be capable of founding liability for the offence.

6.50 The requirement of *substantial* impairment would ensure that the offence only operated where the degree of intoxication was significant: merely having, as it were coincidentally, drunk a glass of beer would not be enough. That requirement will remove any possibility of prosecutors taking the easy course of proceeding for the intoxication offence rather than for the underlying listed offence simply on the basis that the defendant had ingested a small amount of intoxicant.[82]

6.51 The substantial intoxication of the defendant will be adjudicated upon on the basis of evidence of his actions and demeanour, in a commonsense way. Such evidence might, but would not necessarily, include evidence of the amount and nature of the intoxicants consumed by him: we have pointed out elsewhere that a person's behaviour and conversation, rather than any absolute amount of consumption, are likely to be the best guides to the degree of his intoxication.[83] Evidence of the level and nature of consumption will, however, be directly relevant when considering whether his intoxication was "deliberate": an issue to which we now turn.

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[80] See para. 6.10 above.

[81] The expression "substantially impaired his mental responsibility" in s. 2(1) of the Homicide Act 1957 (which relates to the partial defence of diminished responsibility in trials for murder) was considered judicially in *Lloyd* [1967] 1 KB 175. Part of the direction to the jury given by the trial judge and cited with approval by the Court of Criminal Appeal was:

> "I am not going to try to find a parallel for the word 'substantial'. You are the judges, but your own common sense will tell you what it means. This far I will go. Substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to you and other juries to say on the evidence, was the mental responsibility impaired and, if so, was it substantially impaired?"

Our intention is that a similar approach should be adopted to the meaning of "substantially impair" in the proposed new offence.

[82] See further, para. 6.80 below.

[83] See n. 27, para. 1.14 above.

(c) "Deliberate"

6.52 Under the present law, the *Majewski* rule only applies if the defendant's intoxication was "voluntary". We suggest that under the new offence what is broadly the same question will be more clearly understood if it is discussed in terms of the deliberate nature of the intoxication that would found guilt of that new offence. That concept will also better explain the special rule that we propose to deal with cases where the intoxicant in question has been taken for medicinal purposes:[84] in such a case, the defendant's condition has not been incurred involuntarily in any real sense of that word, but he has an excuse that the law should recognise as making his condition non-culpable, and therefore not appropriate to found liability for the new offence. However, as we have indicated, the main issue in respect of the new offence is the same as in the present law: whether the defendant has, of his own free will,[85] taken a substance that produced his state of intoxication. Difficult, though perhaps not very common, issues arises in some particular situations.

6.53 The most obvious case is that colloquially known as "lacing". The defendant drinks a substance thinking that it is non-alcoholic, or only mildly alcoholic, whereas it is in fact substantially intoxicating: the case most usually cited being where a glass of lemonade, or of lager, has a measure of vodka surreptitiously added to it. We are minded to think that such cases should be accommodated by a test that only brought the defendant within the new offence if, when he took the substance in question, he was subjectively aware that what he took would or might cause his awareness or control to be substantially impaired.

6.54 This approach does differ somewhat from that of the present law, where if the defendant knows that what he ingests contains *any* intoxicant the degree of intoxication that is in fact caused cannot be involuntary.[86] That rule is, however, concerned with identifying the circumstances in which, under the *Majewski* approach, evidence of (any) intoxication should be excluded from consideration, and the degree of the party's intoxication is not relevant to that enquiry. Here, by contrast, we are concerned with a new and specific offence of causing particular harm whilst in a state of substantial intoxication. We think it right, therefore, that the defendant should not be convicted unless he was aware that he was at least running the risk of putting himself into that state of substantial intoxication.

6.55 We would, however, make four further points, on all of which we invite comment. They all concern the requirement that we propose that the defendant should be subjectively aware that he was risking substantial impairment of his awareness, understanding or control.

6.56 First, though we do not think that the case would often arise, or be found plausible by a jury if it were pursued, a defendant in a *non*-lacing case might argue that he had no idea that, say, the six pints of lager that he knew he was drinking could have an unsettling effect;

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[84] See para. 6.59 below.

[85] Intoxication would obviously be involuntary if the defendant took an intoxicant under duress, as where he was ordered to drink alcohol at knifepoint; or if, e.g., whisky was poured down his throat when he was unconscious.

[86] See para. 2.27 above.

or that he was perfectly, though in the event wrongly, satisfied on the basis of previous experience that such a quantity would not have a substantial effect on him. The only way of being sure that such an apparently unmeritorious argument would not succeed would be to make the test objective: had the defendant taken substances that he ought to have known would cause substantial intoxication? We are however reluctant to add this element of in effect negligence to an offence that already exposes the defendant to conviction for causing harm that he did not foresee. We should point out that the subjective test that we propose is whether the defendant was aware that the substance that he was taking would *or might* cause substantial intoxication. On the basis of that test we have some confidence in the ability of juries and magistrates to deal with implausible allegations: but we invite comment.

6.57 Second, cases can arise where, because of the unusual susceptibility of the defendant, loss of control or awareness is caused or allegedly caused by substances that, generally, would be quite innocuous: for example, in *Toner*[87] a state of loss of control was said to have been brought about by the ingestion of a small amount of carbohydrate after a long period of fasting. We think that such cases should fall under a new intoxication offence, if the defendant commits the actus reus of a crime in such a state, different though the case might appear from the usual case of "intoxication". However, it would be particularly important in such a case to show that the defendant knew that he was running a risk of loss of control in acting as he did: for instance, by showing that he had had a previous similar experience. It could not be right simply to attribute to him what might be somewhat technical, and possibly controversial, medical knowledge.

6.58 Third, in many cases, and particularly those involving lacing, the facts relating to whether the intoxication was deliberate will lie particularly within the knowledge of the defendant. Indeed, the prosecution may often not lead evidence of the origins of the defendant's allegedly intoxicated state. We therefore consider that, at least, the prosecution should not be under an obligation to deal with that issue in the absence of evidence that raises the issue of whether the defendant's intoxication was deliberate. And we further raise for consultation the question whether the law should go further, and put the burden of proof on the issue of whether intoxication was deliberate on the defendant, to be determined, like all burdens placed on a defendant, on a balance of probabilities. That approach, to the question under the present law of involuntariness, is already taken, for the particular purpose of public order offences, by section 6(5) of the Public Order Act 1986,[88] and we invite comment on whether that pragmatic rule should be applied also to a new offence.

6.59 The fourth issue concerns substances that have been taken for medical purposes. There is some rather complex law on this point in relation to the *Majewski* approach.[89] It may however be possible to take the issue more shortly under the present offence, focusing as it does on the deliberate nature of the defendant's intoxication. We do not think that it would be right to treat as a basis for criminal sanctions a condition produced by substances taken genuinely for the therapeutic purposes, even where the taker was aware that they might

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[87] (1991) 93 Cr App R 382.

[88] See para. 2.22 above.

[89] See n. 8, para. 2.5 above, and also clauses 22(5)(b) and 22(6) of the Draft Code.

impair awareness or control. We therefore propose that there should be exempted from the new offence any condition produced by a substance taken solely for medicinal, sedative or soporific purposes. We offer some brief comments on that formulation.

6.60 First, the test focuses on the *purpose* for which the substance is taken, rather than attempting to categorise some drugs as falling wholly outside the intoxication rules. That is because under the new offence the test is one of the defendant's culpability in taking the substance. It is not therefore necessary to fall back on the somewhat artificial categorisations that, under the present law, are used to avoid injustice under a rule that, in principle, provides that *no* evidence of the effect of an "intoxicant" is admissible.[90] Second, it seems right to include any substance taken for medicinal purposes, and not just those specifically taken on "doctor's orders". Third, it is also right in our view, in the context of the new offence, to exclude conditions produced by substances taken for sedative or soporific purposes. Putting it broadly, the new offence aims at those who cause damage or alarm whilst intoxicated, its paradigm case being that of the drunk in a public place. If a person who seeks sedation should whilst under the influence of a sedative or soporific happen to cause the harm proscribed by an offence (the classic example being the person who suffocates his companion whilst asleep) he should not be punished under the new offence: and his conduct is equally not culpable even if the substance that he takes is not *medicinal* or medically prescribed. This approach would, in theory, include claims that *alcohol* had been taken *solely* for soporific or medicinal purposes: such claims would no doubt be scrutinised with some scepticism.

6.61 The last point illustrates that these comparatively wide exceptions have to be balanced by the requirement that the substance should be taken solely for medicinal, sedative or soporific purposes. Abuse of medicaments or drugs, for instance the taking of an overlarge dose, or a combination of medicines or sedatives with other substances[91] for "kicks" or stimulation will not be exempted. We also recognise that limitation of the exceptions to substances taken for these particular purposes will in a few cases cause there to be brought within the new offence the taking of some substances not normally thought of as dangerous or undesirable, as in the example given in paragraph 6.57 above. We think, however, that that is right, provided that the requirement is established of awareness on the defendant's part of the possibility of substantial loss of control.

6. Mistake

6.62 If the *Majewski* approach is abolished there will go with it the rule that an intoxicated mistake cannot ground a defence at common law.[92] In cases that do not involve intoxication the defendant may rely on a belief, even if mistaken, in facts that justify or excuse his conduct. He may, for instance, claim that injuries were inflicted by him in the mistaken belief that he was being attacked. A person in that position is entitled to use reasonable force

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[90] Cf. the approach in *Hardie*, cited in n. 62, para. 2.29 above. The result in that case had to be achieved by making an *ad hoc* distinction between dangerous and other drugs.

[91] See in this respect the practices reported in n. 19, para. 1.11 above.

[92] See paras. 2.24-2.25 above.

in self-defence; and what is reasonable is judged by the circumstances as he believed them to be. In the context of the proposed new offence, however, this principle would be inconsistent with the policy underlying our proposal, of providing a criminal sanction for the purpose of controlling those who inflict harm when intoxicated. Typically, a person may, because intoxicated, think that he is being attacked by someone whose approach is in fact innocuous - made for the purpose, say, of engaging in small talk: his conduct is no less socially harmful, and thus legitimately the potential subject of criminal sanctions, than is that of a drunken man who hits out without awareness of what he is doing.

6.63 We therefore consider that in such a case the person who through an intoxicated mistake is able to rely on self-defence, or any other defined defence to an existing offence, should be caught by the new offence of criminal intoxication if he otherwise fulfils its requirements. There are, however, difficulties in determining the exact terms and limits of this liability, and we will particularly welcome comments on this aspect of the new offence.

6.64 The simplest course would be to provide no special rule in the case of an intoxicated person acquitted on grounds of, for instance, self-defence. He would be in the same case as any other intoxicated defendant: the fact of his having committed the actus reus of one of the listed offences in a condition of substantial intoxication[93] would be enough to convict him of the new offence. We think that approach would in most cases produce entirely just results where a person was acquitted of the listed offence on grounds of reasonable reaction to his *belief* that he was about to be attacked.[94] The necessary precondition for conviction of the new offence is that the defendant's awareness or understanding has been substantially impaired. When a person is in that condition it seems likely that such condition will affect his perception of the behaviour of others, and will substantially contribute to any mistake that he makes about their aggressive intentions: so it will be perfectly proper to proceed against him, on grounds of intoxication, when such a mistake leads to his committing an assault in wrongly assumed self-defence.

6.65 There may, however, remain the possibility that the victim of such an assault acts in a manner that would be interpreted even by a sober man as threatening. It would not seem just in those circumstances that, having been acquitted of the assault as a sober man would be, the defendant is then inculpated on grounds of his intoxication. This case can, however, only be met by a special provision. The provision that we have in mind is that an intoxicated person can rely on a mistake that, objectively viewed, was one that it would have been reasonable for a sober person circumstanced as the defendant to have made. This does not involve the posing of hypothetical questions in order to inculpate the defendant, but rather gives him the benefit of the doubt in cases where the effect of his intoxication is likely to be in some doubt. It seems right to give the benefit of that doubt to persons who, although intoxicated, find themselves in circumstances where a sober person would reasonably think that circumstances existed that justified or indeed required his commission of that actus reus.

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[93] See para. 6.49 above.

[94] See para. 2.24 above.

7. Possible limitations on a new offence

6.66 We have considered, but as at present advised do not favour, three further requirements for liability that might be incorporated in the offence. We deal with each in turn. We would comment generally however that these limits, if incorporated in the new offence, would be likely to restrict, perhaps almost to disappearing point, the cases to which it would apply in practice.

(a) A causal link between the defendant's state of intoxication and his conduct

6.67 For liability under the new offence the defendant's actions must *cause* the proscribed harm, a matter that seems to call for no legislative definition. It is, however, arguable that, in fairness, or as a principled limitation on the ambit of the criminal law, the new offence should not apply to harm inflicted by a person in circumstances in which, were he not intoxicated, lack of mens rea would negative liability. For example, a sober man would normally commit no offence if he injured a passer-by by thoughtlessly raising his arm to hail a taxi. If deliberately intoxicated, however, he might (in the absence of the further requirement here under discussion) be guilty of the proposed new offence. We have therefore considered whether the new offence should further require that the defendant's act that caused the proscribed harm must itself arise *by reason of* his intoxication.

6.68 We have concluded, however, that to require an *additional* causal connection of this kind would be impracticable. In the first place, the causation involved is of a different kind from that with which the law is familiar, which involves a causal link between an *event* (in the case of the criminal law, an act or muscular contraction on the part of the defendant) and its consequences: the issue here would, by contrast, concern uncharted territory, that of the highly problematic issue whether a person's *mental state* was the cause of an event. In many cases it would involve formidable problems of proof. In the example given above, for instance, the jury would have to decide the speculative, unrealistic question: would the defendant have hailed the taxi in the way that he did had he been sober (or less severely intoxicated)? For the reasons that we have explained in criticising the present law,[95] we consider it undesirable that juries should be required to consider this kind of hypothetical issue.

6.69 It should, further, be borne in mind that the new offence would extend only to persons who are substantially intoxicated:[96] the person who has consumed a moderate amount of alcohol would not be at risk of liability for the new offence if he accidentally caused harm. Thus, not only would the defendant have to have indulged to a substantial degree; but also it is unlikely that in practice, if someone in that condition caused harm of the seriousness to which the offence would be limited,[97] his conduct could be said in any realistic way to be wholly unconnected with his intoxication.

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[95] paras. 3.19-3.20 above.

[96] See paras. 6.49-6.50 above.

[97] See para. 6.41 above.

(b) Foresight of the risk of causing harm

6.70 We have considered whether the new offence should require that the defendant was aware at some time during his (voluntary) ingestion of an intoxicant that he might cause harm of the kind that in fact subsequently occurred. Such a requirement would be in accordance with the general approach of the criminal law that, at least in respect of serious offences, a defendant should not be convicted unless he was aware of the kind of damage that he was at risk of causing. The present offence is, however, not an offence of the ordinary sort, its particular terms having been adopted precisely because the policy objective of bringing within the criminal law those who commit injury or damage when intoxicated cannot be effectively achieved by the ordinary means of the criminal law. Consultees who however regard as paramount the exemption from criminal sanctions of anyone who lacks awareness of the damage that he causes are likely, therefore, to be attracted to option 5 rather than to the present option.

6.71 That the requirement at present under review is unlikely to be appropriate for the new offence is demonstrated also by considering its practical effects. In most cases intoxicated people do not, we believe, foresee the kind of harm to which their consumption of alcohol or their taking of a drug may lead.[98] Indeed, in most cases they cannot do so, since the stage of their indulgence when they are in a state capable of foresight will often be well removed, in time or temper, from the incident in which damage is caused. The inclusion in this offence of the instant requirement would, therefore, defeat the purpose of the offence, by excluding from its ambit precisely the conduct at which the offence is aimed.

6.72 Moreover, at least in cases of alcoholic intoxication, the existence of this element would be very difficult to establish, since the substantial impairment of the defendant's awareness that triggered the offence would be likely to render him unaware of the risk of causing harm. To illustrate: a person consumes fifteen pints of beer in the course of an evening. As a result he becomes intoxicated to the extent required for the new offence, and commits the harm proscribed by a listed offence. He might plausibly assert that when consuming his eighth pint, which in his estimation was the minimum required to intoxicate him to a substantial extent, he did not have in mind to consume as much beer as, in the event, he did; and that after taking his fifteenth glass he was so intoxicated that he did not advert at all to the possibility of causing harm.

6.73 Our view is, therefore, that if there is to be an offence such as is discussed under this Option 6, the element of awareness that it contains can only practically relate to the risk of the defendant making himself substantially intoxicated.[99] To go further and require awareness of the risk of causing the damage or harm that he caused when in that intoxicated state would in effect render the offence nugatory.

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[98] Cf. Stephen J's observation in the leading Australian case, *O'Connor* [1980] 54 AJLR 349 (considered at paras. 5.10-5.14 above), at p. 364: "Cases of 'Dutch courage' and of a known tendency to be violent when intoxicated aside, the possibility of the commission of any crime will not normally be contemplated when the drink or drugs are taken."

[99] See paras. 6.52-6.59 above.

(c) Exclude intoxication by alcohol

6.74 The mere consumption of alcohol, far from being prohibited, is widely accepted. By contrast, the mere possession of many other drugs constitutes an offence.[100] We have therefore addressed the possible argument that the new offence should not apply to drunken, as distinguished from drugged, intoxication. So far as we aware, however, this distinction has nowhere been regarded, either judicially or by those concerned with law reform, as material to the issues addressed by this Paper.[101] Matters germane to the question whether the use of particular substances should be criminal is quite distinct from those that call for consideration in the present context. The instant question concerns criminal liability for harm caused by a person after ingesting a substance that affects his mental state when causing the harm proscribed by an existing offence and so negatives the mental element of that offence. As to *that* issue, the substance that produces the intoxicated state of mind, as distinguished from the nature of that state, is immaterial.

6.75 To limit the offence to cases of drug-induced intoxication would also be impracticable. Many cases, including *Majewski* itself, involve a combination of drugs and alcohol, such combinations being, we understand, particularly productive of uncontrolled behaviour.[102] It would be a serious omission if such cases were not covered by the offence.

8. Automatism

6.76 As we explained in Part II above,[103] the fact that the defendant acted in a state of automatism normally negatives liability; but not, exceptionally, if in an offence of basic intent that state resulted from voluntary intoxication. We intend the new offence to extend to a person who has thus reduced himself to an "automaton", as is probably the case with the present *Majewski* approach.[104]

6.77 As we explained in discussing the present law,[105] the objective of this provision,

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[100] Misuse of Drugs Act 1971, s. 5(1) and (2).

[101] Thus, e.g., the New Zealand Law Reform Commission's Report on Intoxication (1984), considered at paras. 5.21-5.22 above, stated (at para. 1) that the Commission had been "asked to consider the defence of drunkenness as a defence in the criminal law", but went on to explain (at para. 11):

> "The principles which apply to drunkenness also apply where the defendant was affected by other drugs, or by a combination of alcohol and other drugs. We therefore use the more general term 'intoxication', in preference to 'drunkenness', in order to avoid the impression that we are concerned only with cases involving the consumption of alcohol." (Footnote omitted.)

[102] See para. 1.11 above.

[103] para. 2.32.

[104] As in, e.g., the hypothetical case cited by the CLRC (see Appendix B to this Paper, para. 259) of the drunken man who, although he may not know what he is doing, kicks and punches a publican trying to eject him.

[105] See para. 2.33 above.

which would have to be explicitly stated in the legislation creating the new offence, is to ensure that persons to whom the control imposed by that offence should apply cannot escape from that control simply by classifying their case as one of "automatism": thus possibly leading to an argument that they had not in law committed the actus reus of the principal crime, rather than as a case in which the necessary mens rea could not be proved because of their intoxication. We venture to suggest, however, that this, in our view necessary, policy should be expressly stated, and the practical justification for it be debated, as this Paper seeks to do. The present uncertain statement of the law on this point[106] has, we suggest, been caused by the great difficulty of implementing policy decisions by judicial decision.

9. Insanity

6.78 Our provisional proposals in this Paper are not intended to affect the law of insanity in its application either to existing offences or to the proposed new offence of criminal intoxication.

10. "Dutch courage"

6.79 This relates to the alleged case where a person brings about his own intoxication in order to steel himself to commit an offence, and it is argued that he should be liable even if, because intoxicated, he lacks the appropriate mental element at the time of the performance of his subsequent actions. In our view, with the introduction of the new offence, it would be unnecessary to have any such special rule. We do not think that this situation is in any way a practical possibility: see paragraph 2.23 above. However, if a person deliberately becomes intoxicated for the purpose of committing a serious offence and in consequence lacks its mental element at the relevant time, his deliberate intoxication would undoubtedly fall within the new offence.

E. PROCEDURE

1. Overlap with existing offences

6.80 An important practical feature of the offence under discussion is that it is not subject to the precondition that through intoxication the defendant lacked the mental element of the underlying listed offence.[107] He might, for instance, when (deliberately) intoxicated to the extent defined in the new offence,[108] commit an assault that causes personal injury. If, though intoxicated, he committed the assault intentionally or recklessly, he would be guilty both of an offence under the present law[109] and of the proposed new offence.

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[106] See paras. 2.32-2.33 above.

[107] In this respect the new offence would differ from both the Butler Committee's proposal and that of the minority of the CLRC.

[108] See para. 6.49 above.

[109] Offences against the Person Act 1861, s. 47.

2. An alternative verdict

6.81 We do not envisage that the availability of the new offence will affect the great majority of cases in which there is evidence of the defendant's self-induced intoxication, since in practice few of those cases involve the issue whether the defendant formed the requisite mens rea. We propose, however, that where, unusually, there *is* an issue whether through intoxication the defendant lacked the mental element of the (listed) offence charged, the jury could convict of the new offence, whether or not it appeared in the indictment. Thus, if, say, six members of the jury were satisfied that, though intoxicated:

(a) the defendant committed the harm proscribed by the listed offence charged;

(b) he did so with the requisite mental element,[110] and

(c) that he was (also) guilty of the offence of criminal intoxication;

and six members were satisfied only as to (c), the jury would unanimously convict him of the new offence.

6.82 We would further illustrate the matter by reference to a defence. A defendant charged with unlawful wounding[111] might admit that he intentionally inflicted the injury alleged, but contend that he did so believing that he was being attacked. He concedes that his belief was false, but in support of his version of the events he adduces evidence that he had been drinking, and contends that his mistake was such as a sober person would have made. In deciding whether *in fact* he held that belief, the jury could take into account his intoxicated state. If the necessary majority of the jury are not satisfied on that point, they will acquit him of the offence charged. They will go on to consider whether he is guilty of the new offence. In determining *that* issue they will have to consider whether he met the requirements of the new offence when he inflicted the harm prohibited by section 20: and, if a sufficient majority are satisfied on that issue, he will be convicted of the new intoxication offence.

3. The new offence can be charged alone

6.83 Although we envisage that the new offence would normally fall for consideration at a trial for a listed offence, we do not propose to *preclude* the prosecution from charging the new offence. It may well often be desirable for this offence to appear as an alternative count on the indictment, or to be added in the course of the trial. Less often, prosecutors may legitimately decide to charge this offence alone: where, for example, they have clear evidence of severe intoxication and form the view that, if they prosecute for a listed offence, the case may involve a difficult issue concerning the effect of intoxication upon the defendant's mental state; or, simply, that the public interest would be adequately served by

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[110] In deciding this issue, the jury could take the defendant's intoxicated condition into account together with the other circumstances.

[111] Offences against the Person Act 1861, s. 20.

a conviction of criminal intoxication. We would, however, expect such decisions to be taken in accordance with the prosecutor's general duty to ensure that the charges properly reflect the (legal) seriousness of the defendant's conduct: so that where there was a substantial case that a listed offence had been committed, the intoxication offence would only in special circumstances be charged in its place.

F. SUMMARY

6.84 The new offence of criminal intoxication would therefore provide that any person who committed the actus reus of any one of the offences listed in paragraph 6.41 above would be guilty of the new offence if he so acted when his awareness, understanding or control was substantially impaired by his being deliberately[112] intoxicated. Subject to the possibility of the special rule in the case of mistake discussed in paragraphs 6.62-6.65 above, that would be the only requirement of the new offence.

6.85 As a corollary of the introduction of the new offence, the present *Majewski* approach would be abolished, with the effect that in assessing the defendant's intention or subjective recklessness for the purpose of deciding his guilt of an existing offence, the jury would take into account his intoxication, together with all other factors, in assessing his actual subjective state of mind.

6.86 We see the advantages of this approach as being:

(i) Defendants will not be liable to be convicted of offences when, in law, they did not have the required mental state for guilt of that offence.

(ii) At the same time, the criminal law will be able to intervene in cases where the defendant, although not fulfilling the requirements for conviction of a specific crime, committed socially dangerous acts in a state of substantial intoxication.

(iii) This objective will be achieved by allowing the court and jury to apply a set of clear rules, that require them to consider factual and not abstract or hypothetical questions; that clearly identify where the defendant has been convicted on grounds of intoxication rather than of actual intention or recklessness; and which accordingly give positive guidance to the sentencing tribunal as to the ground of his conviction.

6.87 It is not possible to state with confidence how the practical effect of the new offence, in terms of the nature of conduct liable to criminal conviction, will differ from the effect in that respect of the present *Majewski* approach, precisely because of the difficulty of stating with complete confidence the terms and ambit of the law under *Majewski*. It must also be noted that *Majewski*, where it applies, excludes evidence of intoxication of *any* degree from assessment of the accused's guilt, whereas the new offence only applies to those who are intoxicated to a substantial degree.[113] However, we should try to indicate the extent to

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[112] See paras. 6.52ff above.

[113] See paras. 6.48-6.49 above.

which, if at all, the new offence would or might produce convictions in cases in which, under *Majewski*, evidence of intoxication would be taken into account in determining the accused's guilt. First, offences that have, to date, been identified as offences of "basic intent",[114] to which the *Majewski* approach applies, would be covered by the new offence, in the sense that the harm prohibited by each of them is included in the proposed list of harms covered by the new offence.[115] Second, however, that list of harms does not include the harm covered by the actus reus of any present offence identified as one of specific intent, and in particular does not extend the intoxication offence to theft, deceit or handling.[116] Third, the only exception to the immediately foregoing statement is in the case of offences of specific intent where in the present law there is, by chance, another offence, though of basic intent, involving the same actus reus, that can be applied under *Majewski* to convict the offender of *some* offence. The most obvious, and perhaps the only, examples of this process, as explained in paragraph 3.11 above, are conviction of manslaughter in the case of intoxicated murder, and conviction of an offence under section 20 of the Offences against the Person Act 1861 in the case of an intoxicated commission of the actus reus of the offence under section 18 of that Act. In such cases the new offence aims directly at the fact of the commission of the type of harm prohibited, death or serious bodily harm.

6.88 In the event, therefore, the new offence is unlikely to produce convictions of intoxicated inflicters of injury in cases where *Majewski* at present does not apply. Readers may think, however, as we do ourselves, that the complicated process of comparison set out in paragraph 6.87 above, forced on us by the very complicated, and to some extent uncertain, terms of the *Majewski* rules, further demonstrates the merits of implementing policy by the straightforward introduction of a new offence, that concentrates on the nature of the damage caused, rather than by *ad hoc* adjustment of the present law.

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[114] See para. 2.9 above.

[115] See para. 6.41 above.

[116] Cf. para. 2.8 above.

PART VII

SUMMARY OF OUR CONCLUSIONS AND PROVISIONAL PROPOSALS

7.1 We invite comments on any of the matters contained in, or on the issues raised by, this Consultation Paper. For convenience, we summarise here our conclusions and provisional proposals, together with specific issues on which we should particularly welcome comment.

7.2 The *Majewski* approach under the present law, by which in many cases the defendant's intoxication cannot be taken into account in determining whether he had the mental element of the offence charged, is unsatisfactory; in particular, it is (i) complex and obscure, (ii) erratic in its operation and (iii) difficult to apply.

(as to (i), paragraphs 3.1-3.8; as to (ii), paragraphs 3.9-3.16; as to (iii), paragraphs 3.17-3.23)

7.3 In Parts IV of the Paper we consider four options for reform, each of which is a version of the *Majewski* approach. Our provisional view is that none of them is satisfactory. The options are as follows:

Option 1: Do nothing (notwithstanding our criticisms of the *Majewski* approach).
(paragraphs 4.1-4.7)

Option 2: Codify the *Majewski* approach.
(paragraphs 4.8-4.35)

This option takes three, somewhat different, possible forms:

(i) Codify the present law without amendment.
(paragraphs 4.8-4.10)

(ii) Adopt the proposals of the CLRC and the rule in the American Model Penal Code to apply *Majewski* only to issues of recklessness.
(paragraphs 4.11-4.30)

(iii) Adopt a simplified version of (ii), under which a state of voluntary intoxication would itself constitute recklessness in law.
(paragraphs 4.31-4.33)

Option 3: Disregard the effect of voluntary intoxication in *any* offence, with the effect that the defendant could in no case rely on voluntary intoxication to negative mens rea.
(paragraphs 4.36-4.46)

Option 4: Disregard the effect of voluntary intoxication in *any* offence (as under option 3), but subject to a statutory defence whereby it is open to the defendant to

prove, on the balance of probabilities, that he lacked the mens rea of the offence.

(paragraphs 4.47-4.50)

7.4 We consider in Part V two further options for reform, both of which would involve the abolition of the *Majewski* approach; and we have provisionally concluded that one of those options should be adopted. The options are:

Option 5: Abolish the *Majewski* approach without replacement, so that the defendant's intoxication is taken into account with all other relevant evidence in determining whether he had the prescribed mental element of the offence.

(paragraphs 5.8-5.25)

Option 6: Combine abolition of the *Majewski* approach with the introduction of a new offence, "criminal intoxication", the elements of which offence are considered in detail in Part VI.

(paragraphs 5.1 and 5.24-5.25)

We shall particularly welcome comment from those who favour the abolition of the *Majewski* approach on the question whether, in addition, a new offence should be created.

7.5 The elements of a proposed new offence that we submit for comment are:

(a) The offence would be committed by a person who, while "deliberately intoxicated", caused the harm proscribed by any of the "listed offences" set out in subparagraph (b) below.

(paragraphs 6.30-6.33)

(b) The listed offences are provisionally proposed to be:

(1) Homicide.
(2) Bodily harm.
(3) Criminal damage.
(4) Rape.
(5) Indecent assault.
(6) Buggery.
(7) Assaulting a constable, and resisting or obstructing a constable, in the execution of his duty.
(8) The offences, under the Public Order Act 1986, of (i) violent disorder; (ii) affray; and (iii) putting in fear of, or provoking, violence.
(9) Causing danger to road-users.

(paragraph 6.41)

(c) A person would be "intoxicated" for the purpose of the proposed offence if he had taken anything ("an intoxicant") that caused his awareness, his understanding or his control to be substantially impaired.

(paragraphs 6.49-6.51)

(d) A person would not, however, be *deliberately* intoxicated unless aware when he took an intoxicant that, in the amount that he knowingly took, it would or might cause him to become intoxicated (in the sense referred to in subparagraph (c) above).

(paragraphs 6.52-6.54)

(e) In adjudicating upon the question whether the defendant's intoxication was "deliberate", there should be *at least* an evidential burden upon the defendant.

(paragraph 6.58)

(f) An intoxicated person would not be *deliberately* so intoxicated if he did not take the intoxicant of his own will or if his intoxication was caused by an intoxicant taken solely for medicinal, sedative or soporific purposes.

(paragraphs 6.59-6.61)

(g) It would be immaterial to liability for the proposed new offence that the defendant (i) did or did not form the mental element of the underlying listed offence; or (ii) was in a state of automatism when causing the harm proscribed by the listed offence.

(as to (i), paragraph 6.80; as to (ii), paragraphs 6.76-6.77)

(h) Where the defendant sought to rely on a defence (in particular, self-defence) to the proposed new offence and that defence was based on an intoxicated mistake, he would in principle be able to rely on his mistake, provided that it was one that, viewed objectively, would have been reasonably made by a person who was not intoxicated but was otherwise circumstanced as the defendant.

(paragraphs 6.62-6.65)

(i) The proposed new offence could be charged alone; but, further, there should be specific provision that a defendant charged with a listed offence might, instead, be convicted of the new offence.

(paragraphs 6.81-6.83)

(j) The maximum punishment for the new offence should be less than, but proportionate to, that for the underlying listed offence.

(paragraphs 6.42-6.47)

7.6 In relation to a possible new offence, we should in particular welcome comments on the following issues:

(a) What offences should be "listed offences" (and so found liability for the proposed new offence)?

(paragraph 6.41)

(b) The maximum punishment for the new offence.

(paragraph 6.47)

(c) In relation to the question whether the defendant's intoxication was "deliberate", whether the defendant must actually be aware that the intoxicant knowingly taken by him would or might cause his awareness, understanding or control to become substantially impaired; or whether (alternatively) the test should be: was he, *or* ought he reasonably to have been, so aware?

(paragraph 6.56)

(d) In what circumstances should a deliberately intoxicated person who has caused harm owing to a mistake be liable for the new offence (see paragraph 7.5(h) above)?

(paragraph 6.63)

(e) In relation to the question whether the defendant's intoxication is "deliberate", should an evidential or, alternatively, a persuasive burden be placed on the defendant?

(paragraph 6.58)

APPENDIX A

Extract from the Report of the Butler Committee on Mentally Abnormal Offenders (1975), Cmnd. 6244

IV. OFFENCES COMMITTED WHILE INTOXICATED

18.51 Since our remit concerns mentally disordered offenders, it could be interpreted to include intoxicated offenders. In general we have not concerned ourselves with drunkenness and drug addiction, but we have made an exception for one topic, partly because it falls within the question of criminal responsibility with which we have been concerned, and partly because a solution of it is necessary for the purposes of the projected criminal code.

18.52 On a charge of an offence, the general principle is that the defendant may give evidence that he was intoxicated at the time, for the purpose of supporting a defence that he lacked the intent necessary for the alleged offence. Although the rule is clearly right on principle, it would, if logically applied, mean that a person who is habitually violent when in drink may escape any criminal charge. Of course, an intoxicated person will generally know well enough that he is making an attack on another, and if so he is subject to conviction; but the evidence of drunkenness may occasionally be sufficient to create a doubt in the minds of the jury or magistrates. The drunkard may also escape conviction on the argument that in his fuddled condition he mistakenly believed that he was being attacked,[28] and in Canada and Australia it has been held that a person charged with rape could give evidence of drunkenness for the purpose of supporting a defence that he believed that the woman was consenting, although no sober person would have believed it. The difficulty does not arise if death has been caused, because a charge of manslaughter does not require proof of an intent to kill or even to attack. Moreover, in order to avert a complete failure of the prosecution the courts have developed the doctrine that the offence of assault does not require a "specific intent" that can be rebutted by evidence of intoxication. However, the phrase "specific intent" has never been defined. The courts recognise that assault requires an intention to apply force to another or (possibly) recklessness as to such force,[29] so that it is illogical to exclude the evidence of intoxication on a charge of assault; and the practice is not immune from attack if an appeal is taken to the House of Lords, particularly because it seems to be directly contrary to section 8 of the Criminal Justice Act 1967.

18.53 In our view, the courts should be given by statute clear power to convict those who become violent when voluntarily intoxicated. The object is not necessarily to punish them. An alcoholic or drug addict may after conviction be persuaded to accept treatment. But not all these offenders are addicts (the violence may be committed on an occasional drunken spree), and in any case powers of punishment are necessary for those who will not accept treatment and who cannot otherwise be controlled.

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[28] *R* v *Gamlen* (1858), 1 F. & F. 50.

[29] *Fagan* v *Metropolitan Police Commissioner* [1969] 1 Q.B. 439.

18.54 We propose that it should be an offence for a person while voluntarily intoxicated to do an act (or make an omission) that would amount to a dangerous offence if it were done or made with the requisite state of mind for such offence. The prosecution would not charge this offence in the first instance, but would charge an offence under the ordinary law. If evidence of intoxication were given at the trial for the purpose of negativing the intention or other mental element required for the offence, the jury would be directed that they may return a verdict of not guilty of that offence but guilty of the offence of dangerous intoxication if they find that the defendant did the act (or made the omission) charged but by reason of the evidence of intoxication they are not sure that at the time he had the state of mind required for the offence, and they are sure that his intoxication was voluntary.

18.55 A dangerous offence for this purpose should be defined as one involving injury to the person (actual bodily harm) or death or consisting of a sexual attack on another, or involving the destruction of or causing damage to property so as to endanger life. A dangerous offence is to be regarded as charged if the jury can convict of it under the indictment.

18.56 "Voluntary intoxication" would be defined to mean intoxication resulting from the intentional taking of drink or a drug knowing that it is capable in sufficient quantity of having an intoxicating effect; provided that intoxication is not voluntary if it results in part from a fact unknown to the defendant that increases his sensitivity to the drink or drug. The concluding words would provide a defence to a person who suffers from hypoglycaemia, for example, who does not know that in that condition the ingestion of a small amount of alcohol can produce a state of altered consciousness, as well as to a person who has been prescribed a drug on medical grounds without warning of the effect it may produce. We do not think it necessary to define intoxication, drink or drug, because this offence would be a fall-back offence, relevant only when the defendant has been acquitted on another charge by reason of evidence of intoxication.

18.57 These provisions would mean that the offence would be one of strict liability (not requiring proof of a mental element or other fault) in respect of the objectionable behaviour, but would require the fault element of becoming voluntarily intoxicated. A mistaken belief in a circumstance of excuse (such as that the victim was about to attack so that the force was necessary by way of defence, or that the victim consented) would not be a defence unless a sober person might have made the same mistake.

18.58 We have not found the recommendation of an appropriate penalty altogether an easy matter. If the penalty is too severe it becomes unfair. On the other hand, if it is too light then in cases such as wounding with intent to cause grievous bodily harm (where in everyday experience in the courts the vast majority of defendants blame drink for their actions) the existence of a "fall-back" verdict will encourage time-consuming unsuccessful defences to be run in inappropriate cases. On balance, we have come to the view that on conviction on indictment of dangerous intoxication the defendant should be liable to imprisonment for one year for a first offence or for three years on a second or subsequent offence. It should be left to the judge to satisfy himself that the offence is a second or subsequent one. On summary trial the maximum sentence of imprisonment should be six months. Magistrates who try an information for one of the dangerous offences should be enabled to convict of dangerous intoxication without a fresh information. In considering the scale of punishment, it must be realised that we are not proposing an arrangement whereby drunken offenders

obtain the benefit of a reduced punishment. The new offence is needed only when the defendant has been acquitted of the offence originally charged, so that apart from the new offence he would not be subject to any control. There would be no injustice to the defendant in providing for the possibility of conviction of dangerous intoxication as an alternative charge, because the evidence of intoxication would have been produced by him at the trial in answer to the main charge. In our view, it should be made obligatory on the defendant to give the same notice of his evidence of intoxication as we propose in relation to evidence of mental disorder (paragraph 18.49 [SET OUT BELOW AS THE LAST PARAGRAPH TO THIS APPENDIX]). It should also be provided, as we recommend in paragraph 18.48, that if the defendant gives evidence contesting his state of mind the prosecution may reply with evidence of mental disorder.

18.59 It may well be that the new offence should ultimately be included in a new Offences against the Person Act, but we hope that as an interim measure it will be included in any legislation passed to give effect to our recommendations, should that come before Parliament before the Criminal Law Revision Committee has completed its work on offences against the person.

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18.49 To facilitate the production by the prosecution of all relevant information as to the mental state of the defendant we propose that whenever the defence intend to adduce psychiatric or psychological evidence on the mental element - whether in relation to the special verdict or the defence of automatism - there should be a requirement that they should give advance notice of their intention to the prosecution, on conditions similar to those on which advance notice is required of a defence of alibi.[26] At present a defendant is not required to give advance notice of a defence of "insanity" or diminished responsibility, or of intention to adduce psychiatric evidence for the purpose of establishing a defence of mistake or accident (ie denying the mental element). It seems to us unsatisfactory that the defence should be able to produce psychiatric evidence of mental state going to questions of responsibility and disposal without having given the prosecution the opportunity to call evidence in rebuttal. If the disorder is serious the prosecution will already know about it and are unlikely to be taken by surprise by the defence. But this is not so where the defence is one of non-insane automatism, such as a state of dissociation. Advance notice is required by law in several American States and we think that it should be required here also, both in magistrates' courts and in the Crown Court. As in the case of the alibi defence we think that the court should have discretion to waive the requirement of advance notice where necessary. Otherwise in relation to proceedings in the Crown Court a time limit of seven days after committal within which notice must be given will not in our view be unreasonably onerous, and in relation to proceedings in magistrates' courts seven days' notice should be given.

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[26] Criminal Justice Act 1967, section 11.

APPENDIX B

Extract from the Fourteenth Report of the Criminal Law Revision Committee (1980), "Offences against the Person", Cmnd 7844

PART VI. VOLUNTARY INTOXICATION

1. Offences committed while under the influence of drink and/or drugs voluntarily taken

257. By intoxication we mean intoxication due to drink or drugs or both. Intoxication has never in itself been a defence. When an offender adduces evidence of intoxication, he does so in order to show that he did not have the necessary mental element for the offence. He is denying that the prosecution has proved its case. Involuntary intoxication (as for example where a person laces another's drink without telling him, or where a person becomes affected by a medicine without having been warned by the doctor) is a defence if it negatives the mental element. Voluntary or self-induced intoxication, when it leads to actual insanity, including temporary insanity, may amount to a defence under the McNaghten rules. Voluntary or self-induced intoxication[1] not amounting to insanity is not generally a defence even where it negatives the mental element. The reason why the courts have been fearful of giving the defence too wide a scope is the possibility that those who inflict serious injury to the person or damage to property, or who bring about dangerous situations, would escape the sanctions of the criminal law by relying on a defence of intoxication. Consequently, in *Director of Public Prosecutions* v. *Majewski* [1977] A.C. 443, the House of Lords confirmed the rule expressed in previous cases that, while evidence of self-induced intoxication can negative a crime requiring a "specific" intent, it cannot negative one requiring a "basic" intent. It is a rule of substantive law that where an offender relies on voluntary intoxication as a defence to a charge of a crime not requiring "specific" intent, he may be convicted notwithstanding that the prosecution has not proved any intention or foresight, or indeed any voluntary act. In practice, this means that intoxication will generally not be any defence where an offence can be committed recklessly. Section 8 of the Criminal Justice Act 1967 therefore has no application[2].

258. It appears from some of the opinions delivered in *Majewski* that their Lordships decided the case as they did on grounds of public policy. Nevertheless, the rule now settled as representing the common law involves a number of difficulties. One result, which many lawyers including several of our members consider wrong, is that the present law requires an intoxicated person to be convicted of an offence which as it is defined by statute he has not been proved to have committed, because there was no proof that he had the necessary mental element. For example, criminal damage contrary to section 1(1) of the Criminal

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[1] For the proposed definition see paragraph 273 below.

[2] Section 8 requires the court to have regard to all the evidence relevant to the question whether the defendant did intend or foresee the result of his actions.

Damage Act 1971[1] is committed by a person who, *intentionally or recklessly*, destroys or damages property belonging to another. The mental element is an essential element of the crime, no less than the physical element. It requires at least recklessness whether the property of another be damaged or not: *Stephenson* [1979] 2 All E.R. 1198. An intoxicated person may be convicted although on the evidence there remains a doubt whether he has been reckless in this sense. Another weighty objection is that it is not always clear what crimes are crimes of "basic" and "specific" intent. In some areas the distinction between the two intents is clear but in others it is not. An example is provided by rape, over which there have been differences of judicial opinion[2]. It is this latter defect, as we see it, that is most in need of attention and that our proposals seek to repair.

259. Ever since the law started to punish offenders for what was in their minds when they did an act instead of simply for what they did, the commission of criminal acts while intoxicated has been difficult to label. The drunken man who kicks and punches a publican who tries to eject him from his establishment may not know what he is doing; and even if he has enough understanding to appreciate that he is punching and kicking out, he may not be able to appreciate that he is exposing the publican to risk of injury. Yet his conduct is socially unacceptable and deserving of punishment. As we have stated above it seems to some people wrong in principle to convict him of a crime when by reason of his drunkenness he lacked the state of mind ordinarily required for its commission. What calls for punishment is getting intoxicated and when in that condition behaving in a way which society cannot, and should not, tolerate. An offence which covers this situation must make some reference to the harm caused, and cannot be expressed simply in terms of getting dangerously intoxicated, however gross the intoxication may have been. Furthermore, the harm needs to be identified to some extent: the drunken man who on arrest punches a police officer should not be labelled with the same offence as the alcoholic who kills a child when trying to interfere with her sexually. It is doubtful whether any solution to the problem based solely upon legal principle would be generally acceptable. Policy has to be taken into account. Probably the best that can be done is to follow principle as far as possible without producing a result which affronts common sense. Violent drunks have to be restrained and punished.

260. The Butler Committee considered offences committed while voluntarily intoxicated (paragraphs 18.51-18.59 of their report), and they proposed the creation of a strict liability offence where a person while voluntarily intoxicated does an act (or makes an omission) that would amount to a dangerous offence if it were done or made with the requisite state of mind for that offence. Their proposal is that the offence should not be charged in the first instance. On indictment the jury would be directed to find on this offence in the event of intoxication being successfully raised as a defence to the offence originally charged. A bench of magistrates dealing summarily with an offence would have to direct themselves. For convenience in the rest of this section of the report we have referred only to juries. On this

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[1] We take criminal damage as an example because it is an offence where Parliament has spelt out *expressly* the mental element required yet the courts hold persons liable who do not have the mental element; the position is the same under section 20 of the Act of 1861 because "maliciously" means intentionally or recklessly.

[2] *Majewski* per Lords Simon of Glaisdale and Russell of Killowen and *Leary* v. *R.* (1977) 74 D.L.R. (3d) 103.

proposal the jury would have no option but to convict of the dangerous intoxication offence. On conviction of the offence on indictment, the maximum penalty suggested is 1 year's imprisonment for a first offence or 3 years' imprisonment for a second or subsequent one; on summary trial the maximum sentence of imprisonment would be 6 months.

261. One of the defects in the Butler Committee proposal is, in our opinion, the problem of the nomenclature of the offence. A conviction of the Butler Committee offence would merely record a conviction of an offence of committing a dangerous act while intoxicated. This is insufficient. The record must indicate the nature of the act committed, for example whether it was an assault or a killing. It would be unfair for a defendant who has committed a relatively minor offence while voluntarily intoxicated to be labelled as having committed the same offence as a defendant who has killed. The penalty suggested is also in our opinion insufficient to deal with serious offences such as killings or rapes while voluntarily intoxicated by drink or drugs.

262. Professors Smith and Glanville Williams support the proposal of a separate offence because in the first place they consider it to be a fundamental principle that a person should not be convicted of an offence requiring recklessness when he was not in fact reckless. In such a case the verdict of the jury and the record of the court do not represent the truth. Secondly, they think it important that the verdict of the jury should distinguish between an offender who was reckless and one who was not because that is relevant to the question of sentence. In their opinion there is a great difference between, for example, a man who knew that he was taking a grave risk of causing death and one who was unaware that there was any risk of any injury whatever to the person but was intoxicated. The fault of the former was in recklessly doing the act which caused injury to the person: the fault of the latter was in becoming intoxicated. They agree that the same maximum penalty should be available to the judge in these two cases, because, exceptionally, an intoxicated offender may be such a public danger as to require the imposition of the maximum, but think that often the two cases ought to be dealt with differently.

263. For these reasons Professors Smith and Glanville Williams provided an improved version of the Butler Committee proposal for the consideration of the Committee. In the interests of conciseness and clarity their proposal is set out in the following propositions: it is not intended to be a final legislative draft.

(1) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed an intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

(2) Where a person is charged with an offence and he relies on evidence of voluntary intoxication, whether introduced by himself or by any other party to the case, for the purpose of showing that he was not aware of a risk where awareness of that risk is, or is part of, the mental element required for conviction of the offence, then, if:
   (a) the jury are not satisfied that he was aware of the risk, but
   (b) the jury are satisfied
      (i) that all the elements of the offence other than any mental element have been proved, and

(ii) that the defendant would, in all the circumstances of the case, have been aware of the risk if he had not been voluntarily intoxicated,

the jury shall find him not guilty of the offence charged but guilty of doing the act while in a state of voluntary intoxication.

(3) Where a person charged with an offence relies on evidence of voluntary intoxication, whether introduced by himself or by any other party to the case, for the purpose of showing that he held a belief which, in the case of a sober person, would be a defence to the offence charged, then, if:

(a) the jury are of opinion that he held that belief or may have held it, and

(b) are satisfied that the belief was mistaken and that the defendant would not have made the mistake had he been sober,

the jury shall find him not guilty of the offence charged but guilty of doing the act while in a state of voluntary intoxication.

(4) Where the offence charged consists of an omission, the verdict under (2) and (3) above shall be of making the omission while intoxicated.

(5) A person convicted under (2) or (3) above shall, where the charge was of murder, be liable to the same punishment as for manslaughter; and in any other case shall be liable to the same punishment as that provided by the law for the offence charged.

264. If there is to be a separate offence of doing the *actus reus* of an offence while voluntarily intoxicated we are all agreed that the proposal set out above is to be preferred to that of the Butler Committee. The majority of us feel, however, that that proposal would also create problems. The separate offence would add to the already considerable number of matters which a jury often has to consider when deciding whether the offences charged have been proved, and some of us feel that the separate offence would make the jury's task even more difficult than it is at present in some cases, particularly where the charge is murder. We also see difficulties arising if for example six members of the jury are of opinion that the defendant was intoxicated so as not to be reckless whilst the other six members are of opinion that he was reckless even though he had had too much to drink. It seems likely, moreover, that if the separate offence is created there would be many more trials in which defendants would raise the issue of drunkenness, and the majority of us foresee cases where there is overwhelming proof of the commission of the *actus reus* but in which many defendants might seek to plead to the special offence rather than the offence charged, either because they might prefer to be convicted of the special offence rather than the offence charged (as for example rape), or because the special offence might tend to be regarded as a less serious offence. Such pleas would place the prosecution and the judge, who have to consider whether to accept them, in great difficulties. It should also be remembered that all these problems would apply equally in the magistrates' courts. We also consider that it is artificial and undesirable to have a separate offence for which conviction is automatic but which carries the same maximum penalty as the offence for which a defendant would have been convicted but for the lack of proof of the required mental element due to intoxication. It is also important to consider the public reaction to the creation of a separate offence: we are of opinion that they would be confused by it. An example of the type of case in which there is frequently evidence of intoxication is rape. We think the public would find it difficult to understand a verdict to the effect that the defendant was not guilty of rape but guilty of the act. This can only mean that he was guilty of having sexual intercourse without the woman's consent while voluntarily intoxicated, when as far as the victim was concerned she had been raped.

265. In practice juries and courts are reluctant to accept that a defendant was so drunk that he did not form any special intent which may be required or foresee any consequences of his conduct. The *Majewski* situation is rarely met but when it is the courts can, if the circumstances justify it, mitigate the penalty to such extent as is felt appropriate: in some cases the fact of drink may mitigate the offence, in other cases it may well aggravate the offence.

266. We all agree that the present law is right in requiring that the defendant should be acquitted of intentionally causing the *actus reus* if, on account of voluntary intoxication, a requisite "specific intent" cannot be established. Furthermore, we consider that the present law needs amendment in so far as it relates to so called offences of "basic" intent. The majority of us therefore went on to consider whether we could improve upon the common law principle and avoid the problems of "specific" and "basic" intent. We found the germ of our eventual proposal in the American Model Penal Code, Article 2, section 2.08(2) of which provides:

> "When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial."

267. Our recommendation is that the common law rules being rules of general application should be replaced by a statutory provision on the following lines:

(1) that evidence of voluntary intoxication should be capable of negativing the mental element in murder and the intention required for the commission of any other offence; and

(2) in offences in which recklessness constitutes an element of the offence, if the defendant owing to voluntary intoxication had no appreciation of a risk which he would have appreciated had he been sober, such lack of appreciation is immaterial.

268. The provision in (1) is intended to make evidence of voluntary intoxication admissible for the purpose of negativing any intentional element in an offence which is required to be proved by the prosecution, for example the intent in our proposed offence of causing serious injury with intent to cause serious injury. Murder, however, has to be specifically mentioned because, if our recommendation is adopted, it will be murder if a person, with intent to kill, causes death or if a person causes death by an unlawful act intended to cause serious injury and known to him to involve a risk of causing death (paragraph 31 above). On the second limb of our definition, therefore, the prosecution may be required to prove both intention and recklessness, but we consider that a defendant who, owing to voluntary intoxication, failed to appreciate that by his act or omission there was a risk of causing the death of another should not be subject to the mandatory penalty. In murder, therefore, even though an element of the definition may require a type of recklessness, we consider that if the prosecution fail to prove that element of recklessness owing to evidence adduced by the defendant of voluntary intoxication, the offence should be reduced to manslaughter; but when the offence is so reduced, (2) above will apply and lack of appreciation of the risk of causing death will be immaterial.

269. Under (2) above, even where the defendant is able to show that he did not intend the unlawful conduct (for instance in assault, to strike or frighten his victim) if in law the offence in question is capable of being committed recklessly, as is assault, he may nevertheless be found guilty. In such cases the defendant can adduce the evidence of intoxication for the purposes of mitigation.

270. The test in (2) above is formulated in such a way as to require the court to take into consideration any particular knowledge or any other personal characteristics of the defendant, as for example backwardness. Thus in a case where a gun is discharged killing or injuring another a jury might consider that many people could have made a mistake about the risk. But if the defendant was familiar with firearms, the jury may find that he would have appreciated the risk if he had been sober. For similar reasons it would be unjust that a subnormal person should be judged on the same basis as one of average intelligence.

271. Where a defendant is unaware of an element in an offence as to which the law imposes strict liability his lack of awareness will be no defence when it arises through drunkenness.

272. In making our proposals we appreciate that in a few rare cases, mostly sexual offences committed while under the influence of hallucinatory drugs, it might be possible to take advantage of the defence under (1) above. For example in the case of rape, if the defendant alleges that he thought the woman was consenting when she was not this would come within (2) because recklessness as to whether she was consenting is a sufficient mental element and evidence of voluntary intoxication would not be admissible as a defence, but if he said that because of his hallucinations he did not appreciate that he was having sexual intercourse at all, he might have a defence under (1) because he must intend to have sexual intercourse; recklessness is not a sufficient mental element for that part of the offence. However, the likelihood of the jury believing his story seems to us so remote that it can be disregarded.

273. The Butler Committee recommended in paragraph 18.56 of their report that "voluntary intoxication" should be defined "to mean intoxication resulting from the intentional taking of drink or a drug knowing that it is capable in sufficient quantity of having an intoxicating effect, provided that intoxication is not voluntary if it results in part from a fact unknown to the defendant that increases his sensitivity to the drink or drug". We agree that voluntary intoxication should be defined along these lines.

274. In substance our recommendations reproduce the common law as laid down in *Majewski* and, we consider, strike a fair balance between the need to protect society and the desirability on occasions of distinguishing the intoxicated offender from the man who commits an offence while sober.

275. Our recommendations on voluntary intoxication, if acceptable, could hardly be applied only to offences against the person: they must, we think, be applicable to criminal offences generally.

2. Evidence of voluntary intoxication in relation to defences

276. The foregoing discussion concerned cases in which the defendant, because of voluntary intoxication, did not have the mental element specified in the definition of the offence. It

remains to consider those cases in which the defendant, because of a mistake arising from intoxication, held a belief which, in the case of a sober person, would be a defence to the charge. We are proposing[1] that a person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person, or his property or that of any other person. Similarly the Law Commission has proposed that the defence of duress should be available to a person who believes, whether reasonably or not, that he is threatened with death or personal injury (Law Com. No. 83, 2.27). Thus a sober person who mistakenly believes that he, or another, is the victim of an unlawful and deadly attack and kills the supposed attacker by the use of force which would be reasonable if his belief were true has a defence. The defendant need only introduce some evidence of the constituents of the defence and the Crown then has to satisfy the jury that those constituents did not exist.

277. The question is whether the same defence should be available where the belief was wholly or partly induced by drink or drugs. In our opinion it should be in the case of murder or any other offence in which intention is required for the commission of the offence. But in offences in which recklessness constitutes an element of the offence, if the defendant because of a mistake due to voluntary intoxication holds a belief which, if held by a sober man, would be a defence to the charge, but which the defendant would not have held had he been sober, the mistaken belief should be immaterial. In short, we are of opinion that evidence of voluntary intoxication adduced in relation to a defence should be treated in the same way as evidence of voluntary intoxication adduced to negative the mental element.

278. Our recommendation as to voluntary intoxication in relation to defences may be illustrated by a case of mistaken belief as to relevant facts in relation to a defence which, if held by a sober man on a charge of murder, would lead to his acquittal. The effect of our proposals would be that the same belief held by reason of voluntary intoxication would also lead to acquittal of murder but the defendant might be convicted of manslaughter. For example, a householder who mistakenly believes that a police officer, who has entered his house to look around on finding the front door open, is a burglar about to attack him and strikes him down in self-defence would probably be acquitted on the indictment. But if his mistaken belief was due to voluntary intoxication the effect of our proposals would be that he would be acquitted of murder but convicted of manslaughter.

Recommendations

279. 1. The common law rules should be replaced by a statutory provision on the following lines:
   (a) that evidence of voluntary intoxication should be capable of negativing the mental element in murder and the intention required for the commission of any other offence; and
   (b) in offences in which recklessness does constitute an element of the offence, if the defendant owing to voluntary intoxication had no appreciation of a risk which he would have appreciated had he been sober, such a lack of appreciation is immaterial (paragraphs 267-271).

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[1] Paragraph 287 below.

2. Voluntary intoxication should be defined on the lines recommended by the Butler Committee (paragraph 273).
3. In murder or in any other offence in which intention is required for the commission of the offence, a mistaken belief arising from voluntary intoxication should be a defence to the charge if such a mistaken belief held by a sober man would be a defence. However, in offences in which recklessness constitutes an element of the offence, if the defendant, because of a mistake, due to voluntary intoxication, holds a belief which, if he had been sober, would be a defence to the charge, but which he would not have held had he been sober, the mistaken belief is immaterial (paragraphs 276-278).
4. Our recommendations on voluntary intoxication should be applicable to criminal offences generally (paragraph 275).

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