

THE INTOXICATED OFFENDER—A PROBLEM OF RESPONSIBILITY

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The purpose of this article is to analyze the concept of the "guilty mind" as it applies to the intoxicated offender. Such an analysis must include some reference to the origin, history, and application of the idea of *mens rea* and a brief survey of the current controversy over responsibility and the criminal law. Our primary concerns, however, are to trace the history of intoxication in the criminal law; to outline how the courts today deal with the intoxicated offender; to indicate what in fact are the effects of alcohol on an individual; and to ask whether the present method of handling the problem is either rational or effective?

I

In its formative period the common law of crimes was little concerned with the mental processes of the wrongdoer.¹ The commission of a wrong against members of a self-contained community was of prime importance and compensation, not personal punishment, was demanded. The wrongdoer was subject to the punishment of outlawry, as well as the individual revenge of the blood-feud, but these gradually gave way to a system of compensation that allowed the offender to buy back the "peace" he had broken. Even homicide was an act that could be paid for by money—the *wergild*, which was the assigned "worth" of the person slain. The influence of Christianity, with its doctrinal aversion to bloodshed, its commitment to repentance and its insistence on reparation, was also effective, at least prior to the twelfth century, in preventing punishment as we know it today.

By the twelfth century, however, as the administration of

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¹ Pollock and Maitland, *History of English Law*, vol. 2 (2nd ed., 1899), pp. 448-511.

criminal law became centralized under the Crown, punishment became more common and more severe. At the same time moral theology, mainly through the influence of the Penitential books, began to have a greater effect on the criminal law. Notions of guilt, innocence, and sin were not solely secular matters for the King's courts. The Church's stress on the mental elements in sin gave rise to the notion of *mens rea* and the psychical element in crime. Canon law granted a pardon to the man who killed another by accident. Those who intentionally committed crimes were deemed to possess a "vicious will" which had to be punished. Even today *mens rea* is often defined as a "vicious will", a "wicked mind", a "guilty mind", or, most commonly, "some blameworthy state of mind", all terms reflecting the moral standard of the canon law.²

Although the formula has not changed, its meaning and its *raison d'être* have. Its origin, as noted, was theological. Every man was deemed to possess a free will and to be born into a world whose code of moral rules required his knowledge and observance. If he broke those rules he did so of his own choice and therefore his "vicious will" had to be punished.³ Today we are concerned not with the divine but with the utilitarian, not with moral theology, but with social justice, and accordingly the rationale of *mens rea* has changed. Whether one adheres to the deterrent, retributive or reformatory theory of criminal justice, the invoking of sanctions is meaningless in the absence of *mens rea*. If a man causes harm by accident, or acts under a mistake as to essential facts, or in self-defence, or does not appreciate the nature or consequences of his act, or cannot control his conduct, it is pointless to punish him. He does not require reformation, retribution would be savage, and there is no conduct from which others need be deterred. Moreover, it would be unjust to brand as criminal one who, in a moral sense, is not blameworthy.

Having laid down the requirement that some mental element must coincide with the commission of the harmful act for criminal liability to attach, the law then had to define that element. Such terms as "wilfulness", "malice", "malice afore-thought", "guilty knowledge", "intent", "criminal intent", "felonious intent", "*scienter*", and the further subdivision "general intent" and "specific intent", have all been employed in the procrustean attempt to

² *Ibid.*, at p. 477.

³ Turner, *The Mental Element in Crimes at Common Law*, in the *Modern Approach to Criminal Law* (1945), p. 201.

define "the requisite but elusive mental element".⁴ It has been truly said that "attempts to provide a compendious definition of *mens rea* do not get far beyond a gloss on the translation from the Latin: a guilty mind".⁵

Professor Herbert Packer says that two notions are involved: 1. Conduct is criminal only if the actor is aware of facts which make it so.⁶ Thus, in *Beaver*,⁷ the accused was granted a new trial on a charge of possession of narcotics on the ground that there was evidence that might have left a jury in a state of doubt as to whether or not the accused knew that the package in question contained anything other than sugar of milk. Ignorance or mistake of fact excuses. 2. Conduct is criminal even if the accused has no awareness of wrongdoing, that is, does not know his action is contrary to law. *Beaver* could not have successfully advanced the defence that he did not know it was contrary to the law to possess narcotics even if he could prove it. Ignorance of the law does not excuse.

But awareness of all the facts making the conduct criminal is too cryptic as a definition of *mens rea*. What of "intention" and "recklessness" and "appreciation of consequences"?

Professor J. W. C. Turner says the following rule is applicable to crimes:

It must be proved that the accused person realized at the time that his conduct would, or might produce results of a certain kind, in other words that he must have foreseen that certain consequences were likely to follow on his acts or omissions: The extent to which this foresight of the consequences must have extended is fixed by law and differs in the case of each specific crime.⁸

Dr. Glanville Williams says:

Crimes have been divided into those requiring a specific consequence and those in which an act is forbidden irrespective of consequence. In the latter group, intention means knowledge of such surrounding circumstances as make the act or omission criminal. In the former group, intention requires in addition the desire that the specified consequences shall follow from the party's physical act or omission.⁹

⁴ *Morrisette v. United States* (1951), 342 U.S. 246, at p. 252. See also Wechsler, *The Criteria of Criminal Responsibility* (1954-55), 22 U. Chi. L. Rev. 367.

⁵ Packer, *Mens Rea and The Supreme Court*, in *The Supreme Court Review* (1962), p. 107.

⁶ *Ibid.*, p. 108.

⁷ *Beaver v. The Queen*, [1957] S.C.R. 531, 26 C.R. 193, 118 C.C.C. 129. See also Williams, *Criminal Law, The General Part* (2nd ed., 1961), p. 140. "The principle is that where a circumstance is not known to the actor, his act is not intentional as to that circumstance."

⁸ Turner, *op. cit.*, footnote 5, p. 199.

⁹ Williams, *op. cit.*, footnote 7, p. 34.

Professor H. L. A. Hart, on the other hand, argues that excessive stress has been put on the notion of "foresight of harm" by Professors Turner and Williams.¹⁰ "The essential subjective inquiry", says Professor Hart, "is whether the accused when he acted had the normal capacities, physical and mental, for doing what the law requires and abstaining from what it forbids, and a fair opportunity to exercise these capacities".¹¹ "This general evidence is what is relevant to the question of responsibility, not the mere presence or absence of foresight." Thus Professor Hart denies that to invoke the sanctions of the criminal law for negligent behaviour is to abandon a subjective for an objective element in responsibility. Only if the law assumes that the accused possessed capacities for control of his conduct which he did not possess, and which the reasonable man possesses and would have exercised, is an objective standard being employed.¹² As to the efficacy of punishment for carelessness, Professor Hart gives the answer that it will stimulate the wrongdoer, and others, to think about and control their conduct.¹³

In Canada, the Supreme Court has attempted to solve the riddle of criminal negligence by a requirement of recklessness. The *mens rea* of recklessness, said the court in *O'Grady v. Sparling*,¹⁴ is foresight of consequences coupled with a willingness, not necessarily a desire, to run the risk of bringing them about. Whether it added anything to clarity to couple the foggy concept of criminal negligence with an equally obscure concept of *mens rea* is extremely doubtful. Unfortunately the Supreme Court probably did not give serious attention to the policy of the criminal law, for *O'Grady v. Sparling* was a constitutional case and the court was anxious to distinguish between the negligence of driving without due care and attention under the Manitoba Highway Traffic Act¹⁵ and the "negligence" of criminal negligence under section 191 of the Criminal Code. As a result the court adopted Professor Turner's distinction between advertent and inadvertent negligence.¹⁶

A distinguished lay magistrate and social scientist, Barbara Wootton, argues that while the concept of the guilty mind is

¹⁰ H. L. A. Hart, *Negligence, Mens Rea and Criminal Responsibility*, in *Oxford Essays in Jurisprudence* (1961), pp. 29, 45.

¹¹ *Ibid.*

¹² *Ibid.*, pp. 46-47.

¹³ *Ibid.*, p. 49. But see Hall, *Negligent Behaviour Should be Excluded from Penal Liability* (1963), 63 Col. L. Rev. 632.

¹⁴ [1960] S.C.R. 804, 33 C.R. 318, 128 C.C.C. 1, 25 D.L.R. (2d) 145, 33 W.W.R. 360.

¹⁵ R.S.M., 1954, c. 112, s. 55(1).

¹⁶ Kenny, *Outlines of Criminal Law* (18th ed. by Turner, 1962), p. 34.

important, it is misplaced as part of the actual definition of the crime.¹⁷ Lady Wootton argues that the question of *mens rea* is in the first instance irrelevant. The important point is that a harmful act has been committed and it does not become innocuous merely because whoever committed it meant no harm or could not control his conduct. If the object of the criminal law is to prevent the occurrence of socially damaging actions, says Lady Wootton, the presence or absence of *mens rea* only becomes important *after* conviction.¹⁸ For it is then that the court must decide the crucial question of the appropriate measures to be taken to prevent a recurrence of the forbidden act. "The results of the actions of the careless, the mistaken, the wicked and the merely unfortunate may be undistinguishable from one another, but each case calls for a different treatment."¹⁹ Lady Wootton defends this radical extension of strict liability as an "inevitable measure of adaptation to the requirements of the modern world" particularly if it is accepted that "the primary objective of the criminal courts is preventive rather than punitive".²⁰

A more direct assault than Lady Wootton's has been made on the entire concept of the guilty mind. Our increasing knowledge of the human mind no longer allows us to speak as Blackstone did of "that free will which God has given to man".²¹ Present day psychological and psychiatric knowledge tells us that human behaviour is conditioned by subconscious forces and that man is not completely free to choose. And so a freedom of will—determinism argument continues in the medico-legal literature.²² Psychiatrists accuse jurists of being obsessed with the idea of fixing blame and exacting retributive punishment.²³ Lawyers claim that patient-oriented psychiatrists refuse to appreciate the social policy involved in the enforcement of the criminal law and that in all but extreme cases that policy requires the fixing of legal responsibility, not the ascertainment of the precise mental makeup of the offender.²⁴

¹⁷ Wootton, *Crime and The Criminal Law* (1963), p. 52.

¹⁸ *Ibid.*, p. 53.

¹⁹ *Ibid.*

²⁰ Wootton, *op. cit.*, footnote 17, p. 57.

²¹ Commentaries on the Laws of England, Vol. 4 (1813), p. 24.

²² For a summary of the arguments and a complete bibliography see Glueck, *Law and Psychiatry, Cold War or Entente Cordiale* (1962).

²³ See e.g. Zilboorg, *The Psychology of the Criminal Act and Punishment* (1954). For a criticism of Zilboorg see Swartz, *Book Review* (1955), 55 Col. L. Rev. 1098.

²⁴ For an elucidation of this policy argument, set in the context of a discussion of insanity and the criminal law, see Wechsler, *loc. cit.*, footnote 4. See also Hall, *Science, Common Sense, and Criminal Law Reform*

The truth undoubtedly is that the law has not been engaged in defining *mens rea* in terms of the offender's capacity or will to conform. The courts do not seek to know the unconscious motivations of each offender, even if they were accurately ascertainable. What they do seek to know, in the absence of a particular excuse such as mistake, self-defence or accident, is whether, according to common understanding, the accused is responsible for his actions. Only in those few cases when it is clearly shown that the offender was not capable of self-control does the court feel able to assert that the requisite mental element, defined in terms of responsibility, was lacking. That this should be so is entirely understandable. Neither judge nor jury is equipped by training or experience to undertake a search for elusive mental elements. As society's designates in the administration of criminal justice they are constrained to condemn according to well understood and accepted criteria. Even if medical and social science were able to supply the courts with more accurate indicators of whether an accused was capable of conforming to the law's requirements, it is by no means clear that the policy of the criminal law should require that that evidence be adopted *in fixing responsibility*.²⁵

Many judges are quite aware that in requiring *mens rea* they are not engaged in a scientific search for mental elements. Justice Cardozo, for example, spoke of the law as,

. . . guided by a robust common sense which assumes the freedom of the will as a working hypothesis in the solution of its problems.²⁶

Judge Thurmond Arnold, in rejecting the appeal of a convicted murderer based on the ground, *inter alia*, that he was a psychopathic personality observed:

Modern psychiatry has given us much scientific information which disturbs the former certainty of our judgments of individual responsibility and moral guilt. It has revolutionized the methods of treatment and rehabilitation of prisoners. But the principal place for the application of such a therapeutic point of view where the court exercises discretion in the amount of the sentence and in the treatment of criminals is in our penal institutions.²⁷

Franz Alexander, one of this century's most eminent psychiatrists, spoke in similar terms in recognizing the public purpose and practical necessities of the criminal law:

We may for practical purposes hold the individual responsible for his (1964), 49 Iowa L. Rev. 1044; Hall, *General Principles of Criminal Law*, (2nd ed., 1960), p. 466.

²⁵ Wechsler, *loc. cit.*, footnote 4.

²⁶ *Steward Machine Co. v. David* (1937), 301 U.S. 548, at p. 590.

²⁷ *Fisher v. United States* (1945), 149 F. 2d. 28, at p. 29 (D. C. Cir.).

acts; that is to say, we assume an attitude as if the conscious Ego actually possessed the power to do what it wishes. Such an attitude has no theoretical foundation, but it has a practical, or still better, a tactical justification.²⁸

The criminal law, however, sees no challenge to its moral role and societal position in excusing from its standard of responsibility those individuals whose capacity for self-control varies widely from the norm. When the reasonable man can say "that man clearly should not be punished" the criminal law feels free to say "that man will not be held responsible for his actions". This really is the sole purpose of the M'Naghten rules²⁹—to provide guide lines for a jury that must decide on the accused's criminal responsibility. They do not, as numerous critics erroneously assume, purport to define insanity in medical terms.³⁰ The result has been that psychotic offenders, notwithstanding the psychiatrists' complaints about testifying within the confines of M'Naghten's "right-wrong" test, are almost invariably excused from criminal responsibility.³¹ This is not to suggest that the M'Naghten rules are not in need of reform, or that the present state of the law in regard to mental abnormality is satisfactory. Quite the contrary is the case.³²

Relief from responsibility is also granted, at least partially, in cases involving acute intoxication. Although the "defence" of drunkenness has not attracted the attention that has been devoted to insanity, the state of the law is equally uncertain and unsatisfactory. The man on the Clapham omnibus would not readily say

²⁸ Alexander and Staub, *The Criminal, the Judge, and the Public* (1931), pp. 73-74. It should be noted however, that in their chapter on responsibility, Alexander and Staub argue against the idea of responsibility based upon free will.

²⁹ Embodied, for Canadian purposes, in s. 16 of the Criminal Code, S.C., 1953-54, c. 51 as am.

³⁰ A complete bibliography of the medico-legal literature is provided in Glueck, *op. cit.*, footnote 22. For a different approach to an old problem see Ehrenzweig, *A Psychoanalysis of The Insanity Plea—Clues to the Problems of Criminal Responsibility and Insanity in The Death Cell* (1964), 73 Yale L.J. 425.

³¹ Hall, *op. cit.*, footnote 24, pp. 519, 520.

³² The courts in the United States have long recognized the need for reform in the M'Naghten rules. The most recent advance has been made by the influential U.S. Court of Appeals for the Second Circuit, see *U.S. v. Freeman* (1966), 357 F. 2d 606. Judge Kaufman, after a review of the cases and literature dating back to 1582, adopted the test proposed by the American Law Institute in its Model Penal Code. "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." (Section 4.01, final draft, 1962). For a discussion of the problem of automatism see Edwards, *Automatism and Social Defence* (1966), 8 Crim. L.Q. 258.

that one who becomes intoxicated and commits a crime should not be punished; similarly the criminal law has never felt free to say that he should be excused entirely from responsibility.³³ Yet we know that an acutely intoxicated offender may have less self-control than a psychotic offender. But the man in the street, and the criminal law which protects him, reply that no one ever chooses to become psychotic.

Nevertheless, A's actions when drunk would not necessarily be the actions of A when sober. Nor is A's drinking always a matter over which he has complete control. Is this an area in which the law should seek an accurate definition of *mens rea* by taking account of the physiological and psychological effects of alcohol upon the human body and mind? Would it be wise criminal policy to release from responsibility the acutely intoxicated offender? If so, should he be subject to some sanction for his intoxication, such as compulsory treatment, probation or an interdict list? Or is the present method of dealing with the problem a satisfactory compromise?

II

What happens when an individual becomes intoxicated? The rather surprising answer, in view of the social and scientific interest in the problem, is that, in behavioural terms, we do not yet know with any degree of precision. An analysis of the experimental literature in 1940 evoked the following comment:

In view of the psychiatric as well as lay interest in the effect of alcohol on these aspects [changes in volition, emotion and personality] of the individual, it is surprising how little attention they have received from experimental psychologists.³⁴

Another review in 1962 indicated little change:

A review of the psychological literature since 1940 suggests that little progress has been made in developing a knowledge of how and in what way alcohol affects behaviour. It appears that a reformulation of the concepts that guide thinking about the action of alcohol in all areas is needed. Except in a few areas . . . , little creative effort appears to have been spent in research on the effect of alcohol on human behaviour. The exploratory experiment to find out what alcohol does, rather than to confirm some hypothesis, is rare.³⁵

³³ The difficulty is that it does in fact excuse when the intoxicated offender is fortunate enough to commit the right type of crime, see Part IV *infra*.

³⁴ Jellinek and McFarland, *Analysis of Psychological Experiments on the Effects of Alcohol* (1940), 1 Q. J. Stu. Alc. 272, 361.

³⁵ Carpenter, *Effects of Alcohol on Some Psychological Processes* (1962), 23 Q. J. Stu. Alc. 274, 309.

It would be easy to conclude that because experimental psychology has so far told us little about the effects of alcohol on behaviour, the criminal law would not be justified in altering the criteria of responsibility. Medical science does know, in broad terms, what effects alcohol has on the individual, and this knowledge might well justify a change in the degree of responsibility attributed to the intoxicated offender.

It is certain that intoxication impairs perception, judgment and muscular coordination.³⁶ Along with this impairment goes an increase in self-confidence, a lessening of inhibitions, and a release of sexual and aggressive impulses.³⁷ The fact that an individual's repressed instincts may break through and manifest themselves in overt acts during intoxication has led some commentators to the incorrect conclusion that drunken offenders intend their acts in the same manner as do sober men. Their argument is as follows: all men have repressed desires—repressed intents—which they usually manage to control. The drunk is freed from his inhibitions and acts out these desires. His intent while drunk is thus his real intent and his acts are as purposive, or end-directed, as those of a sober man.³⁸

Psychoanalysts tell us, however, that people have repressed instincts, sexual and aggressive, not intents. Intents refer to cognitive functions. Alcohol brings about a diminution of the repressive mechanisms, allowing the instinctual to occur in behaviour. These repressive mechanisms are of emotional, not intellectual, origin. In simple terms, the emotional brakes which act as the restraint in all of us are released, and inhibited or self-controlled desires are converted into action. Striking confirmation of this effect of alcohol is provided by a recently published study of the sex offender by the Institute for Sex Research at Indiana University.³⁹ The study, the most extensive of its kind ever undertaken, is a statistical analysis of interviews with 1,356 men convicted of rape, homosexuality, offences against children and a variety of other sexual crimes. The report shows that sixty seven per cent of the men who threatened or used force on little girls were intox-

³⁶ Schilder, *The Psychogenesis of Alcoholism* (1941), 2 Q.J. Stu. Alc. 277.

³⁷ *Ibid.*, at pp. 289, 290. See also Haggard & Jellinek, *Alcohol Explored* (1942), pp. 109-140; Guttmacher & Weihofen, *Psychiatry and the Law* (1952), pp. 394-395; Barray, *Alcohol and Aggression*, in *Alcohol, Science, and Society* (1945), p. 143.

³⁸ See *e.g.* Comment, *Intoxication as a Criminal Defence* (1955), 55 Col. L. Rev. 1210, at p. 1211.

³⁹ Gebbard, Gagnon, Pomeroy & Christenson, *Sex Offenders* (1965).

icated at the time of their offences,⁴⁰ as were forty per cent of the rapists whose victims were over fifteen.⁴¹ The report states that “. . . in very few cases does intoxication seem to do more than simply release pre-existing desires”.⁴²

The same argument about “real” intent can be made in regard to the actions of a psychotic. Suppose the case of a person who, acting under the delusion that he has been commanded by God to make a sacrifice, kills his child. Certainly it could not be said that such a person’s action was not purposive. In fact such a person might realize that ordinary people regard his act as wrong. Consequently he could be held responsible on a strict application of the M’Naghten rules. He would probably be declared insane, however, as most juries are not hindered by the rigidity of the rules when evidence of disease of the mind is so great.⁴³ Few, if any, would object to that verdict as it would be clear that the offender had lost his power of self-control; that he was incapable of appreciating the moral quality of his act; and that he was incapable of exercising any rational judgment in the matter.

But an acutely intoxicated person has also lost his power of self-control; his ability to make judgments is impaired, and he might be quite incapable of foreseeing the consequences of his acts.

This effect of alcohol in depressing the inhibitory centres of the brain is of considerable medico-legal importance. It may lead to a failure to realize that a contemplated act is fraught with danger to oneself or others, or even if the possibility of danger be realized it may result in recklessness, that is, disregard of risk.⁴⁴

Indeed, the language of the report of the Royal Commission on the Law of Insanity⁴⁵ in delineating the important differences between the wording of the M’Naghten rules and section 16 of the Canadian Criminal Code, points up the similarity between the state of mind of a person who falls within the ambit of section 16 and that of one who is acutely intoxicated.

Section 16 speaks of being “incapable of appreciating the nature and quality of an act”.⁴⁶ The M’Naghten rules say “as

⁴⁰ *Ibid.*, p. 813.

⁴¹ *Ibid.*

⁴² *Ibid.*, pp. 79-80. The study also notes that alcohol does not seem to be any greater a factor in the predisposition to sex offences than in predisposition to nonsexual criminality. “Intoxication inclines persons to legally punishable behaviour, but it does not determine the form that behaviour will take.” *Ibid.*, p. 740.

⁴³ For an expansion of this argument see Williams, *op cit.*, footnote 7, pp. 494-495.

⁴⁴ Davis, Drunkenness and the Criminal Law (1941), 5 J. Crim. L. 169.

⁴⁵ Royal Commission on the Law of Insanity as a Defence in Criminal Cases (1956), p. 11.

⁴⁶ *Supra*, footnote 29, s. 16(2).

not to know the nature and quality of the act he was doing".⁴⁷ The Commissioners concluded that:

. . . there is an important distinction to be drawn under Canadian law between a mental capacity, whether caused by drunkenness or disease of the mind, to "know" what is being done and a mental capacity to "foresee and measure the consequences of the act".⁴⁸

The true test necessarily is, was the accused person at the very time of the offence . . . by reason of disease of the mind, unable fully to appreciate not only the nature of the act but the natural consequences that would flow from it? In other words, was the accused person, by reason of disease of the mind, deprived of the mental capacity to foresee and measure the consequences of the act?⁴⁹

Medical science clearly indicates that one who is acutely intoxicated might also fit within the above test, with the exception, of course, that his incapacity is not due to a disease of the mind (unless the individual is suffering from delirium tremens which is an alcoholic psychosis).⁵⁰ The issue then comes back to voluntariness, for the truth is that the acutely intoxicated offender may have no more appreciation of the nature of an act and its consequences than the psychotic offender who may be excused from responsibility under section 16(2) of the Criminal Code. Society, however, refuses to accept the plea of lack of responsibility from one who commits a crime in an intoxicated state. The act of becoming acutely intoxicated is itself judged as irresponsible and the consequences must be paid for. The result is a compromise between the requirement of the criminal law for a responsible or voluntary act, and the judgment of society that a wrongdoer not be exonerated simply because he was drunk. It is that compromise that we shall next examine.

III

Counsel for the convicted murderer in *D.P.P. v. Beard*,⁵¹ described three distinct periods in the history of the effect of drunkenness upon criminal responsibility. The first was the dormant period from the seventeenth century and the time of Coke, who considered that drunkenness aggravated crime, to 1800. The second was from 1800 to 1835, when the judges first devised the doctrine that drunkenness might afford a partial answer to a crime. The third spanned the period from 1835 to the decision in *R. v. Meade*⁵² in

⁴⁷ *Daniel M'Naghten's Case* (1843), 10 Cl. & Fin. 200.

⁴⁸ Royal Commission on Insanity, *op. cit.*, footnote 44, p. 13.

⁴⁹ *Ibid.*

⁵⁰ Bowan & Jellinek, *Alcoholic Mental Disorders* (1941), 2 Q. J. St. Alc. 312.

⁵¹ [1920] A.C. 479, All E.R. 21, 89 L.J.K.B. 437, 26 Cox C.C. 57.

⁵² [1909] 1 K.B. 895, 78 L.J.K.B. 476, 2 Cr. App. Rep. 54 (C.C.A.).

1909 when the Court of Criminal Appeal laid down the rule that drunkenness might negate intent in an appropriate case.

The law of the period preceding Coke has little relevance in explaining the leading cases of the early nineteenth century. The early commentators were ecclesiastics and their writings are replete with reference to moral blameworthiness. They took the view that drunkenness did not affect criminal responsibility although it might lead to mitigation of the punishment imposed.⁵³

Reniger v. Fogossa,⁵⁴ 1551, is the first reported case referring to drunkenness in the criminal law. The Exchequer Chamber said:

. . . if a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby.

A later case⁵⁵ went further and stated that drunkenness was an "aggravation" of an offence. There are, however, no English cases illustrating the effect of this ambiguous rule: it seems to have had little significance except for the possibility of an increased punishment.⁵⁶

In the sixteenth and early seventeenth centuries, the official attitude toward the growing problem of intoxication remained rigid.⁵⁷ Hale was the first commentator to attempt some amelior-

⁵³ For a comprehensive historical examination of this period, see Singh, *History of the Defence of Drunkenness in English Criminal Law* (1933), 49 L.Q.Rev. 528. Foster warned his readers that the ancient writers approached the subject "rather as divines and casuists than as lawyers". *Crown Cases* (1762), p. 131.

⁵⁴ (1551) Plowden 19. See also contemporary textual references in Bacon, *Elements of the Common Laws of England* (1636 ed.), p. 29 and Dalton's *Country Justice* (1643), p. 299, which are of the same opinion.

⁵⁵ *Beverley* (1603), 4 Coke 125. See also Coke on Littleton, p. 247a, Blackstone, *op. cit.*, footnote 21, p. 23. Aristotle (as quoted in, 1551, Plowden 19) had said: "Such a man deserves double punishments because he has doubly offended, viz. in being drunk to the evil example of others, and in committing the crime of homicide."

⁵⁶ The true meaning of "aggravation" is probably answered in *Reniger v. Fogassa*. The implication in the aggravation principle is not that a greater offence will be found against the accused. In that case, the Exchequer Chamber was examining a defence of necessity. The court also discussed similar defences, such as compulsion and "involuntary ignorance (presumably mistake): the accused might claim one or more of these defences and if he failed, as he did in this instance, then the accused was deemed to have acted *ignoranter* not *ex ignorantia* and was not, at that time, excused.

From the remarks in *Beverley*, it appears that the "aggravation" might consist of nothing more than the law showing no compassion in the escheat of land, branding, etc. that had become customary in cases of insanity and infancy.

⁵⁷ Singh, *loc. cit.*, footnote 53, at p. 533 cites the preamble of (1607), 4 Jac. 1, c. 5, which illustrates the then current attitudes:

ation. Although his view was orthodox in that he termed drunkenness *dementia affectata*, and said that this voluntarily contracted madness⁵⁸ would not admit of any defence, his statement of the law showed the first signs of a changing attitude.

1. That if a person by the unskillfulness of his physician, or by the contrivance his enemies, eat or drink such a thing as causeth a temporary or permanent phrenzy, . . . this puts him in the same condition in reference to crimes as any other phrenzy and equally excuseth him.

2. That although the simple phrenzy occasioned immediately by drunkenness excuse not in criminals, yet if by one or more such practices an habitual or fixed phrenzy be caused though this madness was contracted by the vice and will of the party, yet his habitual and fixed phrenzy thereby caused puts the man into the same condition in relation to crimes, as if the same were contracted voluntarily at first.⁵⁹

No further advance in legal theory was made until the nineteenth century. Nevertheless, the obvious enlightenment of the Hale rules must not be discounted. For the first time, as shown by the cases presently to be discussed, there are signs that the effects of voluntary drunkenness, although of an extreme type, will be given some consideration in the trial of one charged with crime.

The uncertainty of the law is clearly seen in the cases decided between 1800 and 1835 which are difficult, if not impossible, to reconcile. The earliest known case of this period is *Grindley*.⁶⁰ Holroyd J. held that, although voluntary drunkenness cannot excuse the commission of a crime, yet where, upon a charge of murder, the material question is whether an act was premeditated or done only in the stress, heat or impulse of the moment,⁶¹ the fact of the party being intoxicated was a circumstance properly taken into consideration. As a bare legal principle, this case was not followed. Park J. in *Carroll*,⁶² decided some sixteen years later in 1935, stated

Whereas the loathsome and odious sin of drunkenness is of late grown into common use within the realm, being the root and foundations of many enormous sinns, as bloodshed, stabbing, murder, swearing, fornication, adultery, and such like, to the great dishonor of God and of our nation, the overthrow of many good arts and manual trades, the disabling of divers workmen and the general impoverishing of many good subjects, abusively wasting the good creatures of God . . .

⁵⁸ See also (1610), 7 James I, c. 10, (1624), 21 James I, c. 7, (1625), 1 Charles I, c. 4.

⁵⁹ (1847), 1 Hale P.C. 32. Neither Hawkins (1 P.C., c. 1, s. 6, 8th ed., 1824) nor Blackstone, *op. cit.*, footnote 21, p. 23, were prepared to go this far. Coke, *op. cit.*, footnote 55, said:

"As for a drunkard who is *voluntarius daemon*, he hath no privilege Hereby, but what hurts or Ills soever he doth, his drunkenness doth aggravate it."

⁶⁰ Reported in Russell on Crime (7th ed., 1909), Vol. 1, p. 88n (b).

⁶¹ See footnote 64 *infra*, regarding cases involving provocation and drunkenness.

⁶² (1835), 7 C. & P. 145.

that the principle was too wide. He claimed that it was an isolated opinion which Holroyd J. himself had later retracted. Park J. also said that if this were good law there would be "no safety for human life".⁶³ Obviously, the judges were still groping for a firm principle because Park J. himself was inconsistent in the way in which he treated the drunkenness of an accused person. In *Marshall*,⁶⁴ decided in 1830, he had instructed the jury, on a charge of stabbing, that they might take the accused's drunkenness into consideration, *among other circumstances*, in deciding whether Marshall had acted under a *bona fide* apprehension that his person or property was about to be attacked.⁶⁵ This direction shows that the effect of drunkenness on the accused's intention was of some relevance, even if limited to cases of self-defence.

Nevertheless, the cases prior to *Meakin*⁶⁶ in 1836, add little to an understanding of a still very vague concept of the "defence" of drunkenness. They clearly state⁶⁷ that voluntary drunkenness is not usually a "defence", but that it might have ameliorative effects for a person who could come within the principles laid down by Hale, "that drunkenness is only a defence when the derangement which it causes becomes fixed and continued, by the drunkenness being habitual, and thereby rendering the party incapable of distinguishing between right and wrong".⁶⁸ This, of course, equates drunkenness with insanity and as such is in accord with the first rule laid down by Lord Birkenhead L.C., in *Beard*.⁶⁹

In *Meakin*,⁷⁰ we see the first attempt to formulate a legal standard applicable to drunkenness, and, except for the vague comments in *Grindley*⁷¹ and *Marshall*,⁷² the first specific effort to relate drunk-

⁶³ *Ibid.* On the other hand, the decision in *Grindley* incorporated a principle which has been accepted, in part, in cases where the accused was allegedly intoxicated but based his defence on self-defence or provocation. See e.g. *Pearson* (1835), 2 Lewin 144; *Marshall* (1830), 1 Lewin 75; *Gramlen* (1858), 1 F. & F. 89; *Stopford* (1870), 11 Cox C.C. 643; *Thomas* (1836), 7 C. & P. 817 and the more modern cases of *Birchall* (1913), 29 T.L.R. 711; *Hopper*, [1915] 2 K.B. 431 (C.C.A.); and *Letenock* (1917), 12 Cr. App. Rep. 221, and in Canada, *Sparkes* (1917), 29 C.C.C. 116, 41 D.L.R. 102; *Hrynuk*, [1949] 1 W.W.R. 129, 7 C.R. 141, 93 C.C.C.100, 2 D.L.R. 394 and *Abel* (1956), 23 C.R. 163, 115 C.C.C. 119.

⁶⁴ *Ibid.*

⁶⁵ In *Goodier's* case (1831), cited at (1830), 1 Lewin 76, Parke J. had given a similar direction.

⁶⁶ (1836), 7 C. & P. 297.

⁶⁷ These cases cover a wide range of offences: rape (*Burrows*, (1823), 1 Lewin 75), burglary (*Rennie* (1825), 1 Lewin 75), stabbing (*Marshall*, *supra*, footnote 63), murder (*Carroll* (1835), 7 C. & P. 145, *Pearson*, *supra*, footnote 63 and attempted murder (*Meakin*, *ibid.*, *Cruse* (1838), 8 C. & P. 541.)

⁶⁸ *Rennie*, *ibid.* Substantially the same statement was made by Holroyd J. (the judge in *Grindley*, *supra*, footnote 60) in *Burrow's* case, *ibid.*

⁶⁹ *Supra*, footnote 51. ⁷⁰ *Supra*, footnote 66. ⁷¹ *Supra*, footnote 60.

⁷² *Supra*, footnote 63.

eness to the mental element in crime. The charge was stabbing with intent to murder. The accused had used a deadly weapon. After he had referred to the rule that voluntary drunkenness is something for which an accused must account because it was of his choice, Alderson B. stated:

However, with regard to the intention, drunkenness may perhaps be averted to according to the nature of the instrument used. If a man uses a stick, you would not infer a malicious intent so strongly against him if drunk, when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous instrument is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party.⁷³

While recognizing that drunkenness might affect intent in a limited range of circumstances, the learned Baron was not prepared to relax the rigid presumption of intention "where a dangerous instrument is used". The law was moving toward some mitigatory rule but was not yet prepared to extend it to all crimes of violence.⁷⁴

*Cruse*⁷⁵ was the first attempt to formulate a more precise rule akin to the modern rules laid down in *Meade* and *Beard*. The accused had been charged with inflicting an injury dangerous to life with intent to murder. In directing the jury, Patterson J. told them that drunkenness was no excuse but that "it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all and yet he may be guilty of very great violence". He told the jury that if they were not satisfied that the prisoners had formed a "positive intention" to murder, then they may find them guilty of assault.

In a similar charge in *Monkhouse*,⁷⁶ Coleridge J., described drunkenness as a "partial answer" to a criminal charge. The accused was "partially" acquitted and convicted of the lesser charge of feloniously discharging a loaded pistol with intent to do grievous bodily harm. The rule was still far from a firm one. The judges

⁷³ *Supra*, footnote 66, at p. 299.

⁷⁴ The fact that most of the crimes in which drunkenness was raised as a "defence" were of a violent nature is instructive in itself and supported the arguments of those who claimed that drunkenness should not be admitted as a defence because it was the direct cause of much violent crime. An examination of the charges in the cases already examined, particularly those in footnote 67, *supra*, show that on charges of murder, a plea of drunkenness had not been raised very often and when the plea was made "mitigating" circumstances of alleged self-defence and provocation were present.

⁷⁵ (1838), 8 C. & P. 541.

⁷⁶ (1849), 4 Cox C.C. 55.

were improvising. Coleridge J. said that the burden was on the accused and that he must show that his intoxication prevented him from using self-restraint⁷⁷ or took away from him "the power of forming any specific intention".⁷⁸ *Cruse*⁷⁹ was referred to, but the judge's remarks were more reminiscent of the direction in *Meakin*.⁸⁰ For the first time, the enigmatic phrase "specific intention" is used in the summing-up with no definition or amplification. One might well ask whether the lesser crime of which Monkhouse was convicted did not also require a specific intent that could similarly be negated by the accused's drunkenness?

One can see from the cases discussed that, by some haphazard process, the judges slowly focussed on the element of intent in cases in which drunkenness was raised in answer to the alleged *mens rea*. As if by accident, the "specific intention" was seized upon as the important criterion. Yet the wording of Coleridge J's. summing-up shows that he did not mean to weave any particular magic with these words. This is obvious when he directs the jury in *Monkhouse* to make a proper assessment of both act and mind: "To ascertain whether or not [the lack of power to form any specific intention] did exist in this instance, you must take into consideration the quantity of spirit he had taken, as well as his *specific conduct*."⁸¹ Surely the adjective "specific" simply means that the accused's actions, mental processes and motives, that is, all the circumstances of the case, should be evaluated by the jury and viewed subjectively.

In the light of the subsequent cases of the nineteenth century, it is surprising that the concept of "specific intention" remained the key to a formulation of legal theory relating to drunkenness. These cases show that some judges held the view that drunkenness might cause an accused to act "without any intent at all" and therefore he could not be "influenced by such an intent and design as was contemplated by the statute".⁸² At the same time, the courts more readily and accurately recognized that, in certain cases, in-

⁷⁷ See criticism by Lord Birkenhead L.C., in *Beard*, *supra*, footnote 51, at p. 498 (A.C.).

⁷⁸ The contrast drawn between capacity and lack of intention is important in the light of the remarks of Lord Devlin in *Broadhurst*, [1964] 2 W.L.R. 38, at p. 52. See discussion Part IV, *infra*.

⁷⁹ *Supra*, footnote 75.

⁸⁰ *Supra*, footnote 66.

⁸¹ *Supra*, footnote 76, at p. 56. Emphasis added.

⁸² Stated by Alderson B., the judge in *Meakin*, when addressing the jury in *Hayes* (1846), 10 J.P. 470. The accused had been charged that he did "cut and wounded with intent to maim and to do grievous bodily harm." The learned Baron directed that the felonious charge could not be supported. He said he could not make the conviction less than for common assault because "there clearly had been one".

toxication could be equated with temporary insanity as a disease to be taken into account under the M'Naghten Rules.⁸³

The issues were clearly stated in *Bentley*⁸⁴ where the accused was charged with assault (1) with intent to resist his lawful arrest and (2) with intent to do grievous bodily harm. In answer to the Crown contention that drunkenness would only be an answer if the accused was "wholly unconscious of what he was doing", Talfourd J. stated that: "The question of drunkenness is a fact which, among others, the jury may take into consideration in endeavouring to ascertain the intent".⁸⁵

The test of "specific intention" persisted despite the clear terms set out in *Doherty*,⁸⁶ one of the most influential cases of the nineteenth century. In summing-up on a charge of murder, Stephen J. told the jury that:

. . . when the crime is such that the intention of the party committing it is one of its constituent elements you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime.⁸⁷

In the twentieth century, the leading case prior to *Beard* was *Meade*.⁸⁸ After reviewing the history of the "defence", the Court of Criminal Appeal laid down the rule that a person charged with a crime of violence resulting in death or serious injury may show, in order to rebut the presumption that he intended the natural consequences of his acts, that he was so drunk that he was incapable of knowing that what he was doing was dangerous. This rule stated the law in clear terms of *mens rea* which, it is submitted, is the correct approach.⁸⁹ The House of Lords in *Beard*, although it did

⁸³ E.g., Stephen J. in *Davis* (1881), 14 Cox C.C. 563:

"If you think that he was insane—that if his insanity had been produced by other causes he would not be responsible for his actions—then the mere fact that it was caused by drunkenness will not prevent it having the effect which otherwise it would have had, of excusing him from punishment." at p. 564. See *M'Naghten's Case*, *supra*, footnote 47.

⁸⁴ (1850), 14 J.P. 671.

⁸⁵ *Ibid.* See *Doody* (1854), 6 Cox C.C. 463; the charge was attempted suicide and it was said that the defendant "had no deliberate intention to destroy his life". Also see *Moore* (1852), 3 C. & K. 319.

⁸⁶ (1887), 16 Cox C.C. 306.

⁸⁷ *Ibid.* at p. 308. The accused was convicted of manslaughter. Lord Birkenhead L.C. in *D.P.P. v. Beard*, *supra*, footnote 51, construed this result as the proper one (rather than outright acquittal) for, although the accused, due to his intoxication, may not have had the necessary malice aforethought, he nevertheless had performed an unlawful act and should be convicted of manslaughter.

⁸⁸ *Supra*, footnote 52.

⁸⁹ A number of pre-*Beard* cases in the early twentieth century followed the *Meade* principle, concentrating on the facts of the individual case in proving or disproving the alleged intent of the accused. E.g. *Scholey*

not overrule *Meade*, considered that rule too wide. Lord Birkenhead, however, explained the rule in such a way, as we shall see, that drunkenness would still reduce murder to manslaughter because the accused did not have the necessary (*not* the specific) intent.

IV

"The general principle of English law [is] that, subject to very limited exceptions, drunkenness is no defence to a criminal charge, nor is a defect of reason produced by drunkenness."⁹⁰ Thus Lord Denning recently stated the rule of the criminal law, relying on a diagnosis from the seventeenth century by Sir Matthew Hale, that a person who has "this voluntary contracted madness . . . shall have the same judgment as if he were in his right senses".⁹¹

To speak of drunkenness as a "defence" is to obscure the matter. The "defence" consists of a lack of the requisite intent and the phrase "defence of drunkenness" is both inaccurate and pejorative and ought to be discarded. The defence "does not mean that the drunkenness in itself is an excuse for the crime but that the state of drunkenness may be incompatible with the actual crime charged and may therefore negative the commission of that crime".⁹² Once it is clear that the required intent is in issue, it seems reasonable to ask why "subject to very limited exceptions" the lack of intent produced by drunkenness is not a complete defence to crime when the reverently repeated first principle of the criminal law is *actus non facit reum nisi mens sit rea*? The obvious answer is that drunkenness is still regarded as "voluntary contracted madness" and therefore in accordance with a moral, though not necessarily rational judgment, it shall not excuse.

The difficulty, however, is that it does excuse—when the right type of crime is committed, one requiring a "specific" as opposed to a "general" intent. Why do we excuse for one class of crime,

(1909), 3 Cr. App. Rep. 183; *Chapman* (1910), 4 Cr. App. Rep. 54; *Mowbray* (1892), 8 Cr. App. Rep. 8; *Bentley* (1913), 9 Cr. App. Rep. 109 and *Mann*, [1914] 2 K.B. 107, 24 Cox C.C. 140 (C.C.A.).

⁹⁰ *Attorney-General for Northern Ireland v. Gallagher*, [1963] A.C. 349, 3 All E.R. 299. It is not clear what Lord Denning means by "defect of reason". As he himself notes, at p. 381, drunkenness that produces temporary insanity within the M'Naghten Rules, is a defence. It is probably that his Lordship was referring to what he calls, at p. 380, a "self-induced want of moral sense". What the distinction is between a "self-induced want of moral sense" which his Lordship says is no defence, and "evidence of drunkenness which renders a person incapable of forming a specific intention" which is a defence, we are not told.

⁹¹ Hale, *Pleas of The Crown* (1847), Vol. I, p. 32.

⁹² *D.P.P. v. Beard*, *supra*, footnote 51, at p. 499 (A.C.).

which contains the most serious offences, and not for another? If, in reality, we punish intoxicated offenders for getting drunk, why some intoxicated offenders and not others? In terms of medical science the state of mind of an acutely intoxicated offender does not vary with the type of crime he commits, nor does he possess a mind capable of forming a general intent when incapable of forming a specific intent. In terms of psychology, he does not have one mind that forms a general intent and another that forms a specific intent. And logically, such an artificial categorization of crime seems unnecessary.

The leading case in English law is *Beard*.⁹³ The accused, who had been drinking, raped a thirteen year old girl. When she attempted to escape, he placed his hand over her mouth and his thumb on her throat causing her death by suffocation. At trial he was found guilty of murder. The Court of Criminal Appeal reduced the conviction to manslaughter on the ground that the trial judge's direction had imposed a test applicable to the defence of insanity and that was not the test for drunkenness as laid down in *Meade*.⁹⁴ The House of Lords restored the murder conviction and, after an exhaustive analysis of the authorities, held the rule in *Meade* inapposite to the facts of *Beard*, and laid down the definitive test. The basic principle is contained in the second of the three propositions set out by Lord Birkenhead L. C.:

That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent.⁹⁵

The judgment of the Lord Chancellor indicates that when he used the term specific intent, he did not use it in contrast to a general intent. Indeed he did not envisage the concept of a "specific intent crime" as opposed to a "general intent crime". He was simply referring to the fact that the law of crimes requires the *mens* to be *rea* as to each element of the *actus reus* and in that sense, every crime is one involving a specific intent. This is indicated in a later passage which has since proved controversial:

I do not think that the proposition of law deduced from these earlier cases is an exceptional rule applicable only to cases in which it is necessary to prove a specific intent in order to constitute the graver crime—e.g., wounding with intent to do grievous bodily harm or with intent to kill. It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate

⁹³ *Ibid.*

⁹⁴ *Supra*, footnote 52.

⁹⁵ *Supra*, footnote 51, at p. 501 (A.C.).

analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), a person cannot be convicted of a crime unless the *mens rea*.⁹⁶

Consideration of the so called "specific intent" was not necessary for the decision in *Beard*; the intent to rape,⁹⁷ not the intent to murder, was in issue. No one⁹⁸ contended that the accused was incapable of forming the intent to commit rape; as the Lord Chancellor observed, on the evidence, it could not be contended.⁹⁹ There was only slight evidence of the prisoner's drunkenness. Sexual intercourse had taken place and he could hardly contend that he believed the little girl was his wife or that she was consenting.¹⁰⁰ Perhaps the House of Lords should not have so readily adopted the felony-murder rule and should instead have examined the prisoner's drunkenness in relation to his ability to foresee that his use of force was likely to cause serious harm, but that is a wholly different question.

When Lord Birkenhead used the term "specific intent" he was referring to those crimes in which it was necessary to allege the requisite intent in the indictment. The older cases involving drunkenness which were examined by his Lordship were all crimes of that type, that is murder,¹⁰¹ assault with intent to murder, and wounding with intent to do grievous bodily harm or with intent to murder. Given the gradual and grudging acceptance of the full implications of the concept of *mens rea*, the prejudice against attempting to "look into the mind of man" and the fact that the prisoner could not give evidence on his own behalf until 1898,¹⁰² it was not unnatural that the judges only allowed the intoxicated offender to set up his defence of no intent when the definition of the crime contained a particular intent and the indictment therefore spelled it out. When the crime was one that did not require the allegation of an intent, or one in which a particular intent was not necessarily implied, a purely behaviouristic approach was undoubtedly taken, particularly when the defence was that of drunkenness. Then the adage that drunkenness does not excuse was applied and the simple equation "he committed the act therefore he must have intended

⁹⁶ *Ibid.*, at p. 504.

⁹⁷ *Ibid.*, at pp. 504-505.

⁹⁸ *Ibid.*, at p. 505.

⁹⁹ *Ibid.*

¹⁰⁰ It is submitted, *infra*, that if in a rape case there is evidence that due to his drunken condition an accused mistakenly believed the complainant was consenting, that evidence should go to the jury.

¹⁰¹ Under the Indictments Act, 1915, 5 & 6 Geo. 5, c. 90, s. 8, it became unnecessary to allege malice in the indictment. Prior to this an indictment for murder read "did feloniously, wilfully, and of his malice aforethought kill and murder the deceased".

¹⁰² Criminal Evidence Act, 1898, 61 & 62 Vict., c. 117.

to commit it" was drawn. The result was that intention was only in issue as to particular consequences of an act and not as to the act itself. Thus, in the so-called general intent crimes any defence to the issue of *mens rea* was confined to accident, mistake and insanity. In such crimes, drunkenness was never considered a proper excuse.

Yet the *mens* must be *rea* as to each element of the *actus reus* in every crime, unless it is by statute made a crime of strict liability. It was just this principle that Lord Birkenhead was recognizing when he said in effect that a person could not be convicted of a crime unless he possessed the necessary intent and that evidence of drunkenness should be allowed to negative that intent regardless of the constituent elements of the particular crime. This principle seems so in accord with theory and logic that one would not have expected the controversy it aroused. But this wider principle of *Beard* was so effectively attacked¹⁰³ that it has never been followed, and the illogical anomaly of the specific and general intent has become firmly embedded in the criminal law. Admittedly, the wider principle of *Beard* was dictum (as, in strict fact, were the three rules relating to drunkenness) and there was no direct authority for it. But it is equally true that the tenor of Lord Birkenhead's judgment indicates that the House of Lords considered the time had come to undertake a review of the problem of drunkenness in the criminal law and to set out the principles that were to govern. And surely he needed no authority for saying that a man should not be convicted of a crime unless the *mens* was *rea* and for extending that principle to all intoxicated offenders, not just to those who in their intoxicated state were fortunate enough to commit a crime in which an intent had to be alleged in the indictment, or in which a particular intent was implied.

Assuming for a moment that the strict theory of the maxim *actus non facit reum nisi mens sit rea* should be applied to an act committed when the accused was acutely intoxicated, the cases prior to *Beard* and *Meade* seem to imply that the so-called presumption of intention would make it impossible for him to disprove general intent. That explanation is the closest approximation to an answer to the principle that a crime, even one of "general intent", is only committed when the *mens* is *rea*. The judicial observations on *Beard* have ignored the "broad" rule in the judgment

¹⁰³ Singh, *loc. cit.*, footnote 53; Stroud, *Constructive Murder and Drunkenness* (1920), 36 L.Q. Rev. 268; Note, (1920-1921), 34 Harv. L. Rev. 78.

of Lord Birkenhead.¹⁰⁴ The subsequent decisions have accentuated the second rule in *Beard*, the "specific intent" rule. What is specific intent? Unless it means, in a case raising the "defence" of drunkenness, the intent which is spelled out in the indictment (or code provision, if such exists) there is no satisfactory explanation of the term.

The leading case in Canada, and one in which the difficulty of the specific-general intent dichotomy is graphically illustrated, is *George*.¹⁰⁵ Accused had assaulted an elderly man and taken twenty-two dollars from him. He was charged with robbery under section 288 of the Criminal Code.¹⁰⁶ The County Court Judge acquitted at trial on the ground that the accused was so intoxicated he did not have the intent to commit the crime. The Crown appealed on the ground that the trial judge failed to consider the included offence of assault, alleging that the incapacity to form the intent necessary for theft, the intent to deprive of property, did not preclude a conviction for assault. The British Columbia Court of Appeal dismissed the appeal. O'Halloran J. A. dealt with the Crown's contention in the following manner:

. . . having found the respondent so incapacitated by liquor that he could not form an intent to commit the robbery, it follows rationally in the circumstances here, that he must also be deemed to have found that respondent was equally incapable for the same reason of having an intent to commit the assault. If he could not have the intent to commit the robbery, *viz.*, to assault and steal as charged, then he could not have the intent either to assault or to steal when both occurred together as charged; the charge reads "by violence steal".¹⁰⁷

The Crown appealed to the Supreme Court of Canada. The appeal was allowed¹⁰⁸ and a conviction of assault under section 230(a) of the Code recorded.¹⁰⁹ Mr. Justice Ritchie dealt with the specific intent problem in the following terms:

¹⁰⁴ *Supra*, footnote 51, at p. 504 (A.C.).

¹⁰⁵ *The Queen v. George*, [1960] S.C.R. 871, 34 C.R. 1, 128 C.C.C. 289 (S.C.C.).

¹⁰⁶ S. 288. Every one commits robbery who (a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property; (b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person; (c) assaults any person with intent to steal from him; or (d) steals from any person while armed with an offensive weapon or imitation thereof.

¹⁰⁷ *Regina v. George* (1960), 126 C.C.C. 127, at p. 129 (B.C.C.A.).

¹⁰⁸ *George*, *supra*, footnote 105.

¹⁰⁹ S. 230. A person commits an assault when, without the consent of another person or with consent, where it is obtained by fraud, (a) he applies force intentionally to the person of the other, directly or indirectly.

In considering the question of *mens rea*, a distinction is to be drawn between "intention" as applied to acts done to achieve an immediate end on the one hand and acts done with the specific and ulterior motive and intention of furthering or achieving an illegal object on the other hand. Illegal acts of the former kind are done "intentionally" in the sense that they are not done by accident or through honest mistake, but acts of the latter kind are the products of preconception and are deliberate steps taken toward an illegal goal. The former acts may be purely physical products of momentary passion, whereas the latter involve the mental process of formulating a specific intent. A man, far advanced in drink, may intentionally strike his fellow in the former sense at a time when his mind is so befogged with liquor as to be unable to formulate a specific intent in the latter sense. The offence of robbery, as defined by the Criminal Code, requires the presence of the kind of intent and purpose specified in ss. 269 and 288, but the use of the word "intentionally" in defining "common assault" in s. 230(a) of the Criminal Code is exclusively referable to the physical act of applying force to the person of another.¹¹⁰

Mr Justice Fauteux also attempted to distinguish the two types of intention:

In considering the question of *mens rea*, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts considered apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act.¹¹¹

These analyses are, with respect, purely a play with words; there is no reality in them when applied to the facts of the case. The judgment of the Supreme Court can not unfairly be rephrased as: "When he hit him he intended to hit him because he hit him; when he took the money out of his pockets he did not commit theft because he did not intend to deprive him of his property notwithstanding that he did deprive him of his property." Certainly theft, like many crimes, has a technical meaning that must be consistently applied, and a man may indeed take another's property without intending to deprive him of it.¹¹² Such a differentiated approach was

S. 569(1). A count in an indictment is divisible and where the commission of the offence charged, as described in the enactment creating it or as charged in the count, includes the commission of another offence, whether punishable by indictment or on summary conviction, the accused may be convicted

(a) of an offence so included that is proved, notwithstanding that the whole offence is charged or is not proved,

or

(b) of an attempt to commit an offence so included.

¹¹⁰ *George, supra*, footnote 105, at p. 890 (S.C.R.).

¹¹¹ *Ibid.*, at p. 877.

¹¹² *Handfield v. The Queen* (1953-54), 17 C.R. 343 (Que. Q.B.); *Ruse v.*

not applicable in *George*. The opinion of the British Columbia Court of Appeal that the offence must be considered as a whole is, it is submitted, the correct one. No one would seriously contend that, in fact, the accused was possessed of two states of mind at the time of the commission of the offence, or that he considered the assault apart from the taking. The plain fact is that while acutely intoxicated the accused assaulted a man for the purpose of taking his money. What the court really means when it says he did not have the intent to deprive the victim of his property, is that if he had been sober he would not have taken his property. But then if he had been sober he probably would not have committed the assault either. The result of the court's decision is that a drunk who takes another's property will be acquitted of theft as happened in *Regehr*,¹¹³ but a drunk who commits assault will be convicted.

The treatment of the facts in *George* means that in cases involving drunkenness both an objective and subjective test are to be applied in determining the *mens rea* of an accused. In reality, this is the approach of the Supreme Court of Canada in direct contrast to the subjective approach of the British Columbia Court of Appeal. It might be that the social policy of the law dictates a strict view of criminal responsibility, so that any accused claiming drunkenness will not be successful in escaping punishment for a lesser offence, (if in fact, a lesser offence is involved). If so, that policy should not be obscured by a tortured analysis of intent.

The difficulty arises from the false dichotomy of intent. All crimes require *mens rea*, unless it is excepted by statute. *Mens rea* is either intention or recklessness. The factor common to both is foresight of consequence. It has been shown that acute intoxication can erase foresight of consequence and therefore, it is submitted, is available in any crime in which *mens rea* is required. When Justices Fauteux and Ritchie spoke of specific intent they were speaking both of motive and of intention as to consequence which, as Dr. Williams points out,¹¹⁴ is what lawyers usually mean when they talk of a specific intent. "The adjective 'specific' seems to be pointless, for the intent is no more specific than any other intent required in criminal law. The most it can mean is that the intent is specifically referred to in the indictment [or, in Canada, in the

Read, [1949] 36 Cr. App. Rep. 67; *R. v. Kindon*, [1957] Cr. L. Rev. 607 (C.C.A.). *R. v. Kerr* (1965), 52 W.W.R. 176, 4 C.C.C. 37 (Man. C.A.); *R. v. Wilkins*, [1964] 2 O.R. 365, 44 C.R. 375, [1965] 2 C.C.C. 189 (Ont. C.A.).

¹¹³ *R. v. Regehr* (1951-52), 13 C.R. 53 (Sask. Mag. Ct.). See also *Kerr* and *Wilkins*, *ibid.*

¹¹⁴ Williams, *op. cit.*, footnote 7, p. 49.

relevant section of the Criminal Code]. There is no substantive difference between an intent specifically mentioned and one implied in the name of the crime."¹¹⁵

The judgment of the Supreme Court is intelligible if by general intent it is meant that an act is committed neither by accident nor mistake. This seems to be the view of Ritchie J., who said such acts "may be purely physical products of momentary passion, whereas the latter [crimes requiring intention as to consequence] involve the mental process of formulating a specific intent".¹¹⁶ In other words, in general intent crimes the mental process of the offender is irrelevant for the presentation of a *prima facie* case. The *actus reus* is enough as long as it was not done by accident or mistake. This might be a justifiable position on grounds of policy, but it is submitted it is not justifiable as an analysis of *mens rea* because it reduces intent ("general intent" in the terms of the Supreme Court) to a nullity by the application of a purely objective test.

A further objection to the judgment of the Supreme Court, is the treatment of the word "intentionally" in the definition of assault in section 230(a) of the Code.¹¹⁷ At common law, assault requires either intention or recklessness.¹¹⁸ It is not enough that the accused committed the act; it must be shown he had some realization of the quality of the act and the consequences that might flow from it. Yet when the word "intentionally" is expressly added to the definition of the offence, the Supreme Court defines it to be "exclusively referable to the physical act of applying force to the person of another".¹¹⁹ The real problem is pointed up by Mr. Justice Fauteux's analysis:

Hence the question is whether, owing to drunkenness, respondent's condition was such that he was incapable of applying force intentionally. I do not know that, short of a degree of drunkenness creating a condition tantamount to insanity, such a situation could be metaphysically conceived in an assault of the kind here involved.¹²⁰

"Intentionally" in section 230 must have some additional or clarifying effect on the concept of assault as expressed at common law. Fauteux J.'s dictum would narrow the *mens rea* of assault—even to the extent of negating accident or mistake caused by drunkenness, so that an accused would not be able to plead, as the de-

¹¹⁵ *Ibid.*

¹¹⁶ *George, supra*, footnote 105, at p. 890 (S.C.R.).

¹¹⁷ S. 230(a), *supra*, footnote 109.

¹¹⁸ Williams, *op. cit.*, footnote 7, p. 571.

¹¹⁹ *George, supra*, footnote 105, at p. 890 (S.C.R.).

¹²⁰ *Ibid.*, at p. 879.

endant in *Moore*¹²¹ had done, that he did not realize the quality or consequences of his act. The mind boggles at the thought that a man might strike another, in the absence of accident, and yet not intend to strike him, and Mr. Justice Fauteux, too, refuses to accept such a possibility. As he said, he does not know that such a situation could be metaphysically conceived.

Until there is some recognition by the courts of what actually happens when a man becomes intoxicated, the stream of decision will continue to be muddled by intricate theorizing that has no basis in reality. A grossly intoxicated person may commit the very harm he set out to commit in his incapacitated state. But the salient fact is that there was never an intent to cause harm by a sober person.¹²² As noted more extensively above, alcohol removes inhibitions and results in impulsive behaviour. The policeman that is in us all when sober, as a regulator of our conduct, is silenced by alcohol. The restrictions are off and immediate gratification of desires is demanded. Of course a lack of an appreciation of the quality and consequences of one's actions can be a result of this process. But the essential fact is that the acts are the acts the drunk intends at that moment. The acutely intoxicated offender is not partially sober and partially intoxicated, yet that is the current view of the criminal law. His actions are of a whole piece and that is the way his conduct should be treated, which is not necessarily to say that his conduct should be excused.

The problem of recklessness is bound up with the riddle of the *mens rea* of manslaughter.¹²³ There are three types of manslaughter that must be considered; causing death by criminal negligence, constructive manslaughter, and a conviction of manslaughter as a lesser included offence in an indictment for murder.

The Supreme Court of Canada decided in *O'Grady v. Sparling*¹²⁴ that the *mens rea* of criminal negligence under the Criminal Code is recklessness. Mr. Justice Judson, who gave judgment for the majority, expressly adopted the following statement by Turner:

But it should now be recognized that at common law there is no criminal liability for harm thus caused by inadvertence. This has been laid down authoritatively for manslaughter again and again. There are only two states of mind which constitute *mens rea*, and they are intention and recklessness. The difference between recklessness and

¹²¹ (1898), 14 T.L.R. 229.

¹²² Hall, *Intoxication and Criminal Responsibility* (1943-44), 57 Harv. L. Rev. 1045, at p. 1065.

¹²³ For the most recent exposition see Turpin, *Mens Rea In Manslaughter*, [1962] Cambridge L.J. 200.

¹²⁴ *Supra*, footnote 14.

negligence is the difference between advertence and inadvertence: they are opposed and it is a logical fallacy to suggest that recklessness is a degree of negligence. The common habit of lawyers to qualify the word "negligence" with some moral epithet such as "wicked", "gross", or "culpable" has been most unfortunate since it has inevitably led to great confusion of thought and principle. It is equally misleading to speak of criminal negligence since this is merely to use an expression to explain itself.¹²⁵

Mr. Justice Judson then held that it is advertent negligence that has been made a crime under sections 191(1) and 221(1) of the Criminal Code.¹²⁶

To advert to a consequence is to turn the mind to it; to foresee the possibility of it. If one then takes an unjustified risk of bringing that consequence about, the *mens rea* of recklessness has been established. On principle there would seem to be no reason why intoxication should not negative such foresight. The *mens rea* is as specific as it is in any of the so-called specific intent crimes. And it is just such foresight of consequence that the drunk, who acts upon impulse, might not have.

In his attempt in *Gallagher*¹²⁷ to formulate legal principles relating to drunkenness, Lord Denning stated that intoxication could not negative the *mens rea* of recklessness. He recognized that a drunk might not be able to foresee or measure the consequences of his actions in a way that he would if sober. "Nevertheless he is not allowed to set up his self-induced want of perception as a defence."¹²⁸ If a reasonable, sober man would have appreciated the dangerousness of the act, then the drunk must be taken to have appreciated it. His Lordship said this was the result of the decision in *Meade*¹²⁹ as explained in *Beard*.¹³⁰

In *Meade* the charge was murder and the malice alleged was intent to cause grievous bodily harm, the prisoner having administered a severe beating to the deceased. The defence was lack of intent because of intoxication. Lord Coleridge J. directed the jury that "if the reason is dethroned and the man is incapable therefore of forming that intent, it justifies the reduction of the

¹²⁵ Kenny, *op. cit.*, footnote 16.

¹²⁶ S. 191(1). Every one is criminally negligent who (a) in doing anything, or (b) in omitting to do anything that is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, "duty" means a duty imposed by law.

S. 221(1). Every one who is criminally negligent in the operation of a motor vehicle is guilty of (a) an indictable offence and is liable to imprisonment for five years, or (b) an offence punishable on summary conviction.

¹²⁷ *Supra*, footnote 90.

¹²⁸ *Ibid.*, at p. 380.

¹²⁹ *Supra*, footnote 52.

¹³⁰ *Supra*, footnote 51.

charge from murder to manslaughter".¹³¹ On appeal it was alleged that that direction was more consonant with a plea of insanity than one of drunkenness. The Court of Criminal Appeal dismissed the appeal. It did not approve the precise wording used by the trial judge, but held that it did not constitute misdirection. The court then stated that the rule was that intention may be negatived "in the case of a man who is drunk, by showing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, *i.e.* likely to inflict serious injury".¹³²

The Court of Criminal Appeal in *Beard* considered itself bound by its own decision in *Meade*, and held that the jury should have been directed to consider whether *Beard*, at the time of placing his hand on the child as described, was incapable of knowing that what he was doing was dangerous. The House of Lords ruled that the direction in *Meade* could not be applied to the facts in *Beard*. Lord Birkenhead L. C. stressed that in *Meade* it was necessary to prove the specific intent—the intent to cause grievous bodily harm. In *Beard* it was "only necessary to prove that the violent act causing death was done in furtherance of the felony of rape"¹³³ and it "was not in fact" contended that the accused did not have the intent to commit rape. To apply the *Meade* direction to *Beard* would have been to consider the accused's foresight in relation to his use of force, thus abandoning the felony-murder rule,¹³⁴ a rule the House of Lords was concerned to uphold.

The Lord Chancellor did not hold that the rule in *Meade* was incorrect as applied to the facts of that case. His exposition of the principles to be applied when considering drunkenness are wholly consistent with *Meade*. A man cannot intend that which he does not foresee, and if through drunkenness he does not know that what he is doing is "likely to inflict serious injury" he is not guilty of murder if death results. There is no authority for Lord Denning's

¹³¹ *Supra*, footnote 52, at p. 896 (K.B.).

¹³² *Ibid.*, at p. 899.

¹³³ *Supra*, footnote 51, at p. 504 (A.C.).

¹³⁴ As Mr. Turner points out, it appears the C.C.A. did not precisely grasp the problem that was before them. The court had ruled that death caused in the course of commission of a felony is murder—the felony-murder rule. The court then said the principle of *Meade's* case should have been applied, which would have meant considering the accused's foresight in relation to his use of force, thus abandoning the felony-murder rule. It is clear the C.C.A. did not mean that the drunkenness should have been considered in relation to the rape, as it was never argued that the accused did not have the intent to rape and there was no evidence on which the jury could have reached that result. See Turner, *The Mental Element in Crime at Common Law* (1936-38), 6 Camb. L.J. 31, at p. 63.

assertion that evidence of drunkenness is not available to negate foresight of consequence. The judgment of the House of Lords in *Beard* is, it is submitted, authority for the exactly opposite proposition. If "the state of drunkenness may be incompatible with the actual crime charged"¹³⁵ when the *mens rea* required is intention as to consequence, it may be equally incompatible with the crime charged when the *mens rea* required is foresight of consequence.

The only case in which the point appears to have been in issue is the decision of the Court of Criminal Appeal for New South Wales in *Stones*.¹³⁶ The prisoner, during a drunken brawl, stabbed and killed another man. He was convicted of murder. During the course of the summation, the trial judge stated that the evidence of intoxication should only be considered in relation to the intent to kill or to inflict grievous bodily harm. It was not to be considered in relation to the question of whether accused had caused death by an act done with reckless indifference to human life. By the law of New South Wales, the malice necessary for murder can be satisfied by reckless indifference to human life.¹³⁷ Thus the Court of Criminal Appeal was faced with the question of whether intoxication could negative the *mens rea* of recklessness. The court, after noting the dearth of precedent, and quoting the passage from *Beard* that indicated that drunkenness could negate the intent required for any crime,¹³⁸ decided, therefore, that it could negate recklessness as an ingredient in the malicious homicide or murder. The court also stated that it is foresight of consequence that is the common factor in intention and recklessness and that in *Stones* such foresight had been negated. The conviction was reduced from murder to manslaughter.

What hindered a total acquittal of the prisoner? The decision of the court ruled out both intention and recklessness. What *mens rea* was then left for manslaughter? The court was silent on this issue; it merely said: "Drunkenness is, of course, no defence to a charge

¹³⁵ *Supra*, footnote 51, at p. 504 (A.C.).

¹³⁶ *Regina v. Stones* (1956), 56 R.S.N.S. Wales 25 (C.C.A.).

¹³⁷ Crimes Act, 1900, s. 5. "Every Act done of malice . . . or done without malice but with indifference to human life or suffering, . . . or done recklessly or wantonly, shall be taken to have been done maliciously, within the meaning of this Act, and of every indictment and charge where malice is by law an ingredient in the crime.

S. 18(1)(a). Murder shall be taken to have been committed where the act of the accused, or thing by him omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life . . . N.S. Wales Statutes, 1824-1957, Vol. 3.

¹³⁸ *Supra*, footnote 51, at p. 504 (A.C.).

of manslaughter because the standard of care required of a drunkard is the same as that required of anyone else.”¹³⁹ At first sight, that statement seems to rule out *mens rea* and set up the civil standard of care required of the reasonable man. There may have been no foresight of harm, let alone foresight of the possibility of death, yet the conviction will be for manslaughter if death results. The court, however, had strong precedent for a verdict of manslaughter. In *Beard*, Lord Birkenhead was careful to state that if intoxication negatives the intent for murder “nevertheless unlawful homicide has been committed by the accused, and consequently he is guilty of unlawful homicide without malice aforethought, and that is manslaughter”.¹⁴⁰ The use of the adjective “unlawful” begs the question. What *mens rea* must accompany the act before it can be said to be unlawful? Clearly, the act itself is sufficient; if death results the conviction will be for manslaughter.

In a little noted passage in *Beard*, Lord Birkenhead indicated that in cases where lack of intent because of intoxication reduces murder to manslaughter, the conviction for manslaughter might in truth be a conviction for drunkenness:

But nevertheless unlawful homicide has been committed [the intent for murder having been negated] and consequently the accused is guilty of unlawful homicide without malice aforethought, and that is manslaughter This reasoning may be sound or unsound; but whether the principle be truly expressed in this view, or whether its origin is traceable to that older view of the law held by some civilians (as expressed by Hale) that, in truth, it may be that the cause of the punishment is the drunkenness which has led to the crime, rather than the crime itself; the law is plain beyond all doubt . . . that drunkenness . . . can only . . . have the effect of reducing the crime from murder to manslaughter.¹⁴¹

In cases of constructive manslaughter, where the doctrine of the unlawful act is invoked to secure a conviction, the law will operate in a particularly harsh fashion unless evidence of intoxication is allowed to negative foresight of consequences. Suppose the case of a drunk who strikes his victim causing him to knock his head against a wall thus causing his death. It is suggested that on the present state of the law the accused will be guilty of manslaughter, though he might have been quite incapable of appreciating the nature or consequences of his act. That the doctrine of manslaughter by an unlawful act might operate in a similarly

¹³⁹ *Stones, supra*, footnote 136, at p. 33.

¹⁴⁰ *Supra*, footnote 51, at p. 500 (A.C.).

¹⁴¹ *Ibid.*

harsh fashion in the case of a sober man who commits an assault, is little consolation.¹⁴²

Dr. Williams states that "drunkenness is no defence on a charge of manslaughter, because the standard of care required of a drunkard is the same as that required of anyone else".¹⁴³ In his section on manslaughter, Dr. Williams says that "manslaughter can be committed by inadvertent negligence (if sufficiently "gross") for the accused need not have foreseen the likelihood of death".¹⁴⁴ In Canada one might argue that the gross negligence referred to is what the Supreme Court would term recklessness,¹⁴⁵ except that for manslaughter the foresight must only be to harm and not to death. Dr. Williams also submits that the negligence required for manslaughter should be negligence as to death and that the issue of inadvertent manslaughter is still open for consideration by the House of Lords. Even if the advertence required is only as to harm and not to death, why should evidence of drunkenness not be allowed to negate such foresight of harm? If the advertence that is required is to the possibility of death, *a fortiori*, evidence of drunkenness should be allowed to displace such foresight.

The decision of the Supreme Court in *O'Grady v. Sparling*¹⁴⁶ leaves the question open for decision in Canada. Causing death by criminal negligence is culpable homicide¹⁴⁷ and culpable homicide

¹⁴² For a recent discussion of manslaughter by an unlawful act see Buxton, *By An Unlawful Act* (1950), 66 L.Q. Rev. 174 and Sparkes, *The Elusive Element of "Unlawfulness"* (1965), 28 Mod. L. Rev. 600. Both articles take as their starting point the case of *R. v. Church*, [1965] 2 W.L.R. 1220, 2 All E.R. 72 (C.C.A.). After stating that it was not considering manslaughter based on gross negligence (recklessness in Canadian terms) or provocation, the court said that "an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a verdict of manslaughter inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognize must subject the other person to, at least the risk of some harm resulting therefrom, albeit not serious harm." (At p. 1226 (W.L.R.), 76 (All E.R.)). This passage is open to a number of objections. The risk involved need only be to harm, not to death, yet the conviction will be for manslaughter. Is any risk of harm, no matter how slight, enough on which to base a conviction? Does the accused have to be aware of the risk of harm? It would seem that the court has laid down an objective test—"as all sober and reasonable people would inevitably recognize"—thus excluding *mens rea*. Of course if the accused was intoxicated he might very well not have realized that a risk of harm was involved. Undoubtedly the unsatisfactory reply that "the standard of care required of the drunkard is the same as that of everyone else" would be given. The "standard of care" is, of course, the reasonable man test of civil negligence, it has nothing whatever to do with *mens rea*.

¹⁴³ *Williams, op. cit.*, footnote 7, p. 572.

¹⁴⁴ *Ibid.*, p. 106.

¹⁴⁵ *O'Grady v. Sparling, supra*, footnote 14.

¹⁴⁶ *Ibid.*

¹⁴⁷ Criminal Code, *supra*, footnote 29, s. 194(5)(b).

that is not murder is manslaughter.¹⁴⁸ The court has ruled that criminal negligence means advertent negligence, that there must be foresight as to consequence. Will the court now allow evidence of intoxication to show lack of such foresight? The grounds for rejecting such evidence are difficult to imagine. It is submitted, with respect, that it should be accepted. The standard of care of the reasonable man has been ruled out by the requirement of advertence. Why then should a sober man be allowed to prove the truth of the matter and not one who is intoxicated?

The difficulty will arise from the fact that the crime of causing death by criminal negligence was devised to replace the previous laws relating to motor manslaughter. To the man on the street, and, one would guess, to most judges, the suggestion that a man was not reckless in the operation of his automobile because he was too drunk to realize the possible consequences of such an action, would be a contradiction in terms. The natural reaction would be to say that driving in such a state is itself reckless; or that getting drunk when one is aware that one is going to drive is itself reckless.¹⁴⁹ Such an application of the concept of recklessness is stringently objective. The requirement of *mens rea* of foresight of consequences is ignored. Perhaps a man would be legally reckless if he became intoxicated when he knew he was going to drive if it could be shown that he had caused harm through drunk driving on a previous occasion. The same point would apply, of course, to causing harm while drunk by means other than an automobile. The necessary result of the Supreme Court's decision in *O'Grady v. Sparling* should be that evidence of drunkenness is admissible to negative the *mens rea* of criminal negligence. The only difference between such a case and that of *Stones*¹⁵⁰ is that in the former the charge would be manslaughter and in the latter it was murder, but the reasoning of the Australian court is applicable to any crime which can be committed by recklessness.

The Courts of Appeal of British Columbia and Ontario have recently disagreed on the intent necessary for rape and the effect of intoxication thereon. In *Boucher*¹⁵¹ the British Columbia Court of Appeal said, in effect, that if the act of enforced intercourse has been proved, drunkenness could not negative the intent for rape. Wilson J. A. purported to follow the decision in *George*¹⁵² in reach-

¹⁴⁸ *Ibid.*, s. 205.

¹⁴⁹ *Edwards v. State* (1957), 304 S.W. 2d 500, at p. 503 (Tenn. S. Ct.)

¹⁵⁰ *Supra*, footnote 136.

¹⁵¹ *Regina v. Boucher et al.*, [1963] 2 C.C.C. 241, 40 W.W.R. 663, 39 C.R. 242 (B.C.C.A.).

¹⁵² *Supra*, footnote 105.

ing that conclusion. He reasoned that rape, like assault, involves the doing of a physical act without consent and as the Supreme Court of Canada had not considered the defence of consent in *George*, so he rejected the defence of belief in consent once forced coition has been proved. With respect, the cases are not analogous. The Supreme Court ruled in *George* that the word "intentionally" in the definition of assault is exclusively referable to the physical act of applying force. The intention in rape is the intention to have extra-marital intercourse without consent, and in that sense it may be said that a particular state of mind is a part of the crime which is not true of assault. To say that both crimes require the proof of a physical act without consent is not sufficient. Intercourse is an act that is commonly consented to, and a drunk might mistakenly believe that the intercourse was consensual. If there is evidence of such belief, it should be left to the jury. Certainly consent is also a defence to assault, but it is a peculiarly rare occurrence and it is highly unlikely that a man, drunk or sober, would be able to plead such belief unless there was incontrovertible supporting evidence. Mr. Justice Wilson also found support in the *George* decision from the Supreme Court's adoption of the specific-general intent analysis. In his view, the crime of rape was one of general intent—"the intent to enforce coition"—thus excluding the issue of drunkenness.

In *Vandervoort*,¹⁵³ the Ontario Court of Appeal reached a difference conclusion, while also purporting to follow *George*. Mr. Justice Aylesworth held that "rape imports a specific intent to have intercourse without the woman's consent"¹⁵⁴ and therefore evidence of drunkenness could negative such intent. In so holding his Lordship followed the judgment of the Full Court of the Supreme Court of Victoria, in *Hornbuckle*.¹⁵⁵ The analysis of Lowe J. in that latter case illustrates the error in the British Columbia court's reasoning in *Boucher*:

Analysis of the crime of rape involves at least these elements: (a) an indecent assault, (b) an intent to have intercourse with the female without her consent, and (c) the intended assault completed by the having of intercourse. To hold that knowledge that the act of intercourse was occurring sufficiently establishes the intent, because the man

¹⁵³ *R. v. Vandervoort*, [1961] O.W.N. 141, 34 C.R. 380 (Ont. C.A.).

¹⁵⁴ *Ibid.*, at p. 385 (C.R.).

¹⁵⁵ *Rex v. Hornbuckle*, [1945] V.L.R. 281. See also *Snow*, [1962] Tasm. St. R. 271, at p. 276—"Mistake in relation to criminal responsibility is part of the law relating to *mens rea* or the mental element in crime and before considering the relevance of the alleged intoxication of a person charged with rape the mental elements in that crime must be fully defined." Cf. *Vallance*, [1960] Tasm. St. R. 51, at p. 64.

who knows he is committing the act must intend it, even if *prima facie* warranted, seems to us to fail to distinguish "intent to have intercourse" from "intent to have intercourse without the consent of the female".¹⁵⁶

The recent judgment of the English Court of Criminal Appeal in *Okoye*¹⁵⁷ also indicates that in rape a belief that the woman was a consenting party would be a defence, even if in fact she was not consenting. It is submitted, with respect, that the judgment of the Ontario Court of Appeal in *Vandervoort* is correct and is consistent with the judgment of the Supreme Court in *George*.

It is hoped that the foregoing has shown that the statement from *Gallagher*¹⁵⁸ that opened this section is, upon analysis, erroneous (as indeed, with great respect, is almost the whole of Lord Denning's exposition of the law in relation to drunkenness). If the defence of drunkenness is properly understood as a defence of lack of the required intent it is seen "that the state of drunkenness may be incompatible with the actual crime charged" in any crime in which *mens rea*, in the sense of intention or recklessness, is an element. Even if the defence is confined to the so-called specific intent crimes, these crimes are so numerous, particularly in countries possessing criminal codes, for instance Australia and Canada, and are usually of such a serious nature, that it can hardly be said they constitute "very limited exceptions".

V

Not the least of the difficulties with the defence of drunkenness is that in directing juries, judges often tangle Lord Sankey's golden thread¹⁵⁹ with the presumption that a man intends the natural consequences of his acts. Whether the presumption that a man intends the natural consequences of his acts ever was a rule of the criminal law is doubtful; it should not now be treated as such.¹⁶⁰ The only

¹⁵⁶ *Ibid.*, at p. 287.

¹⁵⁷ [1964] Crim. L. Rev. 416 (C.C.A.).

¹⁵⁸ *Supra*, footnote 90.

¹⁵⁹ "Throughout the web of English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. . . . No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained." *R. v. Woolmington*, [1935] A.C. 462, at p. 481, All E.R. 1, 104 L.J.K.B. 433, 30 Cox C.C. 234.

¹⁶⁰ 2 Stephen, *History of English Criminal Law* (1883), p. 111. 3 Holdsworth, *History of English Law* (1941), pp. 374-375. It is not intended here to get into a discussion of *Smith*, [1961], A.C. 290 and Viscount Kilmuir's startling exposition of the presumption of intention. *Smith* is not now the law in Canada and one can only hope that it will not be followed. See *e.g.*

presumption as to proof in the criminal law, aside from the presumption of sanity, is that an accused is innocent until proven guilty, and the burden of proving each element of the crime beyond a reasonable doubt rests always, and at all times, on the prosecution.¹⁶¹ Even if the presumption of intention is justified as referring only to the evidentiary, as opposed to the persuasive burden of proof, it should rarely, if ever, be used by a judge in addressing a jury. If such a practice is allowed the almost inevitable result is to shift the persuasive burden on to the accused to disprove his intent.

The burden of proving the requisite intent is always on the Crown and it does not change because in a particular case the defence is using evidence of intoxication to establish a lack of intent. Indeed the evidence relied upon may have been adduced solely from the Crown's case, as for instance from a police analyst's testimony as to the results of a drunkometer test, or of a blood or urine analysis, coupled with the observations of other Crown witnesses. The language used by Lord Birkenhead in forming the third proposition in *Beard*¹⁶² has led to confusion in regard to the burden of proof:

That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.

Clearly, the Lord Chancellor considered that a rebuttable presumption was raised against an accused to the effect that he intended the natural consequences of his acts. In that belief he had ample support from the Commissioners on Criminal Law¹⁶³ and from the writers of the eighteenth and early nineteenth centuries.¹⁶⁴ Stephen,

Bradley v. The Queen (1956), 116 Can. C.C. 342. The High Court of Australia has rejected the doctrine of *Smith*, see *Smyth v. The Queen* (1957), 98 C.L.R. 163.

For trenchant criticisms of *Smith* see Williams, *Constructive Malice Revived* (1960), 23 Mod. L. Rev. 605; Ryan, *The Objective Test of Criminal Liability* (1960-61), 3 Crim. L. Q. 305; Travers & Morris, *Imputed Intent in Murder or Smith v. Smyth* (1961-62), 35 Aust. L.J. 154; For a more recent explanation of what *Smith* actually decided by one who concurred in Viscount Kilmuir's opinion see *Hardy v. Motor Insurer's Bureau*, [1964] 2 All E.R. 742 per Lord Denning M.R. at pp. 744-745. Lord Denning also attempted to explain the decision in *Smith* in a lecture at the Hebrew University of Jerusalem, Denning, *Responsibility Before the Law* (1961). Dr. Williams used the same platform to criticize Lord Denning's explanation, Williams, *The Mental Element in Crime* (1965).

¹⁶¹ *Woolmington*, *supra*, footnote 159.

¹⁶² *Supra*, footnote 51, at p. 502 (A.C.).

¹⁶³ Fourth Report of the Commissioners on Criminal Law (1839), p. 235. "According to the well established judicial rule, every one must be presumed to contemplate the probable consequences of his own act."

¹⁶⁴ See Turner, *Russell on Crime* (11th ed., 1958), p. 37. Foster, Report

however, doubted that the presumption ever was a rule of law.¹⁶⁵

The case most often cited as proving judicial use of the rule is *R. v. Cooke*.¹⁶⁶ The indictment in *Cooke* charged that the accused had forged and uttered, knowing it to be forged, an acceptance on a bill of exchange. The indictment also alleged an intent to defraud, *inter alios*, one Ambrose, whose name the accused had forged as acceptor. It was proved that Cooke had forged the acceptance, that he had deposited the bill to his credit at his bank, and that he had taken advances on it. In summing up, Patterson J. said:

. . . if a person *knowingly* pays a forgery away as a good bill, it is a consequence, and *almost* a consequence of law that he must intend to defraud . . . the person whose name is used, as everything which is the natural consequence of the act must be taken to be the intention of the prisoner.¹⁶⁷

The last phrase clearly was not necessary for the jury to reach its verdict of guilty. The intent to defraud was the only conceivable inference from the uncontradicted facts of the case and a properly instructed jury would not have required support from a doubtful presumption.

Other cases frequently cited as showing the existence of the presumption similarly do not stand up to analysis. Like *Cooke*, *Boardman*¹⁶⁸ and *Hill*¹⁶⁹ were cases of uttering a forgery with intent to defraud and, as in *Cooke*, the intent to defraud was the only possible inference from the undisputed facts of each case. *Fisher*,¹⁷⁰ *Kelly*,¹⁷¹ and *Morrison*¹⁷² were cases of murder or manslaughter in which the judges said that the killing of another is murder unless the accused can "show that it is a lesser offence" and referred to the "presumption of malice aforethought" arising from the fact of the killing. It was precisely such a direction that the House of Lords disapproved of in *Woolmington*¹⁷³ where Lord Sankey said:

It is not the law of England to say "if the Crown satisfy you that this woman died at the prisoner's hands then he has to show that there are circumstances—which alleviate the crime—or which excuse the homicide altogether. . . ."

A case in which the presumption was given clear judicial blessing and Discourses (2nd ed., 1780), p. 255; Blackstone, *op. cit.*, footnote 21, p. 201, (1803), 1 East P.C. 225.

¹⁶⁵ Stephen, *op. cit.*, footnote 160, p. 111.

¹⁶⁶ (1838), 8 C. & P. 586, 173 E. R. 629.

¹⁶⁷ *Ibid.*, at p. 630 (E.R.). Emphasis added.

¹⁶⁸ (1838), 2 M. & Rob. 147, 174 E.R. 244.

¹⁶⁹ (1838), 2 Mood. 30, 169 E.R. 12.

¹⁷⁰ (1837), 8 C. & P. 182, 173 E.R. 452.

¹⁷¹ (1848), 2 C. & K. 814, 175 E.R. 380.

¹⁷² (1837), 8 C. & P. 22, 173 E.R. 382.

¹⁷³ *Supra*, footnote 159, at p. 482 (A.C.).

ing is *Meade*.¹⁷⁴ The Court of Criminal Appeal was asked to rule on a direction by Lord Coleridge J. in a murder trial in which the defence of drunkenness had been raised. Lord Coleridge had said: "In the first place, every one is presumed to know the consequences of his acts." He then went on to say that if the prisoner's mind was so obscured by drink that he could not form the necessary intent, it justified the reduction of the charge from murder to manslaughter. In upholding the conviction for murder Darling J., speaking for the court, said:

We desire to state the rule in the following terms: A man is taken to intend the natural consequences of his acts. This presumption may be rebutted—(1) in the case of a sober man, in many ways: (2) it may also be rebutted in the case of a man who is drunk. . . .¹⁷⁵

To start with such a rebuttable presumption is really to presume the presence of the *mens rea* as soon as the *actus reus* has been established. This shifts the persuasive burden from the prosecution and casts a burden on the accused to raise a reasonable doubt as to his lack of intent. So to do is open to the double objection that it substitutes the objective criterion of civil liability for the subjective criminal criterion, and reverses the burden of proof set out in *Woolmington*.

Holmes, an advocate of the objective theory of criminal liability,¹⁷⁶ characteristically had no illusions about the truth of the matter:

The very meaning of the fiction of implied malice in such cases at common law, was, that a man might have to answer with his life for consequences which he neither intended nor foresaw. To say that he was presumed to have intended them, is merely to adopt another fiction, and to disguise the truth.

The truth was, that his failure or inability to predict them was

¹⁷⁴ *Supra*, footnote 52. It should be noted, however, that the actual holding in *Meade* supported the subjective theory of liability *i.e.* the actual state of the accused's mind was relevant in considering whether or not he had the intent to do grievous bodily harm.

¹⁷⁵ *Ibid.*, at p. 899 (K.B.).

¹⁷⁶ The House of Lords in *Smith*, *supra*, footnote 160, took support from Holmes' objective theory of criminal liability which led Dr. Glanville Williams to comment: "Greatly as Holmes J. is venerated in the United States, it is fair to say that this theory of objective responsibility in crime is now regarded, over there, as an unfortunate aberration", Williams, *loc. cit.*, footnote 160, at p. 612. Professor Ryan observed: "... when a great man errs he is likely to err greatly, and on this subject Holmes J. erred in the grand manner", Ryan, *loc. cit.*, footnote 160, at p. 315. For a refutation of Holmes' theory see Hall, *op. cit.*, footnote 24, Chaps IV & V. In any event the United States Supreme Court has unequivocally approved the subjective theory of criminal liability. See *e.g.* *Morissette v. United States*, *supra*, footnote 4.

immaterial, if, under the circumstances known to him, the court or jury, as the case might be, thought them obvious.¹⁷⁷

It is submitted that after *Woolmington*, the presumption of natural consequences has no proper place in the criminal courts. It is well to recall what was said in *Woolmington*:

. . . it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, *created by the evidence given by either the prosecution or the prisoner*, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. *No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.*¹⁷⁸

It is true that just prior to the above passage Lord Sankey L. C. said: ". . . there is no such burden laid on the prisoner to prove his innocence, and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of his innocence."¹⁷⁹ This cannot be taken to mean that the prisoner has to raise a doubt as to his guilt. In light of the passage quoted above, it only means that the doubt may be raised by the prosecution's evidence, by the prisoner's evidence, if any, or by a combination—that is from the whole case. At all events it is for the prosecution to prove the case beyond a reasonable doubt, not for the prisoner to raise a doubt. It is a commonplace that an accused may be acquitted without offering a shred of evidence on the basis that the prosecution has not proved its case beyond a reasonable doubt.

The decision of the Ontario Court of Appeal in *Giannotti*¹⁸⁰ is instructive of the error that occurs when the burden of proof on the prosecution is mixed with the supposed presumption of natural consequences. The indictment was for murder. The accused neither gave testimony nor called any witness on his own behalf. Relying on the evidence contained in the Crown's case, he raised two defences, drunkenness and provocation. The Court of Appeal described the trial judge's direction on the presumption of innocence and the burden of proof remaining always on the Crown as "faultless". But the trial judge went on to direct the jury in the

¹⁷⁷ *Commonwealth v. Pierce* (1884), 138 Mass. 165, at p. 178.

¹⁷⁸ *Woolmington*, *supra*, footnote 159, at p. 481 (A.C.). Emphasis added.

¹⁷⁹ *Ibid.*

¹⁸⁰ *R. v. Giannotti*, [1956] O.R. 349, (1956), 115 C.C.C. 203, 23 C.R. 259 (Ont. C.A.). It is submitted, with respect, that A.E. Popple falls into the same error as the trial judge in *Giannotti* in his annotation on drunkenness in (1949), 7 C.R. 152, at p. 157.

following terms: "The next principle of law applicable to this case is that the accused is presumed to intend the natural consequences of his acts. . . . That is a presumption in law but it is a presumption that may be rebutted by evidence."¹⁸¹ He also repeated the third proposition laid down in *Beard*¹⁸² and stressed to the jury that, in regard to drunkenness, there must be a "proved incapacity".

In quashing the conviction, Roach J. A., speaking for the court, said:

. . . the jury may have been left with the impression that for the accused to escape a conviction of murder there was *some burden on him* to raise a doubt in their minds as to whether or not as result of drunkenness, he had the capacity to form the intent.¹⁸³

His Lordship then went on to say, in effect, that if the jury started with the presumption that the accused intended the result because the trial judge told them he was presumed to have so intended, but that that presumption could be rebutted by evidence, the jury might conceivably have thought there was some burden on the accused to rebut the presumption. The error was only compounded by the trial judge telling the jury that the accused was not bound to satisfy them as to his innocence "it is sufficient *for him* to raise a reasonable doubt as to his guilt".

Similarly the stress on the expression "proved incapacity" was criticized as leaving the jury with the impression that the burden of proving that incapacity rested on the accused. It was on the Crown to prove the capacity not on the accused to disprove it. In this, Roach J. A. was following the instruction of the Supreme Court of Canada in *Malanik*¹⁸⁴ where Kerwin J., speaking for the court, said: ". . . we think it proper to state unequivocally that a trial judge should not use the word 'proved' in his charge in any case where drunkenness is set up as a defence to a charge of murder."¹⁸⁵ This position was reaffirmed by the Supreme Court in *Capson*.¹⁸⁶

The Privy Council¹⁸⁷ has also disapproved the use of the phrase

¹⁸¹ *Ibid.*, at p. 209 (C.C.C.).

¹⁸² *Supra*, footnote 51, at p. 502 (A.C.).

¹⁸³ *Supra*, footnote 180, at p. 211 (C.C.C.). Emphasis added.

¹⁸⁴ *R. v. Malanik*, [1952] 2 S.C.R. 335, 103 C.C.C. 1, 14 C.R. 367. See also *Regina v. Hilson*, [1958] O.R. 665 (Ont. C.A.): "The learned trial Judge, on the one hand instructs the jury that there must be proven capacity, beyond doubt, to form intent, and on the other hand, for drunkenness to be effective as a defence, there must be proven incapacity as a result of it. The repeated references to the onus that is upon the Crown, fail to reconcile these inconsistencies". *Per* Porter C.J.O., at p. 670.

¹⁸⁵ *Ibid.*, at p. 341 (S.C.R.).

¹⁸⁶ [1953] 1 S.C.R. 44, 105 C.C.C. 1, 16 C.R. 1.

¹⁸⁷ *Broadhurst v. The Queen*, [1964] A.C. 441, 1 All E.R. 111, 2 W.L.R. 38 (P.C.).

"proved incapacity". The Chief Justice of Malta had quoted the third proposition in *Beard*¹⁸⁸ to a jury. Lord Devlin commented:

In putting the matter in this way the Chief Justice was following verbatim the words used by Lord Birkenhead L.C. in *Director of Public Prosecutions v. Beard*. But much has been said judicially since 1920 about proof of intent, notably in *Woolmington v. Director of Public Prosecutions*. Before the Board the Crown conceded that it is not for an accused to prove incapacity affecting the intent and that if there is material suggesting intoxication the jury should be directed to take it into account and to determine whether it is weighty enough to leave them with a reasonable doubt about the accused's guilty intent. Their Lordships approve this concession. The dictum of Lord Birkenhead L.C. cannot be treated as laying down the law upon burden of proof and it is therefore unwise to use the dictum in a direction to a jury.¹⁸⁹

Lord Devlin's statement applies as much to the use of the presumption of natural consequences as it does to the use of the phrase "proved incapacity". The dictum is question said "evidence . . . falling short of a proved incapacity . . . does not rebut the presumption that a man intends the natural consequences of his acts".¹⁹⁰ The presence of the *mens rea* necessary for a crime can only be inferred from the evidence as a whole, and the fact of intoxication is part of the evidence.¹⁹¹

¹⁸⁸ *Supra*, footnote 51, at p. 502 (A.C.).

¹⁸⁹ *Supra*, footnote 187, at pp. 462-463 (A.C.).

¹⁹⁰ *Supra*, footnote 51, at p. 502 (A.C.).

¹⁹¹ The proper way to consider evidence of drunkenness is, it is submitted, the way suggested by Lord Devlin in *Broadhurst*, *supra*, footnote 187. "One way of approaching the problem [of proving intent] is to say that it is always for the Crown to prove that the accused actually had the intent necessary to constitute the crime, and that proof may emerge from evidence or statements made by the accused about his own state of mind or may be made by way of inference from the totality of the circumstances. *Prima facie* intoxication is one circumstance to be taken into account . . ." at p. 461. This approach, said Lord Devlin, was indicated by s. 35(4) of the Maltese Criminal Code but his Lordship was concerned that "superficially, at any rate" this was different from the approach dictated by *Beard* "that there must be proof (or at least some suggestion) of incapacity . . .". However his Lordship said he did not have to consider the matter because in *Broadhurst* there was no direct evidence about the accused's state of mind, "what he intended to do is a matter for inference". From this Lord Devlin reached the strange conclusion that "In a case in which the intent of an accused is to be ascertained solely by inference, nothing short of incapacity need be considered", at p. 462. Only if the accused gave evidence as to what his state of mind was, could the jury consider lack of intent caused by intoxication, otherwise they could only consider intoxication if it was of such a nature as to render the accused incapable of forming any intent at all. The effect of this is to set up different tests depending on whether or not the accused gives evidence. If he does, his intoxication is one piece of evidence that is considered with the whole in determining the presence or absence of the required *mens rea*. If he does not, only evidence of intoxication of such a degree that it would render the accused incapable of forming any intent at all, need be considered. Surely this cannot be so. The use of the word "incapacity" by Lord Birkenhead in *Beard* was un-

The objections raised by the Ontario Court of Appeal in *Giannotti*¹⁹² and by the Privy Council in *Broadhurst*¹⁹³ apply to any case in which the presumption is used. If a rebuttable presumption of intention is placed on the accused is not the onus put on him to prove, in the case of drunkenness, his lack of intent, and in any other case, that he did not intend the consequences? How can it be denied, to paraphrase Roach J. A., that once a jury is told there is a presumption that might be rebutted by evidence, they might think there is an onus cast on the accused to rebut that presumption? To tell them also that the onus of proof is on the Crown, and always remains on the Crown, is to give a contradictory direction. To add, as is often done, that the accused must only raise a reasonable doubt, is to direct a jury in terms contrary to *Woolmington*.¹⁹⁴

Some commentators have taken solace from the approach to the problem indicated by Lord Denning in *Hosegood v. Hosegood*.¹⁹⁵ In that case, which was one of constructive desertion, Lord Denning said that the presumption is not one of law but of ordinary good sense. It is an inference which may but *need not be* drawn. If on all the facts it is not the correct inference, then it should not be drawn. Lord Denning's approach is to be welcomed as at least discarding the fiction. But his comments were made in the context of a civil case. They do not meet the problem of the use of the presumption in a criminal case, regardless of how the matter is put to the jury. As soon as the words "presumption" and "rebut" are used, the objection raised by Roach J. A. in *Giannotti*¹⁹⁶ is an inevitable consequence.

The approach taken by Lord Goddard in *Steane*¹⁹⁷ (and adopted by the Australian High Court in *Smythe*)¹⁹⁸ is, it is submitted, the correct one. Lord Goddard's approach was simply that where an offence requires a particular intent, that intent must be proved by the Crown just as any other fact necessary to constitute the offence.

fortunate. It is submitted that the sense of the judgment in *Beard* is clearly that evidence of drunkenness is to be considered with all the other evidence in determining the intent of the accused. The approach Lord Devlin said was indicated by the Maltese Criminal Code is, it is submitted, the only possible approach. It is simply that evidence of drunkenness, regardless of whether it arises from the evidence for the prosecution or defence, is relevant to *mens rea*, and should be considered by the jury along with all other relevant evidence in determining whether the prosecution has proved the presence of the required *mens rea* beyond a reasonable doubt.

¹⁹² *Supra*, footnote 180.

¹⁹³ *Supra*, footnote 187.

¹⁹⁴ *Supra*, footnote 159.

¹⁹⁵ (1950), 66 T.L.R. 735 (C.A.).

¹⁹⁶ *Supra*, footnote 180.

¹⁹⁷ [1947] K.B. 997, 1 All E.R. 813 (C.A.).

¹⁹⁸ (1957-58), 98 C.L.R. 163.

Moreover, the Crown may fail to satisfy the jury as to the necessary intent regardless of what the natural consequences of the act might appear to be. As to the inference of natural consequences, Lord Goddard said:

No doubt if the prosecution prove an act the natural consequences of which would be a *certain* result and *no evidence or explanation is given*, then a jury may on a proper direction find that the prisoner is guilty of doing the act with the intent alleged, but if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury's satisfaction and if on a review of the whole evidence they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted.¹⁹⁹

Where the result of an act is certain and no explanation or evidence is offered, a "proper direction" does not require any reference to a rebuttable presumption for a jury to find the accused guilty of doing the act with the intent alleged.

Undoubtedly for an accused to establish the defence of drunkenness, or any other defence, it will be necessary for him to offer some evidence although, to repeat, the Crown's case may establish all the evidence necessary. But the crucial point, as stressed by the Privy Council in *Chan Kau*²⁰⁰ and the Court of Criminal Appeal in *Lobell*²⁰¹ and *Johnson*²⁰² is that there is never any onus on the accused to establish a defence. Citing *Woolmington*²⁰³ and *Mancini*,²⁰⁴ Lord Tucker stated:

. . . the onus is never upon the accused to establish this defence (self-defence) anymore than it is for him to establish provocation or any other defence apart from that of insanity.²⁰⁵

In *Johnson*, Ashworth J., said:

It [an alibi] is the answer which the accused puts forward, and the burden of proof—in the sense of establishing the guilt of the accused, rests throughout on the prosecution. If a man puts forward an answer in the shape of an alibi or in the shape of self-defence, he does not in the law thereby assume any burden of proving that answer.²⁰⁶

In *Lobell*,²⁰⁷ Lord Goddard recognized that before any defence can be left to a jury there must be some evidence for it, and that ordinarily such evidence will be given by the accused.

¹⁹⁹ *Steane*, *supra*, footnote 197 (emphasis added).

²⁰⁰ [1955] A.C. 206, 1 All E.R. 266, 2 W.L.R. 192 (P.C.).

²⁰¹ [1957] 1 Q.B. 547, 1 All E.R. 734, 2 W.L.R. 524 (C.C.A.).

²⁰² [1961] 3 All E.R. 969 (C.C.A.). ²⁰³ *Supra*, footnote 159.

²⁰⁴ *Mancini v. D.P.P.*, [1942] A.C. 1, [1941] 3 All E.R. 272.

²⁰⁵ *Chan Kau*, *supra*, footnote 200, at p. 211 (A.C.).

²⁰⁶ *Supra*, footnote 202, at p. 970. ²⁰⁷ *Supra*, footnote 201.

But there is a difference between leading evidence which would enable a jury to find an issue in favour of a defendant and in putting the onus upon him. . . . It is perhaps a fine distinction to say that before a jury can find a particular issue in favour of an accused person he must give some evidence on which it can be found but nonetheless the onus remains on the prosecution; what it really amounts to is that if in the result the jury are left in doubt where the truth lies the verdict should be not guilty.²⁰⁸

Whatever might have been the reason for the use of the presumption in the past—whether it was to ease the path of the prosecution; whether it was because of suspicion of any attempt to look into the human mind; whether it was that prior to the Criminal Evidence Act of 1898²⁰⁹ the accused could not give evidence and until the Prisoners' Counsel's Act of 1836²¹⁰ counsel were permitted only to argue points of law—it is submitted that the presumption should no longer be used in directing a jury. The objection to its use has been succinctly stated by the High Court of Australia:

The introduction of the maxim or statement that a man is presumed to intend the reasonable consequences of his act is seldom helpful and always dangerous. For it either does no more than state a self evident proposition of fact or it produces an illegitimate transfer of the burden of proof of a real issue of intent to the person denying the allegation.²¹¹

The Supreme Court of the United States has condemned the use of the presumption in terms that also reject the "may not must" approach proposed by Lord Denning in *Hosegood v. Hosegood*.²¹²

We think presumptive intent has no place in this case. A conclusive presumption which testimony could not overthrow would effectively eliminate intent as an ingredient of the offence. A presumption which would permit but not require the jury to assume intent from an isolated fact would prejudice a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect. In either case, this presumption would conflict with the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime. Such incriminating presumptions are not to be improvised by the judiciary.²¹³

The position in Canada is unclear because of the decision of the Supreme Court in *Bradley*.²¹⁴ It is submitted, however, that

²⁰⁸ *Ibid.*, at p. 527 (W.L.R.).

²⁰⁹ *Supra*, footnote 120.

²¹⁰ 6 & 7 William 4, c. 114 (1837).

²¹¹ *Stapleton v. The Queen* (1952-53), 86 C.L.R. 358, at p. 365.

²¹² *Supra*, footnote 195.

²¹³ *United States v. Morissette*, *supra*, footnote 4, at p. 252.

²¹⁴ [1956] S.C.R. 723, 116 C.C.C. 341.

that decision required a subjective test of intention and left ample room for rejection of the use of the presumption in a future case.

The accused in that case, after becoming very drunk, engaged in a fight with the deceased. After knocking him down, kicking him and gagging him with a belt, the accused left the deceased lying unconscious in a deserted alley at two o'clock in the morning with the temperature four degrees below zero. An autopsy disclosed a fractured skull. Death was a result of one or more of the injuries and of exposure.

The trial judge told the jury that in considering the intent of an accused they were to start with a presumption of law that every man is presumed to intend the natural consequences of his acts. He further told them that the accused must be taken to have intended the natural consequences of his conduct if he was capable, having regard to his drunkenness, of forming an intent to do the harm, and of knowing that it was likely to cause death. The accused was convicted of murder and the Manitoba Court of Appeal affirmed without written reasons. The Supreme Court affirmed by a majority of four to three.

The dissents (Rand, Cartwright and Nolan JJ.) all said that the accused's actual intent was a matter for the jury. The effect of the above direction was to take that question away from it. Unfortunately, even in his dissent, Cartwright J. approved the use of the presumption for he said that it "was for the jury, giving due weight to the rebuttable presumption—[of] intention—to decide as a fact whether the appellant had the guilty intent necessary to make him guilty of murder—".²¹⁵

Of the majority, Fauteux J. (Kerwin C. J. C. and Taschereau J., concurring) said that one was irresistibly forced to the conclusion, failing the defence of lack of intent due to drunkenness, that the accused either intended to cause death or to cause bodily harm known to him to be likely to cause death. Most importantly, Fauteux J. noted that certain portions of the charge to the jury dealing with presumption of intention "could be objectionable"²¹⁶ but were adequately corrected when the trial judge dealt with the actual intent that had to be proved before the accused could be convicted of murder.

Locke J., agreed that the passages objected to had to be read with the instruction, twice repeated, that the jury must find intention on the part of the accused to convict. and concluded that no miscarriage of justice had occurred.

²¹⁵ *Ibid.*, at p. 753 (S.C.R.).

²¹⁶ *Ibid.*, at pp. 728-729.

In the result, no member of the court asserted an objective theory of liability, nor did any member approve the use of an ir-rebuttable presumption of intention, nor is it clear that the majority would approve the use of a rebuttable presumption in all cases. On the facts of *Bradley*, a jury would hardly need support from a presumption of intention to justify a verdict of murder. To insert such a presumption in the middle of an otherwise unobjectionable direction is to commit the error so cogently noted in *Giannotti*.²¹⁷ It is to be hoped that the Supreme Court will follow the lead of the highest courts in the United States and Australia and reject the use of the presumption altogether.

VI

The social consumption of alcohol is almost universal in our society. The physiological and psychological effects of alcohol are known in a general way to even the most moderate drinker. Public opinion, however, would not approve of laws which totally excused those who committed crimes while intoxicated. While this attitude may be considered by some to be hypocritical, it is clearly based on sound social policy. "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 counter-balance the potential danger."²¹⁸ There is an uneasiness in the criminal law, however, over punishing an actor who, *at the time of the commission of the offence*, was not fully responsible for his actions. As a result, the law has been ameliorated in the past century and a half so that the fact of intoxication is now relevant in the trial of an accused. No one could suggest that the *Beard*²¹⁹ rules are anything other than compromise solutions to a mixed problem of social policy, *mens rea* and responsibility. The time has now come, it is submitted, for a more rational and accurate analysis of the problem and, it is hoped, a more rational and effective solution.

The jury in a criminal trial must necessarily make inferences as to intent or recklessness from overt acts. Intoxication is but one factor that might be introduced in evidence that will help shape that inference. There is no need for any special rule in regard to it. When the definition of a crime requires purpose or knowledge, intoxication, among other factors, should be allowed to show ab-

²¹⁷ *Supra*, footnote 180.

²¹⁸ Model Penal Code, s. 2.08, Tentative Draft No. 9 (1959) commentary at p. 9.

²¹⁹ *Supra*, footnote 51.

sence of such purpose or knowledge. There is no need to invoke the fiction of "general intent" crimes and "specific intent" crimes. What is required is an analysis of the requisite mental elements of each crime and the application of consistent principles in showing absence of one or more of those elements. The fact that the purpose was lacking or the knowledge was not present was due to self-induced intoxication is irrelevant.

In those crimes that are presently labelled "general intent" crimes it will undoubtedly be difficult for an accused to establish lack of *mens rea* due to intoxication. The commission of the act itself—as in assault—will be an almost insuperable piece of evidence for the defence to overcome. The prosecution has a strong *prima facie* case from the fact of the *actus reus* and a jury does not require help in drawing inferences from an erroneous presumption of intention. But there is no logical reason why intoxication should not negative *mens rea* in such a case. A mistake may have been made, an accident happened, or foresight or consequences been lacking because of intoxication, and if there is sufficient evidence of it, the accused is entitled to the benefit of any reasonable doubt.

The question of recklessness is a more difficult one. There is no doubt that acute intoxication can blunt awareness of the risks involved in particular conduct. Thus the *mens rea* of recklessness may be negated and an acquittal should follow. There is a general feeling, however, that becoming so intoxicated is itself blameworthy and the defence should not be admitted. This feeling is best summed up by the American Law Institute in its Model Penal Code:

... there is the fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair 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. Added to this are the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes and the relative rarity of cases where intoxication really does engender unawareness as distinguished from imprudence. These considerations lead us to propose, on balance, that the Code declare that unawareness of a risk of which the actor would have been aware had he been sober be declared immaterial.²²⁰

²²⁰ *Supra*, footnote 218. S. 2.08(2) of the proposed official draft of the Model Penal Code (1962), provides "when recklessness establishes an element of the offence, if the actor due to self-induced intoxication, is un-

The other point of view, expressed particularly by Dr. Williams²²¹ and recognized in *Stones*,²²² is that it is a consequence of accepted principles that drunkenness can negative recklessness and should be allowed in evidence to do so. It still would be possible, as was the case in *Edwards v. State*,²²³ and might often be the case, to prove foresight of consequences at the time of drinking by showing prior experience of becoming dangerous when intoxicated.

Another suggested possibility is to copy the Danish experience and have a separate offence of being drunk and dangerous. It is this last suggestion which perhaps offers the most realistic solution to a difficult problem. Such a solution would allow for the identification, and, it is hoped, treatment of the habitual drunkard and alcoholic addict. Diagnosis of those who commit crimes while drunk, particularly sex crimes, would undoubtedly disclose sicknesses that would require treatment in other than penal institutions. Those who are simply criminals who drink excessively would be properly subject to penal sanctions. But they also require treatment for their alcohol problem and proper probationary supervision. Those who have neither a criminal record nor any past history of being drunk and dangerous do not belong in prison but might well be put on an interdict list or be placed on probation. Only by a discarding of fictions, an appreciation of the actual effects of alcohol, and the application of proper sanctions and treatment, can the criminal law deal rationally with the problem of the intoxicated offender.

aware of a risk of which he would have been aware had he been sober, such unawareness is immaterial". S. 2.08(1) provides "... intoxication of the actor is not a defence unless it negatives an element of the offence". The effect of the Code's provisions is to retain the common law position.

²²¹ Williams, *op. cit.*, footnote 7, p. 571.

²²² *Supra*, footnote 136.

²²³ *Supra*, footnote 149.