

A THEORY OF THE INTOXICATION DEFENCE

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Introduction

My present objective is to challenge the widespread academic opinion that, in respect of the effect of intoxication upon criminal responsibility, the law is an ass.

The focus of criticism has been the distinction between offences of *specific* intent and offences of *general* (or *basic*) intent and the rule that a sufficient degree of self-induced intoxication may negative the requisite mental element of the former but not the latter. It is often said that no principled or satisfactory explanation can be made of how this distinction operates. For example: the specific intent rule is characterized by "silliness" and "absurdity";¹ it has "applications and modifications that are arbitrary and must be learned by rote";² "the designation of crimes as requiring, or not requiring, specific intent is based on no principle" and to know how an offence should be classified "we can look only to the decisions of the courts";³ these decisions have manifested "a Humpty Dumpty attitude" with the result that it is "impossible to make sense" of the lists of each type of offence.⁴

Those academics who have defended the distinction have generally done so on grounds of social policy, while recognizing some illogicality or inconsistency of application.⁵ This was also the position taken by several members of the House of Lords in the leading English case of *D.P.P. v. Majewski*.⁶ Thus, Lord Salmon said:⁷

. . . I accept that there is a degree of illogicality in the rule that intoxication may excuse or expunge one type of intention and not another. This illogicality is.

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¹ Parker, *Criminal Law—Mens Rea—General Principles—Intoxication as a Defence* (1977), 55 Can. Bar Rev. 691, at p. 702

² Fingarette and Hasse, *Mental Disabilities and Criminal Responsibility* (1979), p. 78.

³ Smith and Hogan, *Criminal Law* (4th ed., 1978), p. 187.

⁴ Williams, *Textbook of Criminal Law* (1978), pp. 428-429.

⁵ See Ashworth, *Reason, Logic and Criminal Liability* (1975), 91 L.Q. Rev. 102, at pp. 112-119 and 129-130; Dashwood, *Logic and the Lords in Majewski*, [1977] Crim. L. Rev. 532, and 591.

⁶ [1977] A.C. 443.

⁷ *Ibid.*, at pp. 483-484. See also per Lord Edmund-Davies, at pp. 492-494, and per Lord Russell, at p. 498.

however, acceptable to me because the benevolent part of the rule removes undue harshness without imperilling safety and the stricter part of the rule works without imperilling justice. It would be just as ridiculous to remove the benevolent part of the rule (which no one suggests) as it would be to adopt the alternative of removing the stricter part of the rule for the sake of preserving absolute logic. Absolute logic in human affairs is an uncertain guide and a very dangerous master.

In the leading Canadian case of *Leary v. The Queen*,⁸ the majority of the Supreme Court of Canada was content to follow existing authority.⁹ Speaking for the dissenting minority, however, Dickson J. endorsed the dissatisfaction of so many academics. He described the distinction between specific and general intent as "neither meaningful nor intelligible,"¹⁰ and as "indefensible".¹¹ His conclusion was that the absence of the requisite mental element should always be a defence to the crime charged.¹²

It will be contended here that the intoxication rules can be explained in terms of a coherent set of principles. The limits of this argument should, however, be stressed. The claim is not that the terms "specific intent" and "general intent" represent anything more than labels identifying the offences for which self-induced intoxication may and may not give rise to a defence. It is rather that the classification of an offence as being of one type or the other is compatible with a largely implicit and unrecognized logic. Nor is it contended that the intoxication rules are correct. It is merely that they constitute a rational development from social judgments about which reasonable people may differ.

There follows an attempt to summarize the principles which govern the criminal responsibility of intoxicated persons in English and Canadian law. Subsequent sections will be directed to the analysis and defence of this statement of principles.

1. Absence of *mens rea* because of intoxication which was not culpable (that is not intentional or reckless) is a defence to a charge requiring proof of *mens rea*. Similarly, lack of voluntary action because of intoxication which was not culpable is a defence to any charge, including a charge of an offence of strict or absolute liability.
2. Absence of voluntariness or *mens rea* because of culpable intoxication (that is intoxication which was intentional or reckless) is not ordinarily a defence to a criminal charge. Wherever the nature of the offence and the sentencing provision permit, the actor is held

⁸ [1978] 1 S.C.R. 29.

⁹ *Ibid.*, at pp. 50-53.

¹⁰ *Ibid.*, at p. 42.

¹¹ *Ibid.*, at p. 44.

¹² *Ibid.*, at pp. 47-48. This has also been the conclusion of the High Court of Australia: see *The Queen v. O'Connor* (1980), 54 A.L.J.R. 349.

absolutely liable for his conduct, so that the doing of the prohibited act constitutes the offence, and any reduced fault is taken into account only as a mitigating factor in sentencing.

3. Absence of voluntariness or *mens rea* because of culpable intoxication is a defence to a charge which requires proof of ulterior intent and therefore does not permit the imposition of absolute liability. Under ordinary principles, an actor can only be held absolutely liable for conduct that has actually occurred. An offence of ulterior intent requires proof of a state of mind with respect to material circumstances that lie beyond the *actus reus* of the offence and need not necessarily have been realized.

4. Absence of voluntariness or *mens rea* because of culpable intoxication is a defence to the charge of an offence that carries a fixed penalty and therefore does not permit the exercise of sentencing discretion in appropriate cases. This holds even where the charge does not require proof of ulterior intent.

In at least one respect the foregoing statement is clearly open to question. It is assumed that, where culpable intoxication is permitted to negate responsibility, it does so in the event that the requisite mental element of the offence was not in fact present. This seems in accordance with the weight of contemporary authority. There have, however, been many suggestions to the effect that the actor must have been intoxicated to such a degree that he was incapable of voluntary action or of forming the requisite *mens rea*. The form of the intoxication defence will be discussed after the conditions for its availability have been examined, since in part the answer to the problem depends on these conditions.

1. *Intoxication and Culpability.*

Why should the criminal law be concerned at all with the mental state of an alleged offender? It is deviant conduct, not thoughts, which the law is primarily designed to control. And, on a theory of general deterrence, an argument could be made for the absolute liability of anyone who commits an act which is prohibited by law.¹³

Among the various theories which have been advanced to explain the mental component in criminal responsibility, the most attractive is perhaps that associated with Hart: the theory of "fairness".¹⁴ At its core is the idea that, recognizing that the individual has some claims against the collectivity, an offender should only be stigmatized and

¹³ See Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968), pp. 40-43.

¹⁴ *Ibid.*, *passim*.

punished to serve the public good when we are satisfied that he could and should have chosen not to engage in the conduct for which he is alleged to be liable. Whether or not we feel that he *could* have chosen otherwise will depend on our prevailing physiological and psychological theories of the causation of human action. Whether or not we feel that he *should* have chosen otherwise will depend on our prevailing ethical theories of social behaviour.

The focus of inquiry into criminal responsibility is ordinarily on the alleged offender's state of mind at the moment when he performed the prohibited act. Thus, if his exercise of reasoning powers played no immediate part in its causation, it is usually concluded that he could not have chosen to avoid it and the defence of automatism is available. Similarly, if he did not know the circumstances or foresee the consequences which happen to make the act a criminal offence, it is usually concluded that there are insufficient grounds to support a determination that he should have chosen to avoid it and the defence of lack of *mens rea* is available.

On one theory of criminal responsibility, this focus on a culpable state of mind which is contemporaneous with the prohibited conduct has the status of a fundamental principle from which departures are to be permitted, if at all, only under the most extraordinary circumstances. Hence the objection to the denial of a defence of lack of voluntary action or *mens rea* which was due to self-induced intoxication. In his dissent in *Leary*, Dickson J. concluded:¹⁵

Intoxication is one factor which, with all of the other attendant circumstances, should be taken into account in determining the presence or absence of the requisite mental element. If that element is absent, the fact that it was absent due to intoxication is no more relevant than the fact of intoxication giving rise to a state of insanity.

There is, however, a difficulty with the principle of contemporaneity. There may be cases in which, although there are insufficient grounds to conclude that an actor could and should have chosen otherwise at the moment of action, we nevertheless feel that he could and should have made earlier choices which would have prevented any mental impairment or would even have avoided the situation in which he acted ever arising. It is on this theory that the common law has traditionally denied a general defence of lack of voluntary action or *mens rea* where the absence was the result of intoxication.¹⁶

¹⁵ *Supra*, footnote 8, at p. 47.

¹⁶ The analogy sought by Dickson J. between intoxication and insanity is inappropriate. Where the insanity defence succeeds on a charge of an indictable offence, the result is the special verdict and indeterminate detention provided by sections 542 and 545 of the Criminal Code, R.S.C., 1970, c. C-34, as am.

The defence has been admitted where there were insufficient grounds to conclude that the actor could and should have avoided becoming intoxicated. This is clearly the case where his intoxication was neither intentional nor reckless. Thus, if he did not voluntarily and knowingly consume the substance which happened to produce an intoxicating effect, his intoxication is not held culpable.¹⁷ Similarly, it is not culpable if he did not appreciate its intoxicating effect. In *The Queen v. King, Ritchie J.* said:¹⁸

It seems to me that it can be taken as a matter of "common experience" that the consumption of alcohol may produce intoxication . . . and I think it is also to be similarly taken to be known that the use of narcotics may have the same effect, but if it appears that the impairment was produced as a result of using a drug in the form of medicine on a doctor's order or recommendation and that its effect was unknown to the patient, then the presumption [that a man intends the natural consequences of his conduct] is, in my view, rebutted.

It has been further suggested by Smith and Hogan¹⁹ that evidence of intoxication may be used to support a defence whenever the drink or drug was taken in *bona fide* pursuance of medical treatment or prescription, even though there may have been knowledge of its intoxicating effect. As a general proposition, this seems questionable, and there appears to be no authority for it.²⁰ It may be that the intoxication could be held not culpable on the ground of necessity, but presumably it would be required that all reasonable precautions be taken to avoid harm occurring to others.

Apart from the exceptional cases of so-called "involuntary" intoxication, the common law originally took the position that an actor becomes intoxicated at his own risk and is liable to be held responsible for the consequences. Thus, in the early case of *Reniger v. Feogossa*, it was said:²¹

... if a man that is drunk kills another, there he shall not be excused, 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.

¹⁷ See *Pearson's Case* (1835), 2 Lew. 144, 168 E.R. 1108.

¹⁸ [1962] S.C.R. 746, at p. 764.

¹⁹ *Op. cit.*, footnote 3, p. 186.

²⁰ Smith and Hogan cite, as authority, *R. v. Quick*, [1973] 3 All E.R. 347 (C.A.). In that case it was held that the defence of automatism should have been put to the jury where the accused claimed to have assaulted another during a hypoglycaemic episode caused by excess insulin in the bloodstream. The court suggested, however, that relevant questions for the jury would have been whether the accused had brought about his condition by not following his doctor's instructions and whether he knew that he was getting into a hypoglycaemic episode and should have taken an antidote: *ibid.*, at p. 356.

²¹ (1551), 1 Plow. 1, at p. 19, 75 E.R. 1, at p. 31.

In the nineteenth century there was some relaxation of this uncompromising position.²² There may be some dispute about how far this has gone, but Lord Denning was surely not hopelessly wide of the mark when he asserted that there is still "a general principle of English law that, subject to certain very limited exceptions, drunkenness is no defence to a criminal charge, nor is a defect of reason produced by drunkenness".²³

The "fault" which may be imputed to a state of self-induced intoxication was stressed by all of the Law Lords in *Majewski*.²⁴ For example, Lord Salmon claimed:²⁵

A man who by voluntarily taking drink and drugs gets himself into an aggressive state in which he does not know what he is doing and then makes a vicious assault can hardly say with any plausibility that what he did was a pure accident which should render him immune from any criminal liability.

Similarly, Lord Simon concluded:²⁶

There is no juristic reason why mental incapacity (short of M'Naghten insanity), brought about by self-induced intoxication, to realize what one is doing or its probable consequences should not be such a state of mind stigmatized as wrongful by the criminal law; and there is every practical reason why it should be.

If prior fault were alone relevant to the problem of intoxication, it might appear an arbitrary departure from principle. Yet, as Ashworth²⁷ has shown, the intoxication rules in this respect reflect a wider theory of criminal responsibility. Ashworth asserts the existence of a principle in relation to the "general defences" that "an accused should not be permitted to rely on an incapacitating condition which arose through his own fault".²⁸ The principle has been recognized for the defence of automatism.²⁹ Similarly, the Canadian Criminal Code excludes the defence of duress where an actor is "a party to a conspiracy or association whereby he is subject to compulsion".³⁰

²² See *D.P.P. v. Beard*, [1920] A.C. 479, at pp. 495-500; Singh, *History of the Defence of Drunkenness in English Criminal Law* (1933), 49 L.Q. Rev. 528, at pp. 536-542.

²³ *Attorney-General of Northern Ireland v. Gallagher*, [1963] A.C. 349, at p. 380.

²⁴ *Supra*, footnote 6, per Lord Elwyn-Jones, at pp. 474-475, per Lord Simon, at pp. 478 and 479, per Lord Salmon, at p. 482, per Lord Edmund-Davies, at pp. 496-497, per Lord Russell at p. 498.

²⁵ *Ibid.*, at p. 482.

²⁶ *Ibid.*, at p. 478.

²⁷ *Op cit.*, footnote 5.

²⁸ *Ibid.*, at p. 103.

²⁹ *R. v. Quick, supra*, footnote 20; *Rabey v. The Queen* (1980), 54 C.C.C. (2d) 1, per Dickson J., at p. 31 (S.C.C.).

³⁰ *Supra*, footnote 16, s. 17.

None of this is intended as an expression of support for the position which the law has taken. It may well be unjust to treat as like cases a man who commits a crime with full comprehension of what he is doing and a man who performs the same act in a state of intoxicated impairment or oblivion. Indeed, there is much to be said for the commonly advanced view that a special offence of dangerous intoxication should be the answer to the problem of the culpably intoxicated offender.³¹

Nevertheless, there is no patent absurdity in the traditional approach of the common law, which imposes absolute liability where lack of voluntariness or *mens rea* was due to culpable intoxication and makes the question of degree of fault a matter for sentencing rather than criminal responsibility. Nor is this approach to be regarded as a philosophically unconscionable departure from a fundamental principle of contemporaneity. Even accepting the existence of such a principle, it must be weighed in application against other principles and policies. Such flexibility is in the nature of a legal principle.³²

The foregoing argument should be relatively uncontroversial. At its core is the contention that the intoxication rules are constructed on the foundation of a social judgment about which reasonable people may and do differ. If this judgment is wrong, it is not thereby made irrational.

The charge that the intoxication rules are irrational and unintelligible has been levelled primarily on the ground of inconsistency. Absolute liability is not imposed on all offenders whose lack of a requisite mental element was due to culpable intoxication. The law has been relaxed to some extent, and in the process the distinction has emerged between offences of specific and general intent. It is this distinction which is alleged to be philosophically indefensible. Hence, the conclusion is drawn that, once the principle of responsibility because of self-induced intoxication is abandoned for some offences, it should be abandoned for all. Otherwise, the result is arbitrary.

The contrary argument to be advanced is that the exceptions which comprise the category of "specific intent" offences are not inconsistent with the traditional principles governing intoxication and culpability.

³¹ See Report of the Committee on Mentally Abnormal Offenders (1975), Cmnd. 6244, paras 18.51-18.59; Gold, *An Untrimmed "Beard": The Law of Intoxication as a Defence to a Criminal Charge* (1976), 19 *Crim. L.Q.* 34, at p. 82; Smith and Hogan, *op. cit.*, footnote 3, p. 191; *Leary v. The Queen*, *supra*, footnote 8, per Dickson J., at pp. 46-47.

³² See Dworkin, *The Model of Rules* (1967), 35 *U. Chi. L. Rev.* 14, at pp. 22-29.

II. Intoxication as a Defence: (1) Ulterior Intent.

There is a good deal of overlap between the category of "specific intent" offences, to which lack of voluntariness or *mens rea* caused by self-induced intoxication can be a defence, and the category of offences of "ulterior intent", where the requisite mental element includes intention with respect to, not merely the *actus reus* of the offence, but also something which lies beyond the *actus reus*.³³ In an offence of ulterior intent, the prohibited act is performed with a further intention which is treated as material to the criminal responsibility of the actor.

Examples of offences of ulterior intent under the Criminal Code are breaking and entering, where the charge is that a person has broken and entered a place with intent to commit an indictable offence therein,³⁴ and theft, where typically the accusation is that a person has fraudulently and without colour of right taken property with intent to deprive the owner of it.³⁵ Similarly, all offences of attempting to commit an offence involve ulterior intent: the further intention is to effect the *actus reus* of the completed offence.³⁶ Offences of ulterior intent are contrasted with what are loosely referred to as offences of "basic" or "general" intent, where proof of *mens rea* is required with respect to no more than the elements of the *actus reus*. Examples of the latter are rape, manslaughter, and most forms of assault and murder.³⁷ The distinction refers not to the nature of the intent itself but to the relationship between the intent and the *actus reus* of the offence.

The terms "basic" and "general" intent are therefore used in contrast to both specific intent under the intoxication rules and ulterior intent. In order to reduce conceptual confusion, the following terminology will be adopted here: "specific" intent will be contrasted with "general" intent and "ulterior" intent will be contrasted with "basic" intent.

The overlap between offences of specific and ulterior intent is apparent on examination of any of the standard lists of offences for

³³ See Smith and Hogan, *op cit.*, footnote 3, pp. 55-56. Closely related to ulterior intent is ulterior recklessness, where the prohibited act is performed with the foresight of a risk of something else occurring. Smith and Hogan suggest that "where an ulterior intent is required, recklessness is not enough"; *ibid.*, p. 56. While this may be true at common law, a statutory provision can expressly permit a charge that the actor was reckless with respect to the further material circumstance: see, for example, *infra*, footnote 104.

³⁴ *Supra*, footnote 16, s. 306(1)(a).

³⁵ *Ibid.*, s. 283(1)(a).

³⁶ *Ibid.*, s. 24(1).

³⁷ *Ibid.*, ss 143, 205, 212-213, 244.

which self-induced intoxication may and may not provide a defence.³⁸ Among the offences of general intent are such "basic intent" crimes as assault,³⁹ rape⁴⁰ and manslaughter.⁴¹ Among the offences of specific intent are such "ulterior intent" crimes as theft,⁴² robbery (because of the theft element)⁴³ and breaking and entering with intent to commit an indictable offence.⁴⁴ Indeed, it has been said that all offences of ulterior rather than basic intent are offences of specific intent for the purposes of the intoxication rules.⁴⁵

The degree of overlap is such that, when *Majewski* was decided in the Court of Appeal, Lawton L.J. seemed to suggest that ulterior and specific intent are one and the same.⁴⁶ The implication is that specific intent is a special kind of intent, the distinctiveness of which is to be found in its ulterior character. In the House of Lords, Lord Simon took the view that specific intent is broader than ulterior intent, but he did indicate that the latter is one type of the former.⁴⁷

Ulterior intent can provide, at best, a partial explanation of the "specific intent" category. In particular, murder is well established as an offence of specific intent but ordinarily does not include any element of ulterior intent.⁴⁸ An explanation for its characterization as an offence of specific intent must be sought elsewhere.

Some critics, however, have argued further that any overlap between the two categories is merely coincidental: that there is no *prima facie* reason why the ordinarily required mental element should be abandoned for offences of basic but not ulterior intent. This is, for example, the position taken by Smith, who was one of the originators of the concept of ulterior intent:⁴⁹

³⁸ See *infra*, section IV.

³⁹ See *The Queen v. George*, [1960] S.C.R. 871; *D.P.P. v. Majewski*, *supra*, footnote 6.

⁴⁰ See *D.P.P. v. Majewski*, *ibid.*, per Lord Simon, at p. 477, and per Lord Russell, at pp. 499-500; *Leary v. The Queen*, *supra*, footnote 8.

⁴¹ See *D.P.P. v. Beard*, *supra*, footnote 22; *MacAskil v. The King*, [1931] S.C.R. 330; *R. v. Mack* (1975), 22 C.C.C. (2d) 257 (Alta C.A.).

⁴² See *Ruse v. Read*, [1949] 1 K.B. 377; *The Queen v. George*, *supra*, footnote 39; *D.P.P. v. Majewski*, *supra*, footnote 6, per Lord Simon, at p. 477.

⁴³ See *The Queen v. George*, *ibid.*

⁴⁴ See *R. v. Skippen*, [1970] 1 C.C.C. 230 (Ont. C.A.); *R. v. Johnnie and Mamox* (1975), 23 C.C.C. (2d) 68 (B.C.C.A.).

⁴⁵ Smith, Commentary, [1976] Crim. L. Rev. 375, at p. 377.

⁴⁶ *R. v. Majewski*, [1975] 3 All E.R. 296, at p. 306.

⁴⁷ *Supra*, footnote 6, at p. 478.

⁴⁸ See *infra*, footnotes 71-72 and accompanying text.

⁴⁹ Commentary, [1975] Crim. L. Rev. 572, at p. 574. See also Dashwood, *op cit.*, footnote 5, at p. 592.

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

If the principle which underlies the intoxication rules is the imposition of absolute liability in cases where the intoxication is held culpable, it would not be irrational to make an exception for "ulterior intent" crimes. Indeed, it might be thought absurd if this exception were not to be admitted. The imposition of absolute liability, if conceivable at all, would involve a violation of fundamental principles far graver than anything hitherto wrought by the intoxication rules.

For offences of basic intent, the requisite mental element is superimposed upon the requisite conduct. It is therefore dispensable: the performance of the prohibited act can constitute the commission of the offence on the basis of absolute liability. But, if absolute liability is given its ordinary meaning, it is not available as an alternative for offences of ulterior intent. Their material orientation is towards conduct in process, rather than conduct completed.

In a crucially important sense, ulterior intent creates a crime of intent and not of deed. In addition to the intention which accompanies the *actus reus*, there is a free-floating mental element with respect to a further material circumstance which may or may not have been realized. In an attempted crime the further circumstance will never have been realized. Once it is, the attempt becomes the completed offence. In a crime like theft, the further circumstance (deprivation of the rightful possessor) will usually have occurred. Yet it need not have done so and its occurrence is immaterial to the criminal responsibility of the taker.

Thus, a charge of ulterior intent ought to permit a defence of lack of voluntariness or *mens rea*, even where this is due to culpable intoxication, for the simple reason that a person can only be held absolutely liable for what he has actually done. The requirement of an ulterior intent cannot be jettisoned without transforming the basis of responsibility in a manner far more radical than is involved in the mere imposition of absolute liability. If we isolate the ulterior intent part of the offence, and then remove this intent, what is left?

To appreciate the difficulty, suppose that a man is charged with breaking and entering a place with intent to commit an indictable offence therein, contrary to section 306(1)(a) of the Criminal Code. There is evidence indicating that, due to his self-induced intoxication, he was acting as an automaton, oblivious of what he was doing. If the

absence of the requisite mental element is excluded as a defence, the man can be held absolutely liable for his breaking and entering. Yet breaking and entering is only part of the material circumstances which section 306(1)(a) contemplates. It is concerned with breaking and entering as part of a process which, if all had gone as was intended, would have led to the commission of an indictable offence. If the intention is removed, there is no link between the act which was performed and the consequence contemplated in the statutory provision.

Suppose further that a man discharges a firearm in the direction of another and is charged with attempted murder, contrary to section 222 of the Criminal Code. Again, there is evidence indicating that self-induced intoxication had made him oblivious of what he was doing or of the presence of another in the line of fire. If the ordinarily required mental element is jettisoned, he can be held absolutely liable for having discharged a firearm in the direction of another. Here, there is a link, independently of intention, with the consequence of endangering life, which brings the material circumstances of his conduct within the purview of section 222. But it is only a link of likelihood, more or less remote. To hold the actor liable for an offence which contemplates resulting death would be to impose absolute liability for what might have happened rather than what did happen.

The problem does not arise in the example previously cited⁵⁰ with respect to criminal damage and theft. But this is only because, in the particular case, the owner has actually been deprived of his property. Apart from attempted crimes, it is always a possibility (immaterial to criminal responsibility) that the further circumstance to which the ulterior intent is directed may have been realized. If deprivation had not occurred—if, for example, property had been taken and recovered before the loss was experienced by the owner—then, again, absolute liability would have to be imposed on the basis of what might have been. It would not be absolute liability in the form which has developed within the traditional principles of the criminal law.

It is perhaps conceivable that culpably intoxicated persons could be held responsible for what they might have done. Yet, even apart from any philosophical objections, the practical difficulties are enormous. At what point would the taker of property commit the offence of theft?—merely upon picking it up? How should we determine whether the automaton who breaks and enters is likely to commit an indictable offence? Moreover, it is the ulterior intent which binds together the events to which such offences are directed.

⁵⁰ See *supra*, at text accompanying footnote 49.

To remove this intent is to alter fundamentally their material as well as mental character. No equivalent radical transformation is involved in the imposition of absolute liability for crimes of basic intent.

It is only in recent years that attention has been drawn to the concept of ulterior intent. The term itself originated with Smith and Hogan⁵¹ and was subsequently given high judicial recognition by Lord Simon in *D.P.P. v. Morgan*.⁵² Caution should therefore be exercised with respect to the commonly stated proposition that, until the nineteenth century, lack of voluntariness or *mens rea* could never provide a defence when it was due to self-induced intoxication.⁵³ There is no indication that such a rule was ever framed in contemplation of the special problems raised by ulterior intent, and the charge of such intent provided many of the occasions on which the defence was early admitted in the nineteenth century.⁵⁴

There are in fact very few offences not involving an ulterior intent which have been characterized as offences of specific intent. Smith has proposed three: murder, causing grievous bodily harm with intent to cause grievous bodily harm and attempted suicide.⁵⁵ In *Majewski*, Lord Simon also suggested a list of three: doing an act likely to assist the enemy with intent to assist the enemy, causing grievous bodily harm with intent to cause grievous bodily harm, and murder.⁵⁶

These exceptions can quickly be reduced to two: murder and intentionally causing grievous bodily harm. Attempted suicide, like all offences of attempt, patently involves an ulterior intent.⁵⁷ So also does the offence of doing an act likely to assist the enemy with intent to assist the enemy.⁵⁸ It is not required that the enemy actually have been assisted. The exception for murder can readily be explained in accordance with the principle regarding fixed penalties which is

⁵¹ Criminal Law (1st ed., 1965), pp. 38-39.

⁵² [1976] A.C. 182, at pp. 216-217.

⁵³ See *D.P.P. v. Beard*, *supra*, footnote 22, at pp. 494-495; Singh, *op. cit.*, footnote 22, at pp. 528-535.

⁵⁴ See *R. v. Cruse* (1838), 8 Car. & P. 541, at p. 546, 173 E.R. 610, at p. 612 (assault with intent to murder); *R. v. Monkhouse* (1849), 4 Cox C.C. 55, at p. 56 (wounding with intent to murder); *R. v. Moore* (1852), 3 Car. & K. 319, 175 E.R. 571 (attempted suicide); *R. v. Stopford* (1870), 11 Cox C.C. 643 (wounding with intent to do grievous bodily harm). A contrary decision may be *R. v. Meakin* (1836), 7 Car. & P. 297, 173 E.R. 131: the language is, however, ambiguous.

⁵⁵ *Op. cit.*, footnote 45, at p. 377.

⁵⁶ *Supra*, footnote 6, at p. 478.

⁵⁷ Attempted suicide was one of the earliest offences for which the intoxication defence was permitted: see *R. v. Moore*, *supra*, footnote 54.

⁵⁸ See *R. v. Steane*, [1947] K.B. 997.

discussed in the following section. This leaves intentionally causing bodily harm as the only problem.

In England, intentional wounding and causing grievous bodily harm are governed by section 18 of the Offences Against the Person Act, 1861.⁵⁹ It must be conceded that, although these have been characterized as offences of specific intent,⁶⁰ they do not include an ulterior intent. Yet, in other modes, the section does permit charges of ulterior intent: for example, wounding with intent to cause grievous bodily harm⁶¹ and shooting with intent to do grievous bodily harm or to resist lawful apprehension.

This is also the position in Canada, where likewise intentional wounding has been held to be an offence of specific intent.⁶² Section 228 of the Criminal Code⁶³ permits the charge of the "basic intent" offence of causing bodily harm with intent to wound. Other charges can be the "ulterior intent" offences of causing bodily harm with intent to maim or disfigure and of discharging a firearm with intent to wound or to prevent arrest.

With respect to statutory provisions of this kind, two options are available. The particular charge may be characterized as alleging an offence of specific or general intent. Alternatively, the statutory provision as a whole may be characterized as creating an offence of specific intent because of the possibility that the particular charge may allege ulterior intent. In general, the former approach would seem preferable, especially where the accusation of ulterior intent is exceptional.⁶⁴ Nevertheless, in the cases of section 18 of the Offences

⁵⁹ 1861, 24 & 25 Vict., c. 100: "Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, or shoot at any person, or, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony"

⁶⁰ See *Bratty v. Attorney-General for Northern Ireland*, [1963] A.C. 386, per Lord Denning, at p. 410; *R. v. Pordage*, [1975] Crim. L. Rev. 575 (C.A.); *D.P.P. v. Majewski*, *supra*, footnote 6, per Lord Simon, at p. 477, per Lord Salmon, at pp. 480-481, per Lord Edmund-Davies, at p. 493, per Lord Russell, at p. 499.

⁶¹ As Lord Simon has noted, the crime could be committed without any serious physical injury being caused; *supra*, footnote 52, at p. 217.

⁶² See *R. v. Penny* (1959), 125 C.C.C. 341, at p. 345 (N.S. Mag. Ct.).

⁶³ *Supra*, footnote 16: "Everyone who, with intent (a) to wound, maim or disfigure any person, (b) to endanger the life of any person, or (c) to prevent the arrest or detention of any person, discharges a firearm, air gun or air pistol at or causes bodily harm in any way to any person, whether or not that person is the one mentioned in paragraph (a), (b) or (c), is guilty of an indictable offence"

⁶⁴ For example, a charge of common assault under s. 245(1) of the Criminal Code may rest upon an allegation that the accused attempted to apply force to the person of

Against the Person Act and section 228 of the Criminal Code, the accusation is not exceptional. The form in which the same offence is charged varies widely and often involves ulterior intent. Considerations of simplicity and convenience may therefore justify treating the sections as a whole as creating offences of specific intent. This avoids having to determine the character of each particular charge.

III. *Intoxication as a Defence: (2) The Fixed Penalty.*

Some of the older authorities appear to suggest that self-induced intoxication aggravates rather than mitigates the "fault" of an accused who lacked voluntariness or *mens rea*.⁶⁵ As Singh has noted, however, it may be "that *omne crimen ebrietas et incendit et detegit* was little more than rhetorical flourish inspired by the spirit of the times . . .".⁶⁶ Certainly this view has been rejected in modern times, when judges have often spoken of "mitigation" and "merciful relaxation" as factors underlying the intoxication rules.⁶⁷ Thus, as Dickson J. said in *Leary*:⁶⁸

The notion that drunkenness might negative an intent integral to the more serious charge, such as murder, and permit conviction of a lesser charge, such as manslaughter, of which the intent was not a constituent element, was conceived in response to humanitarian urgings which sought to distinguish between the homicide committed in cold blood by a sober person and one committed by a drunken person.

Ordinarily there is no need to scale down the gravity of the offence in order to take account of any reduced fault of the accused. If it is thought appropriate, sentencing discretion may be exercised in his favour.⁶⁹ Moreover, acquittal of an offence of specific intent will not always leave a lesser included offence of general intent of which the accused may be absolutely liable. The classification of theft,⁷⁰ for example, could hardly be explained on this basis.

The reasoning of Dickson J. is, however, peculiarly appropriate to the problem of murder. Murder is well established as a crime for which lack of the requisite mental element due to self-induced intoxication will provide acquittal of the major charge and conviction of

another, having had or causing the other to believe that he had the ability to effect his purpose: see s. 244(b). In such a case, the intoxication defence should be permitted. Ordinarily, however, assault is not a crime of ulterior intent.

⁶⁵ See *Reniger v. Feogossa*, *supra*, footnote 21, at p. 31; Singh, *op. cit.*, footnote 22, at pp. 531-533.

⁶⁶ *Op. cit.*, footnote 22, at p. 532.

⁶⁷ See *D.P.P. v. Beard*, *supra*, footnote 22, at p. 495; *D.P.P. v. Majewski*, *supra*, footnote 6, *passim*.

⁶⁸ *Supra*, footnote 8, at pp. 39-40.

⁶⁹ See *D.P.P. v. Majewski*, *supra*, footnote 6, per Lord Elwyn-Jones at p. 475.

⁷⁰ See *supra*, footnote 42.

the lesser included offence of manslaughter.⁷¹ Yet it is almost always a crime of basic intent. Ulterior intent is only in issue in a few instances of constructive murder⁷² and it may be difficult to account for the "specific intent" classification of the offence under the principles enunciated in the previous section. Nevertheless, murder carries a fixed penalty. If sentencing discretion is to be permitted in the case of the culpably intoxicated offender, the offence must be classified as one of specific intent so that the discretionary provision for manslaughter will apply.⁷³

That the law should have taken this course is not surprising. The same phenomenon is observable in relation to the defence of provocation. Both at common law and under the Criminal Code, provocation has been a defence to murder alone and, when raised successfully, leads to the same result of a conviction of the lesser included offence of manslaughter.⁷⁴ As Viscount Simon said in *Holmes v. D.P.P.*:⁷⁵

... the reason why the problem of drawing the line between murder and manslaughter, where there has been provocation, is so difficult and important, is because the sentence for murder is fixed and automatic. In the case of lesser crimes, provocation does not alter the nature of the offence at all, but is allowed for in the sentence.

The principle of discretionary sentencing in relation to the culpably intoxicated offender explains what might otherwise appear the strange decision of the Supreme Court of Canada in *Swietlinski v. The Queen*.⁷⁶ At issue there was the status under the intoxication rules of a charge of constructive murder under section 213(d)(i) of the Criminal Code, where the only intent required to be proved was the intent to commit an indecent assault and the intent to use a weapon during the commission of the offence.

McIntyre J. determined, correctly, that indecent assault is an offence of general intent which does not permit the negation of the

⁷¹ See *D.P.P. v. Beard*, *supra*, footnote 22; *MacAskill v. The King*, *supra*, footnote 41; *Swietlinski v. The Queen* (1980), 55 C.C.C. (2d) 481 (S.C.C.).

⁷² For example, under s. 212(c) of the Criminal Code, *supra*, footnote 16, where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death and thereby causes death; or, under s. 213(a), where he causes death meaning to cause bodily harm for the purpose of facilitating the commission of certain indictable offences; or, under s. 213(d), where he causes death by having used a weapon during the attempted commission of one of these offences.

⁷³ See Criminal Code, *ibid.*, ss. 218 and 219. The only other offence in the Criminal Code which carries a fixed penalty is high treason: see ss 46(1) and 47(1). The same principle should apply here.

⁷⁴ See *R. v. Cunningham*, [1958] 3 All E.R. 711 (C.C.A.); Criminal Code, *supra*, footnote 16, s. 215. Again, however, the principle should apply to any offence which carries a fixed penalty and for which there is an included offence carrying a discretionary penalty.

⁷⁵ [1946] A.C. 588, at p. 601.

⁷⁶ *Supra*, footnote 71.

requisite mental element by evidence of any degree of culpable intoxication.⁷⁷ Nevertheless, he held that the intoxication defence is always permitted on a murder charge, even one which arises under section 213(d)(i).⁷⁸

... I am of the opinion that the rule of law to the effect that voluntary or self-induced intoxication cannot negative a general intent constituting the only mental element required for an indecent assault does not apply to the offence of murder where the conviction rests upon proof of the offence of indecent assault. This conclusion rests upon the proposition that the appellant was not charged with indecent assault, an offence in respect of which the defence of drunkenness would not have assisted him. He was charged with murder, an offence which cannot be complete without the proof of some mental element which, in a charge of murder resting upon proof of an underlying offence, as in s. 213(d) of the Code, substitutes for the specific intent ordinarily required for murder.

This reasoning follows the interpretation of *D.P.P. v. Beard*⁷⁹ which was suggested by Lord Russell in *D.P.P. v. Majewski*.⁸⁰ In *Beard*, the accused had been convicted of murder under the felony-murder rule at common law, because of a killing by an act of violence done in the course or furtherance of the crime of rape. Lord Birkenhead laid down the general proposition that "where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime".⁸¹ He then went on to indicate that, in the instant case, the accused would have had a defence if he had been so drunk that he was incapable of forming the intent to rape.⁸² Yet rape has been held not to be a crime of specific intent.⁸³

It may be that Lord Birkenhead was not using the term "specific intent" in any technical sense and was in fact indicating that intoxication may negative the requisite mental element for any offence. The alternative explanation, suggested by Lord Russell in *Majewski* and adopted in *Swietlinski*,⁸⁴ is that the remarks with respect to rape were directed to the context of a felony-murder charge. The disappearance of sentencing discretion in this context was noted the judgment of the Ontario Court of Appeal in *Swietlinski*.⁸⁵

⁷⁷ *Ibid.*, at pp. 490-492.

⁷⁸ *Ibid.*, at p. 498.

⁷⁹ *Supra*, footnote 22.

⁸⁰ *Supra*, footnote 6, at pp. 499-500.

⁸¹ *Supra*, footnote 22, at p. 499.

⁸² *Ibid.*, at pp. 504-505.

⁸³ See *supra*, footnote 40.

⁸⁴ *Supra*, footnote 71, at p. 497.

⁸⁵ *R. v. Swietlinski* (1978), 44 C.C.C. (2d) 267, at p. 293.

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

The major effort to explain the intoxication rules by reference to qualitatively different states of mind came in an earlier decision of the Supreme Court of Canada. In *The Queen v. George*,⁸⁶ the view was expressed that offences of specific intent, unlike those of general intent, require proof of *purpose*. In other words, it is insufficient that the accused had knowledge or foresight of the circumstances which constituted the offence or were otherwise included in its definition: his knowledge or foresight must have been the *reason* why he acted as he did.⁸⁷

In *George*, Fauteux J. said:⁸⁸

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.

In his view, it followed that intoxication could negate the requisite mental element of theft and robbery but not of common assault.⁸⁹ In a similar vein, Ritchie J. spoke of "the specific and ulterior motive and intention of furthering or achieving an illegal object" and concluded that robbery but not common assault requires the presence of this kind of "intent and purpose".⁹⁰

This approach to the problem of the intoxication defence was endorsed in *Majewski* by Lord Simon, who contended that it provided the link between crimes of ulterior intent and other crimes of specific intent such as murder.⁹¹ After quoting the above words of Fauteux J., he concluded:⁹²

In short, where the crime is one of "specific intent" the prosecution must in general prove that the purpose for the commission of the act extends to the intent expressed or implied in the definition of the crime.

⁸⁶ *Supra*, footnote 39.

⁸⁷ On the concept of purpose, see White, *Intention, Purpose, Foresight and Desire* (1976), 92 L.Q. Rev. 569, at pp. 573-575.

⁸⁸ *Supra*, footnote 39, at p. 877.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, at p. 890.

⁹¹ *Supra*, footnote 6, at pp. 478-479.

⁹² *Ibid.*, at p. 479.

The "purpose" theory was seemingly given further approval by the majority in *Leary*, where Pigeon J. noted that none of the other Law Lords in *Majewski* had disagreed with Lord Simon.⁹³

Offences of specific intent will often be committed purposefully as well as knowingly. The same is true, however, of offences of general intent. And proof of purpose is not generally necessary for conviction. For example, to impose a requirement of purpose to kill or even to cause bodily harm before there can be a conviction of murder would be to rewrite both the common law⁹⁴ and the Criminal Code.⁹⁵ The Code does expressly require purpose for an attempted offence.⁹⁶ And there are other offences of ulterior intent, such as breaking and entering a place with intent to commit an indictable offence therein,⁹⁷ which it is difficult to imagine being committed other than purposefully. Yet, this does not apply to theft,⁹⁸ where the taker of property may well be indifferent to the deprivation which he expects to inflict upon the rightful possessor.

The argument which has been presented here is not therefore in total conflict with the conventional criticism of the distinction between specific and general intent. It is agreed that no single principle can explain this distinction and further that it does not reflect a qualitative difference between states of mind. Indeed, to say the least, the terminology of specific and general intent is unhelpful. My point of disagreement with the conventional criticism is its claim that the search for any principled explanation of the distinction between offences for which self-induced intoxication may and may not negate the requisite mental element is futile. The principles outlined here have not been articulated in this form in the cases. The association of the "specific intent" category with both ulterior intent and fixed penalties has, however, been recognized on occasion. And the theory is able to account for most if not all the precise rules regarding the availability of the intoxication defence for particular crimes.

IV. Testing the Theory.

The proposed theory is to be judged by its explanatory power in relation to the classification of offences as permitting or not permit-

⁹³ *Supra*, footnote 8, at p. 52.

⁹⁴ See *D.P.P. v. Smith*, [1961] A.C. 290; *Hyam v. D.P.P.*, [1975] A.C. 55.

⁹⁵ For example, under s. 212(c) of the Criminal Code, *supra*, footnote 16, culpable homicide is murder "where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being".

⁹⁶ *Ibid.*, s. 24(1).

⁹⁷ *Ibid.*, s. 306(1)(a).

⁹⁸ *Ibid.*, s. 283(1).

ting the intoxication defence: it is a theory of what the intoxication rules are, not of what they ought to be. It should not, however, be demanded of the theory that it account for every single case. In an area of the law as complex and confused as the relationship of intoxication to criminal responsibility, total consistency may be an unattainable dream. The theory will be adequate if it explains the broad pattern of the decisions emanating from the courts.

In the discussion of general principles, an attempt was made to deal with the major offences where the problem of intoxication most commonly arises. There follows a more systematic analysis of the theory's explanatory power, utilizing as a data-base the lists of offences of specific and general intent prepared by Smith and Hogan,⁹⁹ Williams¹⁰⁰ and Gold.¹⁰¹ Their authorities will be cited only where classification poses some special problem.

The lists prepared by Smith and Hogan and by Williams focus upon English decisions and are very similar. They may therefore be conveniently discussed together. Both state that the following are offences of specific intent: murder (which can be explained by reference to the principle with respect to fixed penalties); theft, handling stolen goods, endeavouring to obtain money on a forged cheque and attempting to commit any offence (all of which can be explained by reference to the principle with respect to ulterior intent);¹⁰² wounding or causing grievous bodily harm with intent (which may possibly be explained by reference to their close statutory association with offences of ulterior intent).¹⁰³ In addition, Smith and Hogan include in the "specific intent" category, the offences of robbery, burglary with intent to steal and damaging property contrary to section 1(2) of the Criminal Damage Act, 1971.¹⁰⁴ All involve an ulterior mental element.¹⁰⁵

⁹⁹ *Op. cit.*, footnote 3, p. 187.

¹⁰⁰ *Op. cit.*, footnote 4, p. 428.

¹⁰¹ *Op. cit.*, footnote 31, at pp. 66-69.

¹⁰² Handling stolen goods includes an ulterior element. The *mens rea* is the intentional handling of goods, knowing that they have been taken with the intent to deprive the rightful possessor. The difficulty in imposing absolute liability for the material circumstances to which the offence is directed is the same as in the case of theft; the deprivation may, but need not, have occurred.

¹⁰³ See *supra*, at text accompanying footnotes 59-64.

¹⁰⁴ 19 & 20 Eliz. c. 48: "A person who without lawful excuse destroys or damages any property, whether belonging to himself or another—(a) intending to destroy or damage any property or being reckless as to whether any property would be destroyed or damaged; and (b) intending by the destruction or damage to endanger the life of another or being reckless as to whether the life of another would be thereby endangered: shall be guilty of an offence." It has been held that danger to the life of another is not part of the *actus reus* of the offence: see *O'Driscoll* (1977), 65 Cr. App. R. 50, at p. 55 (C.A.). See also *supra*, footnote 33.

¹⁰⁵ Smith and Hogan, *op. cit.*, footnote 3, also state that "possibly" the aiding and

With one exception, all the offences classified in the "general intent" category in either or both lists involve neither a fixed penalty nor, except possibly in some exceptional forms of assault, an ulterior intent. They are common assault, assault on a constable in the execution of his duty, assault occasioning actual bodily harm, unlawful wounding,¹⁰⁶ indecent assault, rape, manslaughter and damaging property contrary to section 1(1) of the Criminal Damage Act, 1971.

The exception is taking a conveyance without the consent of the owner contrary to section 12(1) of the Theft Act, 1968.¹⁰⁷ On the authority of *R. v. MacPherson*,¹⁰⁸ this is classified in both lists as an offence of general intent. White, however, has recently argued that the decision in *MacPherson* is incorrect.¹⁰⁹ He notes that the court failed to inquire into the significance of the requirement that the person taking the conveyance must do so "for his own or another's use" and he contends that such an inquiry should have led to the conclusion that it is an offence of specific intent, whatever that term means.¹¹⁰ The reference to the taker's own or another's use should certainly be regarded as introducing an ulterior mental element.

The lists presented by Gold cover American as well as English and Canadian cases. Since the focus of the present inquiry is Anglo-Canadian law, and consideration of American materials would require more extended treatment, only those items will be utilized for which English or Canadian authority is cited. Emphasis will be placed on Canadian authority.

Many of the items for which Gold cites clear Canadian authority have already been discussed. Thus, offences of general intent include manslaughter, unlawfully causing bodily harm or assault causing bodily harm,¹¹¹ and common assault; offences of specific intent

abetting of any offence is a crime of specific intent. See *infra*, footnotes 112-120 and accompanying text.

¹⁰⁶ Offences Against the Person Act, *supra*, footnote 59, s. 20: "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor" Unlike s.18, s.20 does not permit any form of charge of an ulterior intent.

¹⁰⁷ 16 & 17 Eliz., c. 60: "... a person shall be guilty of an offence if, without having the consent of the owner or other lawful authority, he takes a conveyance for his own or another's use or, knowing that any conveyance has been taken without such authority, drives it or allows himself to be carried in or on it."

¹⁰⁸ [1973] R.T.R. 157 (C.A.). To the same effect is a dictum of Lord Simon in *D.P.P. v. Majewski*, *supra*, footnote 6, at p. 477.

¹⁰⁹ White, Taking the Joy Out of Joy-Riding: The Mental Element of Taking a Conveyance Without Authority, [1980] Crim. L. Rev. 609.

¹¹⁰ *Ibid.*, at pp. 618-620.

¹¹¹ Gold does cite *R. v. Martin* (1947), 88 C.C.C. 314 (Alta S.C.), as one decision which goes against the massive weight of authority (including *D.P.P. v. Majewski*,

include murder, attempted murder, intentional wounding, breaking and entering with intent to commit an indictable offence (and also being in a dwelling-house with intent to commit an indictable offence), theft, robbery and receiving stolen property.

An additional item included in the "specific intent" category is being a party to an offence under either sub-section (1) or (2) of section 21 of the Criminal Code. Section 21(2) clearly involves ulterior intent: the parties must form an intention in common to carry out an unlawful purpose and to assist each other therein, and a foreseeable offence must be committed in carrying out the common purpose. There is no requirement that the original common objective have been attained. Section 21(1), however, raises greater difficulties. Ulterior intent is present under paragraph (b), where a person is made a party to the offence of another if he does or omits to do anything for the purpose of aiding its commission. Although the offence must have been committed there is apparently no requirement that the act or omission of the secondary party have actually aided its commission. There is not, however, an ulterior element under paragraph (c), where liability arises from the abetting of an offence.¹¹²

The authorities cited by Gold for the proposition that section 21(1) involves specific intent do not directly address the problem of intoxication in relation to abetting. *R. v. Waterfield*¹¹³ involved secondary liability for manslaughter, on the basis of either section 21(2) or section 21(1)(b). *R. v. Halmo*¹¹⁴ did involve an abetting of reckless driving, but the charge was in the composite form that the accused "did aid, abet, counsel or procure" the offence.¹¹⁵ In holding that his drunken state was not a defence, the members of the Ontario Court of Appeal simply indicated that there was no evidence of intoxication to such a degree as would negate *mens rea*.¹¹⁶ It was not considered whether the section as a whole, or any of its constituent parts, would permit a defence of lack of *mens rea* caused by self-induced intoxication.

supra, footnote 6) and holds that assault causing bodily harm is a crime of specific intent. This was not, however, the decision in the case. On a charge of shooting with intent to do grievous bodily harm, where there was evidence that the accused was drunk and did not intend to shoot at anyone, the judge refused to convict of unlawful wounding on the ground that it is not an included offence.

¹¹² The elements of abetting are the intention to encourage and encouragement in fact. See *Dunlop and Sylvester v. The Queen* (1979), 47 C.C.C. (2d) 93, at pp. 104-109 (S.C.C.).

¹¹³ (1974), 18 C.C.C. (2d) 140 (Ont. C.A.).

¹¹⁴ (1941), 76 C.C.C. 116 (Ont. C.A.).

¹¹⁵ Under the then s. 69 of the Criminal Code, *supra*, footnote 16.

¹¹⁶ *Supra*, footnote 114, at pp. 120-121, 127, 131.

In the English case of *R. v. Clarkson*,¹¹⁷ there was a dictum to the effect that intoxication could negate the *mens rea* for aiding and abetting. On this authority, Smith and Hogan have suggested that "possibly" the aiding and abetting of any offence is a crime of specific intent.¹¹⁸ Their cautionary note was sounded because of Lord Simon's statement¹¹⁹ that, in English law, neither aiding nor abetting involve an ulterior element.

In the result, the authorities are inconclusive. Applying the ordinary principles with respect to ulterior intent, it should follow that paragraph (b) of section 21(1) permits the intoxication defence but paragraph (c) does not. Yet, the common failure to draw a clear distinction between aiding and abetting in charging practices and in legal argument may justify the characterization of both aiding and abetting as crimes of specific intent for the purposes of Canadian law. Gold's classification is at least not patently incompatible with the present theory.¹²⁰

There are three offences of which Gold's classification cannot be reconciled with the present theory. None, however, poses any great problem. First, constructive murder in the course of robbery under section 213(a) is said to be a crime of general intent. The proposition is not supported by the cited authority of *R. v. McLaren*.¹²¹ Secondly, committing mischief by wilfully damaging property, contrary to sections 387 or 388, is said to be a crime of specific intent. Quite independently of the present theory, the decision in the cited authority of *R. v. Piche*¹²² is highly questionable. In determining the breadth of specific intent, the Magistrate relied in part on the decision of the Ontario Court of Appeal in *R. v. Vandervoort*.¹²³ This case was subsequently overruled by the Supreme Court of Canada.¹²⁴

The third offence is taking a vehicle without the owner's consent. Gold cites English but not Canadian authority for classifying this as an offence of general intent. The objections to this classification as a

¹¹⁷ [1971] 3 All E.R. 344, at p. 347 (Courts-Martial App. Ct).

¹¹⁸ *Op. cit.*, footnote 3, p. 187.

¹¹⁹ *Lynch v. D.P.P.*, [1975] A.C. 653, at pp. 698-699.

¹²⁰ The theory cannot, however, explain the dictum with respect to English law in *Clarkson*, *supra*, footnote 117.

¹²¹ (1949), 93 C.C.C. 296 (Alta C.A.). It was simply decided that, despite the drunkenness of the accused, the requisite intent to inflict grievous bodily harm was fully established. On constructive murder, see also *Swietlinski v. The Queen*, *supra*, footnote 71.

¹²² (1967), 10 Crim. L.Q. 107 (Ont. Mag. Ct).

¹²³ (1961), 130 C.C.C. 158.

¹²⁴ *Leary v. The Queen*, *supra*, footnote 8, at pp. 53-58.

matter of English law have already been discussed.¹²⁵ Under the Canadian Criminal Code, the vehicle must have been taken "with intent to drive, use, navigate or operate it or cause it to be driven, used, navigated or operated".¹²⁶ The offence therefore involves ulterior intent and, in the absence of contrary authority, should permit the intoxication defence.

Finally, Gold cites conflicting authority for the classification of rape, indecent assault and assault upon a police officer. The conflict with respect to rape has now been resolved by the judgment of the Supreme Court of Canada in *Leary v. The Queen*¹²⁷ and with respect to indecent assault by the judgment of the same court in *Swietlinski v. The Queen*.¹²⁸ It has been held, correctly on the present theory, that these are offences of general intent.

In *D.P.P. v. Majewski*,¹²⁹ the House of Lords unanimously held that assaulting a police officer in the execution of his duty is another crime of general intent. The primary authority relied on by Gold for the contrary position is *R. v. Vlcko*.¹³⁰ This was one of a series of cases in which the Ontario Court of Appeal took a broad view of the scope of specific intent that was subsequently repudiated by the Supreme Court of Canada in *Leary*.¹³¹ Furthermore, *Leary* endorsed the authority of *Majewski* on the general position of intoxication in relation to criminal responsibility.¹³² The decision in *Vlcko* cannot therefore be regarded as still good law, any more than can the decision of the same court in *R v. Schmidt and Gole*¹³³ on indecent assault and *R. v. Vandervoort*¹³⁴ on rape.

To summarize: the explanatory power of the proposed theory of the intoxication defence has been measured against the classification of nineteen items in the lists of Smith and Hogan and of Williams and eighteen items in Gold's lists. The theory was clearly able to account for the classification of all but three items in the lists of Smith and Hogan and Williams: intentional wounding, the aiding and abetting of

¹²⁵ *Supra*, at text accompanying footnotes 107-110.

¹²⁶ *Supra*, footnote 16, s. 295.

¹²⁷ *Supra*, footnote 8. See also *D.P.P. v. Majewski*, *supra*, footnote 6, per Lord Simon, at p. 477, and per Lord Russell, at pp. 499-500.

¹²⁸ *Supra*, footnote 71, at p. 492. See also *Leary v. The Queen*, *supra*, footnote 8, at p. 57.

¹²⁹ *Supra*, footnote 6.

¹³⁰ (1972), 10 C.C.C. (2d) 139. Also cited for the proposition was the dictum of Davey C.J. in *R. v. Resener*, [1968] 4 C.C.C. 129, at p. 133 (B.C.C.A.).

¹³¹ *Supra*, footnote 8, at pp. 53-58.

¹³² *Ibid.*, at pp. 50-53.

¹³³ (1972), 9 C.C.C. (2d) 101.

¹³⁴ *Supra*, footnote 123.

an offence and taking a conveyance without the consent of the owner. In the case of the last offence, it was noted that the authority for its classification as a crime of general intent has been criticized.

The result for Gold's lists is more complicated because, on the basis of conflicting authorities, he made double entries for three offences.¹³⁵ The theory was clearly able to account for the classification of ten of the fifteen items which received single entries. One of the others was taking a vehicle without the consent of the owner, for the classification of which no Canadian authority was cited. The remaining four were intentional wounding, aiding and abetting, constructive murder, and committing mischief by wilfully damaging property. It has been argued that the authorities do not support his classification of the latter two and that, when they are correctly classified, they fall within the ambit of the theory under test. In addition, the conflict of authority with respect to rape, indecent assault and assaulting a police officer has now been resolved and the present classification of these offences as not permitting the intoxication defence is consistent with the theory which has been advanced.

The data under examination therefore raise only two substantial problems for the present theory: intentional wounding and the aiding and abetting of an offence. It was contended earlier that the classification of intentional wounding may be explained on the ground that, where a statutory provision permits the charge of offences of both basic and ulterior intent, considerations of simplicity and convenience can sometimes justify characterizing the provision as a whole as permitting the intoxication defence. It has been further suggested that this reasoning may apply to aiding and abetting in Canadian law. It would not cover aiding and abetting in English law, but it is by no means clear that these do permit the intoxication defence in England. The only authority for the proposition is the dictum in *Clarkson*, Williams makes no reference to the classification of aiding and abetting, and Smith and Hogan go no further than to say that they may "possibly" fall within the "specific intent" category.

Even if the arguments with respect to intentional wounding and aiding and abetting are rejected, it is submitted that the explanatory power of the proposed theory is sufficiently great to deny the charge that the distinction between offences of specific and general intent is neither principled nor intelligible.

V. Degrees of Intoxication.

Thus far, the inquiry has been directed towards explaining why the intoxication defence is available for some but not other crimes. There

¹³⁵ Four offences, if his mistake on assault causing bodily harm is included. See *supra*, footnote 111.

remains a question about the form of the defence when it is available. In the introductory statement of principles it was noted that there is some dispute about the validity of the assertion that it involves simply a denial of the presence of the requisite mental element.

Throughout much of the history of the intoxication defence, there have been statements suggesting that it may only be available for a person who was intoxicated to such a degree that he was *incapable* of voluntary action or of forming the requisite *mens rea*. On this formulation, there is a parallel between the intoxication defence and the first arm of the insanity defence under section 16(2) of the Criminal Code, where the person must suffer a natural imbecility or disease of the mind "to an extent that renders him incapable of appreciating the nature and quality of an act or omission".¹³⁶ There may be, however, a major difference between the significance of a requirement of incapacity for the two defences. If an accused has the capacity to appreciate the nature and quality of his conduct but, by reason of insanity, he fails in fact to appreciate it, then the result should be a straightforward acquittal rather than the special verdict and indeterminate detention provided by sections 542 and 545 of the Criminal Code.¹³⁷ In contrast, if cognitive incapacity is a requirement for the intoxication defence, its absence will lead to a conviction.

In recent decisions of the Supreme Court of Canada, there have been several statements appearing to indicate that cognitive incapacity may be a requirement for the intoxication defence. Thus, in *Leary v. The Queen* a secondary issue was said to be whether the accused was "so intoxicated that he *could* not form a criminal intent"¹³⁸ and it was concluded that "there was no evidence that the accused was drunk to such a degree as to be incapable of forming the intent".¹³⁹ Similarly, in *Swietlinski v. The Queen* the issue in relation to the intoxication defence was expressed in terms of capacity to have formed the criminal intent.¹⁴⁰ One of the clearest pronouncements of the court on this point was in its earlier decision in *Malanik v. The*

¹³⁶ On the meaning of "incapacity", "appreciate" and "nature and quality" in the insanity defence, see Colvin, *Ignorance of Wrong in the Insanity Defence* (1980-81), 19 U.W.O.L. Rev. 1

¹³⁷ Presumably, however, there would not necessarily be an acquittal if the insanity was caused by the willing and knowing consumption of intoxicating substances. Liability would depend on the intoxication rules.

¹³⁸ *Supra*, footnote 8, per Pigeon J., at p. 49 (emphasis added).

¹³⁹ *Ibid.*, at p. 59.

¹⁴⁰ *Supra*, footnote 71, at pp. 492 and 500. See also the statements of Spence J. in *Alward and Mooney v. The Queen*, [1978] 1 S.C.R. 559, at pp. 566-569; *Morris v. The Queen* (1979), 47 C.C.C. (2d) 257, at pp. 280-281 (S.C.C.). In the latter case, Spence J. was dissenting on another point, but his remarks on the intoxication defence were not disapproved by the majority.

Queen, where Kerwin J. said that "the existence of drunkenness not involving such incapacity is not a defence".¹⁴¹

The older English decisions contain several references to cognitive incapacity.¹⁴² Moreover, it was integral to Lord Birkenhead's propositions on the scope of the defence in *D.P.P. v. Beard*.¹⁴³ His conclusions were:¹⁴⁴

1. That insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged. The distinction between the defence of insanity in the true sense caused by excessive drinking, and the defence of drunkenness which produces a condition such that the drunken man's mind becomes incapable of forming a specific intention, has been preserved throughout the cases
2. 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.
3. That evidence 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.

The context of Lord Birkenhead's remarks on incapacity lends support to Gold's argument that he was addressing problems of proof rather than substantive law.¹⁴⁵ Although the substantive issue is intent in fact, only evidence of incapacity to form this intent may rebut the presumption that a man intends the natural and probable consequences of his acts.¹⁴⁶ That the substantive issue was conceived to be intent in fact is demonstrated by the second of Lord Birkenhead's propositions,¹⁴⁷ and the evidentiary character of the "incapacity" requirement is indicated in both the second and third. As Gold has said: ". . . it was this presumption [that a man intends the natural and probable consequences of his acts] which covered the logical gap between incapacity and the intention in fact".¹⁴⁸

With the waning recognition of a firm presumption of intention,¹⁴⁹ it is not surprising that the courts have increasingly

¹⁴¹ [1952] 2 S.C.R. 335, at p. 341.

¹⁴² See *R. v. Monkhouse*, *supra*, footnote 54, at p. 56; *R. v. Stopford*, *supra*, footnote 54, at p. 644; *R. v. Meade*, [1909] 1 K.B. 895, at p. 899 (C.C.A.).

¹⁴³ *Supra*, footnote 22.

¹⁴⁴ *Ibid.*, at pp. 500-502.

¹⁴⁵ *Op cit.*, footnote 31, at pp. 42-43.

¹⁴⁶ See also *R. v. Monkhouse*, *supra*, footnote 54, at p. 56; *R. v. Meade*, *supra*, footnote 142, at p. 899.

¹⁴⁷ See also his remarks in *Beard*, *supra*, footnote 22, at pp. 499 and 504.

¹⁴⁸ *Supra*, footnote 31, at p. 43.

¹⁴⁹ See, for example, *R. v. Steane*, *supra*, footnote 58, at p. 1003; *Hosegood v. Hosegood* (1950), 66 T.L.R. 735, at p. 738 (C.A.); *R. v. Gianotti* (1956), 115 C.C.C. 203, at pp. 213-214 (Ont. C.A.).

spoken of the intoxication defence as arising from lack of *mens rea* in fact rather than from lack of capacity to form *mens rea*. Thus, on the authority of *R. v. Sheehan*¹⁵⁰ and *R. v. Pordage*,¹⁵¹ and of dicta in *Broadhurst v. The Queen*,¹⁵² it has been asserted that in England the defence no longer requires incapacity.¹⁵³

With respect to Canadian law, the same conclusion had been reached in the recent decisions of the Ontario Court of Appeal in *R. v. Dees*¹⁵⁴ and *R. v. Seguin*,¹⁵⁵ where convictions of offences of specific intent were quashed because the juries had been instructed merely with reference to the issue of incapacity. In *Dees*, Arnup J.A. said:¹⁵⁶

The ultimate question must always be: did the accused have the requisite intent? Of course, if he lacked the capacity to form that intent, then he did not have the intent, but the converse proposition does not follow, i.e., it does not follow that just because he had the capacity he also had the specific intent.

Arnup J.A. attempted to deal with the authority of the majority opinion in *Leary* by suggesting that, in speaking of incapacity, Pigeon J. had been addressing evidentiary problems and not the substantive form of the defence.¹⁵⁷ Whether or not this interpretation is accepted, it remains true that neither Pigeon J. in *Leary* nor McIntyre J. in *Swietlinski* indicated that they had considered and rejected the alternative that the defence is available where the requisite mental element was not in fact present. Their remarks on incapacity, like much that has been said on the subject, appear to be the recitation of a time-honoured formula. In contrast, where an attempt has been made to weigh incapacity against lack of *mens rea* in fact, the latter formulation of the defence has generally found favour in both England and Canada. The result has been the same in Australia and New Zealand.¹⁵⁸

The explanation which has been proposed for the admission of the intoxication defence for offences of ulterior intent offers a reason why its substantive form should be lack of the requisite mental

¹⁵⁰ [1975] 2 All E.R. 960, at p. 964 (C.A.).

¹⁵¹ *Supra*, footnote 60.

¹⁵² [1964] A.C. 441, at p. 461 (P.C.).

¹⁵³ See Smith and Hogan, *op. cit.*, footnote 3, p. 185; Williams, *op. cit.*, footnote 4, p. 420.

¹⁵⁴ (1978), 40 C.C.C. (2d) 58.

¹⁵⁵ (1979), 45 C.C.C. (2d) 498.

¹⁵⁶ *Supra*, footnote 154, at p. 66.

¹⁵⁷ *Ibid.*, at p. 67: "Pigeon, J., consistently speaks of 'the incapacity [or 'inability'] of the accused to form' the requisite specific intent. He does not comment upon whether, if the accused be found to have the *capacity* to form the requisite intent, there is a further question whether the accused in fact had formed it."

¹⁵⁸ See *Viro v. The Queen* (1978), 52 A.L.J.R. 418 (H.C.); *The Queen v. O'Connor*, *supra*, footnote 12; *R. v. Kamipeli*, [1975] 2 N.Z.L.R. 610 (C.A.).

element in fact rather than lack of the capacity to form this element. It was contended that to hold a person absolutely liable for an offence of ulterior intent would be to convict on the basis of what might have happened rather than what did happen; which development, apart from the practical difficulties of implementation, would involve a radical shift away from the traditional concept of absolute liability. The same problem would arise were the defence to be denied to a person who had the capacity to form an ulterior intent but who had not in fact formed it. An accused cannot, consistently with established principles, be held absolutely liable in relation to all the material circumstances contemplated by an offence of this kind.

The problem does not arise with respect to an offence such as murder, where the intoxication defence is admitted because of a fixed penalty and not an element of ulterior intent. Here the defence could be denied for degrees of intoxication short of cognitive incapacity. There do not appear, however, to be any strong arguments for a distinction between types of "specific intent" offence which would further complicate an already complex area of the law.

Conclusions

It is a feature of the common law that principles and other abstract propositions emerge by slow accretion as more and more particular decisions are rendered by the courts and a pattern forms. The classic example is the history of the tort of negligence up to the statement of the "neighbour principle" in *Donoghue v. Stevenson*.¹⁵⁹ Lord Atkin's analysis of the duty to take care exemplifies much in the methodology of the common law:¹⁶⁰

It is remarkable how difficult it is to find in the English authorities statements of general application defining the relations between parties that give rise to the duty. The Courts are concerned with the particular relations which come before them in actual litigation and it is sufficient to say whether the duty exists in those circumstances In this way it can be ascertained at any time whether the law recognizes a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist [I]n English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances.

Issue might be taken with the assumption that a general theory always awaits discovery. Yet its absence is likely to produce a sense of discordance and stimulate the search for new directions. Where the courts have been able to maintain a high consistency of decisions over

¹⁵⁹ [1932] A.C. 562, per Lord Atkin, at p. 580.

¹⁶⁰ *Ibid.*, at pp. 579-580. See also *Home Office v. Dorset Yacht Co. Ltd.*, [1970] A.C. 1004, per Lord Diplock, at pp. 1058-1059.

a considerable period of time, the absence of at least a rough underlying theory may be thought remarkable. The present thesis is that a general theory is discernible in relation to the intoxication defence even if it has been largely implicit and unrecognized. That it has not hitherto been expressly formulated does not confound the argument for its existence. The "neighbour principle" was no less valid because it had not been previously articulated.

The common failure to appreciate the rationality of the intoxication rules may be the result of analysts having started at the wrong end. If it is initially determined that justice requires the admission of the intoxication defence for crimes such as murder, theft and breaking and entering with intent to commit an indictable offence, it is difficult to see why the same considerations of justice do not apply for manslaughter, rape and assault. On the other hand, if we start with the traditional position of the common law that lack of voluntariness or *mens rea* is no defence where it is caused by culpable intoxication, then the present rules make a good deal more sense.

The effect of the traditional position is that, where a requisite mental element is absent because of culpable intoxication, the actor is held absolutely liable for his conduct and any reduced fault is taken into account only as a mitigating factor in sentencing. It has been argued that the adoption of this approach nevertheless necessitates exceptions for offences of ulterior intent and offences which carry a fixed penalty. To impose absolute liability where ulterior intent is involved would be to convict on the basis of what might have happened rather than what did happen. To impose it for an offence to which a fixed penalty is attached would be to preclude the possibility of exercising sentencing discretion in the light of any reduced fault of the offender. It has been further argued that the high degree of judicial consistency in both England and Canada can be explained by reference to this theory.

A clear distinction should be drawn between the questions of which direction the courts have taken and which direction they should have taken. On grounds of justice, a strong argument can be made that the legal response should be different for each of three separate categories of actor: the person who commits a criminal act with full comprehension of what he is doing; the person who commits this act in a state of intoxicated impairment or oblivion for which he is culpable; the person who commits it in a similar state for which he is blameless. Under the present rules respecting the criminal responsibility of intoxicated persons, these three categories are telescoped into two. Subject to certain exceptions, the liability of the person who is culpable because of his intoxication is the same as the liability of the person who is culpable because of his state of mind at the moment of action.

If the only choice is between liability or immunity where a requisite mental element is absent due to culpable intoxication, there must at least be some sympathy for the approach which the courts have taken. Even the most stringent critics of the intoxication rules have been wary of suggesting that no penal consequences should follow. Their preference has generally been the creation of a special offence of dangerous intoxication which would require legislative initiative. Would it be proper for the courts to encourage the legislatures to action by abandoning the present intoxication rules and insisting upon the contemporaneity of the culpable state of mind and the prohibited conduct? At stake here are theories of the judicial role which lie beyond the scope of this article. It is, however, concluded that one good reason for judicial activism—the irrationality of present law—does not apply to the intoxication defence.