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The Intoxication Defence: Constitutionally Impaired and in Need of Rehabilitation

Gerry Ferguson*

I. INTRODUCTION

The intoxication defence encompasses both voluntary and involuntary intoxication. Involuntary intoxication arises relatively infrequently as a defence and its rules are less well developed. On the other hand, the rules governing voluntary intoxication as a defence have been frequently considered and applied, but nevertheless remain in a wholly unsatisfactory state. They are illogical, arbitrary, unprincipled and in various respects unconstitutional. In this article, I will briefly examine the rules for involuntary intoxication as a defence and suggest that, in part, they probably violate the Canadian Charter of Rights and Freedoms\(^1\) and in any event should be amended and included as a new Criminal Code\(^2\) provision. I will then examine the current rules for voluntary intoxication as a defence, alluding to their historical development as well as the various ways in which they are unsatisfactory. I will also point to three areas in which the current rules are, or may be, unconstitutional.

The first area of Charter concern is in respect to section 33.1 of the Criminal Code. Section 33.1 is Parliament’s partial reversal of \textit{R. v. Daviault}\(^3\) and it likely violates section 7 of the Charter. In addition, there is a strong argument that this violation is not saved under section 1 since other constitutionally valid alternatives are available to Parliament to achieve the objectives it had in mind in enacting section 33.1. Second, the reverse onus imposed in \textit{Daviault} and continued in section 33.1 is a

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clear violation of the Charter’s section 11(d) guarantee of the presumption of innocence. That reverse onus is illogical and, more importantly, unnecessary. The Supreme Court’s conclusion that the section 11(d) Charter violation is a reasonable limit under section 1 should be re-examined in light of the fact that the Supreme Court justified that reversal in barely one paragraph of reasoning — hardly a full and fair section 1 analysis! Third, there is a gap in the section 33.1 and Daviault rules. Those rules do not provide a defence to a person who lacks the general mens rea for an offence due to a mistake of fact caused by intoxication which is less than extreme intoxication akin to automatism or insanity. That gap offends section 7 and is not saved by section 1 of the Charter.

I will conclude this paper by recommending a more logical, more fair and constitutionally valid set of intoxication offences which involve the creation of new included offences to deal with cases in which voluntary intoxication has negated the subjective fault of the offence charged. When an accused is acquitted of any subjective fault offence because the requisite subjective fault is negated due to voluntary intoxication, that accused will be automatically convicted of a lesser included offence of “unintentionally causing that offence due to criminal intoxication”. For example, in the case of a charge of sexual assault, such a person would be convicted of the new offence of “unintentional sexual assault due to criminal intoxication”.

II. INVOLUNTARY INTOXICATION

Statistically speaking, it is fair to say that the law’s treatment of involuntarily intoxicated accused persons is not a pressing social concern. In the past, cases in which persons have been surreptitiously or otherwise involuntarily intoxicated have arisen relatively infrequently, although there appears to be a significant increase in surreptitious administration of the drug GHB, and other similar “date rape” drugs. But in these and other cases, the involuntarily intoxicated person is normally a “victim” rather than an offender. Seldom does an involuntarily intoxicated person commit an offence while in a state of involuntary intoxication. But in those rare cases where that does occur, how does and how ought the law to deal with them? The fact that such cases are rare is no justification for allowing an incomplete and perhaps unconstitutional law to continue unamended.
In examining the law of involuntary intoxication, the first issue is to determine in what circumstances the law treats intoxication as involuntary. If a person, against his or her will, is forced to take or has administered to him or her an intoxicant, that person is involuntarily intoxicated. Likewise, if an intoxicating substance is surreptitiously inserted into food or drink that a person consumes, or is surreptitiously administered to a person, that person is also involuntarily intoxicated. However, there is a third form of intoxication where the case law is less clear in classifying it as voluntary or involuntary. How does the law treat a person who voluntarily consumes (or is consensually administered) a drug (e.g., medication) without being aware of its intoxicating qualities, or voluntarily consumes a drug, being aware that it has some intoxicating qualities, but mistaken about the extent of that drug’s intoxicating effect? In many jurisdictions, intoxication which has occurred through no fault of the accused will be classified as involuntary intoxication. Conversely, intoxication caused by some degree of fault on the part of the accused will not be treated as involuntary intoxication. In Canada, in R. v. Chaulk, R. v. Saxon and R. v. Abel, the appeal courts have held that if a person knew, or ought reasonably to have known, that the substance voluntarily consumed was an intoxicant, then a claim of involuntary intoxication will fail. Likewise, in R. v. Hardie the English Court of Appeal held that where self-induced intoxication by medical drugs is “faultless” (subjectively and objectively), the person will be treated as involuntarily intoxicated. In effect, this principle of faultless intoxication seems to have also prevailed in the Supreme Court’s decision in R. v. King, although the stated rationales of both Taschereau and Ritchie JJ. for acquittal are somewhat different. In R. v. Allen the English Court of Appeal held that ignorance or mistake as to the strength of an alcoholic

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4 See, however, S. Bronitt & B. McSherry, Principles of Criminal Law, 2d ed. (Pyrmont, NSW: Lawbook Co., 2005), at 257, where the authors note that the legislative provisions in some Australian jurisdictions indicate that intoxication which results from a “reasonable” mistake will be considered involuntary: see s. 428G of the Crimes Act 1900 (NSW), s. 1 of the Criminal Code (NT), s. 34 of the Criminal Code (ACT) and s. 8.1 of the Criminal Code (CTH).


8 [1985] 1 W.L.R. 64 (C.A.).


drink that is voluntarily consumed will not be treated as involuntary intoxication. The same result will presumably be reached in Canada on the basis that everyone who knows that alcohol or other drugs can have an intoxicating effect has subjectively, or at least objectively, taken a risk that their impairment may result in their commission of an offence.

The Canadian rule as articulated in cases such as *Chaulk*, *Saxon* and *Abel* is too broadly cast and arguably offends section 7 of the Charter. It can be forcefully argued that depriving an accused of the benefits of a defence of involuntary intoxication on the basis of an objective standard of fault (i.e., “ought to have known”) at least for stigma offences is an unconstitutional application of substituted fault. And even if this substituted fault is not unconstitutional for subjective offences that are not classified as stigma offences, the application of an objective fault standard to exclude a defence that negates subjective fault or voluntariness is undesirable. Similar to rules governing mistake of fact, where the offence charged requires subjective *mens rea*, an accused should not lose the benefit of involuntary intoxication unless he or she knew or was subjectively reckless or wilfully blind to the fact that the substance was an intoxicant. Being objectively negligent should not suffice unless the offence committed is an offence of criminal or penal negligence.

Once an accused’s intoxication is classified as involuntary, the next question is what rules of exculpation apply to an involuntarily intoxicated person. Should the same rules apply to involuntary intoxication as apply to voluntary intoxication? If that were the case, there would be no need to distinguish between voluntary and involuntary intoxication. But there is an essential difference between the two. Involuntary intoxication occurs blamelessly, voluntary intoxication does not. That difference should be reflected in the rules governing both situations. At a minimum, an involuntarily intoxicated person who lacks the intent or the voluntariness for the offence charged, whether specific or general, should be acquitted. In other words, the strictures of the specific-general intent rule, as modified in *Daviault* and section 33.1, which apply to cases of voluntary intoxication should not apply to cases of involuntary intoxication. That proposition seems to be recognized in Canadian case law.

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12 In *Chaulk*, supra, note 5, the trial judge acquitted the accused on three general intent assault-related offences on the basis of involuntary intoxication. The Court of Appeal reversed, holding that the accused’s intoxication was voluntary. However, the Court did not appear to dispute
Likewise, involuntary intoxication can and should be a defence to offences of penal or criminal negligence, provided the accused’s state of involuntary intoxication did not arise out of negligence on the accused’s part.\textsuperscript{13}

Those two differences from the rules governing voluntary intoxication arguably do not constitute, by themselves, an adequate and just set of rules for involuntary intoxication as a defence. Intoxication normally has to be quite high to negate specific or general intent. It is well recognized that milder forms of intoxication do not negate intent, but do loosen inhibitions to the extent that a person would not have committed the offence but for the intoxication. Those offences could run the gamut from a foolish incident of theft or damage to property to a serious assault, or perhaps even intentional killing. The law is clear that voluntary intoxication that loosens inhibitions but does not negate intent is no defence.\textsuperscript{14} But should a person who was blameless in becoming intoxicated be entitled to claim lessened or diminished control as a defence? Although it is controversial, I suggest that they should and that such a claim of diminished control due to involuntary (blameless) intoxication may be supported under principles of fundamental justice in section 7 of the Charter. Such a defence is not entirely unknown. The famous 19th-century codifier, Thomas Macaulay, who in 1837 prepared a draft Criminal Code for the then British colony of India, included a straightforward provision which in effect recognized diminished control due to involuntary intoxication as a defence.\textsuperscript{15} Unfortunately, Macaulay’s provision was altered beyond recognition when the Indian \textit{Penal Code} was finally enacted in 1860.\textsuperscript{16} As far as I am aware, no other commonwealth jurisdiction replicated Macaulay’s diminished control defence for involuntary intoxication until the enactment of section 8.5 of the Austra-

\textsuperscript{13} \textit{R. v. King}, supra, note 9.


\textsuperscript{15} In s. 68 of his draft Code, Macaulay provided that “Nothing is an offence which a person does in consequence of being, at the time of doing it, in a state of [involuntary] intoxication.” For a full account of Macaulay’s treatment of involuntary intoxication, and the abandonment of it by the final drafters of the Indian \textit{Penal Code}, see G. Ferguson, “Intoxication” [hereinafter “Ferguson, ‘Intoxication’”] in W.C. Chan, B. Wright & S. Yeo, eds., \textit{Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform} (Farnham, UK: Ashgate, 2011).

\textsuperscript{16} Act No. 45 of 1860 (October 6, 1860).
lian Commonwealth *Criminal Code* in 2002. That same provision was adopted in the Australian Capital Territory *Criminal Code Act 2002* and subsequently adopted in the Northern Territory *Criminal Code Act 2003*. A lessened inhibitions standard for involuntary intoxication was also adopted by the English Court of Appeal on a charge of indecent assault in *R. v. Kingston* under the rubric of a defence of “innocent intent”. However, the House of Lords overruled that decision and held that there is no defence of innocent intent or lessened inhibitions by reason of involuntary intoxication. Subsequently, the English Law Commission and the Tasmania Law Reform Institute examined and rejected the idea of an involuntary intoxication defence based on lessened inhibitions.

Notwithstanding these rejections of such a defence, I think there is a sound moral basis for exculpating such accused persons. It can be argued that principles of fundamental justice dictate that persons who would not have committed an offence but for the unlawful imposition of intoxication on them deserve not to be punished even if they intended the offence committed. At first glance, it may seem contrary to ordinary principles of responsibility to acquit a person of an offence if the person has committed it with the requisite mental fault element. However, that is precisely what the law does in the context of certain other lawful justifications and excuses, such as self-defence, necessity or duress. In each of those instances, the mental element for the offence committed exists, but the accused is excused or justified in committing that offence for sound policy reasons. In the case of involuntary intoxication, the accused should be entitled to an acquittal because his or her ordinary volitional control mechanisms are impaired, through no relevant fault of his or her own, to the extent that the accused has committed an offence which he or she would not have committed if sober. Under those circumstances, it is unfair to hold that person to blame for something which was in effect caused through no fault of his or her own.

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18 *Criminal Code Act 2002* (A2002-51), s. 34.
21 [1995] 2 A.C. 355 (H.L.). The House of Lords held that if such a defence was to be created, it was a task for Parliament, not the courts.
23 Tasmania Law Reform Institute, *supra*, note 17, at 94-102.
Critics of the lessened inhibitions concept argue that it is an unworkable test because it would be virtually impossible to determine whether the accused would not have committed the offence had he or she not been involuntarily intoxicated. While this is a legitimate concern, it is not insurmountable. Like many other legal tests, it will be easy to infer in some cases and difficult to infer in other cases, just as inferences about the accused’s fault or state of mind are easy to draw in some cases and difficult to draw in other cases. Judges and juries rely on their own experience and common sense in drawing such inferences. It may, however, require specialized rules regarding the admissibility and use of the accused’s prior conduct and character. While it is challenging to craft specific evidence rules for certain contexts, as we have seen in regard to self-defence (e.g., in regard to the admissibility of evidence concerning the complainant’s disposition for violence), battered woman syndrome (e.g., specific directions on how a judge or jury should use expert evidence in respect to the battered woman syndrome), and rape shield evidence laws (e.g., ss. 276-278), it is not impossible.

A more substantial argument against a lessened inhibitions rule is the claim that the accused is still morally blameworthy if he or she intentionally or recklessly commits an offence, even though the accused would not have committed that offence if sober. This claim is often premised on the assumption that an involuntarily intoxicated person will become aware of his or her intoxication and at that stage has an obligation or responsibility to monitor his or her behaviour from that point on. In fact, in many cases, involuntarily intoxicated persons may not know they are intoxicated. Second, even if a person does become aware of his or her intoxication, it may be unfair to impose a duty or responsibility on that person to “make special efforts to see and avoid risks” when his or her blameless state of intoxication has impaired the very qualities — intellectual and moral judgment and ordinary behaviour control mechanisms — that are relevant to taking special precautions to avoid commission of a crime.

A third concern with a lessened inhibitions test for involuntary intoxication is its potential to be a complete defence to the intentional commission of the most serious of offences by persons whose inhibitions

24 Id., at 97.
25 Some commentators have suggested that the law should treat involuntarily intoxicated persons who are unaware that they are intoxicated more leniently than involuntarily intoxicated persons who become aware that they are intoxicated. While there may be some merit in that claim, I have not adopted it in my proposed draft.
are only modestly impaired. For example, suppose A, while in a state of involuntary intoxication, intentionally sexually assaults or kills V. An acquittal for sexual assault or for murder in such circumstances would indeed be a cause for concern in most circumstances. But this sort of unlikely hypothetical must be put into context. The lessened inhibition defence for involuntary intoxication only applies in circumstances where the accused would not have committed the offence but for the involuntary intoxication. Involuntary intoxication is rare. Intentionally killing or sexually assaulting another person while in such a state would be even rarer. If such a claim ever arose, in my view a judge or jury would be naturally skeptical and therefore very slow to accept that an intentional killing or sexual assault was committed as a consequence of the accused’s involuntary intoxication, and would not have occurred but for the involuntary intoxication. In addition, under my proposal for a lessened inhibitions defence of involuntary intoxication, the accused is not entitled to rely on involuntary intoxication to a subjective fault offence like murder or sexual assault if the accused was subjectively reckless or wilfully blind in becoming intoxicated.

Finally, there may be a slippery slope concern. If lessened inhibitions due to blameless intoxication is recognized as an excuse for crime, why shouldn’t lessened inhibitions due to blameless circumstances such as mental and behavioural disorders, social upbringing, economic circumstances, absence of essential social safety nets for those in need, etc., be an excuse for crime if the accused would not have committed the crime but for his or her blamelessness in regard to the existence of those circumstances? This is a fair and legitimate question. A full analysis of it is beyond the scope of this paper, but I would make a few brief points. First, I suggest that the law needs to step onto slippery slopes where fairness and justice demand. The law is quite capable of carefully and cautiously taking one step at a time. Second, the law already recognizes some instances of impaired or lessened inhibitions, such as some incidents of necessity, duress, provocation and entrapment. Third, recognition of a discretely contained and infrequently occurring defence of lessened inhibitions due to blameless intoxication may have the positive effect of opening up a wider debate on the relevance of lessened inhibitions to criminal liability. That debate on the extent to which current criminal law and its categories for blame “scapegoat” vulnerable members of society and thereby consciously and unconsciously reject

In light of the above analysis, I propose the enactment of an involuntary intoxication defence provision along the following lines:

(1) No person shall be convicted of an offence in respect of an act or omission committed in consequence of being in a state of involuntary intoxication.

(2) For the purpose of this section, a person is in a state of involuntary intoxication in circumstances where the substance which intoxicated that person was consumed or administered

(a) against that person’s will,

(b) without that person’s knowledge, or

(c) in ignorance of its intoxicating quality,

and provided that the compulsion, lack of knowledge or ignorance in paragraphs (a) to (c) did not arise from subjective recklessness or wilful blindness on the part of that person in the case of subjective fault offences, or penal negligence in the case of objective fault offences.

Under the above proposal, if A commits a subjective fault offence (e.g., assault, theft or mischief), while intoxicated by reason of circumstance (a), (b) or (c) in subsection (2), A is involuntarily intoxicated and is not guilty of that subjective fault offence even if A acted with the requisite subjective fault for that offence, provided: (1) A would not have committed that offence if A was not so intoxicated; and (2) A was not subjectively reckless or wilfully blind in becoming intoxicated by reason of circumstances (a) to (c). If A was subjectively reckless in regard to his intoxication under circumstance (a) to (c), A is not involuntarily intoxicated and cannot therefore rely on the defence of involuntary intoxication. In this latter circumstance, A may rely on voluntary intoxication as a defence if the requirements for voluntary intoxication have been met. On the other hand, if A was objectively but not subjectively reckless in becoming intoxicated under circumstances (a) to (c), A can rely on involuntary intoxication as a defence to any subjective fault offence, but
not to an objective fault offence such as causing death or bodily harm by criminal negligence or careless use of a firearm by penal negligence.

Clause (c) of subsection (2) deals with a situation where the accused knowingly consumes, or consents to the administration of, a substance with no knowledge of its intoxicating properties. This clause draws a hard line between no knowledge of a substance’s intoxicating effect and mistaken knowledge as to the strength or extent of its intoxicating effect. The first scenario is treated as involuntary intoxication. The second scenario is treated as voluntary intoxication.

III. Voluntary Intoxication

1. The Specific-General Intent Rule

Accepting voluntary intoxication as a partial or complete defence to any crime can be a controversial matter. This controversy is heightened by the indisputable fact that a large percentage of crimes, and especially crimes of violence, are committed by persons who have voluntarily consumed alcohol or drugs.27 There is a strong correlation between intoxication and the commission of crime, even if that relationship is not purely causal. At the same time, although intoxicated crime is frequent, the extent to which intoxication exempts an offender from full or partial liability should not be exaggerated. While alcohol and drugs loosen an offender’s inhibitions and render the commission of crime more likely, that circumstance alone provides no defence.28 There is only a small percentage of intoxication cases where the intoxication is so extreme that...

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27 In Family Violence in Canada: A Statistical Profile (Ottawa: Canadian Centre for Justice Statistics, Statistics Canada, 2005), K. Beattie utilizes the 2004 General Social Survey, showing an association between alcohol and violence in domestic settings: 44 per cent of women stated that their partner had been drinking at the time of violence, and women with partners classified as “heavy drinkers” (five or more drinks on one occasion) experienced a greater likelihood of violence than women with “moderate” drinking partners. N. Desjardins and T. Mahony revealed in “Trends in Drug Offences and the Role of Alcohol and Drugs in Crime”, in Juristat (February 2004), that alcohol-dependent inmates were much more likely to have committed a violent crime than were drug-dependent inmates. Further, the General Social Survey from 1999 revealed that 51 per cent of victims of physical assaults and 45 per cent of victims of sexual assault believed their incident was related to the assailant’s use of alcohol. See also K. Pernanen, Alcohol in Human Violence (New York: The Guildford Press, 1991) and Intoxication and Criminal Liability, supra, note 22, at 1-2, summarizing data indicating that in 46 per cent of violent incidents, victims believe their offender(s) to be under the influence of alcohol; and 20 per cent of the time, under the influence of other drugs. See also G. Dingwall, Alcohol and Crime (Devon: William Publishing, 2006), esp. ch. 2.

28 See, e.g., Beard, supra, note 14.
the offender lacks the subjective state of mind required for the offence committed.\footnote{See, e.g., C.N. Mitchell, “The Intoxicated Offender — Refuting the Legal and Medical Myths” (1988) 11 Int’l J. of Law & Psychiatry 77, at 91, where the author cites studies indicating that intoxicated defendants are rarely unaware of their actions and rarely act without intent. While intoxication may make people less concerned about the consequences of their actions, it seldom renders them unable to perceive those consequences.} It is in this latter category of cases where the law struggles to craft an appropriate response. Clearly a person who has committed a criminal harm while voluntarily intoxicated is deserving of both condemnation and some degree of punishment. The difficulty which arises as a matter of logic is the apparent inconsistency in convicting a person of an offence requiring a subjective state of mind when it is apparent that the person did not have that state of mind due to a high level of voluntary intoxication. Over time, the common law and penal codes around the world have adopted various approaches in respect to liability for offences committed while in a state of voluntary intoxication. The development of the specific-general intent rule has been the dominant approach in common law countries for two centuries.\footnote{For a more detailed historical account, see G. Ferguson, “Mens Rea Evaluated in Terms of the Essential Elements of a Crime, Specific Intent, and Drunkenness” (1971) 4 Ottawa L. Rev. 356, at 373-78, which relies in part on R.U. Singh, “History of the Defence of Drunkenness in English Criminal Law” (1933) 49 Law Q. Rev. 528 (1933) [hereinafter “Singh”].}

Prior to 1800, the common law never considered voluntary intoxication as a defence to crime;\footnote{Singh, id., at 536. See also Reniger v. Fogossa (1551), 1 Plowdon 2, 75 E.R. 1 (K.B.).} in fact, it was sometimes considered an aggravation.\footnote{See Beverley’s Case (1603), 4 Coke Rep. 123b, at 125a, 76 E.R. 1118, at 1123 (K.B.).} The first signs that voluntary drunkenness would be given some consideration appeared in the early 19th century.\footnote{See Rennie’s Case (1825), 1 Lewin 76, 168 E.R. 965 (Sp. Assizes); Marshall’s Case (1830), 1 Lewin 76, 168 E.R. 965 (Sp. Assizes); Pearson’s Case (1835), 2 Lewin 144, 168 E.R. 1108 (Sp. Assizes); R. v. Thomas (1837), 7 C. & P. 817, 173 E.R. 356 (Oxford Cir. Ct.); but see R. v. Carroll (1835), 7 Car. & P. 145, 173 E.R. 64 (Nisi Prius).} In a series of cases starting with \textit{R. v. Meakin},\footnote{(1836), 7 Car. & P. 297, 173 E.R. 131 (Nisi Prius).} \textit{R. v. Cruse},\footnote{(1838), 8 Car. & P. 541, 173 E.R. 610 (Nisi Prius).} and \textit{R. v. Monkhouse},\footnote{(1849), 4 Cox C.C. 55 (Central Crim. Ct.). See also the discussion in A.P. Simester & W.J. Brookbanks, \textit{Principles of Criminal Law}, 3d ed. (Auckland: Thomson, 2007), at 336-37 [hereinafter “Simester & Brookbanks”].} the courts held that if intoxication negated the specific or particular intent required for the offence charged, there could be no conviction for that offence. Although the expression “specific intent” was used in these cases, there was no legal rule at this stage which divided intent into specific and basic intent crimes. In \textit{R. v. Doherty},\footnote{1687, 16 Cox C.C. 306 (Nisi Prius).} and \textit{R. v. Meade},\footnote{[1909] 1 K.B. 895 (Ct. Crim. App.).} the
English courts held that drunkenness as a defence was not restricted to specific intent crimes and was available as a defence to any crime requiring proof of intent. In 1920, the House of Lords in *Beard* 39 articulated their oft-quoted statement of the intoxication rule in terms of specific intent. Later in their judgment, the House of Lords held that intoxication was not restricted to specific intent offences and could also be used to negate any intentional offence. 40 However, that wider rule was not followed in subsequent cases. Instead, the intoxication defence in England, Canada 41 and some Australian jurisdictions became a rigid rule that intoxication is only admissible to negate specific intent but not basic or general intent.

The specific-general intent rule which excludes voluntary intoxication as a defence to general intent crimes has been vigorously defended as a just rule that is based on the need to protect the public by punishing intoxicated offenders. It is argued that a voluntarily intoxicated offender who commits a (general intent) offence is morally blameworthy and deserves to be convicted and punished for that offence. For example, in the House of Lords’ decision in *D.P.P. v. Majewski*, Lord Elwyn-Jones claimed that the general-specific intent rule is not “unethical or contrary to the principles of natural justice”, and he justified the rule that intoxication is no defence to basic intent offences on the grounds that a person who voluntarily “takes a substance which causes him to cast off the restraints of reason and conscience, ... in my view supplies the evidence of mens rea, of guilty mind certainly sufficient for crimes of basic intent. It is a reckless course of conduct and recklessness is enough to constitute the necessary mens rea in assault cases”. 42 As with other defenders of the specific-general intent rule, he gives no real explanation of why these same reasons do not exclude intoxication as a defence to specific intent offences.

and law reform bodies as unprincipled, illogical and arbitrary. In brief, the primary criticisms include the following:

1. The specific-general intent rule is considered both illogical and unprincipled by many judges and commentators. For example, in Daviault, Cory J., for the majority of the Supreme Court of Canada, held that preventing the admission of evidence of extreme intoxication to negate general intent offences is unprincipled and contrary to principles of fundamental justice because it substitutes the intent or recklessness to get drunk for the intent or recklessness required to commit sexual assault in circumstances where the former is in no way morally equivalent to the latter.

2. The distinction between specific and general intent offences is premised on linguistic manipulation of the definition or description of an offence, not on any morally significant differences between specific and general intent offences.

3. It is difficult in some cases to articulate and apply the distinction between specific and general intent offences. This difficulty leads to arbitrary and inconsistent results from court to court, offence to offence and jurisdiction to jurisdiction.

4. The specific-general intent rule is an inadequate compromise solution. Intoxication as a defence to specific intent offences has been accepted by common law courts as an imperfect but tolerable rule because it mostly arises in the specific intent offence of murder and offenders who lack the intent for murder due to intoxication, are still convicted of a serious, lesser included offence of manslaughter.

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43 For a more detailed critique of the specific-general intent rule, see T. Quigley, “Specific and General Nonsense?” (1987) 11 Dal. L.J. 75. Likewise, Dickson J., dissenting in Leary, supra, note 14, gives a cogent and convincing critique of the specific-general intent rule.

44 Supra, note 3.

45 Id., at paras. 39-42.

46 See, e.g., O’Connor, supra, note 42, at 104. For example, in Canada, sexual offences in ss. 271-273 of the Criminal Code are general intent offences and sexual offences against children and young persons in ss. 151-153 are specific intent offences. Since intoxication is not a defence to the former, what moral justification is there for it being a defence to the latter?

47 The definition of specific-general intent in George, supra, note 14, per Fautaux J., was adopted in Majewski, supra, note 42. In R. v. Heard, [2008] Q.B. 43 (C.A.) [hereinafter “Heard”], the Court interpreted the Majewski specific-basic intent distinction, which they acknowledged was elusive, as indicating that a specific intent offence requires “proof of a state of mind addressing something beyond the prohibited act itself, namely its consequences”.

48 The commonly repeated distinction that specific intent offences require a mens rea which goes beyond the immediate actus reus — i.e., an ulterior intent — fails to explain why murder is consistently classified as specific intent although it requires no ulterior intent. And the offence of rape has also been difficult to classify.
with a very wide sentencing range. But some specific intent offences do not contain lesser included general intent offences, and therefore the intoxicated offender escapes conviction and punishment for any offence. For example, a thief who lacks the necessary specific intent for theft will be acquitted entirely, with no alternative conviction available.\textsuperscript{49} There is no moral justification for absolving the intoxicated thief entirely.

Despite these criticisms, the specific-general intent rule continues to be the law in England,\textsuperscript{50} in Tasmania\textsuperscript{51} and, in a modified way, under the Australian Commonwealth \textit{Criminal Code Act, 1995},\textsuperscript{52} the Australian Capital Territory \textit{Criminal Code Act, 2002},\textsuperscript{53} the \textit{New South Wales Crimes Act}, as amended in 1996,\textsuperscript{54} and in South Australia as amended in 2004.\textsuperscript{55} And in Canada, the specific-general intent rule still applies although it has been significantly modified by \textit{Daviault} and section 33.1 of the \textit{Criminal Code}.

2. \textit{Leary} and Pre-Charter Attempts to Alter the Specific-General Intent Rule

The serious deficiencies in respect to the specific-general intent rule led the majority of the Australian High Court in \textit{O’Connor}\textsuperscript{56} to abolish

\begin{itemize}
\item Theft has been classified as a specific intent crime: see, \textit{e.g.}, \textit{Ruse v. Read}, [1949] 1 K.B. 377, approved in \textit{Majewski}, supra, note 42; and \textit{George}, supra, note 14.
\item See \textit{Majewski}, id., and \textit{Heard}, supra, note 47.
\item \textit{Criminal Code Act, 1924 (Tas.),} s. 17.
\item \textit{Criminal Code Act, 1995 (Cth.),} ss. 8.1-8.4, which provide that self-induced intoxication cannot be used to negate basic intent, but restrict basic intent to intention to commit the prescribed act or omission, but not intention in respect to requisite circumstances or results.
\item \textit{Criminal Code, 2002 (ACT),} ss. 30-31 and 33. See \textit{Intoxication and Criminal Liability,} supra, note 22, at 126-27, where the relevant provisions in the Commonwealth and ACT Codes are summarized.
\item \textit{Crimes Legislation Amendment Act 1996,} Part 11A, which is summarized in Tasmania Law Reform Institute, \textit{supra}, note 17, at 57.
\item \textit{Criminal Law Consolidation (Intoxication) Amendment Act, 2004 (S.A.),} s. 268. The new sections are summarized in Tasmania Law Reform Institute, \textit{id.,} at 58-60. Under these provisions, South Australia abolished the broad common law \textit{O’Connor} rules in 2004, and reverted to a narrower specific-basic intent rule whereby a presumption is created that an accused possesses the necessary mental element in the act requirement of basic intent offences. However, where offences require proof that the accused foresaw particular consequences or was aware of particular circumstances, voluntary intoxication is admissible to rebut the existence of that foresight or awareness.
\item \textit{Supra,} note 42. As noted below, a similar attempt to abolish the specific-general intent rule in favour of a negation of subjective fault rule was rejected by a majority of the Supreme Court
\end{itemize}
the common law rule of specific-basic intent and replace it with a rule that evidence of intoxication may be used to negate any subjective mental element, including voluntariness, intention, knowledge or subjective recklessness. A similar approach was taken by the New Zealand Court of Appeal in *R. v. Kamipeli* five years earlier. The rule in *Kamipeli* was also examined and endorsed as the most appropriate intoxication rule by the New Zealand Criminal Law Reform Committee in 1984. One of the major concerns about the *Kamipeli* and *O'Connor* rule is the fear that it will result in a flood of acquittals and/or an increase in crime. However, studies have indicated that this fear has not materialized. It takes a very high level of intoxication to negate a basic intent, and therefore it is not surprising that it seldom occurs, although it can still be argued that even one such acquittal may be one too many.

Two years before *O'Connor*, the Supreme Court of Canada was asked to reconsider the rule that voluntary intoxication is no defence to a general intent offence. In *Leary*, the accused was convicted of rape. The complainant testified it was a case of non-consensual, forced intercourse. The accused argued that it was consensual. There was some evidence of intoxication. The trial judge told the jury, “drunkenness is no defence in a charge of this sort”. The Court of Appeal agreed: rape is a general intent offence and therefore intoxication is no defence. A majority (6-3) of the Supreme Court dismissed the accused’s appeal on the same grounds. Justice Pigeon, for the majority, relied heavily on the unanimous decision of the House of Lords in *Majewski*. In that case, the House of Lords unanimously upheld the specific-basic intent rule. Justice Pigeon, for...
example, expressly relied on Lord Elwyn-Jones’ justification for the rule, quoted above. On the other hand, Dickson J., dissenting, vigorously and persuasively set out the criticisms of the specific-general intent rule that I have summarized above. He then concluded that the specific-general intent distinction should be abandoned and that evidence of intoxication should be admissible in determining whether specific or general mens rea for the offence charged did in fact exist. He challenged the claim that the general intent rule protects the public from violence. He also emphasized the importance of subjective mens rea in respect to the offence committed, and rejected the argument that the fault in becoming intoxicated can be necessarily equated to the subjective recklessness that is required for the offence committed, such as rape. Finally, he acknowledged that Parliament could, if it wished, create a separate offence of drunk and dangerous.62

Although the abolition rule adopted in O’Connor and Kamipeli and advocated by Dickson J. dissenting in Leary has several advantages, it has one fatal disadvantage. In terms of advantages: (1) it adheres to fundamental principles of responsibility by preventing conviction of a person for a crime in circumstances where the requisite volition or subjective fault element for that crime are not present; (2) it is logical and straightforward in its application of the principles of responsibility; and (3) it has not, as some feared, resulted in a spate of acquittals or an increase in intoxicated crime. But the fatal disadvantage of the O’Connor rule is the fact that it results in the total acquittal of some intoxicated offenders. Except in the rarest of circumstances,63 an outright acquittal is not morally warranted where a person has voluntarily become intoxicated and thereby taken a risk of committing some offence, and in that state has in fact committed an offence. Furthermore, such acquittals lead to public disillusionment in the justice system.64 In my view, abolition of the specific-general intent rule, without the creation of a legislative replacement, is socially and morally an unacceptable option.65

62 See id., at paras. 61-68 (S.C.C.).
63 The very rare case of a first-time drinker who was unaware of the intoxicating effects of alcohol or other drugs may provide an example of a case where a conviction and criminal sanction are not morally justified. This situation would be akin to mistake of fact.
64 See discussion of this point in note 60 above.
65 Surprisingly, in spite of the above criticism, the Tasmania Law Reform Institute in its Report, supra, note 17, has recommended the adoption of the O’Connor rule as the best intoxication option, and has rejected adding to it a new lesser included offence of criminal intoxication for persons who are acquitted of the crime charged due to intoxication.
3. The Specific-General Intent Rule after the Charter

In *Bernard*,\(^{66}\) the accused was convicted of sexual assault causing bodily harm. He admitted that he forced the complainant to have intercourse, but he claimed that due to intoxication he did not know what he was doing and that when he did realize what he was doing, he stopped. The trial judge directed the jury that drunkenness was no defence to the charge. The Court of Appeal agreed. The Supreme Court was then asked to reconsider the *Leary* rule. Justice McIntyre (with Beetz J. concurring) upheld the *Leary* rule, arguing that it was not artificial, illogical or lacking in rational justification. Following the reasoning in *Majewski*, he held that voluntarily getting so drunk as to lose control and cause criminal harm is reckless behaviour and that recklessness is an adequate *mens rea* for general intent offences such as assault and sexual assault. He also concluded, somewhat briefly, that this form of substituted fault does not offend section 7 or section 11(d) of the Charter.

Justice Wilson (with L’Heureux-Dubé J. concurring) held that withholding evidence of intoxication from the jury is appropriate in most general intent offences because, except in cases of extreme intoxication, evidence of intoxication is not capable of “raising a reasonable doubt as to the existence of the minimal intent required for the offence”.\(^{67}\) Second, Wilson J. disagreed with McIntyre J. and held that it is not necessary to resort to the proposition that the *mens rea* in getting voluntarily intoxicated is an adequate *mens rea* for the subjective fault offence that was committed, for example, sexual assault. She expressed her tentative view on the basis of *R. v. Vaillancourt*\(^ {68}\) and *R. v. Whyte*\(^ {69}\) that McIntyre J.’s “substituted *mens rea*” principle violated the presumption of innocence in section 11(d) of the Charter and was not saved by section 1 of the Charter. Justice Wilson upheld the specific-general intent rule but made one significant modification, namely, evidence of extreme intoxication involving an absence of awareness akin to automatism or insanity is admissible to negate general intent. She argued that it is only in cases of extreme intoxication that the evidence of intoxication is strong enough to raise a reasonable doubt that the accused had the minimal general intent for the offence charged. In that regard, Wilson J. stated:

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\(^{67}\) *Bernard*, *id.*, at para. 90.


... The decision of the House of Lords in *D.P.P. v. Majewski* ... may stand for the rather harsh proposition that even self-induced intoxication producing a state of automatism cannot constitute a defence to an offence of general intent such as assault but I doubt that our Canadian jurisprudence goes that far.

... I believe that the *Leary* rule is perfectly consistent with an onus resting on the Crown to prove the minimal intent which should accompany the doing of the prohibited act in general intent offences. I view it as preferable to preserve the *Leary* rule in its more flexible form as Pigeon J. applied it, *i.e.*, so as to allow evidence of intoxication to go to the trier of fact in general intent offences only if it is evidence of extreme intoxication involving an absence of awareness akin to a state of insanity or automatism. Only in such a case is the evidence capable of raising a reasonable doubt as to the existence of the minimal intent required for the offence. I would not overrule *Leary*, as the Chief Justice would, and allow evidence of intoxication to go to the trier of fact in every case regardless of its possible relevance to the issue of the existence of the minimal intent required for the offence.

It was argued by the appellant and indeed accepted by the Chief Justice in his reasons that the *Leary* rule converts the offence of sexual assault causing bodily harm into a crime of absolute liability in that the Crown need not prove any mental element. This is said to offend section 7 of the Charter as interpreted in *Re B.C. Motor Vehicle Act* ... and in *R. v. Vaillancourt* .... With all due respect to those who think differently I do not believe that the Crown is relieved from proving the existence of the required minimal intent by the operation of *Leary*.70

Chief Justice Dickson (with Lamer J. concurring and La Forest J. concurring on the law, but not the result) argued that the specific-general intent *Leary* rule should be abandoned for the same reasons he expressed in dissent in the *Leary* case. Second, he held that the *Leary* rule violated sections 7 and 11(d) of the Charter and was not saved by section 1. In particular, he held that the general intent rule imposes a form of absolute liability that violates the Charter. He also argued that the general intent rule violated section 11(d) of the Charter. In cases of general intent offences, he stated that “guilty intent is in effect presumed upon proof of the fact of intoxication. Moreover the presumption of guilt created by the

70 *Bernard*, supra, note 56, at paras. 87 and 90-91.
Leary rule is irrebuttable.” In his view, that was a clear violation of both section 7 and section 11(d) since the presumed fact does not inevitably flow from the proven fact. Chief Justice Dickson’s analysis of why the general intent portion of the Leary rule is not saved by section 1 of the Charter is particularly instructive and relevant to a Charter analysis of section 33.1 of the Criminal Code. It should be consulted by counsel and courts engaged in a constitutional challenge to section 33.1.

In Daviault the constitutionality of the specific-general intent rule was revisited. The accused was a 69-year-old alcoholic man who sexually assaulted his 65-year-old partially disabled neighbour, after being invited to her apartment. He had consumed approximately eight beers before arriving and consumed approximately 35 ounces of brandy while there. He had no memory of the sexual assault (although lack of memory after the event does not necessarily mean he was unaware of what he was doing at the time of the event). An expert pharmacologist testified that with the quantity of alcohol in his system, a person could well be in a state of automatism or “black out”. The trial judge acquitted the accused. He applied Wilson J.’s reasons for judgment in Bernard and held that the accused was in a state of extreme intoxication and that there was a reasonable doubt whether he had the general intent to sexually assault the complainant while in that state. On appeal, the Quebec Court of Appeal held that Leary and George were still binding, that Wilson J.’s modification of Leary in Bernard was not the law, and therefore allowed the appeal and entered a conviction for sexual assault.

In a 6-3 decision, the majority of the Supreme Court disagreed with the Court of Appeal, set aside the conviction entered by that Court, but did not re-enter the acquittal at trial. Instead, the majority ordered a new trial on the ground that the trial judge acquitted the accused using the ordinary standard of “reasonable doubt”, whereas the majority ruled that extreme intoxication akin to insanity or automatism is a defence to general intent offences only if the accused establishes that defence on a balance of probabilities. Thus a new trial was required to determine whether that reverse onus could be met by the accused on the facts of the case. Justice Sopinka dissenting (with Gonthier and Major JJ. concurring) held that the Court of Appeal was right in deciding that the Leary rule applies and that drunkenness, regardless of its degree, cannot be used to negate general intent. In essence, Sopinka J. followed the

71 Id., at para. 38.
72 Supra, note 3.
reasoning of McIntyre J. in *Bernard*. He held that the *Leary* rule is not fundamentally illogical and he concluded, as McIntyre J. stated in *Bernard*, that “any logical weakness in this position is justified on the basis of sound social policy”.73 Second, relying on his own views in *R. v. De Sousa*74 and McLachlin J.’s views in *R. v. Creighton*,75 he held that symmetry between the *actus reus* and *mens rea* is a general rule for criminal liability, but is not a principle of fundamental justice since it is subject to several exceptions. He concluded that one of those exceptions is the general intent portion of the *Leary* rule. In his view, the *Leary* rule does not violate principles of fundamental justice because the extremely intoxicated accused who is convicted of a general intent offence is not morally innocent. The accused’s moral fault in voluntarily putting himself in that dangerous state is in his view sufficiently blameworthy to substitute as the *mens rea* for the offence committed. Furthermore, he held that this type of substitution is not disproportionate to the *mens rea* for the offence committed, and therefore is not a violation of the principles of fundamental justice.

Justice Cory, for the majority, adopted the compromise approach of Wilson J. in *Bernard*. He first discussed the two contrasting common law approaches to the defence of voluntary intoxication. The first is to maintain the traditional specific-general intent rule as supported in *Leary* and *Majewski*, and the second is to abandon that distinction as was done in *O'Connor*, *Kamipeli* and as advocated by Dickson J., dissenting in *Leary* and *Bernard*. But with the advent of the Charter, Cory J. concluded that a third way suggested by Wilson J. in *Bernard* was possible, desirable and indeed required by the Charter. Justice Cory adopted Wilson J.’s view76 that the *Leary* rule is consistent with the Charter if it is modified by adding the “extreme intoxication akin to automatism or insanity” provision. Justice Cory then gave a fairly detailed explanation of how the general intent portion of the *Leary* rule offends sections 7 and 11(d). In short, to eliminate the requirement for proof of the requisite *mens rea* for the offence charged and to substitute in its place an entirely different form of fault — voluntarily getting extremely intoxicated — violates principles of fundamental justice in both section 7 and section 11(d) of the Charter. Justice Cory then gave the following brief explanation of

73 *Bernard*, supra, note 56, at 878.
76 Quoted supra, note 70, at para. 90.
why the section 7 and section 11(d) infringements in the Leary rule could not be saved under section 1 of the Charter:

In summary, I am of the view that to deny that even a very minimal mental element is required for sexual assault offends the Charter in a manner that is so drastic and so contrary to the principles of fundamental justice that it cannot be justified under section 1 of the Charter. The experience of other jurisdictions which have completely abandoned the Leary rule, coupled with the fact that under the proposed approach, the defence would be available only in the rarest of cases, demonstrate that there is no urgent policy or pressing objective which needs to be addressed. Studies on the relationship between intoxication and crime do not establish any rational link. Finally, as the Leary rule applies to all crimes of general intent, it cannot be said to be well tailored to address a particular objective and it would not meet either the proportionality or the minimum impairment requirements.\(^{77}\)

It is worth noting that Dickson J.’s section 1 analysis in Bernard is significantly more detailed than Cory J.’s explanation in Daviault. In addition, Cory J. went a step beyond the views of Wilson J. in Bernard in one important respect. In a brief, summary fashion, he equated the new extreme intoxication defence to the defence of insanity and concluded that, like the insanity defence, the onus of proof should be on the accused to establish Daviault extreme intoxication on a balance of probabilities. I will return to this cryptic conclusion later.

4. The Enactment of Section 33.1

The decision in Daviault was rendered on September 30, 1994. It was met with strong, adverse reaction from many quarters, including strong interventions from feminist legal scholars.\(^{78}\) The Minister of Justice and his officials scurried to find a solution. As usual, there was plenty of “behind the scenes” lobbying. Section 33.1 was introduced as Bill C-72 on February 23, 1995 and proceeded through Parliament fairly

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\(^{77}\) Daviault, supra, note 3, at para. 47.

swiftly. It received Royal Assent on July 13, 1995 and came into force on September 15, 1995. Section 33.1 did not replace the common law defence of intoxication with a complete codified provision. Instead the Minister of Justice chose to craft Bill C-72 so that it only modified part of the Daviault rule. In turn, the Daviault rule upheld the common law Leary rule with one significant alteration. Thus, the law of voluntary intoxication as a defence in Canada is now the Leary rule, as modified by Daviault and as further amended by section 33.1.

Section 33.1 provides, in essence, that if a person voluntarily gets into “a state of self-induced intoxication that renders the person unaware of, or incapable of consciously controlling, their behaviour”, then that person has departed “markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault” for any general intent offence “that includes as an element assault or any other interference or threat of interference ... with the bodily integrity of another person”. Put another way, such a person is acting in a penally negligent fashion. If the person in that penally negligent, intoxicated state commits a general intent offence which involves assault, or interference or threat of interference with the bodily integrity of another person, the person is guilty of the offence committed even though he or she lacked the general intent or voluntariness normally required for that offence. In other words, the penal negligence in regard to getting voluntarily intoxicated becomes a substitute mens rea for the mens rea or voluntariness normally required for the general intent, assault-based offence that is committed.

One obvious problem with section 33.1 is that it seems to reverse part of the Charter ruling of the Supreme Court of Canada in Daviault. Not all of it, but part of it. Daviault intoxication (i.e., extreme intoxication) is still a valid defence to general intent offences not involving assault or interference or threatened interference with another person’s bodily integrity. Thus Daviault intoxication still applies to general intent offences, such as some instances of forcible entry (section 72), trespassing at night (section 177), mischief (section 430), etc.

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79 Bill C-72 was passed through the House of Commons, including a review of it by the House of Commons Committee on Justice and Legal Affairs, by June 22, 1995, and by July 12, 1995 it had passed through the Senate, including a briefer review of it by the Senate Committee on Legal and Constitutional Affairs. No changes were made to the Bill throughout the Parliamentary process, except to delete the phrase “basic intent” (which is used in England and some other countries) and insert in its place the phrase “general intent”.

5. Constitutional Problems with the Law of Voluntary Intoxication

There are three constitutional problems with the current law of voluntary intoxication which I intend to address: (1) the possible unconstitutionality of section 33.1; (2) the reverse-onus imposed in the Daviault rule; and (3) the gap in the Daviault rule whereby a mistake of fact that negates a general intent is not recognized as a defence if the mistake is caused by intoxication that is less than extreme intoxication akin to automatism or insanity.

(a) Constitutionality of Section 33.1

In Daviault, the Supreme Court held that the portion of the Leary rule that prevents extreme intoxication akin to automatism or insanity from being a defence for a general intent offence is an infringement of principles of fundamental justice in both section 7 and section 11(d) of the Charter. The infringement in the Leary rule arises from the fact that the fault of getting extremely intoxicated is treated as an adequate and essentially equal level of fault as the fault required for the offence committed, e.g., an intent to commit sexual assault. In Daviault, the Supreme Court held that those two fault levels are not equivalent and cannot be substituted one for the other. The Supreme Court further concluded that this infringement of sections 7 and 11(d) cannot be saved under section 1 of the Charter. Thus Daviault held that extreme intoxication akin to automatism or insanity must be recognized as a defence — the Charter compels it!

Parliament’s enactment of section 33.1 appears to be an “in your face” partial reversal of the Daviault ruling. Section 33.1 contradicts Daviault by declaring that extreme intoxication akin to automatism or insanity shall not be a defence to any general intent offence which includes as an element assault or interference with the bodily integrity of another. Thus, contrary to Daviault, section 33.1 states that extreme intoxication is not a defence to offences of assault or sexual assault.

How did Parliament assume section 33.1, which is a partial reversal of Daviault, would survive a subsequent Charter challenge? First, section 33.1 was drafted in a fashion to try to avoid the Charter obstacle identified in Daviault.81 To repeat, that obstacle was the Court’s finding that

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81 See, for example, Justice Minister Rock’s testimony before the Senate Committee on Legal and Constitutional Affairs, Proceedings of the Senate, Issue No. 46, June 28, 1995, at 46:22 and 46:25.
substituting the fault of voluntary extreme intoxication for the general
intent of the offence charged violates principles of fundamental justice in
sections 7 and 11(d) of the Charter. In my view, Parliament’s attempt to
avoid unconstitutional substitution of *mens rea* in section 33.1 has failed.
Section 33.1 declares that voluntary, extreme intoxication resulting in the
commission of a general intent offence involving assault or interference
with a person’s bodily integrity constitutes the criminal fault level of
penal negligence. While Parliament has the constitutional power to
create a (non-stigma) offence of sexual assault by penal negligence, it did
not do so. Section 33.1 still convicts the intoxicated accused of the
intentional offence of sexual assault when that person lacked the neces-
sary general intent, and it justifies doing so by substituting instead the
fault level of penal negligence in regard to getting extremely intoxicated.
Penal negligence is not equivalent to intention and to substitute it in a
crime that is defined as requiring intention will continue to violate
sections 7 and 11(d) of the Charter. This point is relevant to my proposal
later in this paper to create a separate set of penal negligence offences
which run parallel to general and specific intent offences, and which can
be used as an alternative lesser included offence if a person is so intoxi-
cated that he or she does not have the requisite intent or voluntariness for
the subjective *mens rea* offence.

Parliament has sometimes created parallel offences whereby one of-
fence is an intentional (or reckless) offence and the other is a criminal or
penal negligence offence; consider, for example, assault causing bodily

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Bill C-72 is not meant to reverse the court’s decision in *Daviault*, but rather to address
the problems or limitations with the common law that were identified by the court in that
case.

In the *Daviault* case, the court found that troublesome because they were unable to find a
linkage between the blame or the conduct of ingesting the intoxicant and the gist of the
criminal act.

What we have done to bridge the gap and overcome that legal issue is to legislate a stan-

dard of care and conduct to say that anybody who puts themselves in that position falls
below that standard and is not able to rely upon that defence.

Conduct that is a marked departure from the standard of care expected of reasonable
persons has been classified as penal negligence by the Supreme Court: *R. v. Hundal*, [1993] S.C.J.
negligence is a higher form of negligence than penal negligence and it applies to three *Criminal
Code* offences: ss. 220, 221 and 222(5)(b). It is defined in s. 219 as conduct showing “wanton or
reckless disregard for the lives or safety of other persons” which, according to the above case law,
also involves “a marked and substantial departure from the conduct of a reasonable person”: see also
harm (section 267(b)) and criminal negligence causing bodily harm (section 221), or intentional or reckless arson (section 433) and arson by penal negligence (section 436). By creating separate parallel negligence offences for persons who lack subjective mens rea due to intoxication, the improper fault substitution of negligence for intention in section 33.1 is avoided. Another principle of fundamental justice should also be noted here. In Martineau and in Creighton, the Supreme Court stated that causing harm intentionally must be punished more severely than causing harm unintentionally. This fundamental principle of proportionate punishment can be satisfied provided the two offences do not have the same mandatory minimum punishment. This leaves Parliament open to create the same maximum penalty for the penally negligent offence as for the intentional offence, just as Parliament has done in sections 267(b) and 221, or to create different maximum punishments as Parliament has done in sections 433 and 436.

Apart from Parliament’s attempt to avoid a Charter breach in respect to substituted mens rea, Parliament’s main Charter defence to its abrogation of part of the Daviault defence in section 33.1 is a claim that even if section 33.1 involves an unconstitutional form of substituted fault, that violation of sections 7 and 11(d) is justified under section 1 of the Charter. Parliament tried to embolden its section 1 justification by emphasizing the government’s pressing and substantial objective in enacting section 33.1, and by attempting to impair the section 7 and section 11(d) Charter infringement as little as reasonably possible by restricting section 33.1 to general intent offences involving assault or interference with bodily integrity. In regard to its pressing and substantial legislative objective, Bill C-72 contains a long Preamble which expressly sets out Parliament’s concerns about permitting a defence of extreme intoxication to persons who commit assault-type offences. In particular, those concerns relate to the strong association between intoxication and violence, and the infringement of equality values that such a defence involves, since the victims of this form of drunken violence are disproportionately women and children. These claims are real and legitimate but may not be enough to overcome a section 1 Charter challenge. Certainly, the government was not entirely confident that section 33.1

83 Supra, note 11.
84 Supra, note 75.
85 See Creighton, id., and Gosset, supra, note 82, as discussed in Stuart, supra, note 78, at 224-25.
86 See note 26, supra, and Grant, supra, note 78, at 388-90.
would survive a constitutional challenge. In introducing Bill C-72 into the House of Commons and in defending it in the Senate, the Minister of Justice indicated that the government was seriously considering a reference of Bill C-72 to the Supreme Court before it was proclaimed. That reference did not occur. It is, however, very surprising that 17 years after its enactment, no appellate court in Canada has yet ruled on the constitutionality of section 33.1, although appellate courts have, from time to time, applied section 33.1 without commenting on its constitutional validity.

On the other hand, courts of first instance have considered the constitutionality of section 33.1 on several occasions and have reached different conclusions. There is virtual unanimity among those courts that section 33.1 does violate principles of fundamental justice in sections 7 and 11(d), as articulated in Daviault. These cases have generally ignored one strong feminist argument. That argument is that the removal of a defence of extreme intoxication in cases of general intent offences involving assault (by reliance on the device of substituted fault) should not be seen as a violation of principles of fundamental justice since it supports equality rights of women and children and is applied to a group of extremely intoxicated persons who are not morally blameless for the ultimate consequences of their conduct. This argument is, for example, well articulated by Professor Grant. If the Supreme Court adopts this legitimate approach (and I cautiously predict that it will not), section 33.1 may survive a section 7 challenge. The Court will then be required to apply this same reasoning to conclude that the substituted fault in section 33.1 does not violate section 11(d) of the Charter. If that is the case, then the courts will not have to apply a section 1 Charter analysis to section 33.1 of the Criminal Code.

In regard to lower courts that have examined the constitutionality of section 33.1, the different conclusions reached by those courts arise from their difference of opinion as to whether section 33.1 is a reasonable limit on the violation of sections 7 and 11(d). In R. v. Vickberg, R. v. Dow and R. v. N. (S.), the courts engaged in detailed analysis before concluding that section 33.1 did not violate section 1 of the Charter. On the other

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87 See Proceedings of the Senate, supra, note 81, at 46:23.
89 Grant, supra, note 78, at 390-400.
hand, in *R. v. Brenton*,93 *R. v. Dunn*,94 *R. v. Jenson*,95 *R. v. Cedano*96 and *R. v. Fleming*,97 the courts held that section 33.1 did violate section 1 of the Charter. In regard to that conclusion, the reasons for judgment in *Brenton, Dunn* and *Jenson* are most helpful. It is beyond the scope of this paper to conduct a detailed critique of these two lines of reasoning. What can be said is that it remains an open question as to whether the Supreme Court will uphold or strike down section 33.1.

In my opinion, if the Supreme Court accepts the view that there is another reasonable alternative open to Parliament to achieve its objectives of denunciation of the offender’s conduct and protection of society, especially women and children, from drunken violence, without any impairment of section 7 or section 11(d), then section 33.1 is bound to fail the minimal impairment test in section 1 of the Charter. Later in this paper, I argue that Parliament’s objectives can indeed be achieved with no constitutional infringement by creating a set of penally negligent offences which apply when an accused’s voluntary intoxication negates the requisite subjective fault for those offences.

(b) The Reverse Onus for Daviault Intoxication

When Wilson J. fashioned the defence of extreme intoxication akin to automatism or insanity for general intent offences in *Bernard*, she also applied the ordinary standard of proof to that defence. In other words, the Crown must prove the requisite intent, whether specific or general, beyond a reasonable doubt. If a reasonable doubt exists, intent has not been proven. Intent is normally proven by drawing inferences from all of the evidence. If there is evidence of voluntary intoxication that raises a reasonable doubt regarding whether the accused formed the minimal intent required for general intent offences, then, as Wilson J. indicated, the accused must be acquitted.98 Likewise, Dickson C.J.C., who disented in *Bernard*, clearly recognized that the onus and standard of proof

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98 *Bernard*, supra, note 56, at paras. 90-91.
in intoxication defence cases remains on the Crown. In doing so, he pointed out that \textit{mens rea} is a fundamental requirement of criminal liability and that it is always for the Crown to prove \textit{mens rea} beyond a reasonable doubt. He further noted that since intoxication affects one’s ability to perceive the circumstances or appreciate the consequences of one’s act, “therefore intoxication is relevant to the mental element in crime, and should be considered, together with all other evidence, in determining whether the Crown has proved the requisite mental state beyond a reasonable doubt”.\footnote{Dickson C.J.C., \textit{id.}, at para. 16.}

As already noted, in \textit{Daviault} Cory J. for the majority of the Court adopted Wilson J.’s expansion of the \textit{Leary} rule to cover extreme intoxication in the context of general intent offences. But with very little analysis, Cory J. also stated that, like insanity, the burden of proof should be on the accused to prove on a balance of probabilities that extreme intoxication akin to automatism or insanity existed. In that regard, Cory J. stated:

\begin{quote}
It should not be forgotten that if the flexible “Wilson” approach is taken, the defence will only be put forward in those rare circumstances of extreme intoxication. Since that state must be shown to be akin to automatism or insanity, I would suggest that the accused should be called upon to establish it on the balance of probabilities. This court has recognized in \textit{R. v. Chaulk}, [1990] 3 S.C.R. 1303, that although it constituted a violation of the accused’s rights under s. 11(d) of the Charter, such a burden could be justified under s. 1. In this case, I feel that the burden can be justified. Drunkenness of the extreme degree required in order for it to become relevant will only occur on rare occasions. It is only the accused who can give evidence as to the amount of alcohol consumed and its effect upon him. Expert evidence would be required to confirm that the accused was probably in a state akin to automatism or insanity as a result of drinking. ...\end{quote}

\begin{quote}
Extreme intoxication akin to automatism or insanity should, like insanity, be established by the accused on a balance of probabilities.\footnote{Daviault, supra, note 3, at paras. 63-64.}
\end{quote}

The reverse onus imposed in \textit{Daviault} was not altered by section 33.1. That reverse onus continues to apply to general intent offences not involving assault as an element. That reverse onus should be re-challenged when the next intoxication case reaches the Supreme Court. There are a number of grounds to challenge it. First, Cory J. acknowl-
edges that the reverse onus violates section 11(d) of the Charter, but he expresses the view that the violation can be justified under section 1 of the Charter. However, he does not engage in a complete or detailed section 1 analysis. Instead, he simply equates the extreme intoxication defence to the insanity defence and then applies *Chaulk*¹⁰¹ as authority for the constitutional legitimacy of the reverse onus. But insanity and extreme intoxication are not virtually identical. Intoxication is a defence because it negates *mens rea*. And *mens rea* is an element of liability which the Crown must always prove beyond a reasonable doubt. On the other hand, insanity may negate *mens rea*, but it is much wider than a *mens rea* defence; it applies even if *mens rea* exists provided the criteria in section 16 of the *Criminal Code* have been proven.

Second, the reverse onus in section 16 which deals with the mental disorder defence is a historic anomaly dating back to *M’Naghten’s Case*¹⁰² in 1843, a time when the burden of proof for affirmative defences was less clear. In subsequent cases, including *Woolmington v. D.P.P.*¹⁰³ the burden of disproving affirmative defences, once there was an air of reality to them, was clearly placed on the Crown beyond a reasonable doubt. It is unfortunate that Canadian codifiers in 1892 incorporated the reverse onus for the insanity defence into section 16 of the *Criminal Code*. While one can at least say that the reverse onus in the insanity defence is legislatively imposed, it is very disappointing to see the Supreme Court, on its own initiative, judicially impose a reverse onus where there is no need to do so.¹⁰⁴ Third, there seems to be no convincing rationale or justification to place the ordinary burden of proof on the Crown in regard to the intoxication defence for specific intent offences and to place it on the accused for general intent offences. That is illogical and arbitrary, and is certainly difficult to explain to jurors in cases where there is evidence of intoxication negating both specific and general intent.

¹⁰¹ *Supra*, note 5.
¹⁰² (1843), 8 E.R. 718 (H.L.).
¹⁰³ [1935] A.C. 462 (H.L.). The House of Lords treated the reverse onus in the insanity defence as some sort of historic exception.
¹⁰⁴ The Supreme Court compounded its uncritical acceptance of a reverse onus in *Daviault* by then justifying a reverse onus for the defence of automatism in *R. v. Stone*, [1999] S.C.J. No. 27, [1999] 2 S.C.R. 290 (S.C.C.), through the use of a bootstrap argument. The majority in *Stone* stated that since the onus for the defences of insanity and *Daviault* intoxication are on the accused, then it is logical and appropriate to place the burden of proof on the accused for the somewhat similar defence of automatism.
Fourth, a full section 1 analysis of whether the reverse onus for extreme intoxication is justified would easily put paid to the assumption that it would be virtually impossible for the Crown to disprove extreme intoxication without a reverse onus. That questionable assumption was accepted in regard to the insanity defence by a majority of the Supreme Court in *Chaulk*\(^{105}\) in the absence of any empirical evidence supporting that assumption. On the other hand, Wilson J. relied on empirical evidence in rejecting that assumption. My own brief empirical study, which demonstrates that the prosecution can easily disprove the insanity defence in states in the United States where the prosecution bears the burden to do so, also supports Wilson J.’s conclusion on this point.\(^{106}\) Moreover, even if the assumption was true that mental disorder is such a complex, uncertain state of mind that it would be virtually impossible for the Crown to disprove it, that assumption has little or no purchase in respect to the Crown’s ability to disprove beyond a reasonable doubt that the accused was not so extremely intoxicated that he lacked the general intent for the offence charged. If the accused wants to raise an air of reality to the defence of intoxication, evidence of how much the accused drank or consumed will have to come from the accused. The credibility of that evidence can easily be assessed against the actions of the accused, statements by the accused and the observations of others. In addition, in an effort to raise a reasonable doubt about the existence of extreme intoxication, it is likely that the accused will call expert evidence in regard to the effects of a certain amount of alcohol or drugs on a person’s mental functions. Proof or disproof of extreme intoxication negating general intent is no more difficult than proof or disproof of intoxication negating specific intent, which the Crown must already do. There is


\(^{106}\) See G. Ferguson, “A Critique of Proposals to Reform the Insanity Defence” (1989) 14 Queen’s L.J. 135, at 148:

The experience in the United States is particularly revealing. As of 1982, in half of the States and in all federal courts, once there is some evidence of insanity, the prosecution has the burden of proving the accused’s sanity beyond a reasonable doubt. Does that burden allow a throng of fabricated insanity pleas to succeed? Does it put an intolerable or impossible burden on the Crown? I sampled the reported cases in those jurisdictions for the year 1982. In almost all of the cases there was at least some expert evidence supporting the accused’s insanity plea. But in twenty-eight of the thirty cases, the defence of insanity failed. The Crown proved its case; the accused failed to raise a reasonable doubt. If anything, these figures suggest that even raising a reasonable doubt about insanity may be too difficult a standard to meet rather than one which is too facile. (Incidentally, in jurisdictions where the accused had the burden of proof on a balance of probabilities, the accused’s insanity plea failed sixteen times in seventeen cases.)
simply no need for justification to reverse the onus of proof for extreme intoxication.

(c) The Mistake of Fact Gap in Daviault and Section 33.1

Both Daviault, and its restricted version in section 33.1, still allow a person to be convicted of a general intent offence when that person makes a mistake of fact that negates the general intent, if that mistake was caused by a degree of intoxication that was less than the extreme intoxication required under Daviault. Under Daviault, intoxication is only a defence for general intent offences when the intoxication is extreme. Otherwise intoxication is not admissible to negate general intent.107 For example, causing a disturbance by shouting in a public place is a general intent offence. An intoxicated person, who is not extremely intoxicated, may intend to talk loudly, but due to his intoxication does not realize that he is shouting. But because his intoxication is not extreme, the accused cannot rely on intoxication as a defence even though the accused lacks the general intent to cause a disturbance. Likewise, mischief (section 430) is a general intent offence.108 If an accused intentionally kicks the side of a car, causing some damage, but due to intoxication he mistakenly thinks the car is his own, he does not have the mens rea for mischief. However he will be convicted because he is not permitted to rely on mistake of fact caused by intoxication that is less than extreme. The same would apply to a person charged with assaulting a police officer, which is a general intent offence.109 If an accused intended to assault a person, but by mistake of fact did not know the person was a police officer, then the accused is acquitted of assaulting a police officer and convicted of a common assault.110 But if the accused’s mistake is caused by intoxication that is less than extreme intoxication, then intoxication is no defence and the accused will be convicted of assaulting a police officer. And since the enactment of section 33.1, the accused would also be convicted even if his intoxication was so extreme that he did not have the general intent to assault anyone.

Chief Justice Dickson recognized this gap and anomaly in his disenting judgment in Bernard. He argued that if a mistake of fact negates the requisite subjective mens rea for an offence, whether that mens rea is specific or general, an accused should not be convicted of that offence, whether the mistake arose from intoxication or otherwise. The existence of this gap in the intoxication defence has been largely ignored since Dickson J.’s comments in Bernard. The continuation of this gap in the current law of intoxication appears to violate principles of fundamental justice under sections 7 and 11(d), and does not appear justified under section 1 of the Charter. It should be challenged. This gap will disappear under my proposal.

6. Intoxication and Subjective Elements of Defences

There is disagreement and uncertainty in many jurisdictions on the question of whether an accused is entitled to rely on certain defences if, due to voluntary intoxication, that person has a mistaken belief in regard to an essential element of that defence.\footnote{See, e.g., the discussion in Tasmania Law Reform Institute, supra, note 17, at 104-112.} The disagreement and controversy should only arise in respect to defences which contain some subjective fault elements. Where the essential elements of a defence are defined on a purely objective, reasonable person standard, there is no question that the accused’s self-induced intoxication should not be relevant in determining whether those objective, reasonable standards have been met. A reasonable person is a sober person. While intoxication, by itself, is not an absolute bar to an accused relying on a defence such as self-defence, the intoxicated accused must nonetheless meet the objective standards required for that defence in spite of his or her intoxication. The issue of the relevance of intoxication in regard to defences has most frequently arisen in the context of self-defence, but the same issue can also arise with other defences such as provocation, duress and necessity. The analysis of a mistake of fact caused by voluntary intoxication with respect to an essential element of a defence needs to be analyzed in a slightly different way than mistake of fact caused by voluntary intoxication which negates the mens rea of an offence.

For defences like self-defence, the key question is whether the law in the jurisdiction in question is defined solely in terms of objective elements, or whether the defence contains a combination of subjective and objective elements. For example, the key elements of self-defence in
section 34(2) of the Canadian Criminal Code are defined in both subjective and objective terms. Thus the Supreme Court of Canada in R. v. Reilly,112 held that intoxication is not relevant in determining whether the accused (i.e., a subjective test) had a “reasonable” (i.e., an objective test) apprehension of death or bodily harm and whether the accused “reasonably” believed he could not otherwise preserve himself from death or bodily harm. On the other hand, New Zealand and some Australian jurisdictions (including the Commonwealth, ACT, Tasmania and New South Wales) have a different combination of objective and subjective self-defence elements (i.e., “reasonable force or response in the circumstances as he or she perceives them”).113 Courts in New Zealand114 and New South Wales115 have held that intoxication can be taken into account when determining the accused’s perception of the circumstances in regard to the need for self-defence. The accused’s perception of the circumstances is relevant to both the perceived, but mistaken need for self-defence and to the degree of force that is reasonable (an objective test) under the accused’s mistaken perception of the circumstances (a subjective test). For example, if an accused, due to intoxication, wrongly thinks he is being unlawfully assaulted by another person with a gun, the accused’s claim of self-defence would be judged upon his mistaken perception of the facts in regard to both the need for self-defence and the type of response that would be warranted if the mistaken facts actually existed. The Tasmania Law Reform Institute in its 2006 Report supports this latter approach, and recommends that intoxication should be relevant to determining whether subjective, or partially subjective, elements of a defence exist.116 I agree with this approach, subject to an important corollary principle. Jurisdictions such as New Zealand and New South Wales seem to treat intoxication as to subjective elements of a defence as a full defence entitling the accused to an acquittal. That position ignores the fact that the accused has caused a serious harm due to self-induced intoxication and is deserving of condemnation and some degree of

113 Tasmania Law Reform Institute, supra, note 17, at 104-110.
116 Indeed, Tasmania Law Reform Institute, supra, note 17 goes one step further and recommends that intoxication should also be relevant in assessing the accused’s physical abilities (e.g., slow reactions, poor coordination) and therefore the increased degree of force that might be necessary to defend oneself while intoxicated.
punishment in the same way that the intoxicated offender who lacks the requisite subjective intent for an offence is deserving of punishment. Thus, I recommend that an accused who is acquitted of the offence charged on the basis of a defence which is only applicable due to the accused’s self-induced intoxication should be convicted of the new penally negligent, intoxication-based offence described below.

7. An Alternative Offence for Intoxicated Offenders

In my view the best and most principled way to deal with voluntary intoxication is to create a set of rules which (1) allow evidence of voluntary intoxication to negate the subjective fault elements and the voluntariness requirement of offences and defences; (2) permit conviction of persons who are acquitted of an offence by reason of voluntary intoxication to be convicted of an included offence; (3) create a new included offence which will be an unintentional form of the full offence and will be called “unintentional [e.g., sexual assault, aggravated assault, theft, etc.] due to criminal intoxication”; (4) the voluntariness requirement for this new penal negligence offence will be satisfied by the accused’s prior voluntary conduct of becoming so intoxicated that he or she ran the risk of committing an offence while intoxicated; and (5) make the new unintentional offence due to intoxication punishable by the same or a specified portion (e.g., 80 to 90 per cent) of the maximum punishment that exists for the full offence. The general parameters of the new voluntary intoxication provisions would be as follows:

Voluntary Intoxication

(1) Voluntary intoxication shall not constitute a defence to any criminal charge unless the conduct constituting the offence was committed without the subjective fault element or voluntariness required for that offence due to that intoxication.

(2) For the purposes of this section, a person departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault where the person commits the conduct constituting an offence while in a state of self-induced intoxication that negates the requisite subjective fault or voluntariness for that offence.
(3) Where the conduct constituting a criminal offence was done without the subjective fault element or voluntariness required for that offence due to voluntary intoxication, the accused shall be acquitted of that offence and convicted of an included offence of unintentionally causing that offence due to criminal intoxication.\(^{117}\) If the offence charged is indictable, the included offence shall be deemed indictable; if the offence charged is summary, the included offence shall be deemed summary.

(4) The punishment for the offence of unintentionally causing an offence due to criminal intoxication in subsection (3) shall

[insert option (a) or (b)]

(a) not exceed the maximum punishment for the offence that would have been committed but for the intoxication.

(b) (i) not exceed 15 [or some other nominated number] years where the offence he or she would have been convicted of but for the intoxication is punishable by life imprisonment, or

(ii) in all other cases, not exceed more than [80 or 90 per cent, etc.] of the maximum punishment for the offence that he or she would have been convicted of but for the intoxication.

(5) Voluntary intoxication is not relevant in determining whether an accused has met objectively defined elements of a defence. However, where any element of a defence is based on a subjective belief or knowledge of a fact, an accused may rely upon his or her belief of that fact even though that belief is mistaken due to voluntary intoxication.

(6) Where an accused meets the requirements of a defence based on a mistaken belief, caused by voluntary intoxication, in respect to an essential subjective element of that defence, the accused shall be acquitted of the offence which he or she would have committed but for the intoxicated defence and shall be convicted of an included offence of

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\(^{117} \text{If it was considered desirable or expedient, a provision could be added to create an exception for the included offence in cases in which the } \textit{mens rea } \text{for murder is negated by voluntary intoxication. Under s. 86(3), the offence would be called "unintentional murder due to criminal intoxication". It could instead be provided that the included offence would be manslaughter, as it currently is.} \)
unintentionally causing that offence due to extreme intoxication, in accordance with subsection (3).

There is not space in this paper to fully explain this proposal, but a few brief comments are in order.

(1) **Advantages.** This proposal abolishes the troublesome distinction between specific and general intent and in the process also does away with the Daviault and section 33.1 exceptions to that rule. The new provision does not reverse the onus of proof and place it on the accused. And by creating a parallel set of penally negligent offences due to voluntary intoxication, there is no longer any concern about an unconstitutional substitution of mens rea.

(2) **Differences from other proposals.** Proposals for the creation of some form of alternate offence for offenders who lack mens rea due to voluntary intoxication have been considered in Canada and elsewhere.\(^{118}\) The creation of an included offence of “criminal intoxication” is the proposal most frequently discussed. That proposal has been properly discarded by academics and by the government when it was considering its response to Daviault.\(^{119}\) That proposal has several flaws. First, it improperly disguises the actual harm caused by creating only one offence called criminal intoxication. A conviction for criminal intoxication may involve minor harm such as creating a disturbance or major harm such as aggravated sexual assault. Second, because the offence of criminal intoxication would cover such a wide range of harm, it is very difficult to establish a maximum penalty for that offence — 14 years would be grossly disproportionate for causing a disturbance and six months, or two years, would normally be grossly disproportionate for aggravated sexual assault. In addition, there are possible constitutional problems with respect to creating only one offence of criminal intoxication. My proposal suffers from none of these three defects. It creates a set of intoxication offences which match the harm caused. Since the name of the offence matches the harm caused, there is no problem of inappropriate


\(^{119}\) See, e.g., the academics referred to in id. See also Senate Committee Proceedings on Bill C-72, supra, note 81, at 46:24 and 46:25; and Department of Justice, Information Note, “Self-Induced Intoxication as Criminal Fault” released by the Department on February 24, 1995 when Bill C-72 was tabled in Parliament. A proposal to create an offence of dangerous intoxication was rejected in England. However, alternative offences built on criminal negligence have been enacted in South Australia, Northern Territory, South Africa and Germany. For more details on these proposals, see Ferguson, “Intoxication”, infra, note 15, at 276-79.
labelling. Second, in regard to the penalty for the new intoxicated offences, my proposal sets out two options for Parliament to choose from: (1) the same maximum penalty for the intoxicated offence as for the non-intoxicated offence; or (2) a reduced maximum sentence for the intoxicated offence (e.g., 80 or 90 per cent of the maximum sentence for the same offence committed by non-intoxicated persons).

(3) Intoxication and sexual assault. If section 33.1 is held to be unconstitutional and Parliament decides to enact the alternative approach to the intoxication defence set out in this paper, these new provisions will replace section 273.2(a)(i), which prohibits the defence of mistaken belief in consent due to self-induced intoxication. Under my proposal, mistaken belief in consent due to voluntary intoxication may be a defence to sexual assault in some circumstances, but where it is, the accused will be automatically convicted of the new included offence of unintentional sexual assault due to criminal intoxication. If Parliament chooses to keep the limitation in section 273.2(b) that mistaken belief in consent is a defence only where the accused has “taken reasonable steps in the circumstances as that person perceived them”, intoxicated mistakes will sometimes succeed and sometimes fail as a defence to sexual assault. Where the accused did not take reasonable steps in the circumstances as the accused mistakenly perceived them due to intoxication, the accused will be acquitted of sexual assault but convicted of the new offence of unintentional sexual assault due to criminal intoxication. If Parliament is not satisfied with that result — a result that I consider to be appropriate to those circumstances, then Parliament can amend section 273.2(b) by deleting the expression “in the circumstances known to the accused” and replacing it with the expression “in the circumstances as reasonably perceived by the accused”. The insertion of the word “reasonably” will make the element of consent a purely objective standard and thereby entirely eliminate the defence of mistaken belief in consent due to self-induced intoxication.

(4) Penalty. I favour the reduced maximum penalty model noted above. The existing specific intent rule inherently recognizes that unintentionally committing an offence due to intoxication is somewhat less morally blameworthy than intentionally committing the same offence (pejoratively referred to as a “drunkenness discount”). At the time Bill C-72 was enacted, the government indicated they did not want to adopt a proposal (at least for general intent offences) which involved a
sentencing discount for intoxicated offenders.\textsuperscript{120} So my proposal leaves that option open for the government to choose.

As I noted above under the heading “Constitutionality of Section 33.1”, there is no constitutional problem with having the same maximum penalty for the included offence as for the full offence. Maximum penalties allow judges discretion to treat each case on its merits, including whether the intoxication in that case is an aggravating, mitigating or neutral factor. There may be constitutional problems, however, if both offences carry the same mandatory minimum penalty. For offences that involve mandatory minimum sentences, the proper option is to declare that the included intoxication offence has a lesser mandatory minimum penalty than the full offence (\textit{e.g.}, 80 to 90 per cent).

(5) \textit{Procedural issues}. Because the new intoxicated offence is specifically referred to as an “included offence”, there is no need under section 662 of the \textit{Criminal Code} to charge it separately. Juries will need to be instructed, especially, in cases of multiple defences that “if you have a reasonable doubt whether the accused had the requisite mental element for the offence charged due to voluntary intoxication, you must acquit him or her on that charge and you must convict him or her of the included offence of unintentional \textit{[sexual assault] due to criminal intoxication}”. Concerns have been raised that creating a lesser included offence based on intoxication would encourage plea bargains whereby the accused pleads guilty to the lesser offence in circumstances where he or she should be convicted of the full offence. While this is a legitimate concern, the problem is not with the presence of an included intoxicated offence for proper cases, the problem is with unregulated or improper plea bargaining. If it becomes a problem, the solution is to better regulate that form of plea bargaining.

(6) \textit{Name of offence}. The name I have chosen for the intoxicated offence is not written in stone. The name “unintentional \textit{[sexual assault] due to criminal intoxication}” is in my view an accurate reflection of how the intoxication defence is operating. However, the name could be changed if Parliament thought another name was more appropriate. For example, the offence could be called “criminal intoxication causing \textit{[sexual assault]” or “\textit{[sexual assault] due to criminal intoxication}”.

\textsuperscript{120} Ironically, by only amending part of the \textit{Leary} and \textit{Davault} intoxication rules, Parliament has left sentencing discounts in place for specific offences and for general intent offences that do not involve assault.