Chapter 6
Please Drink Responsibly: Can the Responsibility of Intoxicated Offenders Be Justified by the Tracing Principle?

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Abstract Normally, reduced mental capacities are thought to reduce responsibility. This is how, for example, the criminal defences of insanity/mental defect and automatism work. Persons who lack the capacity, due to a disease of the mind, to understand the nature of their actions or that they are wrong, and persons who lack the capacity for voluntary control of their bodily movements, are thought to lack essential capacities for criminal responsibility. These criminal law practices exemplify the intuition that responsibility tracks capacity, a view sometimes called "capacitarianism". An equally widely held view, however, operates to restrict the commitment to capacitarianism: the intuition that when a person is responsible for his own reduced mental capacities, the exculpatory value of those reduced capacities is discounted or even extinguished. The paradigmatic case of such reduced capacities involves persons who have reduced their capacities (of understanding, foresight, knowledge, advertence or self-control) through voluntary intoxication. This intuition is also reflected in the criminal law practices of most jurisdictions. Whether such practices can be justified is the topic of this paper. My conclusion will be that, even if we accept the capacitarian intuition and its limited application to those who are responsible for their own reduced capacities, the legal instantiation of them in criminal practice is unjustified. My argument is that our treatment of intoxicated offenders is not, in fact, supported by these commitments, contrary to what many theorists and jurists think.

6.1 Introduction

Normally, reduced mental capacities are thought to reduce responsibility. This is how, for example, the criminal defences of insanity/mental defect and automatism work. Persons who lack the capacity, due to a disease of the mind, to understand the nature of their actions or that they are wrong (the two pronged McNaughten rule of insanity), and persons who lack the capacity for voluntary control of their

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bodily movements, whether because they are suffering from a disassociative state caused by a blow to the head, a severe emotional trauma, being swarmed by bees, or sleep-walking, and so who satisfy the legal definition of automatism, are thought to lack essential capacities for criminal responsibility. These criminal law practices exemplify the intuition that responsibility tracks capacity, a view sometimes called "capacitarianism".

An equally widely held view, however, operates to restrict the commitment to capacitarianism: the intuition that when a person is responsible for his own reduced mental capacities, the exculpatory value of those reduced capacities is discounted or even extinguished. The paradigmatic case of such reduced capacities involves persons who have reduced their capacities (of understanding, foresight, knowledge, advertence or self-control) through voluntary intoxication. Even if a person lacks the capacity to understand the nature or consequences of his actions, the capacity to know that his actions are wrong, or the capacity to exercise voluntary control over his bodily movements, if that lack of capacity can be traced to his own voluntary intoxication, the lack of capacity will not exonerate. This intuition is also reflected in the criminal law practices of most jurisdictions (common law as well as civil law systems). Whether such practices can be justified is the topic of this paper. My conclusion will be that, even if we accept the capacitarian intuition and its limited application to those who are responsible for their own reduced capacities, the legal instantiation of them in criminal practice is unjustified. I am not arguing that capacitarianism and its intuitive exception in cases involving the destruction of one's own capacities is itself unjustified: I think them quite correct. Rather, my argument is that our treatment of intoxicated offenders is not, in fact, supported by these commitments, contrary to what many theorists and jurists think. Although I will use Canadian legal practice as my example in what follows, the problems identified here should apply equally to other legal jurisdictions as well.

6.2 Components of Criminal Liability: Elements of a Crime

I am interested in the criminal responsibility of intoxicated offenders. In order to understand for what intoxicated offenders are responsible, let's remind ourselves of the basic elements of criminal offences. First, offences consist of an *actus reus*, a prohibited act, omission, or result. Persons are responsible only for committing or bringing about the *actus reus* of a crime. In order to commit the *actus reus* of an offence, the person's conduct must be voluntary and conscious. There must be an acting agent whose conduct is under her voluntary and conscious control. The voluntariness component of the *actus reus* is well summed up by Vertes J. in R. v. Brenton (R. v. Brenton 1999:para. 42).

> The concept of voluntariness... represents the fundamental principle of our criminal law that no act can be regarded as criminal unless it is a voluntary act: R. v. Stone (1999) 134 C.C.C.(3d) 353 (S.C.C.) (at 421). Thus it is an aspect of the *actus reus*. It is the minimal requirement that acts must be conscious acts. There must be a mind capable of exercising the will-power to do the physical act that represents the crime. There must be a state of

> awareness on the part of the actor that he or she is doing the act. One can phrase this principle in numerous ways but the point is that voluntariness is an aspect of all crimes since all crimes must have an *actus reus* [case references omitted].

Larry Alexander calls this The Voluntary Act Principle: "there can be no criminal liability in the absence of a voluntary act", and says that "it is the law in all Anglo-American jurisdictions that no person is guilty of a crime unless she commits a voluntary act" (Alexander 1990:85).[1] This requirement has been incorporated in the Model Penal Code (Model Penal Code §2.01).

Second, all criminal offences have as an essential component some mental element known as the *mens rea* of the offence. To commit a crime a person must have the required "guilty mind" or fault element. The mental element required for different offences varies. Sometimes a person must act with intention, knowledge, foresight, or wilful blindness to commit a particular crime. These are all subjective mental states, concerning what the actual defendant knew, foresaw, or intended at the time of committing the *actus reus*. When no particular *mens rea* condition is specified, recklessness typically suffices. Recklessness is a subjective awareness of or advertence to the risk that one's conduct might constitute or bring about the *actus reus* of the offence charged, and continuing despite that risk. Many criminal law theorists, as well as some judges, have insisted that all crimes must have a subjective *mens rea* requirement. Indeed, many theorists think that what distinguishes true crimes from regulatory offences or torts is just that the latter can be committed without subjective fault, whereas criminal conduct can only be committed with subjective awareness of the harm one does. But no criminal jurisdiction has operationalized such a blanket requirement, and all legal systems allow that some crimes might be committed with only the objective fault of (gross or criminal) negligence. Negligence does not concern what was in the mind of the accused at the time of action, but rather is determined by a standard of what a reasonable person in the same circumstances would have known, foreseen, intended or appreciated, and gross negligence is a marked departure from what a reasonable person would have done in the circumstances. A person can bring about a prohibited result without any subjective fault, being unaware of the risk that his conduct may produce that result, negligently; here fault is based on the fact that he did not know or attend to facts that a reasonable person in the same circumstances would have attended to, and criminal fault consists of precisely this negligent failure to attend to relevant features of his circumstances, where that leads to a prohibited outcome.

Voluntariness is also a component of *mens rea*. Again Justice Vertes sums up the law well.

> Voluntariness is also linked to the *mens rea* component. It is a principle of fundamental justice that every criminal offence punishable by imprisonment must have a *mens rea* component. There must be at least some minimal mental state as an essential element of the crime. . . . This requirement of *mens rea* may be satisfied in different ways. There may be a subjective or an objective approach. An offence could require proof of a state of mind

[1] Alexander (1990), quoting Dressler (1987:65).

> such as intent, recklessness or wilful blindness. The *mens rea* requirement could, on the other hand, be satisfied by evidence of negligent conduct (a "marked departure") measured against an objective standard (what should have been in the accused's mind had he or she proceeded reasonably) [case references omitted]. But there must be some *mens rea* element, as there must be an *actus reus*, since otherwise the offence would be one of absolute liability, something that in criminal law violates both s. 7 and s. 11(d) of the Charter: R. v. Hess, [1990] 2 S.C.R. 906. [Section 7 of the Canadian Charter of Rights and Freedoms guarantees the right to life, liberty and security of the person, and the right not to be deprived thereof except in accordance with principles of fundamental justice. Section 11(d) guarantees to those accused of criminal offences the presumption of innocence.] Voluntariness is the basic constituent element of the *mens rea* requirement. The conscious doing of an act (being the *actus reus*) encompasses the intention to do it and therefore constitutes the minimal *mens rea* for general intent offences.

Finally, there is a required connection between the *actus reus* and *mens rea* constituting a crime. This is typically referred to as the principle of contemporaniety. *Actus non facit reum, nisi mens sit rea*: the intent and the act must concur to constitute the crime. That is, the *mens rea* must be directed to the *actus reus* itself, and they must occur, if not simultaneously, at least in tight temporal relation. No act can be criminal without a mental element of fault.

These elements of criminal offences establish a set of basic requirements that criminal law systems must satisfy if they are to conform to principles of fundamental justice. First, criminal law typically requires subjective fault. Exceptions to this rule are just that: exceptional. Moreover, the Crown or prosecution bears the burden of proving every element of the offence, to the criminal law standard of proof beyond a reasonable doubt. This is required by the presumption of innocence. A person accused of a criminal offence has nothing to answer for unless and until the prosecution has proved that he committed the *actus reus*, with the required *mens rea*, duly related to the prohibited outcome. (Duff 2007; Duff 2009; Tadros 2005; Horder 2004; Gardner 2007).

6.3 Responsibility, Liability and Defences

Understanding the elements of a crime is important because it allows us to distinguish four different kinds of answers one might raise to an allegation of criminality: exemptions (youth, insanity, diplomatic immunity), justifications (self-defence, lesser evils), excuses (duress, necessity), and denials that one satisfied all of the elements of the offence. Exemptions and exculpatory defences of justification or excuse have been the subject of considerable philosophical and legal analysis, but they are not relevant to our purposes, because no one thinks voluntary intoxication exempts persons from meeting the demands of the criminal law, nor that it functions as a justification or excuse. If intoxication is relevant to responsibility and liability, it is so because it negates an essential element of the crime alleged.

Often persons answer a criminal charge by raising a *reasonable doubt as to some element of the offence*. Here they are not accepting responsibility for the conduct constituting a crime and raising considerations that block the normal transition from

responsibility to liability, as in the case of justifications and excuses. Nor are they denying that they are answerable to the criminal jurisdiction in question or that they are responsible agents fit to answer at all, as in the various kinds of exemptions. Rather, they are denying that they committed the crime at all. That a person cannot be criminally responsible for or liable to punishment on account of conduct not meeting all of the essential elements of the crime charged seems obvious. Suppose a person is charged with a homicide offence, murder or manslaughter. It is a complete answer to the charge that the person one is charged with killing did not die. Bringing about the death of another person is an essential component of the *actus reus* for homicide. It is every bit as much a full answer to deny that one's conduct satisfies the essential *mens rea* or fault elements of the offence charged, though not so intuitively obvious. If an offence requires a particular *mens rea*, that one do something knowingly, or with a specific intention, or being reckless with respect to the risk that one's conduct will bring about a prohibited result, and one does not have the required mental state, one is simply not guilty of the crime. To be guilty of an offence one must satisfy all of its essential elements, and the prosecution must be able to prove that one does satisfy all of those elements, beyond a reasonable doubt. Thus many defences take the form of raising a reasonable doubt as to a required element of the offence charged. Mistake and accident often function this way, defeating either the *mens rea* or *actus reus* elements of the crime.

Automatism is a defence in this same family, in that it functions to defeat an essential element of the crime. Automatism is a defence available to those who "act" without consciousness and voluntary control over their bodily movements. Paradigmatic cases involve persons who bring about a prohibited result while sleepwalking, while in a disassociative state caused by a blow to the head or a severe emotional trauma, or in the throes of a seizure or other condition that undermines their ability to control their bodily movements. If I strike a person, causing him injury, while in any of these states, I will not be held criminally responsible or made liable for that harm. Whether one is in a state of automatism is determined by the degree to which one is in conscious and voluntary control of one's bodily motions and actions. Conceptually, it does not depend upon the cause of one's automatism. Yet the law makes two distinctions within the class of automatistic conduct, based on the cause of the automatism: it distinguishes sane from insane automatism, depending on whether the cause is a disease of the mind as understood in our insanity or mental defect jurisprudence; and within the category of non-insane automatism, it treats differently automatism caused by voluntary intoxication. If automatism is a result of voluntary intoxication, it cannot function to raise a reasonable doubt as to an essential element of the crime charged, for a wide range of crimes. This is problematic, given that automatism seems to defeat both the minimal mental elements of the *actus reus* (voluntary and conscious control), as well as any subjective *mens rea* requirements the offence might have, since there is nothing the person knows, intends, foresees, or adverts to while in a state of automatism. Even if the fault condition is objective negligence, it seems unfair to hold a person responsible for failing to meet the standard of care a reasonable person would meet in circumstances where she is incapable of exercising any care at all. Thus it should raise a reasonable doubt

as to both *mens rea* and *actus reus*. As we shall see, in cases of automatism caused by voluntary intoxication, this is not the case, and the automatism defence is denied to intoxicated offenders, even if they would otherwise qualify for it.

6.4 Voluntary or Self-Induced Intoxication

Intoxication, if relevant to questions of criminal responsibility and liability, seems to be so because intoxication can affect a person's mental states, and more especially can diminish a person's capacities that are relevant to responsibility and liability. Indeed, it seems pretty plausible to think that intoxication might be relevant to the mental states of persons at the time they commit an offence, and so it may be used to raise a reasonable doubt as to whether the person had the required *mens rea* for the crime charged. If crimes require subjective *mens rea* – knowledge, intention, malice, planning, deliberation, foresight, awareness, advertent recklessness or wilful blindness – then intoxication should be relevant to assessments of guilt, because it is relevant to an essential element of crimes. An accused person should be able to use the fact of intoxication as an evidential basis for claiming that she lacked the *mens rea* of the offence and so to raise a reasonable doubt as to fault, whatever the fault elements may be. As the New Zealand Court of Appeal put it: "Drunkenness is not a defence of itself. Its true relevance by way of defence, so it seems to us, is that when a jury is deciding whether the accused has the intention or recklessness required by the charge, they must regard all the evidence, including evidence as to the accused's drunken state, drawing such inferences from the evidence as appears proper in the circumstances" (R. v. Kamipeli 1975:616). The success of such arguments will vary depending upon the degree of intoxication and the specific fault requirements of the offence charged. It might be more plausible to assert that a person lacked knowledge of a particular circumstance or foresight of a particular result because she was intoxicated, for example, than to argue that she was not aware of the nature of her act or that she did not act recklessly. But for any crimes requiring subjective fault, whether intent, purpose, knowledge, willful blindness, or advertent recklessness, it seems that intoxication ought to be considered in determining whether the Crown has proved all the elements of the crime beyond a reasonable doubt. (McCord 1990) Intoxication is relevant because it might prevent the formation of the fault element of some crimes. Not surprisingly, then, the intoxication defense began as a common law defense in recognition of the fact that an accused person may be sufficiently intoxicated not to have the subjective *mens rea* for the crime charged.

On the other hand, both policy considerations and general conditions underlying exculpation tend to lend support to a regime in which voluntary intoxication cannot be used to relieve persons of criminal responsibility and punishment. This tension has been played out in law in a number of ways.

The leading modern case is *Director of Public Prosecutions vs. Beard* (1920), a rape and felony murder case heard by the House of Lords. In Beard, the House of Lords developed the distinction between general intent and specific intent offences,

and they limited the defense of intoxication to only specific intent crimes. The distinction between the two rests, as the names suggest, upon a difference with respect to the *mens rea* element of the offences. The House of Lords began with the common sense relevance of intoxication to *mens rea*. "That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proven in order to determine whether or not he had this intent" (D.P.P. v. Beard 1920: 501–02). This suggests that intoxication should function as the basis of a claim that the accused lacked the required *mens rea* to be guilty of the offence charged, and thus as an evidentiary consideration of relevance to proof of the essential elements of the crime.

But Lord Birkenhead's articulation in Beard of the principles to govern considerations of intoxication in criminal cases has been taken to require something quite different. It has been taken to mark a general distinction between crimes of general and specific intent. Although there is no canonical formulation of the distinction, the *mens rea* for general intent crimes is only a conscious performing of the prohibited act, whereas crimes of specific intent require a further purpose beyond the mere intention to perform the prohibited act, an ulterior purpose, or a fault element greater than recklessness (D.P.P. v. Majewski 1976). Examples of general intent crimes include all forms of assault, manslaughter, mischief, and breaking and entering. Examples of specific intent offences include robbery, breaking and entering with the intent to commit an indictable offence, assault to resist or prevent arrest, murder, theft, aiding and abetting a crime, attempted crimes, and being an accessory after the fact. Several scholars and jurists have challenged the dichotomy between general and specific intent offences as artificial, unprincipled, and indeterminate. (Quigley 1987a, b, c; Colvin 1981; Dickson J. in Leary v. The Queen 1978) While I agree with these critiques of the common law, they are not my purpose here.

The purpose of introducing the general/specific intent distinction was to limit the range of cases in which a "defense of intoxication" could be raised. However specific intent is understood, intoxication may raise a reasonable doubt over whether or not the accused had the specific fault element required. In this sense, intoxication may be a defense available to an accused person charged with a specific intent crime. But intoxication cannot be used to raise a reasonable doubt as to *mens rea* in the case of general intent offences (Leary v. The Queen 1978). Indeed, in many jurisdictions, intoxication can be substituted for the *mens rea* of every general intent crime, so that the prosecution may satisfy its burden of proving fault simply by proving intoxication (D.P.P. v. Majewski 1976; Leary v. The Queen 1978). This substitution rule has been widely debated, and my purpose is not to rehearse that debate or my reasons for thinking the substitution rule is unjust. (Dimock 2009) What matters here is that a person will be held responsible for the crime if it is proved that she committed the *actus reus*, even if she lacked the *mens rea* that would otherwise be required for quilt, if she committed the act while intoxicated. This will be so, moreover, even if the intoxication is extreme enough to raise a reasonable doubt as to the voluntariness of the conduct, even if it is so extreme, that is, as to produce a state of automatism. It is the justification of this practice that I now wish to examine.

6.5 The Fault of Intoxication

The rationale for the substitution rule and its subsequent limiting of the use of intoxication to raise a defense to a criminal charge is defended on a number of different grounds. But all, I suggest, are based upon a particular conception of the intoxicated offender, one which cannot be sustained given how voluntary or self-induced intoxication is understood by the courts. The image is familiar: a person drinks alcohol, consumes narcotics or prescription medication, mixes the two, either with the intent to become impaired, or at least being entirely reckless with respect to whether impairment results. He is blameworthy for his impairment, and so no wrong is done to him if he is held responsible for harms he then does as a result of incapacitating himself.

The willingness to substitute intoxication for the *mens rea* of every general intent offence or to find in intoxication an alternate basis of criminal liability stems from the conviction that individuals who become voluntarily intoxicated are morally blameworthy for doing so. When Canadian courts have addressed the constitutionality of the restrictions on the intoxication defense, many of the Justices have referred to the blameworthiness of becoming voluntarily intoxicated. Thus concerns about whether the restriction violates considerations of fundamental justice, which are centrally concerned with not punishing the morally innocent, are thought to be more easily met, because intoxicated offenders are not morally innocent, just in virtue of their self-induced intoxication. As Lamar C.J. said, intoxicated offenders are not "completely blameless" (R. v. Penno 1990). As he put it: "By voluntarily taking the first drink, an individual can reasonably be held to have assumed the risk that intoxication would make him or her do what he or she otherwise would not normally do with a clear mind."

It would seem, then, that the intoxication rule which allows voluntary intoxication to be substituted for the normal *mens rea* of general intent offences can be justified under a widely accepted principle of responsibility, namely, the "tracing" principle identified by John Martin Fischer and Mark Ravizza. (Fischer and Ravizza 1988) As is well-known, Fischer and Ravizza have argued that it suffices for responsibility that a person exercised guidance control over his action, which control just requires that the person's action issue from their own moderately reasons responsive mechanism. Applied to our case, the position would be that even if the intoxicated offender lacks the capacity to be reasons-responsive after becoming intoxicated, he may still be responsible for his conduct while intoxicated if becoming intoxicated was, at an earlier time, something over which he exercised guidance control. As Fischer and Ravizza put it, "When one acts from a reasons-responsive mechanism at *T1*, and one can be reasonably expected to know that so acting will (or may) lead to acting from an unresponsive mechanism at some later time *T2*, one can be held responsible for so acting at *T2*." (Fischer and Ravizza 1998:50) They describe their view as "a 'tracing' approach: when an agent is morally responsible for an action that issues from a mechanism that is not appropriately reasons-responsive, we must be able to trace back along the history of the action to a point (*suitably related to the action*) where there was indeed an appropriately reasons-responsive

mechanism." (Fischer and Ravizza 1988:50–51) The semicompatibilism of Fischer and Ravizza is not only widely adopted among responsibility theorists, but it seems just the kind of theory that the criminal law needs to undergird its practices. So if it has the resources to explain and justify the treatment of intoxicated offenders as responsible for their offences, even when lacking the *mens rea* typically required for them, by tracing back to a choice for which they were responsible (the choice to become intoxicated), then the tracing principle will justify the intuitions about capacities with which we began. The lack of capacity typically exculpates, but not when the incapacity can itself be traced back to a choice for which the incapacitated agent is responsible. Not surprisingly, Fischer and Ravizza use an intoxicated driver as their example to establish the intuitive force of the tracing principle.

Whether the tracing principle can justify holding intoxicated offenders responsible for their offences will depend, however, on whether the choice to become intoxicated is something for which they can be held responsible, and on whether that choice is "suitably related to the [criminal] action". As Fischer and Ravizza note, the tracing principle requires that the person to be held responsible for some act at *T2* must be reasonably expected to know that his conduct at *T1* will or might lead to action on the basis of an unresponsive mechanism at *T2*. He must be able to anticipate, that is, that his earlier choice to consume an intoxicant might lead to acting on unresponsive mechanisms in the future. As they say, "the degree of likelihood employed by the tracing approach would need to be context-relative". (Fischer and Ravizza 1998:50, fn 21) In the context of criminal liability, the degree of likelihood must be above the *de minimus* range if our practices are to satisfy the requirements of fundamental justice. I argue that they do not.

6.6 What Makes Intoxication Voluntary or Self-Induced?

The greatest injustices worked by our current intoxication rules actually stem from the way that voluntary or self-induced intoxication is defined. The problem lays with the responsibility conditions for voluntary intoxication. The image of the intoxicated offender that is relied upon is of a person who imbibes significant qualities of drugs, alcohol or both, over an extended period of time. Even if reaching a state of intoxication or impairment in not intended, any reasonable person engaging in such behaviour must anticipate that impairment might result from his actions. Indeed, it seems simply inconceivable that the person himself did not, at some point in the process of consuming the intoxicants, advert to the risk of impairment that his consumption might have. If this was the only type of person caught by our intoxication rules, they would not likely generate the controversy they have, and they could be justified by the tracing principle. (Although there might still be worries about those whose ingestion of intoxicants is the result of addiction, if addictive desires are not themselves moderately reasons-responsive.) But this is not the only type of person who is deemed to satisfy the conditions for voluntary intoxication.

The conditions on involuntary intoxication are stringent. A person cannot plead involuntary intoxication just because he did not intend to become intoxicated, or

if he did not know or even foresee that his conduct would produce intoxication. In order to be involuntary, a reasonable person could not have foreseen intoxication resulting from the person's conduct. If a person ingests or consumes anything which *he knows or ought to know is an intoxicant*, he cannot plead involuntary intoxication (R. v. King 1962). In Canada and elsewhere, there is a rebuttable presumption that impairment from alcohol or drugs is voluntary. Only if there is a reasonable doubt as to a defendant's ability to appreciate and know that he would or might become impaired, an inability for which he is completely without fault, can his subsequent intoxication exonerate. If a person voluntarily consumes alcohol or a drug which he knew or had any reasonable ground for believing might cause him to be impaired, then he cannot use his impairment to escape liability for a crime he then commits, even if he did not intend to become impaired. Among the authorities appealed to in support of this position is Justice O. W. Holmes, who wrote in *The Common Law* that: "As the purpose is to compel men to abstain from dangerous conduct, and not merely to restrain them from evil inclinations, the law requires them at their peril to know the teachings of common experience, just as it requires them to know the law." Applied to intoxication, it has been "taken as a matter of 'common experience' that the consumption of alcohol may produce intoxication and, therefore, 'impairment' . . ., and I think it is also to be similarly taken to be known that the use of narcotics may have the same effect" (R. v. King 1962).

The presumption that persons know that consumption of intoxicants is inherently dangerous and risks impairment is rarely overcome. This is so, even if the resulting intoxication is highly improbable, as long as it is the result of ingesting known intoxicants. Thus even if someone has a completely unpredictable reaction to a small amount of marijuana, for example, or someone else puts drugs into the person's alcoholic drink without his knowledge, his resulting intoxication is not involuntary because it is in part due to his ingesting substances that are known by reasonable people to be intoxicants (R. v. Brenton 1999; R. v. Talock 2003). The lack of fault for the offence due to involuntary intoxication can only exonerate if the intoxication itself was without fault, and fault for intoxication is in practice established merely by the consumption of anything reasonably known to be an intoxicant. Case after case demonstrates that the real test is proof of the voluntary consumption of intoxicants; once voluntary consumption is proved, persons are expected to have common knowledge about the dangers of their consumption, and so recklessness is simply inferred rather than proven. As Clackson J. summed up, "self-induced intoxication . . . means the accused voluntarily consumed a substance which he knew or *ought to have known* was an intoxicant and appreciated or should have appreciated that he risked becoming intoxicated" (R. v. Huppie 2008:para. 23; R. v. Chaulk 2007). As another Canadian judge put it, "the law in Canada requires that the Court find that the accused consumed the alcohol. A successful *mens rea* defence would involve evidence that the act of drinking was prompted by threats or mistake and thus not an act of volition. Examples that come to mind of this sort might be: the accused was forced against his will to drink alcohol; or a third party slipped alcohol into the drinks of an unknowing accused; or the alcohol, having been transferred

by a third party into an orange juice container, the accused was unaware he was drinking alcohol" (R. v. Thompson 1993:para. 31).

Put positively, if a person knows or ought to know that what he or she is voluntarily consuming is an intoxicant then any resulting state of intoxication is itself deemed to be voluntary. As Dyer J. put it, after reviewing the jurisprudence on voluntary intoxication, "a trial judge in dealing with voluntary consumption of drugs [must] consider whether an accused person knew or had any reasonable grounds for believing that such consumption might cause him to be impaired. In so doing, I do believe the Court should not permit negligence or carelessness on the part of an accused to become a defence. I think persons who take drugs or drink voluntarily are required to act reasonably in taking them and are to be taken to reasonably understand the likely results of taking them in most cases" (R. v. Kataria 2005: para. 102).

In practice, however, the possibility of taking drink or drugs responsibly seems to be ruled out from the start. The courts have ruled, for example, that a person cannot claim to know from experience how long a sleep-aid medication takes to work to escape liability for impaired operation of a motor vehicle, though such arguments would seem to suggest that the accused did not appreciate the risk that he would become impaired while he was in care and control of a vehicle. They have ruled that "It is not necessary for the Crown to show that the appellant knew the degree to which he would be affected. The Crown need only show knowledge that [the intoxicants in question] could affect him and that in fact they did so" (R. v. Jensen 1991:para. 25). Generally, the courts take it as a matter of common knowledge that drugs, whether illicit, prescription or unregulated such as cold medications or sleeping aids, should not be taken with alcohol or at a dosage higher than prescribed or recommended on the packaging, and such knowledge will suffice for proof that any resulting impairment is voluntary.

That voluntary intoxication can result from negligence and yet be the standard of criminal fault in any general intent offence involving crimes against the person has been codified in Canadian criminal law, which establishes gross negligence as a standard of penal fault, and creates an irrebuttable presumption that a person who becomes extremely intoxicated has that fault: he "departs markedly from the standard of reasonable care generally recognized in Canadian society and is thereby criminally at fault" (Criminal Code of Canada, s. 33.1 (2)). Thus if a person commits a general intent offense while voluntarily intoxicated, or a crime against a person even if so severely intoxicated as to be acting involuntarily, he will be deemed to have the *mens rea* necessary for conviction. Negligently becoming intoxicated suffices for criminal fault (R. v. Chaulk 2006).

The case of R. v. Brenton illustrates the problem with this approach. Mr. Brenton shared a marijuana cigarette with his landlady one evening after work. He had prior experience with the drug, though was not a habitual user, and had never had an unusual reaction to it. He smoked the joint hoping to relax so that he could sleep. Instead, he had an extreme and both statistically and subjectively unpredictable reaction to the drug, producing a state of automatism, in which he assaulted his landlady.

He was convicted at trial of the charges, even though the trial judge had a reasonable doubt as to the voluntariness of his conduct or his mental state at the time of the commission of the crimes. On appeal, Mr. Brenton argued that his conviction should be overturned because his intoxication was not voluntary. "The appellant argued, at trial and on appeal, that it cannot be said that he intended to become intoxicated or should have known that he would become intoxicated given the relatively small amount of marijuana he ingested. His purpose for smoking the marijuana was to relax so as to help him sleep. Therefore, it was argued, the result was an unintended and unexpected outcome and thus tantamount to non-voluntary intoxication." Justice Vertes rejected this argument: "I cannot agree with the appellant's submission. Generally speaking, if the ingestion of a drug (or alcohol) is voluntary and the risk of becoming intoxicated is within the contemplation or should be within the contemplation of the individual, then any resulting intoxication is self-induced. Involuntary intoxication is generally confined to cases where the accused did not know he or she was ingesting an intoxicating substance (such as where the accused's drink is spiked) or where the accused becomes intoxicated while taking prescription drugs and their effects are unknown to the accused. This is fairly basic law" (R. v. Benton 1999:paras. 30 and 31). Thus it is voluntary consumption of intoxicants, rather than any subjective appreciation that impairment might result, that is the fault of intoxication, fault that can be substituted for the *mens rea* of any general intent offence. Voluntary intoxication, then, can result from negligence without any subjective awareness of the risk of impairment or subsequent criminality.

That negligence is the fault criterion for voluntary intoxication is extremely important. Many cases involve the combination of alcohol and other drugs, whether banned substances, prescription medications or over-the-counter products. Many drugs in the latter two groups contain warnings against mixing them with alcohol, but the warnings actually suggest that sleepiness might result. While it might be negligent to drive an automobile or operate dangerous equipment in circumstances where one does or ought to anticipate extraordinary tiredness being experienced, it is not at all clear that such a warning suffices to establish that a reasonable person combining a small amount of alcohol with such drugs would or ought to anticipate that he might become violent and actually do or threaten harm to another. The fact pattern in Brenton, involving the consumption of at most half a marijuana joint, which produced a completely unexpected reaction, leading to a loss of voluntary control and violence, raises equal concern. Such an outcome was not subjectively foreseeable, nor, I would argue, even objectively foreseeable. Even a reasonable person would not have anticipated the resulting danger. Nonetheless, the trial judge felt compelled to find the accused guilty, even though entertaining a reasonable doubt as to the voluntariness of Mr. Brenton's conduct. (Criminal Code of Canada s. 33.1 (1)–(3)).

We can now see that the intoxication rules as applied are not actually supported by the tracing principle. The first problem, related to how voluntary intoxication is understood in the law, means that the substitution rule fails to meet the condition of the tracing principle that one can be reasonably expected to know that ingesting an intoxicant will (or may) lead to acting from an unresponsive mechanism

at some later time (impairment or loss of capacity). This is so because a person could satisfy the legal requirements for voluntary intoxication without satisfying the requirement that he can reasonably be expected to know that he will later become impaired to the point of being unresponsive, or becoming violent.

There is, moreover, a second way in which our intoxication rules fail to be supported by Fischer and Ravizza's tracing principle. According to their account, we must be able to trace back along the history of the subsequent criminal action to a point (*suitably related to the act of ingesting intoxicants*) where there was an appropriately reasons-responsive mechanism operating. But in fact the acts at *T1* producing intoxication are not "suitably related" to acts of violence that might be committed at *T2*. It is not reasonable to expect that persons engaged in the act of consuming alcohol or drugs can be reasonably expected to know that their conduct at *T1* creates a risk of criminality at *T2*. This is because the risk of criminality from intoxication is in fact so low, objectively speaking, that to say that a person ought to recognize that becoming intoxicated at *T1* constitutes a significant risk of a loss of capacity producing criminality at *T2* is to say that a person ought to believe what is objectively false.

Yet many people seem to think that such a risk is foreseeable from intoxication. Indeed, many judges and academic commentators suggest that becoming voluntarily intoxicated is necessarily reckless. The claim must be a necessity claim if the substitution rule is to be acceptable, because voluntary intoxication creates an irrebuttable presumption of criminal fault for general intent crimes. The problem with this line of argument should now be apparent. The law characterizes voluntary intoxication as intoxication resulting from the consumption of substances the person knew or *ought to have known* were intoxicants, and that he *knew or ought to have known* might cause impairment. Thus the law makes negligence sufficient for voluntariness, rather than the subjective standard of recklessness. But the issues here are too important to settle by semantics, so let's examine whether the ingestion of intoxicants to the point of impairment is necessarily reckless conduct. Only if ingestion of intoxicants really does create a foreseeable risk of criminality will the reasons-responsive mechanisms leading to the decision to consume intoxicants be suitably related to the subsequent criminal conduct (produced as it may be by non-reasons-responsive mechanisms at the time of its occurrence) so as to allow us to trace responsibility from the earlier time to the later. The answer to the question – is the ingestion of intoxicants to the point of impairment necessarily reckless? – is no.

It is surely problematic that a legally innocent action can be a conclusive and irrebuttable basis of criminal fault, indeed, fault for a vast range of crimes, including crimes the commission of which is punishable by life imprisonment. Many judges and legal theorists attempt to meet this concern by claiming that the fault element is the recklessness that necessarily attaches to the act of becoming intoxicated itself. Thus recklessness is the fault element, rather than intoxication per se, and it is satisfied by every voluntarily intoxicated offender. This was the tack taken in Majewski, and it has since been followed by many Canadian judges.

This line of thought has attracted many, in part because it would provide a principled way of distinguishing between general and specific intent crimes, something

that has otherwise seemed ad hoc, uncertain and unprincipled. The idea is that specific intent crimes have *mens rea* conditions beyond mere recklessness but general intent crimes require only recklessness. If that was true, and becoming voluntarily intoxicated is necessarily reckless, then the substitution rule would be acceptable. Proof of intoxication would suffice as proof of recklessness and so *mens rea*. But the argument trades on an ambiguity concerning "recklessness." While many general intent offences have recklessness as *mens rea*, recklessness as the fault element of crimes is more constrained than recklessness outside the law. To be guilty of a crime, a person must be reckless *with respect to the criminal act or result* specifically. It is not a crime to be reckless per se. Legal recklessness implies foresight of specific consequences or an awareness of or adverting to risks with respect to a prohibited act or result, and a decision to assume that risk. This presents a dilemma. On one horn, we must suppose that every person who becomes voluntarily intoxicated is reckless with respect to every prohibited act or result that falls within the bounds of general intent offences. This should function as a *reductio ad absurdum* of this way of understanding the argument; we cannot infer such foresight or advertence merely from the fact that a person became voluntarily intoxicated. On the other horn, we must admit that the recklessness evidenced by voluntary intoxication is not of the same kind as reckless in law, and therefore even if intoxicated offenders are reckless in some sense, it is not the sense required for criminal fault.

We should not, however, accept the general claim that becoming intoxicated is necessarily reckless or otherwise morally faulty, even understood in the non-legal sense of recklessness. Recklessness can be inferred from intoxication in some circumstances, but only given additional facts. A person who routinely becomes violent when he drinks alcohol, for example, could reasonably be expected to foresee the danger that he might assault someone if he drinks and so can be considered reckless with respect to that danger. But equally conceivably, a person could take all reasonable steps to avoid harming others while intoxicated.

In an earlier paper, I offered the following counter-example to the claim that voluntary intoxication is necessarily reckless.

> Mary has just achieved some very important personal goal. She has defended her Ph.D., secured a long-sought promotion, or earned tenure. She decides that a party is in order, at which friends, family, and colleagues will celebrate her achievement. But she is a cautious and responsible person, who knows the courts have been doing funny things with respect to host liability specifically and intoxication law in general. Since she also knows that she is likely to imbibe a lot of alcohol at the party, she takes all reasonable precautions. She arranges for the party to be catered by licensed professionals so that there will be no incidents involving food preparation and safety. She ensures that accommodations are made for people who must drive to the party at an inexpensive motel within walking distance from her home and has taxi chits available for local celebrants. Finally, she arranges to have a trusted friend shadow her. Her friend's job is to stay sober and ensure that she does not do anything untoward should she become intoxicated. All is going smoothly on the big night. Her friend is conscientiously performing his duty. Her guests are heartily enjoying themselves, and she raises her glass to every toast made in recognition of her achievement [Miss Manners notwithstanding]. Then, once she is clearly intoxicated, the caterer serves a rare seafood delicacy unknown to many of her guests. Her friend eats a morsel, has an allergic reaction, and dies. At that point, she is agitated and distressed, and intoxicated.

> There seems no reason to accept that she was reckless in becoming intoxicated or that she thereby demonstrated fault sufficient to establish *mens rea* for every general intent offence. Yet according to Canadian law, she has the *mens rea* for all general intent crimes involving violence or bodily interference. (Dimock 2009)

This example still seems to me to stand as a counter-example to the necessity claim, and to provide reason for rejecting the position that proof of voluntary intoxication can ground an irrebuttable presumption of recklessness.

Yet the claim that becoming intoxicated is necessarily reckless persists. It is claimed that it is common knowledge that intoxication is inherently dangerous. Such a claim is especially problematic in a country like Canada, where in most provinces the state itself sells the vast majority of the alcohol available to consumers. In the latest year for which there are statistics (April 1, 2007–March 31, 2008), beer and liquor stores in Canada sold $18.8 billion worth of alcoholic beverages, or 222.9 million litres. Provincial and territorial governments realized a net income of $5.2 billion from the sale of liquor and related products (e.g. liquor licenses). Our governments have not, then, told citizens not to consume alcohol or pharmaceuticals because of the risk of criminality, nor have they made general prior rules against such behavior. To the contrary, members of our society are inundated with advertisements extolling the pleasures of alcohol (including from government-owned liquor retailers) and promoting the ideal of better living through pharmaceuticals. Our governments certainly have not pointed, with a few notable exceptions such as impaired driving, to specific dangers that consuming intoxicants might produce. Instead, our government urges that we "drink responsibly".[2] If the very consumption of alcohol is necessarily criminally reckless, however, then at the very least the government is complicit in that fault, perhaps so much so that it has lost the right to hold citizens to account for it (Tadros 2009).

Chester Mitchell has argued that judicial or legislative treatment of voluntary intoxication as itself criminally negligent or reckless cannot be sustained on the scientific evidence. It is simply not true that the vast majority of people who ingest drugs or drink, even to the point of intoxication, are thereby reckless in doing so. As he says: "For almost all persons, the probability of their drug consumption causing a serious crime is too low to qualify as recklessness. Violent crimes are rarely compared to the common incidence of intoxication or drug-impairment. Furthermore, the relationship between intoxicants and crime is much more problematic, subtle, and indirect than is usually assumed" (Mitchell 1988:78). The claim that becoming intoxicated is itself criminal recklessness simply lacks empirical support.

> For ordinary intoxication, the evidence suggests a probability of resultant harm considerably lower than the level needed for criminal recklessness. The chances of drug users turning to violent or serious crime because of intoxication are at best remote. Most North Americans take alcohol and millions regularly become intoxicated without putting themselves or others at serious risk. Unfortunately, most crime-alcohol studies merely state the proportion of

[2] The Liquor Control Board of Ontario uses "Please drink responsibly" as a regular feature of it community messaging, including advertising on its bags. This suggests that the government thinks it is possible to drink responsibly.

> known criminality involving drug use. This may be as high as 50%. But to judge whether intoxication is reckless we require the opposite statistic, namely the portion of drunken events that involve serious criminal activity. This figure is certainly below 1%. (Mitchell 1988:88–89)

If these facts are correct, as they certainly are in Canada, the eventual criminal act is simply too remote and unforeseeable from the act of becoming intoxicated for intoxication to constitute *mens rea* for it, or for the two acts to be "suitably related" so as to bring them within the scope of the tracing principle. For most people who imbibe intoxicants, it is simply not true that criminal actions fall within the ambit of the act of becoming intoxicated (Gough 1996). The two acts are not "suitably related" such that a person should foresee criminality resulting from the use of intoxicants; not even a reasonable person can foresee connections that are statistically insignificant.

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