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Drink, drugs and law reform: a review of Law Commission Report No.314

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***Crim. L.R. 488 Summary:** *This article reviews the 2009 Law Commission report on Intoxication and Criminal Liability. Focusing on voluntary intoxication, the article assesses whether the Commission's reformulation of the specific/basic intent distinction will resolve the problems with the current law. Further, it also discusses the Commission's treatment of intoxicated defendants who assist or encourage another person to commit an offence. The article concludes that although the Report sets out a defensible approach, a series of exceptions to that approach ultimately undermine its appeal.*

If a defendant (D) commits the actus reus of an offence but claims that he or she lacked mens rea as a result of voluntary intoxication, commentators are naturally torn as to how this should affect D's liability. On the one hand, a "strictly logical"¹ approach may conclude that intoxication (if demonstrated) should always be relevant. Therefore, if D (because of intoxication) fails to fulfil the fault requirements of offence x, then D should not be liable for that offence. On the other hand, an "absolutist"² approach may counter that, by allowing D to escape liability in these circumstances, the law fails both to protect the public and to deter people from irresponsible drinking and drug taking. Therefore, D's culpability in becoming intoxicated should *always* be sufficient to *substitute* for any lack of fault (in relation to the offence definition) caused by that intoxication. We are thus left with two conflicting approaches. And with each appealing to different priorities, the choice for the law reformer is an unenviable one.

However, despite broad scope for disagreement, the Law Commission has generally approved of the common law's adoption of a midway course³ and has made several attempts to codify it into legislation.⁴ The problem with the current law (as the Commission perceives it) stems not from the balancing ***Crim. L.R. 489** of legal priorities, but from the *method* developed by the courts to decide when intoxication should be relevant.⁵ In its 1995 Report on intoxication⁶ the Commission made recommendations to correct this problem, but they were rejected by the Government for being "unnecessarily complex".⁷ Despite a gap of 14 years, Law Com. No.314 ("the Report") follows directly from the 1995 Report without a second round of consultation. Having taken account of the criticisms levelled at the 1995 Report, the Commission constructs "an entirely new draft Bill"⁸ that it claims will make the law "consistent, coherent and much easier to apply".⁹

The recommendations in the Report focus on two core areas.¹⁰ First, where D has completed the actus reus of an offence, the Commission seeks to clarify exactly when D's voluntary intoxication¹¹ will become relevant to his or her liability (the midway course). Secondly, going beyond the remit of the 1995 Report, the Commission also addresses the relevance of intoxication where D does not perpetrate the offence personally, but assists or encourages another person (P) to do so. This second area includes both secondary liability (where P goes on to commit the principal offence), and inchoate assisting and encouraging under the Serious Crime Act 2007 (where D is liable as soon as he or she has completed the act of assistance or encouragement). Taking each area in turn, this article questions whether the Commission's recommendations, if implemented, would be a positive addition to the law.

The midway course

Balancing the arguments of the strictly logical and absolutist approaches, the common law distinguishes between offences of "basic intent" and offences of "specific intent".¹² For specific intent offences, for example murder, evidence of intoxication will not be excluded from the assessment of D's fault (or lack of fault). Conversely, for basic intent offences, for example battery, D's mens rea will be constructed¹³ on the basis of D's actual fault *plus* any fault D would have had if ***Crim. L.R. 490**

not intoxicated.¹⁴ With so much riding on the distinction, the ability to categorise offences as either of specific or basic intent is therefore pivotal. However, as the courts openly admit, they have failed to develop a “universal logical test”.¹⁵

Commenting on this failure, the Commission “believe[s] that the distinction [between specific and basic intent offences] is ambiguous, misleading and confusing, and that it should be abandoned”.¹⁶ However, a similar distinction must still operate in order to balance the strictly logical and absolutist positions. Therefore, the Commission looks beneath the language of specific and basic intent in order to identify rules within the case law that would be able to provide for an objective and principled test.

Central to the Commission's new test is the contentious¹⁷ distinction between the act, circumstance and result elements of an offence (the external elements).¹⁸ The Commission examines the law to discover what level of fault (attached to what external element) has generally been considered enough to label an offence as one of specific intent.¹⁹ Instead of specific intent offences however, the Commission maintains a narrow focus and examines each external element to see what level of fault could not logically be replaced by intoxication. These are labelled as “integral”²⁰ and, where they are present, intoxication will be a relevant consideration when assessing D's lack of fault.

Following the common law, the Commission contends that intoxication is *potentially equivalent* to a state of subjective recklessness. However, for equivalence to be demonstrated, culpability must be established on two limbs. The first limb (unsurprisingly) is that D must be intoxicated. D's intoxication is a form of culpable recklessness because, in a society that recognises the link between intoxication and crime, D is knowingly creating the risk that he or she may go on to complete the actus reus of an offence.²¹ Secondly, D must also satisfy a test akin to objective recklessness: it must be demonstrated that, if sober, D would have foreseen the ***Crim. L.R. 491** specific risk relevant to the offence with which he or she is being charged.²² If D satisfies both limbs, his or her combined culpability is then able to construct and substitute for subjective recklessness. Therefore, if D denies fault in relation to a certain external element, and that element requires fault of recklessness or lower,²³ D's intoxicated state will be irrelevant.²⁴

By contrast, if D denies fault in relation to an external element that requires fault akin to knowledge or intention, this will be deemed integral and intoxication *will* be relevant.²⁵ This is because, as set out above, intoxication (combined with objective foresight of risk) only has “moral equivalence”²⁶ with subjective recklessness. Thus, it would be illogical for intoxication also to be held equivalent to any fault in excess of recklessness.²⁷ Beyond this simple weighing of culpability, the potential for intoxication to substitute for knowledge or intention is also ruled out by the nature of the wrong D is committing. Accepting the Commission's premise that intoxication involves D knowingly taking a risk as to his or her future actions, we are able to see the basis for a link (if D would have foreseen the risk if sober) to recklessness in law.²⁸ However, this link quickly breaks down if we attempt to equate recklessness as to future conduct with requirements of knowledge or intention. This is because, in the case of the latter, the criminal law is only targeting defendants who consciously and willingly break the law, and not those who merely take risks.

Although it is not explored in the Report, it *may* be possible to reinterpret the two limbs of intoxication to make it equivalent to knowledge or intention. However, in order to answer the problems set out above, this would require a significant change. Thus, the second limb of intoxication, rather than requiring objective foresight of a risk, would instead have to ask whether D would have known or intended the external element if sober. However, to the extent that this would involve a judgment of D's character (asking whether D is the sort of person to intend offences for example) it is clearly unacceptable.

***Crim. L.R. 492** Having identified intoxication as the equivalent of recklessness, the Commission sets out an “exhaustive”²⁹ list of fault elements (some specific to certain external elements) that should be deemed integral and therefore allow intoxication to be taken into account. These are:

- “(1) intention as to a [result];
- (2) knowledge as to something;
- (3) belief as to something (where the belief is equivalent to knowledge as to something);
- (4) fraud; and
- (5) dishonesty.”³⁰

Problems with the midway course

Although the Report should be commended for the detail of its analysis and the clarity of its recommendations, there remains some doubt as to whether the Commission has achieved its aim of making the law consistent, coherent and easier to apply. The main problem in this area of the law is the inability of the courts to distinguish specific and basic intent offences objectively. Replicating a similar distinction, but focusing on individual external elements rather than offences, the Commission believes that the clarity of its recommendations will make the law “easier to understand and therefore easier to apply in practice”.³¹ However, the link between clarity and application is assumed rather than demonstrated.

Unfortunately, it is likely that uncertainty will remain. The reason for this is that in order to apply the Commission's recommendations, it must be possible to isolate the act element of every offence objectively. This is because although intention as to the act element will never be integral (intoxication is not relevant), knowledge as to circumstances and intention as to results are integral (intoxication is relevant).³² Therefore, for offences (for example, murder) that require intention as to the act and result elements, the line drawn between those external elements defines the extent to which intoxication is relevant.

The difficulty of isolating the external elements of an offence, as required, has been widely explored in the literature.³³ Even within the Report, examples of the problem are clear. Having set out the external elements and fault required for murder and battery, the Commission describes the offence of theft in the following terms:

“D's liability for the offence of theft requires (i) the appropriation by D of another person's property, where (ii) D acted dishonestly with (iii) the intention permanently to deprive ...”.³⁴

***Crim. L.R. 493** Whilst (i) is presented as a single element, we are not told which one. Depending upon the commentator, the “act” could defensibly be described as the “body movement of D”, the “appropriation” or even the “appropriation of another person's property”. Indeed, identical problems arise when trying to identify what the circumstance and result elements are (if there are any). Yet this separation could be essential in order to discover whether D's intoxication is relevant to his or her fault: the more widely the act element is defined the less likely intoxication will be relevant. Therefore, unless the courts are given an objective technique to distinguish between external elements, policies relying upon the distinction will remain uncertain.

Beyond this broad concern, there are also two ways in which the Commission's recommendations create new problems for the law. First, relating to the policy's internal consistency, and secondly, to its simplicity.

The internal consistency of the Commission's policy is threatened by the special treatment given to the act element. The Commission states that external elements requiring intention are “integral” because intoxication cannot be used to replace the lack of fault. However, if this was true of intention as to the act element, then intoxicated automatons would escape liability for almost all criminal offences.³⁵ Therefore, because of issues of public policy, it is excluded from the list of integral states.³⁶ However, as explained above, expecting intoxication to replace intention, and asking a jury what D would have intended if sober, are both unacceptable.

Although this conflict is relatively obvious, it is not dealt with explicitly in the Report and it is left to the common law (a decision that disguises rather than resolves the problem).³⁷ There are, however, places within the Report in which the fault attached to the act element is represented as being unique. This is because intention as to the act element (or volition) is seen as being part of the act element rather than a separate fault element applied to it.³⁸ To the extent that volition (usually requiring no more than voluntary movement) can be represented as a separate state from intention or knowledge, the Commission may be able to justify its treatment of it without sacrificing the internal consistency of its policy.³⁹

However, the Commission's discussion of acts in volitional terms only works if the act element is defined narrowly to include little more than bodily movement.⁴⁰ For the Commission to accept such a narrow definition, however, would mark a major change in the way it has presented the act element in recent papers. For example, we have already discussed the Commission's wide definition of the act element for theft above. Further, in the previous Law Commission publication ***Crim. L.R. 494** that relied upon the separation of external elements,⁴¹ the act element is described variously as, for

example, “visits to the victim's home or repeated telephone calls”, “appropriating property” and “using or threatening violence”.⁴² In each case, going beyond simple bodily movement, the act elements include various circumstances (for example, the fact the home belongs to V and the fact D's behaviour is threatening) as well as results (for example, that property is appropriated).⁴³ In line with this wide definition of the act element, it is rightly discussed (in that paper) in terms of intention rather than volition. On this basis, it seems even this tentative defence would be unavailable.

The second way in which the Commission may have created new problems for the law relates to its simplicity. Ironically, following the non-acceptance of its previous recommendations,⁴⁴ simplicity is one of the Commission's central concerns and it consciously avoids intricate policy areas in order to keep its recommendations straightforward.⁴⁵ Beyond this, when discussing D's liability for assisting and encouraging, the Commission is careful to create consistency between inchoate liability and complicity so that (if D is charged in the alternative) the relevance of intoxication will be the same.⁴⁶

However, although the Commission can boast consistency between certain offences, its move from specific/basic intent *offences* to external *elements* means that it has sacrificed consistency within individual offences.⁴⁷ For example, if D denies any fault for an offence that contains both integral and non-integral elements (for example, murder⁴⁸ or attempted criminal damage⁴⁹), a jury will have to be instructed to take account of D's intoxication for certain external elements and not for others. This is likely to cause considerable confusion.

Secondary liability

Going beyond D as the principal offender, the Report also makes recommendations to clarify the position of an intoxicated D who assists or encourages P to commit an offence. Noting that, despite its “practical importance”, a “test for accessories **Crim. L.R. 495* has never been articulated in the case law”,⁵⁰ the Commission is thus granted considerable freedom. However, as will be seen, the Commission does not employ that freedom to apply the general policy developed in the rest of the Report. Abandoning, to a large extent, the reasoning of its midway path, the Commission's recommendations therefore become open to new and, perhaps, more telling criticism.

We will discuss in turn the Commission's treatment of joint criminal ventures and complicity. In the next section we will then examine inchoate liability.

Joint criminal ventures

In order to be liable for a joint venture, D must ally himself with P foreseeing that either one of them will, or might, commit a principal offence as part of their joint conduct. When the principal offence is committed, D is then liable.⁵¹ Foresight that the external elements of the principal offence *might* happen (akin to a form of recklessness) is therefore the minimum fault requirement.

If the Commission's general policy for intoxication were applied to joint ventures, it would appear that the fault required by D for each of the external elements of the principal offence would be *non-integral*: they require a fault akin to recklessness. Therefore, D would be liable as a joint principal with P for *any* crime, even if it was not actually foreseen, that D would have foreseen might happen if he or she was not intoxicated. For example, if D and P enter a joint venture to kill V and P does kill V, D will not be able to escape liability for murder if the only reason he or she did not foresee the risk of intentional killing was through intoxication.

However, despite this being the straightforward application of its midway course, the Commission labels it as an “unacceptable application of the ‘absolutist’ principle”.⁵² On this basis, the Commission recommends an exception to the general rule. The exception holds that if the fault required by P for the principal offence includes an integral fault element, the fault required by D should also be deemed integral (every element). Conversely, if the fault required by P does not include an integral element, D's fault should also be viewed as non-integral (every element).⁵³ Thus, in the example above, as the offence of murder includes an integral element (intention as to the result element), D's requirement of recklessness in relation to every element of the principal offence will also be deemed integral.

To justify the exception, the Commission draws a distinction between recklessness as to one's own conduct (general rule) and recklessness as to the conduct of another (as with assisting and encouraging).⁵⁴ However, this distinction quickly breaks down. First, where, under the general rule, intoxication is used to construct liability relating to a circumstance element, it already goes beyond D's own conduct. For example, D's intoxication is capable (under the general rule) of constructing fault

relating to an appreciation of non-consent in rape cases or property ownership in criminal damage, each of which does not involve D's own conduct. Further, and perhaps more importantly, if intoxication is not equivalent to this kind of ulterior recklessness, the Commission has a burden to tell us why it **Crim. L.R. 496* becomes equivalent when P's offence does not include an integral element. Why, for example, if P's offence was battery, would D's recklessness as to each element of that offence now be non-integral? Why and how has the nature of D's culpability changed? The Commission does not answer these concerns.⁵⁵

Not relying on the previous contention, the Commission also says that "even if" ulterior recklessness were held to be the same as recklessness under the general rule, the unsatisfactory results of applying it are still enough to justify the exception.⁵⁶ The concern here is that D, as in the example above, should not be liable for offences like murder (through joint venture liability) where he or she did not foresee the possibility of the offence, on the basis that he or she would have foreseen it if sober. However, we must ask why the Commission believes that applying the general rule to joint ventures in this way would be unacceptable?

There are only two sensible explanations. First, it may be that the Commission, like Simester,⁵⁷ is not convinced that the act of becoming intoxicated and subjective recklessness have moral equivalence. But, if this were the case, it would undermine the general rule. Alternatively, if the Commission does believe that intoxication is equivalent to recklessness, it may be questioning whether D (intoxicated or not) should be held liable for offences like murder on the sole basis of foreseeing a possibility. However, having recently published a report on complicity that would retain the law of joint ventures, this too seems unlikely.⁵⁸

The other problem created by this exception relates to the inconsistent treatment of similar defendants. The fault requirements for joint venture liability are the same for D whether P is committing murder or any other offence. However, because of D's intoxication, we are now told that D should be treated differently depending upon the offences committed by P. But why? If it is because the different fault requirements reflect a *real* difference in culpability between D that forms a joint venture to commit offences like murder, and D that forms a joint venture to commit offences like rape, this should be reflected in the general policy of joint venture liability and not just in cases involving intoxication. However, if it does not reflect a *real* difference in culpability, the distinction is anomalous.

Complicity

D is liable under the doctrine of complicity when he or she assists or encourages P to commit an offence, intending to do the act of assistance or encouragement (non-integral), *knowing* that P will commit the act element (integral) with the requisite circumstances (integral) and results (integral).⁵⁹ However, as with joint ventures, where intoxication is relevant to D's fault, we are told to look at the fault required of P for the principal offence in order to ascertain whether it can be used by D.⁶⁰

**Crim. L.R. 497* To an extent, the problems here mirror those explored in the context of joint ventures above. So, if the principal offence contains an integral element, intoxication will be relevant for D to every external element of his or her offence (even those requiring non-integral fault). Also, we again have inconsistent treatment of similar defendants. However, as the fault requirements of complicity contain integral as well as non-integral elements, we have a further potential for *over*-inclusiveness when the exception is applied to complicity. This is because, if the principal offence does not include an integral element, intoxication will be irrelevant for D to every external element of his or her offence (even those requiring integral fault).⁶¹ For example, for D to be liable as an accomplice we may imagine (applying the general rule) that D's requirement of knowledge as to each element of P's offence would be integral (intoxication would be relevant). However, if P's offence was criminal damage for example, which does not include an integral element, the exception dictates that D's knowledge requirements will now become non-integral (intoxication will be irrelevant).

Having accepted, as at least logical, that intoxication is equivalent to recklessness, we are again being asked to accept it as a possible replacement for a higher level of fault (something the Commission itself says is unacceptable in the context of the general rule). Beyond this, as, unlike automatism, complicity is not left to the common law, the draft Bill suggests we must also apply the second limb of the test: asking what D would have been aware of if sober.⁶² If this is the case (it is not mentioned in the text of the Report), the jury are being asked to assess D's character: if sober do you think he or she would have known/intended the offence? Again, asking the jury to assess D's character in this way is either impossible or, if undertaken, unacceptable.

The only alternative open to the Commission, maintaining the exception but avoiding the use of intoxication to construct fault of knowledge or intention, would be to adapt the fault requirements of complicity itself. Thus, for example, the Commission could qualify the exception in a way that reduces the mens rea of complicity to recklessness (every element) in cases where D is intoxicated and the offence committed by P does not contain an integral fault element. However, such an approach would be very difficult to justify and it is unlikely that it would appeal to the Commission. It would mean, for example, that an intoxicated D would be liable as an accomplice to rape even though he or she did not intend, know or even foresee the possibility that P might commit rape on the basis that he or she would have foreseen a possibility if sober. Bearing in mind that in its recent report on complicity, the Commission recommends that D should only be liable as an accomplice if there is a “parity of culpability” between D and P, requiring D to intend P to commit at least the act element of the principal offence, this position would be very hard to maintain.⁶³

The reasons given by the Commission for moving away from its general rule are unconvincing. The first is that “a difference in the rules to be applied, depending on whether it is alleged that the accused was a perpetrator or an accessory, would be difficult to justify”.⁶⁴ Although consistency is always desirable, when we are dealing ***Crim. L.R. 498** with offences with different fault requirements, surely differences are acceptable. They are clearly acceptable for the general rule, which applies to external elements differently depending on whether they require integral fault, yet we are not told why this area is different.

The other explanation relates to cases where it is impossible to tell which party perpetrated the offence and which was the accomplice. Under the current law it is possible to convict both parties in the alternative and so the Commission is wary of any policy that would enforce different rules, as between perpetrators and accomplices, that might undermine this possibility.⁶⁵ However, it may be that this concern is overstated. If D and P are tried in this way, the fault requirements for both will be identical. Applying the general rule would simply require intoxication to be taken into account when assessing the integral fault requirements of the intoxicated defendant. This does not require the court to differentiate between the perpetrator and the accomplice.

Inchoate liability

Under the Serious Crime Act 2007, for D to be liable for assisting and encouraging P to commit an offence, he or she must intend the act of assistance or encouragement (non-integral), believing that P will perpetrate the act element of the offence (integral) whilst reckless as to the circumstances (non-integral) and results (non-integral).⁶⁶ As with secondary liability, the Commission recommends that the relevance of D’s intoxication should be determined by the fault required by P.⁶⁷

The problem (again) is that where the principal offence contains an integral element we are told that D’s intoxication is never able to substitute for his or her lack of *non*-integral fault (whether he or she would have been reckless if sober or not). For example, intoxicated D lends P his or her gun to murder V. If D is not reckless as to whether P will use the gun to murder V, even if he or she would have been if sober, D will not be liable for assisting murder. This is because the Commission believes that convicting D in this type of case would be unfair.⁶⁸ However, again, we are not told explicitly whether this exception is due to the Commission doubting its own general rule (that intoxication is equivalent to recklessness), or whether it is questioning the definition of the offence to which it is being applied, both of which would be problematic for the Commission. Although, in its comments that “recent reforms [the Serious Crime Act] introduced by Parliament undermine the argument for a sensible interpretation”,⁶⁹ we may have some indication towards the latter.

The Commission attempts to justify the exception further by highlighting the consistency between inchoate assisting and encouraging and complicity.⁷⁰ However, as discussed in the context of complicity, it is difficult to understand why consistency between two offences with different fault requirements is so beneficial. Also, to the extent that one agrees with the view expressed in this article that the exception should not apply to complicity, the consistency argument turns in favour of removing the exception from both.

***Crim. L.R. 499** There may also be some doubt about whether the Commission’s draft Bill does create the consistency with complicity that the Commission clearly wants. Under cl.4 (secondary liability) it is reasonably clear that whether P’s offence contains an integral element will affect (in the same way) every element of D’s offence. Thus, if P’s offence does not contain an integral element, every element of the fault required by D will be deemed non-integral. However, for inchoate assisting and encouraging (cl.3), the exception is only expressly applied to D’s fault relating to P’s circumstance

and result elements.⁷¹ Thus, if P's offence does not contain an integral element, it is clear that D's fault relating to the circumstance and result elements of P's offence will be non-integral, but it seems that D's fault relating to P's act element will remain integral. Therefore, a jury will already have to be directed in a different way as to the relevance of intoxication for inchoate assisting and encouraging and secondary liability.

In the context of an argument in favour of consistency, it is also remarkable that the Commission is willing to sacrifice consistency between inchoate assisting and encouraging and the other inchoate offences. In its recent Consultation Paper on attempt and conspiracy, the Commission stresses the importance of consistent fault requirements between the inchoate offences because of the broad overlap between them.⁷² However, when it comes to intoxication, we are now told that although assisting and encouraging is subject to the exception, attempts and conspiracy⁷³ will be governed by the general rule. For example, where D is charged with assisting, encouraging and conspiring to commit a certain offence, although the fault required of D in relation to the circumstances and results of P's offence will always be integral for conspiracy,⁷⁴ for assisting and encouraging it will change depending upon the fault requirements of the principal offence. The Commission does not provide an explanation as to why this kind of inconsistency is acceptable.

Although it is not dealt with in the Report, the application of the general rule to attempts and conspiracy also exposes a further problem. We have already discussed, and criticised, the Commission's non-integral classification of "intention as to the act element". The Commission attempts to justify this on the basis that intention in this area is more akin to volition. However, liability for attempts and conspiracy do not only require D to intend his or her actual act, they also require D to intend P to commit the act element of the principal offence. As the list of integral fault elements is exhaustive, we must assume that this kind of ulterior intention as to the act element is non-integral. Yet, surely, this type of intention cannot be deemed synonymous with volition.⁷⁵

A way forward?

Despite some quite fundamental criticisms, there is much in the Report to commend it. In fact, agreement can be found with the majority of the policy set out by the Commission. However, as explored above, having set out a sensible approach **Crim. L.R. 500* it then proceeds to create a series of exceptions, exceptions that question and ultimately undermine that good sense.

It is best to start where there is agreement. The Commission is clearly right that although the common law may have found a reasonable balance between the strictly logical and absolutist positions, the method adopted (specific/basic intent) is unfit for purpose. It is also right to state that when attempting to reform and codify the current law, avoiding unnecessary complexity is very important.⁷⁶ Finally, partly on the basis of the previous two statements, we may also accept that the process of becoming voluntarily intoxicated is *broadly* equivalent to subjective recklessness if D would have foreseen the specific risk (required by the offence definition) if sober. However, the case has not been made for exceptions to this.

Stripped of its exceptions, the preferred policy is therefore that intoxication can be constructive of missing fault *only* where the fault being replaced is subjective recklessness or lower, and *only* where (if it is recklessness) D would have foreseen the risk if sober. Thus, a midway course will be maintained. For example, an intoxicated D who smashes V's window with a stone, denying recklessness in relation to the damage, will be liable for criminal damage if he or she would have foreseen the possibility of damage if sober.⁷⁷ However, an intoxicated D who kills V, denying intention to kill or cause grievous bodily harm, will not be liable for murder because a lack of intention cannot be replaced by intoxication.

The advantages of this policy are, first, that it is clear and logically constructed: having agreed with the basis for constructive liability (intoxication being equivalent to recklessness) it does not go on to make exceptions to that rule. Secondly, and perhaps more importantly, it also avoids being overly complex. The courts would not be required to distinguish specific and basic intent offences and they would not be required to distinguish between the external elements of an offence. Rather, judges would simply direct a jury that intoxication (where D would have foreseen a risk if sober) is equivalent to recklessness. Thus, where part of an offence requires a mens rea of recklessness or lower, intoxication can be constructive, but, where a higher level of fault is required, it cannot be.

In relation to offences of assisting and encouraging (including both secondary and inchoate forms of liability) the Commission's argument that this type of policy will lead to unsatisfactory results has not

been accepted.⁷⁸ However, as discussed above, even if the Commission's position was accepted, this should not lead to exceptions that base D's fault requirements on the fault required by P for the principal offence. Rather, it should lead to debate about whether intoxication really is the equivalent of recklessness and/or whether the fault requirements of assisting and encouraging themselves need reform.

The only area where we may concede that problems arise is in the context of intention as to D's own actions. Most criminal offences require D to *intend* to act and thus D would escape liability (under this stripped-down approach) if he or she did not *intend* to act because of intoxication. However, having concluded ***Crim. L.R. 501** that intoxication is not equivalent to intention, making an exception to allow it to be constructive in this context would be illogical. Therefore, to the extent that it is deemed necessary to convict intoxicated automatons, it will have to be done through a separate intoxication offence.⁷⁹

The final part of this discussion represents only the bare bones of the stripped-down Commission policy, but it does have some appeal. With this alternative playing some part, the article as a whole has attempted to demonstrate that although the Commission was right to prioritise consistency, clarity and simplicity, realising those aims may require *yet* another round of re-evaluation.

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Crim. L.R. 2009, 7, 488-501

1. Law Com. No.314, *Intoxication and Criminal Liability*, 2009, paras 1.49-1.55. Hereafter, Law Com. No.314.
2. Law Com. No.314, paras 1.55-1.57.
3. *DPP v Majewski* [1977] 1 A.C. 443 HL.
4. Law Com. No.177, *A Criminal Code for England and Wales: Report and Draft Criminal Code Bill*, 1989, cl.22 of the draft Bill; Law Com. No.218, *Legislating the Criminal Code: Offences Against the Person and General Principles*, 1993, cl.21, 33 and 35 of the draft Bill; Law Com. No.229, *Legislating the Criminal Code: Intoxication and Criminal Liability*, 1995. The only exception to this approval was Law Com. Consultation Paper No.127, *Intoxication and Criminal Liability*, 1992, in which the Commission made provisional proposals (rejected following consultation) for the creation of a separate intoxication offence.
5. Law Com. No.314, para.1.31. Here the Commission lists its five principal objections to the current law.
6. Law Com. No.229.
7. Law Com. No.314, para.1.66.
8. Law Com. No.314, para.1.68.
9. Law Com. No.314, para.3.157. The quotation (which the Commission takes from its 1995 Report) demonstrates the commonality between the two papers.
10. The Commission also explores the issue of *involuntary* intoxication. However, commenting that this area is a "much less important concern in practice" than voluntary intoxication, it does not make recommendations that would change the substance of the current law. Law Com. No.314, para.1.4.
11. To avoid wearisome repetition, as we will not be discussing involuntary intoxication, the article will refer to "voluntary intoxication" simply as "intoxication".
12. *DPP v Majewski* [1977] 1 A.C. 443 HL.
13. Simester has recently provided a compelling case that intoxication should be categorised as a form of constructive liability. A. Simester, "Intoxication is Never a Defence" [2009] Crim. L.R. 3, 7-9.

14. There is some debate about whether, for basic intent offences, intoxication can replace a lack of mens rea automatically (without having to prove that D would have been at fault if not intoxicated). Support for this view may be taken from Lord Mustill's judgment in *Kingston* [1995] 2 A.C. 355 HL. However, the Commission (rightly it is contended) states that "this cannot be an accurate explanation" of the current law. Law Com. No.314, para.2.25.
15. *Heard* [2007] EWCA Crim 125; [2008] Q.B. 43 at [32].
16. Law Com. No.314, para.1.28.
17. See the discussion "Problems with the midway course" below.
18. This is a technique that the Law Commission has employed in several of its recent papers on the inchoate offences and complicity. Although the Commission refers to "conduct" and "consequence" elements in the Report, this article will employ the alternative labels "act" and "result" elements. "Act" is preferred to "conduct element" because although the term is being used to refer to a section within the actus reus, the term "conduct element" is often used synonymously with the term actus reus generally (often by the Commission itself). "Result" is preferred because that is the term employed in the appended draft Bill ("the draft Bill"): Law Com. No.314, cl.3(5)(a).
19. In doing so, the Commission rejects an alternative/additional line of authority that has held all offences with an element of ulterior intent to be specific intent offences: Law Com. No.314, para.2.8.
20. Law Com. No.314, para.3.34.
21. Law Com. No.314, paras 1.55 and 2.15. In relation to *objective* fault elements like negligence and objective recklessness, only this first limb is relevant. Thus, on the basis of D's culpably self-induced intoxication, the objective standard upon which D is judged will exclude intoxication.
22. For evidence of the test's *objectiveness*, see Law Com. No.314, para.2.64(2)(b). Unfortunately, other references in the Report make it possible to interpret this second limb subjectively, requiring the court to decide whether D *personally* would have foreseen the risk if sober (Law Com. No.314, para.2.46 and draft Bill cl.3(3)). It is unfortunate because such a question would be impossible to answer fairly (the court cannot judge what D *would have* foreseen). Therefore, to give the Commission's policy its best reading, the second limb should be interpreted as an objective test inquiring what someone in D's position would have been likely to foresee if sober.
23. e.g. objective recklessness, negligence and strict liability.
24. Draft Bill cl.3(3). Where the Commission refers to intoxication in the Report as being "irrelevant", in the case of subjective recklessness, it means that the fault may be constructed from what D would have foreseen if not intoxicated.
25. The one exception to this is intention as to an act element, which is not integral. See the discussion "Problems with the midway course" below.
26. Law Com. No.314, para.2.17.
27. Law Com. No.314, para.2.21.
28. However, commentators may still disagree whether intoxication (plus objective foresight) should be sufficient to construct *subjective* recklessness. See Simester, "Intoxication is Never a Defence" [2009] Crim. L.R. 3, 8-9. Due to space, however, the debate will not be pursued in this article. Progressing on the basis that (because of a consensus between the Commission and the courts) intoxication is equivalent to subjective recklessness, our focus will remain on the areas where the Commission recommends changes to the current law.
29. Law Com. No.314, para.3.48.
30. Law Com. No.314, para.3.46. See also draft Bill cl.3(5).
31. Law Com. No.314, para.3.18.
32. Law Com. No.314, para.3.46 and fn.53; draft Bill cl.3(5)(a).
33. See, e.g. R. Buxton, "The Working Paper on Inchoate Offences: (1) Incitement and Attempt" [1973] Crim. L.R. 656; R. Buxton, "Circumstances, Consequences and Attempted Rape" [1984] Crim. L.R. 25; G. Williams, "Intents in the Alternative" [1991] C.L.J. 120; R.A. Duff, *Criminal Attempts* (1996), pp.12-14; S. White, "Three Points on Pigg" [1989] Crim. L.R. 539, 544-545. For an attempt to make the distinction work, see P.H. Robinson, *Structure and Function in Criminal Law* (1997).

- [34.](#) Law Com. No.314, para.1.13(3).
- [35.](#) Law Com. No.314, paras 1.45-1.55.
- [36.](#) Law Com. No.314, para.3.46 and fn.53; draft Bill cl.3(5)(a).
- [37.](#) LawCom.No.314, para.3.35 and fn.37. Although certain tangential issues may justifiably be left out of the draft Bill in order to avoid unnecessary complication (paras 3.25-3.31), intention as to the act element is not in this class. Not only is it of central importance (applying to almost all offences), but the common law's approach (as discussed) also contradicts the logic of the Commission's approach.
- [38.](#) Law Com. No.314, para.1.12, fn.17.
- [39.](#) Although this may be the best defence of the Commission's policy it is not an acceptable one. As the Commission seems to accept, it would still require a jury to decide whether D *would have* been acting voluntarily: Law Com. No.314, para.1.47.
- [40.](#) This is because the concept of volition is tied to the physical processes involved in movement. Thus, volition can explain "the movement of my finger", but "shooting V" involves circumstances and results that require a wider concept such as intention.
- [41.](#) Law Com. Consultation Paper No.183, *Conspiracy and Attempts--A Consultation Paper*, 2007.
- [42.](#) Law Com. CP No.183, paras 4.6-4.15.
- [43.](#) Again, commentators may disagree with my labelling certain parts of the offence as circumstances and results. Such disagreement reinforces my previous contention that (currently) the separation of external elements lacks the necessary objectivity.
- [44.](#) Rejected by the Government because they were deemed "unnecessarily complex", Law Com. No.314, para.1.66.
- [45.](#) Law Com. No.314, paras 3.25-3.31.
- [46.](#) Law Com. No.314, paras 3.116-3.117.
- [47.](#) The fact that an integral element does not equate to the entire offence being treated as integral can be gleaned from several references in the Report, e.g. Law Com. No.314, para.3.110(4), as well as a literal reading of the draft Bill. However, if this is not the Commission's intention the policy would be open to an alternative attack for not consistently equating intoxication with recklessness.
- [48.](#) D is guilty of murder if he or she intends the act element (non-integral) and intends the result element (integral).
- [49.](#) D is guilty of attempted criminal damage if he or she intends to commit the act element (non-integral), is reckless as to the circumstance element (non-integral) and intends the result element (integral).
- [50.](#) Law Com. No.314, para.1.29.
- [51.](#) See *Rook* [1993] 1 W.L.R. 1005 CA (Crim Div); *Powell* [1999] 1 A.C. 1 HL.
- [52.](#) Law Com. No.314, para.2.101.
- [53.](#) Draft Bill cl.4.
- [54.](#) Law Com. No.314, paras 2.98-2.101.
- [55.](#) The Commission uses a similar argument in the context of complicity and inchoate assisting and encouraging. The same objections apply.
- [56.](#) Law Com. No.314, para.2.101.
- [57.](#) Simester, "Intoxication is Never a Defence" [2009] Crim. L.R. 3.

- [58.](#) Law Com. No.305, *Participating in Crime*, 2007. However, the Commission may be interpreted as going some way towards this position, see Law Com. No.314, para.3.101.
- [59.](#) Law Com. No.305, Appendix B. Debate about whether this is a correct summary of the current law is largely irrelevant to the analysis that follows.
- [60.](#) Draft Bill cl.4.
- [61.](#) Draft Bill cl.4.
- [62.](#) Draft Bill cl.4(3).
- [63.](#) Law Com. No.305, paras 3.5-3.7.
- [64.](#) Law Com. No.314, paras 3.95-3.96.
- [65.](#) Law Com. No.314, para.3.97.
- [66.](#) Serious Crime Act 2007 Pt 2.
- [67.](#) Draft Bill cl.3(5)(e) and (6).
- [68.](#) Law Com. No.314, paras 3.110-3.112.
- [69.](#) Law Com. No.314, para.1.29.
- [70.](#) Law Com. No.314, para.3.117.
- [71.](#) Draft Bill cl.3(5)(e) and (6).
- [72.](#) Law Com. CP No.183, paras 4.124-4.132.
- [73.](#) For conspiracy, the Commission does say that this position will be re-evaluated in the forthcoming report on conspiracy. Law Com. No.314, para.3.120.
- [74.](#) The Criminal Law Act 1977 s.1, which requires D to intend or know the circumstance and result elements of the principal offence.
- [75.](#) See discussion "Problems with the midway course" above.
- [76.](#) Although, as discussed above, it is doubted whether the Commission's recommendation represents any progress in this regard.
- [77.](#) This is because the offence of criminal damage only requires D to be reckless as to the occurrence of damage (we are assuming D has no other defence). Criminal Damage Act 1971 s.1.
- [78.](#) See the discussions "Assisting and encouraging" and "Inchoate liability" above.
- [79.](#) Although the idea of a separate intoxication offence has been rejected by the Commission, it is contended that a narrower offence dealing solely with intoxicated automatons (operating alongside a general rule for constructive liability) would at least minimise the problems inherent in such an offence.