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POTENTIATE LIABILITY AND PREVENING FAULT ATTRIBUTION: THE INTOXICATED “OFFENDER” AND ANGLO-AMERICAN DÉPEÇAGE STANDARDISATIONS

ALAN REED AND NICOLA WAKE

I do not suppose that, when a drunkard reasons with himself upon his vice, he is once out of five hundred times affected by the dangers that he runs through his brutish, physical insensibility; neither had I, long as I had considered my position, made enough allowance for the complete moral insensibility and insensate readiness to evil, which were the leading characters of Edward Hyde.¹

I. INTRODUCTION

The intoxicated “offender” presents a dilemmatic Sophie’s Choice² in terms of legitimate inculpatory principles of criminal law, but set against and conflicting with the availability of any exculpatory defences. The imbibing of drink or drugs may have released a character transformation and physiological reaction that creates a new individuated personification of wrong-doing, and an actor engaged in a penumbra of harmful risk-taking.³ It engrafts issues related to moral culpability and human frailty in viewing substance abuse disorders as potentially exculpatory, or alternatively constructing imputed liability centred on criminal responsibility in becoming intoxicated at first instance. The sympathy that may exist to the alcoholic, and the compassionate wish to extend the hands of support, is tempered by concern over the innocent victim(s) of their actions, and the need for societal

1. April 2014: ISSN: 0270-854X . Alan Reed (Professor of Criminal and Private International Law, and Associate Dean for Research and Innovation in the Faculty of Business and Law at Northumbria University) and Nicola Wake (Senior Lecturer in Law, Northumbria University). Contact:[alan.reed@northumbria.ac.uk and nicola.wake@northumbria.ac.uk].1. ROBERT LOUIS STEVENSON, *STRANGE CASE OF DR JEKYLL AND MR HYDE AND OTHER TALES* 60 (Oxford Univ. Press 2006).

2. WILLIAM STYRON, *SOPHIE’S CHOICE* (Vintage Publ’g 2004).

3. See generally Ronnie Mackay, *The Taint of Intoxication*, 13 INT’L J.L. & PSYCHIATRY 37 (1990); Tim Quigley, *Reform of the Intoxication Defence*, 33 MCGILL L.J. 1 (1987); VICTOR TADROS, *CRIMINAL RESPONSIBILITY* (Oxford Univ. Press 2005).

protection and deterrence of egregious behaviour.⁴ These tensions to which we refer are reflected in substantive policy choices, in particular the distinction made between liability for voluntary and involuntary intoxication. The offence-fault definitional nexus that pervades the compartmentalised perspectives attached to intoxication are more subtle than provided in current substantive law precepts.⁵

It is our view that Anglo-American standardisations applied to the intoxicated offender are in urgent need of reform. The extant position is deconstructed in Part I of this article and it is propounded that it is inappropriate to focus on cognitive states of imputed “recklessness”, and thereby to amorphously construct a conviction predicated on a legalised fiction.⁶ The juxtaposition effected stands in contradistinction to primordial concerns attached to fair labelling and doctrinal coherence that ought to be determinative. A new optimal model is adduced herein on a principled basis that engages a re-examination of potentiating liability linked to actual criminal responsibility across the spectra of intoxication imputations. It is important to establish a moral legitimacy to inculcating any intoxicated offender who commits a crime without the prevalence of the designated offence-specific *mens rea* element at the time of commission of the unlawful act. It is provided by our new standardisation of “potentiating liability” for preventing fault, and inculcated policy rationalisations are derived from principled consideration of individual responsibility. Fault attached to lack of care as a moral agent should be determinative of inculcation, and not fictionalised cognitive states of imputed *mens rea*.⁷

In Part II, we examine potentiating liability and preventing fault in Anglo-American standardisations of intoxicated offending. Our theoretical construct is contextualised within the parameters of four important situations attached to liability: Dutch Courage and drinking to commit specific offences; pathological intoxication and imbibing of “therapeutic” substances; involuntary intoxication (outwith alcoholism); and basic intent offences *simpliciter*. *Dépeçage* principles are advocated in this context, utilising the ability to “pick and choose” different laws to appropriately govern specific issues of intoxication.⁸ It is the overarching concept of

4. See generally David McCord, *The English and American History of Voluntary Intoxication to Negate Mens Rea*, 11 J. OF LEGAL HIST. 372 (1990) (Eng.).

5. See JOHN MARTIN FISCHER & MARK RAVIZZA, *RESPONSIBILITY AND CONTROL: A THEORY OF MORAL RESPONSIBILITY* (Cambridge Univ. Press 1988).

6. See generally Eric Colvin, *A Theory of the Intoxication Defence*, 59 CANADIAN BAR REV. 750 (1981).

7. See generally Andrew Ashworth, *Reason, Logic and Criminal Liability*, 91 L.Q.R. 102 (1975) (Eng.).

8. See ALAN REED, *ANGLO-AMERICAN PERSPECTIVES ON PRIVATE*

potentiate liability that provides a moral credibility and legitimacy to our re-categorisations, and a fairer edifice of offence individuation. The demands of fair labelling require a more policy-oriented and rule-selective methodology than is currently operative, and a greater appreciation of preventing fault attached to separately classified malfeasance.

In Part III of this article, we consider the situation where the defendant suffers from alcohol dependence syndrome. A major aspect of the condition is an inability to control alcohol consumption, but numerous studies demonstrate that alcoholics often and volitionally refrain from alcohol intake over a continuum, and different gradations of intoxication apply than in stereotypical terminology.⁹ The ubiquitous nature of the syndrome represents “a challenge for a construction of the intoxicated offender as abnormal,”¹⁰ and as a result, it is not uncommon for the chronic alcoholic’s condition to be considered “part vice, part disease.”¹¹ The idea that an alcoholic may retain the capacity to choose whether to consume intoxicants has resulted in a refusal to accept the syndrome as a bespoke medical condition for exculpatory purposes within U.S. jurisdictions. Alcoholism is unfortunately viewed in black and white terms, which are irreconcilable with the array of categorisations and gradations of substance use disorder recognised in medical and behavioural sciences.¹² Alcohol consumption on the part of the chronic alcoholic is regarded as intentional,¹³ and accordingly the rules pertaining

INTERNATIONAL LAW 25 n.2 (Edwin Mellin Press 2003) (explaining where the nature of *dépeçage* principles are examined in the different context of Anglo-American private international law standardisations).

9. See generally HERBERT FINGARETTE, *HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE* (Univ. of California Press 1988); Herbert Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413 (1975); Herbert Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the “Disease Concept of Alcoholism”*, 83 HARV. L. REV. 793 (1970).

10. ARLIE LOUGHNAN, *MANIFEST MADNESS: MENTAL INCAPACITY IN THE CRIMINAL LAW* 199 (Oxford Univ. Press 2012).

11. MARIANA VALVERDE, *DISEASES OF THE WILL: ALCOHOLISM AND THE DILEMMAS OF FREEDOM* 51 (Cambridge Univ. Press 1998). See also Stephen Morse, *A Good Enough Reason: Addiction, Agency and Criminal Responsibility*, 56(5) INQUIRY 490-518 (Taylor & Francis (2013)).

12. See, e.g., WORLD HEALTH ORG., *MANAGEMENT OF SUBSTANCE ABUSE* (Feb. 14, 2013), http://www.who.int/substance_abuse/terminology/acute_intox/en/index.html (providing that “[i]ntoxication is highly dependent on the type and dose of drug and is influenced by an individual’s level of tolerance and other factors,” and the “behavioural expression of a given level of intoxication is strongly influenced by cultural and personal expectations about the effects of the drug”).

13. FINGARETTE, *HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE*, *supra* note 9, at 34-39; Fingarette, *Addiction and Criminal Responsibility*, *supra* note 9, at 426-33; Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the “Disease Concept of Alcoholism”*, *supra*

to voluntary intoxication apply in terms of attributing fault in this context.¹⁴ In contrast, a more nuanced and empathetically valid approach is adopted in England, which recognises that the disorder may affect the defendant's decision-making powers, but it does not completely abrogate or displace free will.¹⁵ The result has been to accept that chronic alcoholism may have an impact on the defendant's culpability, but only to a limited extent, and this is reflected through the availability of the concessionary diminished responsibility defence.¹⁶ It is suggested herein that a revised approach to alcohol dependence syndrome ought to be adopted with a shift in emphasis from voluntary / involuntariness to a wider consideration of preventing culpability and responsibility.

In Part IV, we contend that the bifurcatory categorisation of the alcohol dependent's conduct as voluntary or involuntary has led the U.S. courts to standardise chronic alcoholics according to normative societal expectations of the reasonable sober person: an objectification that is inapt. A review of the *Model Penal Code* highlights that the chronic alcoholic's condition is viewed *con una prisma* as part of involuntary act doctrine, rather than involuntary intoxication per se, and alcohol dependence is only regarded as potentially exempting where the defendant's free will has been totally abrogated. This deontological reasoning has resulted in a refusal to accept alcohol dependence syndrome as a mental disease or defect for the purposes of exculpation;¹⁷ an overly restrictive approach which is erroneously supported by a number of academicians who claim that alcoholism is simply a way of life.¹⁸ This view is counter-intuitive to psychiatric accounts of the condition,¹⁹ and it is our contention that distinguishing voluntary

note 9, at 800-808; Morse, *supra* note 11.

14. See *infra* Parts I and II; see also ELAINE CASSEL & DOUGLAS A BERNSTEIN, CRIMINAL BEHAVIOR 178 (Lawrence Erlbaum Associates 2007).

15. See Alan Reed & Nicola Wake, *Anglo-American Perspectives on Partial Defences: Something Old, Something Borrowed, and Something New*, in LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES 183-206 (Alan Reed & Michael Bohlander eds., Ashgate Publ'g 2011).

16. *Id.*

17. See, e.g., *Heard v. United States*, 348 F.2d 43, 44 (D.C. Cir. 1965) (holding that "a mere showing of narcotics addiction, without more, does not constitute 'some evidence' of mental disease or 'insanity' so as to raise the issue of criminal responsibility"); see also *Doughty v. Beto*, 396 F.2d 128, 130 (5th Cir. 1968) (holding that "chronic alcoholism, standing alone, raised no defense" to the charged crime).

18. FINGARETTE HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE, *supra* note 9, at 100; Fingarette, *Addiction and Criminal Responsibility*, *supra* note 9, at 443; Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism"*, *supra* note 9, at 801-02; Morse, *supra* note 11.

19. LAW COMMISSION, INSANITY AND AUTOMATISM SUPPLEMENTARY MATERIAL TO THE SCOPING PAPER (Law Com SM/SP, 2012). LAW COMMISSION, DISCUSSION PAPER, INSANITY AND AUTOMATISM (Law Com DP, 2013).

from involuntary intoxication on the part of the alcohol dependent defendant involves a blurring of individuated agency. In practical terms, whether the defendant could not or would not resist his impulse is “probably no sharper than between twilight and dusk,”²⁰ and in this respect, a more delineated approach is required which recognises that alcohol dependence syndrome may affect the defendant’s level of criminal responsibility, and potentiate liability in terms of preventing fault attribution.

In the final Part of our article, we suggest that the recently reformulated diminished responsibility plea in English law, within the ambit of the Coroners and Justice Act 2009, and as interpreted by the Court of Appeal, provides an appropriate template for beneficial harmonisation in terms of accounting for the chronic alcoholic’s condition in order to appropriately attribute fault in murder cases. The revised plea can be aligned with medical simulacrums of alcohol dependence syndrome, and is representative of a more realistic view of human behaviour: in essence, “the distinction between the impulse that was irresistible and the impulse not resisted” should no longer operate determinately.²¹

II. INTOXICATION AND CRIMINAL LIABILITY: THE REQUIREMENTS OF FAIR LABELLING AND DOCTRINAL COHERENCE

The current metaphysics of Anglo-American criminal law reveals an uneasy equipoise in assessment of the effect of voluntary intoxication on criminal liability.²² The juxtaposition

20. AMERICAN PSYCHIATRIC ASS’N, STATEMENT ON THE INSANITY DEFENSE 11 (1982).

21. See Richard Bonnie, *The Moral Basis of the Insanity Defense*, 69 A.B.A. J. 194, 196 (1983) (arguing that the insanity defence should be narrowed to exclude questions of “whether the defendant had the capacity to ‘control’ himself or whether he could have resisted the criminal impulse”).

22. See generally Douglas Husak, *Intoxication and Culpability*, 6 CRIM. L. & PHIL. 363 (2012) (rejecting the common conceptualisation of the effect of intoxication on criminal liability as Anglo-American jurisdictions analyse this effect in many different ways); Gideon Yaffe, *Intoxication, Recklessness, and Negligence*, 9 OHIO ST. J. CRIM. L. 545 (2012) (analysing the “Intoxication Recklessness Principle” and when most justified to employ its use); Rebecca Williams, *Voluntary Intoxication – A Lost Cause?*, 129 L.Q.R. 264 (2012) (Eng.) (examining the disadvantages of applying “the Majewski” common law approach as the compromising rule for dealing with voluntary intoxication and other possible alternatives); Susan Dimock, *The Responsibility of Intoxicated Offenders*, 43 J. VALUE INQUIRY 339 (2009) (providing an overview of the different categories of intoxication defences and then critiquing the intoxication rules); Susan Dimock, *What are Intoxicated Offenders Responsible for? The “Intoxication Defense” Re-Examined*, 5 CRIM. L. & PHIL. 1 (2011) (presenting a brief history of the common law of criminal liability as it relates to intoxicated offenders in Canada and objecting to those rules as applied); Kimberly Ferzan, *Opaque Recklessness*, 91 J. CRIM. L. & CRIMINOLOGY 597 (2001) (exploring the placement of opaque recklessness, as it often falls outside

may be constitutively identified as “Janus-faced”²³ in that bifurcatory conceptualisations of intoxication as an inculpatory or exculpatory element are prevalent.²⁴ Intoxication is not an excuse per se, as in the case of cognate defences such as loss of control²⁵ or duress; nor does it align with justificatory elements of self-defence or necessity.²⁶ The attributional significance of intoxication relates to the individual actor’s mental state, and from a subjectivism perspective it ought to primordially attach to a potential denial of fault appurtenant to the time-specificity of commission of the relevant harm.²⁷ In simple terms of coincidental liability where the requisite fault is lacking, and the intoxicated “offender” has not formed the offence-fault definitional nexus, exculpation presumptively is implicated.²⁸ The “inexorable logic” is that where

the scope of culpable recklessness, in criminal law); and Holly Smith, *Non-Tracing Cases of Culpable Ignorance*, 5 CRIM. L. & PHIL. 97 (2011) (arguing that attributionist views on non-tracing cases of culpable ignorance should be seriously considered and culpability should be extended to non-voluntary responses).

23. LOUGHNAN, *supra* note 10, at 63, 279, and 351.

24. See generally ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 196-99 (Oxford Univ. Press 2009); WILLIAM WILSON, CRIMINAL LAW: DOCTRINE AND THEORY 221-25 (Longman Law Series 2011).

25. The English provocation defence was abolished by the Coroners and Justice Act, 2009, section 56. Coroners and Justice Act, 2009, c. 25, pt. 2, c. 1, § 56 (U.K.). Section 54(1)(a) and (7) of the 2009 Act reduce a conviction of murder to one of voluntary manslaughter where the defendant kills subject to a loss of control; the loss of control must be attributable to at least one of two qualifying triggers. *Id.* § 54(1)(a) & 54(7). “The first qualifying trigger is satisfied by a thing said or things done or said (or both) which constituted circumstances of an extremely grave character, and caused D to have a justifiable sense of being seriously wronged (the ‘seriously wronged’ trigger). The second qualifying trigger requires D to fear serious violence from V against D or another identified person (the ‘fear’ trigger).” Nicola Wake, *Loss of Control Beyond Sexual Infidelity*, 76 J. CRIM. L. 193, 193 (2012). See also Coroners and Justice Act, § 55(3) (applying subsection of “qualifying trigger” when “D’s loss of self-control was attributable to D’s fear of serious violence from V against D or another identified person”); *id.* § 55(4)(a)–(b) (defining loss of self-control when attributable to “a thing or things done or said (or both)”); *id.* § 55(6)(c) (requiring that the “thing done or said constituted sexual infidelity is to be disregarded”); R v. Clinton, Parker, & Evans, [2012] EWCA (Crim) 2 (Eng.) (holding by an appellate court most recently on the new defence); R v. Asmelash, [2013] EWCA (Crim) 157, [25] (Eng.) (finding “that the loss of control defence must be approached without reference to the defendant’s voluntary intoxication” in applying the statutory provisions about “loss of control”).

26. See PAUL H. ROBINSON, STRUCTURE AND FUNCTION IN CRIMINAL LAW 14–15, 68–71 (Oxford Univ. Press 1997) (asserting a five-part categorisation that encompasses justifications, excuses, absent element defences (e.g. alibi), non-exculpatory defences (e.g. diplomatic immunity), and offence modification defences (e.g. renunciation in attempts or conspiracy)).

27. See ANDREW SIMESTER & BOB SULLIVAN, CRIMINAL LAW: THEORY AND DOCTRINE 628–30 (Hart Publishing 2007).

28. John Child, *Drink, Drugs And Law Reform: A Review Of The Law Commission Report No. 314*, CRIM. L.R. 2009, 7, 488-501 (Eng.). See generally

the *mens rea* is lacking within offence-specificity inferentially affected through intoxication or any other destabilisation, then criminal liability is precluded on accepted doctrine.²⁹

The corollary to this “strictly logical”³⁰ and mechanistic adoption of subjective *mens rea* for the crime charged posits an alternative policy-driven conceptualisation of intoxication as inculpatory *ex ante*, and morally, the harmful consumption itself is viewed as blameworthy.³¹ The imbibing of intoxicants, either alcohol or drug-taking, lowers the levels of cognitive perception

Chester Mitchell, *The Intoxicated Offender—Refuting the Legal and Medical Myths*, 11 INT’L J.L. & PSYCHIATRY 77 (1988) (comparing legal assumptions about intoxication with scientific findings to demonstrate the discrepancies between the law and empirical scientific evidence, and how medical testimony further complicates rectifying this issue); Andrew Paizes, *Intoxication Through the Looking Glass*, 105 S. AFRICAN L.J. 776 (1988) (analysing South Africa’s recognition of voluntary intoxication as a possible complete defence and the effect this holding had on the “specific-intent rule” at the time).

29. See generally LAW COMMISSION, INTOXICATION AND CRIMINAL LIABILITY ¶¶ 1.49-1.55 (Law Com No 314, 2009). See generally Jeremy Horder, *A Critique of the Correspondence Principle in Criminal Law*, CRIM. L.R., Oct. 1995, at 759 (U.K.) (analysing the “correspondence principle” between the *actus reus* and *mens rea* relationship and its limited application); Stephen Gough, *Intoxication and Criminal Liability: The Law Commission’s Proposed Reforms*, 112 L.Q.R. 335 (1996) (Eng.) (offering one interpretation of current intoxication rules while bringing to light three particular weaknesses of the Law Commission’s reform of these rules); Ewan Paton, *Reformulating the Intoxication Rules: The Law Commission’s Report*, CRIM. L.R., May 1995, at 382 (U.K.) (analysing the legislative and legal movement towards re-implementing recklessness in voluntary intoxication considerations). There is a basic link between the situation where D knowingly takes a risk that intoxication may cause him to commit the *actus reus* of an offence and recklessness in criminal law. Child, *supra* note 28, at 490–91. This link is not present where the offence requires evidence of knowledge or intention. *Id.* at 491. The courts admit to failing to have developed a universal “logical test” in this area. R v. Heard, [2007] EWCA (Crim) 125, [32], [2008] Q.B. 43, [55] (Eng.). See also *New Jersey v. Stasio*, 396 A.2d 1129, 1133-34 (N.J. 1979) (creating a distinction between specific and general intent crimes allows intoxication defences to inconsistently excuse crimes).

“It has of course been long understood that the consumption of alcohol, or indeed the taking of drugs, may diminish the ability of an individual to control or restrain himself, so that, in drink, or affected by drugs, he may behave in a way in which he would not have behaved when sober or drug free. Although it may sometimes impact on the question whether the constituent elements of a crime, in particular in relation to the required intent, have been proved, self-induced intoxication does not provide a defence to a criminal charge.”

Asmelash, EWCA (Crim) at [22].

30. Child, *supra* note 28, at 488.

31. Important herein is societal expectations regarding legitimate notions of justice. See, e.g., LORD C. RADCLIFFE, *THE LAW AND ITS COMPASS* 63–64 (Faber and Faber 1960) (stating that “[e]very system of jurisprudence needs . . . a constant preoccupation with the task of relating its rules and principles to the fundamental moral assumptions of the society to which it belongs”).

and physical restraint, and our courts are overly burdened with intoxicated offenders, especially in the context of violence and sexual crimes.³² The implicated policy consideration, in “absolutist” terms,³³ is that for reasons of deterrence and social protection it is essential to convict outwith definitional offence coincidence of liability: “It is common knowledge that those who take alcohol to excess or certain sorts of drugs may become aggressive or do unpredictable things.”³⁴

This construction of intoxication “imputes” liability for prior fault in becoming intoxicated in the first instance, and engrains an evaluative moral culpability within the parameters of the offence-responsibility nexus.³⁵ The policy tension created in Anglo-American standardisation lies in a legal hinterland between the scylla and the charybdis, viewing intoxication as either “exculpatory abnormality”³⁶ or “morally culpable conduct.”³⁷ The conundrum that is presented is how to square the circle between legitimate subjectivism of individual offender treatment, coalescing and contradicting with societal protection and moral responsibility.³⁸ Further grist to the mill is added by realisation that all intoxicated offenders are not the same, that different gradations and thresholds apply to voluntary and involuntary intoxication, and concatenations of responsibility are demarcated

32. See LAW COMMISSION, INTOXICATION AND CRIMINAL LIABILITY, *supra* note 29, at ¶ 1.55 (stating that “Given the culpability associated with knowingly and voluntarily becoming intoxicated, and the associated increase in the known risk of aggressive behaviour, there is a compelling argument for imposing criminal liability to the extent reflected by that culpability. The imposition of such criminal liability is morally justifiable in principle, and warranted by the desirability of ensuring public safety and deterring harmful conduct.”).

33. *Id.* at ¶ 1.57.

34. R v. Bailey, [1983] 1 W.L.R. 760 (A.C.) (Eng.).

35. Paul H. Robinson, *Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985) [hereinafter *Causing the Conditions*].

“[T]he imputation of a culpable state of mind when none truly exists seems particularly strange for the *Model Penal Code* drafters. These drafters actively opposed placing the burden of persuasion on the defendant for most defences. Yet as to intoxication, the drafters permit what is in essence an irrebutable presumption as to the existence of an element of the offense.”

Id. at 17. Equivalent culpability may presumptively apply in that a defendant who voluntarily becomes intoxicated is equated with the reckless actor. Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 660-63 (1984).

36. LOUGHNAN, *supra* note 10, at 174, 182, 185–86, 200.

37. *Id.* at 174, 198-200.

38. “By allowing himself to get drunk, and thereby putting himself in such a condition as to be no longer amenable to the law’s commands, a man shows such [disregard] as amounts to for the purpose of all ordinary crimes . . .” Douglas A. Stroud, *Constructive Murder and Drunkenness*, 36 L.Q.R. 268, 273 (1920) (Eng.).

in terms of moral agency or otherwise.³⁹

Our arguments suggest that a new *via media* is needed to properly reflect fair labelling in these terms, and the template presented looks to potentiate liability linked to actual criminal responsibility across the spectra of intoxication imputations.⁴⁰ It is suggested that this modelling provides a cathartic panacea and much needed substantive transparency in an arena that has been correctly described by the English Law Commission as, “ambiguous, misleading and confusing.”⁴¹ The quintessential inquiry as to “blameworthiness” in relation to any intoxicated offender should focus upon lack of individuated responsibility in terms of preventing fault and attributional liability. It is inapt to focus instead on cognitive states of imputed recklessness and thereby to amorphously construct a conviction on a fundamental predicate that stands in contradistinction to correspondence principles and substantive coherence.⁴²

A review of extant law reveals significant Anglo-American commonalities in creating a bifurcatory schematic template to voluntary intoxication. It is viewed through a schizophrenic legal prism of inculcation and exculpation, akin in characterisation to the allegorical literary creations of Dr. Jekyll and Mr. Hyde. The topographical map has designated all types of crime within the penumbra of two discrete categorisations. In this iteration stands offences transmogrified as specific intent (intention, knowledge or purpose fault ingredients) to which subjective principles of *mens rea* pertain, aligned together with offence-specific definitional elements as a pathway to liability.⁴³ Intoxication is presumptively

39. See generally Arlie Loughnan, *Mental Incapacity Doctrines in Criminal Law*, 15 NEW CRIM. L. REV. 1 (2012) (Eng.) (discussing mental incapacity in its application in deciding exculpation for crimes within the English and Welsh legal system).

40. See Robinson, *Causing the Conditions*, *supra* note 36, at 59 (contending in a different context that, “the defendant would escape or reduce his liability by showing that he was not reckless or negligent as to the offense both at the time he became intoxicated and at the time of the alleged offense. The state could increase the defendant’s liability by showing that when he became intoxicated, he was knowing or purposeful as to the offense”).

41. LAW COMMISSION, INTOXICATION AND CRIMINAL LIABILITY, *supra* note 29, at ¶ 1.28; LOUGHNAN, *supra* note 10, at 278 (stating that “The rules about how intoxication affects criminal liability are rather notorious for their complexity and technicality.”); Derrick Augustus Carter, *Bifurcations of Consciousness: The Elimination of the Self-Induced Intoxication Excuse*, 64 MO. L. REV. 384, 411 (1999) (noting that jurists and legal commenters find the specific / basic intent delineation “illogical, inconsistent and inequitable”).

42. See generally Andrew Simester, *Intoxication Is Never A Defence*, 2009 CRIM. L.R. 3 (2013) (U.K.) (addressing how intoxication should not be a criminal defence); see also LOUGHNAN, *supra* note 10, at 279 (noting that in this regard, intoxication is “conceptualized as a ‘doctrine of imputation’”) (quoting ROBINSON, *supra* note 26, at 67).

43. Lawrence P. Tiffany, *The Drunk, The Insane, And the Criminal Courts: Deciding What To Make Of Self-Induced Insanity*, 69 WASH. U. L. REV. 221,

relevant not as a defence per se, but simply as part of the overall evidence to rebut the inference of fault that would otherwise be adduced. This doctrine of specific intent is transformational in that it “collapses a question of fact (did the defendant form the requisite intent?) into the question of capacity (was the defendant capable of forming the requisite intent?).”⁴⁴ A physiological linkage applies between the intoxication and the specific intent crime fault element. Intoxication may be adduced as affecting the individual’s powers of ratiocination and ability to form compartmentalised intentions, and the jurors assess this as part of their incanted Mr. Hyde character personification. This generalised evidential assessment applies to jury evaluation as part of normative “folk knowledge”⁴⁵ on the transitional changes to personality affected by drugs or alcohol.⁴⁶ It is predicated on personal experience and evaluative assessments on individual culpable intoxication. This model, utilising fact finders as a barometer of normative fault attached to any intoxicated offender, has been adopted in other jurisdictions.⁴⁷ It has been broadly legitimised to all types of offences in Victoria in Australia and New Zealand, and not simply to those categorised as specific intent.⁴⁸ Views, however, have been

226-27 (1991); see generally Megan Paulk Ingle, *Law On The Rocks: The Intoxication Defenses Are Being Eighty-Sixed*, 55 VAND. L. REV. 607 (2002) (addressing *mens rea* and intoxication); Lawrence P. Tiffany, *Pathological Intoxication And The Model Penal Code*, 69 NEB. L. REV. 763 (1990) (addressing how intoxication relates to intent in the *Model Penal Code*).

44. LOUGHNAN, *supra* note 10, at 121.

45. *Id.* at 47.

46. WILSON, *supra* note 24, at 231. Wilson cogently asserts:

[s]ince it is common knowledge that intoxication disposes people to commit crime, voluntary intoxication supplies the fault element which intention and recklessness normally express. It is not necessarily contrary to principle, therefore, to hold a person responsible for an unforeseen harm if both the harm and the lack of foresight were occasioned by voluntary intoxication (a mind at fault). A more elegant solution would be to remove entirely the need to reply on such constructive recklessness.

Id.

47. See *R v Keogh* (Vic) [1964] VR 400 (Austl.) (stating it is a jury’s job to determine if the defendant has the requisite mental state required for the crime, or if intoxication has precluded the forming of guilty intent); *R v O’Connor* [1980] 29 ALR 449 (Austl.) (Gibbs, J., Mason, J., & Wilson, J., dissenting) (determining that evidence of self-induced intoxication is relevant if it raises a reasonable doubt as to whether an individual actor acted intentionally or voluntarily when committing the relevant act). This was a decision in Australia by a bare minority of the High Court. *Id.* In essence, the High Court minority refused any distinction between “specific” and “basic intent” offences holding the distinction to be unsupportable, and hence self-induced intoxication could be relied upon to negative the fault element of any offence. *Id.* Barwick C.J., Stephen J., Murphy J. and Aicken J. were in the majority. *Id.* See also *R v Kamipeli* [1975] 2 NZLR 610 (CA) (refuting any bifurcatory classification divide). This is the key authority in New Zealand. *Id.*

48. See Gough, *supra* note 30, at 342-43 (observing that certain case law

intemperately and splenetically expressed, as to the success or otherwise of such a template:

[T]he Australian approach . . . relies on juries to make covert moral assessments and not simply the factual assessment that the law requires.⁴⁹

In contradistinction, and for fundamental reconsideration herein, stands offences designated as basic intent (recklessness or negligence).⁵⁰ In this pantheon, intoxication will not negative an inference of fault, but rather liability is constructed around the morally culpable conduct of the defendant in becoming intoxicated prior to the commission of the *actus reus* of the specified offence. The paradigm is that it is the state of intoxication that constitutes the culpability required for the offence.⁵¹ In this regard, however, it is important that we can justify the reasons for temporally defining the offence elements and harm-prevention nexus that pervades criminal law.⁵² For basic intent crimes a schism applies between T1 (the culpable intoxicating interlude) and T2 (external elements of offence commission). The *actus reus* elements for basic intent crimes at T2, without any subjective *mens rea* attachment, is conjoined together with the T1 state of intoxication to create

makes no distinction between specific intent and general intent). *R v. O'Connor* (1980) 146 CLR 64, 82 (Austl.) (Barwick C.J.: “[T]he distinction between basic and specific intent is unhelpful as a basis for distinction or crimes by reference to *mens rea*.”).

49. ASHWORTH, *supra* note 24, at 201; *see also* Gerald Orchard, *The Law Commission Paper on Intoxication and Criminal Liability: Part 2: Surviving Without Majewski – A View From Down Under*, CRIM. L.R., Jun. 1993, at 426, 429 (Eng.) (stating that the courts will take the decision out of the hands of the jury if there is not enough evidence to reasonably conclude that there is an absence of intent).

50. *See* SIMESTER & SULLIVAN, *supra* note 27, at 633-36; *see generally* Ingle, *supra* note 43 (discussing intoxication and the *mens rea* of recklessness).

51. *See* LAW COMMISSION, INTOXICATION AND CRIMINAL LIABILITY, *supra* note 29, at ¶ 2.19 (stating “D ought to be aware that by becoming voluntarily intoxicated, D increases the risk that he or she will cause harm to other persons or damage to property. That is enough to justify liability for the range of violent and sexual offences classified as offences of ‘basic intent’”); *see generally* James Chalmers, *Surviving Without Majewski?*, CRIM. L.R., Mar. 2001, at 258 (Eng.) (addressing how voluntary intoxication can provide the necessary intent element to a crime); Alan Gold, *An Untrimmed “Beard”: The Law of Intoxication As A Defence To A Criminal Charge*, 19 CRIM. L.Q. 34 (1976) (Eng.) (discussing how the intent requirement cannot be rebutted with evidence of voluntary intoxication).

52. *See generally* Stephen Schulhofer, *Harm and Punishment: A Critique of Emphasis On The Results of Conduct In The Criminal Law*, 122 U. PA. L. REV. 1497 (1974) (addressing the results of criminal punishment); Paul R. Hoeber, *The Abandonment Defense To Criminal Attempt And Other Problems Of Temporal Individuation*, 74 CALIF. L. REV. 377 (1986) (discussing temporal aspects to criminal offenses, such as attempt).

“inculpation”,⁵³ The rationale for “offender” liability, despite the lack of coincidence in offence-definition nexus, was provided by a unanimous judgment of the House of Lords in *Majewski*.⁵⁴ It is predicated upon a “fiction”⁵⁵ that transmutes the common parlance of “recklessness” as an every-day term embracing an individual heedless of risk or demonstrating a lack of consideration to others, into a prescriptive and substantive definition of subjective recklessness as an essential fault element.⁵⁶ This metamorphosis is replicated in the U.S. under the *Model Penal Code* definition, and in some common law jurisdictions.⁵⁷

In *Majewski*, following an incident in a public house, the defendant was convicted of three offences of assault occasioning actual bodily harm and three offences of assaulting a police officer in the execution of his duty.⁵⁸ Prior to the alleged assaults Majewski had consumed large quantities of drugs and alcohol, as a result of which he said that he had been totally unaware of what he was doing, and thus was not subjectively reckless in accordance with the offence-definition element. Their Lordships, nonetheless, constructively imputed liability for policy reasons attached to basic intent offences of violence or disorder.⁵⁹ If the accused is indeed so drunk that he does not form the *mens rea* of a basic intent crime, the prosecution will be unable to establish the fault element for culpability. In such circumstances the prosecution should, in accordance with *Majewski*, be entitled to prove that the accused did not form the *mens rea* for the offence, but that had he not been drunk he would have done so.⁶⁰ The external elements of T2 are conjoined with T1 (voluntary consumption of drink or drugs), and liability can be established even though the individual actor did not appreciate the relevant risks, so long as it can be proved that the defendant (personified as Dr Jekyll) would have appreciated

53. Simester, *supra* note 42, at 4-5.

54. DPP v Majewski, [1977] A.C. 443 (H.L.) 474-75; see Alan Dashwood, *Logic And The Lords in Majewski* [1977] CRIM. L.R. 532 (1977) (U.K.).

55. WILSON, *supra* note 24, at 231.

56. ORMEROD ET AL, SMITH AND HOGAN'S CRIMINAL LAW 314-16 (Oxford Univ. Press, 13th ed., 2011).

57. MODEL PENAL CODE § 2.08(2). This code provides that self-induced intoxication is of no relevance to offences including recklessness as an element. *Id.* A number of states, including Montana, have a wider prohibition on the admissibility of evidence of voluntary intoxication, excluding such evidence even in relation to fault requirements of intention or knowledge; and in *Montana v Egelhoff*, a plurality of the Supreme Court determined an evidentiary rule excluding such evidence was not unconstitutional. 518 U.S. 37 (1996).

58. *Majewski*, [1977] A.C. at 498. See generally Simon Gardner, *The Importance Of Majewski*, 14 O.J.L.S. 279 (1994) (discussing the *Majewski* case).

59. *Majewski*, [1977] A.C. at 474-75.

60. *Id.*

that risk if he or she had been sober.⁶¹ This construct of intoxication portrays it as an inculpatory mechanism to assist prosecutors, distilled from prior fault, and to safeguard societal interests so adduced by Lord Elwyn-Jones in *Majewski*:

If a man of his own volition takes a substance which causes him to cast off the restraints of reason and conscience, no wrong is done to him by holding him answerable criminally for any injury he may do while in that condition. His course of conduct in reducing himself by drugs and drink to that condition in my view supplies the evidence of *mens rea*, of guilty mind certainly sufficient for crimes of basic intent?⁶²

The constructive nature of liability attached to prior fault in becoming intoxicated, in essence antecedent *mens rea* at T1, is also reflected in section 2.08(2) of the American *Model Penal Code* which provides that self-induced intoxication is of no relevance to offences involving recklessness as an element: “When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.”⁶³ A preponderance of states in the U.S. have accepted a distinction between specific / general intent (basic) classifications.⁶⁴ If the only reason why an individual actor was reckless in their actions correlates to T1, and the defendant was too intoxicated to realise the risk they were taking, then imputed recklessness transpires. The drafters of the *Model Penal Code* highlighted the risk-creation justification that governs intoxicated constructive liability, and is pervasive today at common law:

[T]here is the fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings

61. Simester, *supra* note 42, at 4-5. The author asserts:

The criminal law does contain an intoxication doctrine, but it is a doctrine of inculcation not exculpation. Whether the intoxication doctrine is evidential or substantive in character is uncertain, and I shall say something about that question below. Either way, however, it operates for the benefit of the prosecution, not the defence. Wherever the doctrine applies, its function—its sole function—is to treat the defendant as if he acted with *mens rea* when, in fact, he did not.

Id. at 4.

62. *Majewski*, [1977] A.C. at 474-75. “[A] person who kills another should not be “privileged” if he [sic] was drunk when he acted, and actually deserves double punishment, because he has doubly offended.” *Reniger v Feogossa* (1551) 75 ER 1, 31 cited in *DPP v Beard*, [1920] 1 A.C. 479, 494.

63. See generally Tiffany, *The Drunk, The Insane, and the Criminal Courts: Deciding What to Make of Self-Induced Insanity*, *supra* note 43, at 226-27.

64. *Id.* Some States regard intoxication evidence as irrelevant in terms of assessing culpability and reports show that very few claims of involuntary intoxication are accepted. Ingle, *supra* note 43, at 608; see also JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 539 (Bobbs-Merrill 1960). See generally JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* (Matthew Bender 1995).

to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk.⁶⁵

This fictionalised personification of criminal recklessness may be pervasive, but it is important to readdress the moral legitimacy of this ascription and the flawed assumptions that underpin the construct.

III. POTENTIATE LIABILITY AND CRIMINAL RESPONSIBILITY: NEW STANDARDISATIONS FOR INTOXICATION

It is our contention that to continue to predicate the inculpatory effect of intoxication for basic intent crimes on a legalised fiction of subjective recklessness is fundamentally inapt, undermines fair labelling principles, and contradicts the requirement of specificity regarding individuation of offence definition.⁶⁶ The continued pretence of deeming that such offenders are reckless in a criminal fault connotation, as if *mens rea* were present because foresight of the risk of harm described in the gravity of the offence should / ought to have been prevalent if the actor had been sober, is simply a prosecutorial inculpatory tool.⁶⁷ The nature of prior fault, when properly deconstructed, is misunderstood in Anglo-American extant standardisations.⁶⁸ It is not that the intoxicated offender is criminally reckless—in truth they lack subjective recklessness as a fault concept where any risk of harm never crossed their mind because they were inebriated. The stark reality, as a consequence, is not that they were criminally reckless, but that they were criminally responsible. It is criminal responsibility in terms of awareness of the risk of criminality at the T1 stage of individuation that requires further exposition and appropriate modelling.⁶⁹ The concepts of potentiate liability and preventing fault underpin consequentialist liability to this effect, and address fair labelling requirements.

There must exist a moral legitimacy for inculcating the intoxicated “offender” who commits basic intent crimes without

65. MODEL PENAL CODE §§ 2.08, 3, and 9 (Tentative Draft No. 9, 1959).

66. See WILSON, *supra* note 24, at 231-33.

67. Simester, *supra* note 42, at 4.

68. See generally Heidi M. Hurd & Michael S. Moore, *Punishing The Awkward, The Stupid, The Selfish And The Weak: Negligence As Criminal Culpability*, 5 CRIM. L. & PHIL. 147 (2011); Peter Western, *An Attitudinal Theory Of Excuse*, 25 LAW & PHIL. 289 (2006); LARRY ALEXANDER & KIMBERLEY KESSLER FERZAN WITH STEPHEN J MORSE, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW (Cambridge Univ. Press 2009).

69. See Rebecca Williams, *Voluntary Intoxication – A Lost Cause?*, *supra* note 22 (Eng.) (arguing for a new intoxication offence for the irresponsible acting.; see also Dimock, *The Responsibility Of Intoxicated Offenders*, *supra* note 22.

the prevalence of the designated offence-specific⁷⁰ *mens rea* element at the time of the offence. It is provided by a standardisation of potentiate liability for preventing fault. Inculcated policy rationalisations are derived from abjuration of individual responsibility and attributional liability attached to lack of care as a moral agent determinative of inculcation, and not cognitive states of falsely imputed *mens rea*.⁷¹ Moral culpability should effectively apply in that an individual party must take responsibility for elective choices—drinking or taking drugs: “[I]t should be drunken unawareness, inattention or dangerousness which should be punished rather than allow the courts to continue to impose fictionalised responsibility for a crime where *mens rea* is lacking.”⁷² The epicentre of potentiate liability for intoxicated behaviour conflagrates around the standardisation of harm prevention as part of the legitimate factorisation of conduct criminalisation.⁷³ Harm was perceived by Mill in the sphere of legitimate restriction of individual liberty and autonomy,⁷⁴ and subsequently extrapolated by Feinberg as, “a thwarting; setting back or defeating of an interest.”⁷⁵

A corollary exists between our arguments of potentiate liability and preventing fault attribution to intoxicated “offenders”, and developments in substantive English law on supervening fault and creation of a dangerous situation.⁷⁶ The latter doctrine is delineated by a reverse temporal individuation of harm–fault nexus in specificity.⁷⁷ At T1 the individual may create a dangerous situation without culpability, but this is aligned at T2 with supervening fault created by a failure of responsibility to an extent that is inculpatory.⁷⁸ Supervening fault is attributable where the criminal actor has set in motion a dangerous situation (in *Miller*⁷⁹

70. See generally Paul H Robinson, *Causing The Conditions*, *supra* note 35.

71. GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 421 (Little Brown 1978); see also Bob Sullivan, *Making Excuses*, in HARM AND CULPABILITY (Andrew Simester and ATH Smith eds., Oxford Univ. Press 1996) (asserting: “Attributions of liability in Anglo-American criminal law rest on certain key assumptions. There is an assumption of free will or a version of compatibilism or at least that certain reactive attitudes to conduct and the punitive responses they engender remain acceptable practices even if hard determinism be true”).

72. WILSON, *supra* note 24, at 231.

73. See generally TADROS, *supra* note 3, at 207-11.

74. See generally JONATHAN HERRING, *CRIMINAL LAW: TEXT, CASES AND MATERIALS* 22 (Oxford Univ. Press 2008).

75. JOEL FEINBERG, *HARM TO OTHERS, THE MORAL LIMITS OF THE CRIMINAL LAW* 33 (Oxford Univ. Press 1984).

76. See generally ALAN REED & BEN FITZPATRICK, *CRIMINAL LAW* 32-34 (Sweet and Maxwell 2009).

77. Paul R Hoeber, *The Abandonment Defense To Criminal Attempt And Other Problems Of Temporal Individuation*, 74 CALIF. L. REV. 377 (1986).

78. Alan Reed, *Criminal Law*, (2010) ALL ENGLAND ANNUAL REV. 131.

79. R v. Miller [1982] UKHL 6, [1983] 2 A.C. 161 (appeal taken from Eng.).

it was arson and in *Evans*⁸⁰ the risk affected by drug administration related to gross negligence manslaughter) and then comes under an incumbent duty to prevent the harm occurring by taking effective and “reasonable” remedial steps to prevent inculpatory liabilities.⁸¹ Harm and deterrence theories coalesce together to identify liability of an intoxicated offender on similar grounds of reverse conduct prophylaxis, and reflective instead of potentiate liability for morally blameworthy engagement.

The appellate court in *Evans* determined that the “duty” (criminal responsibility) arises when the individual actor realises or ought to have realised the danger; it is this foresight (or otherwise) of causing impairment or future harm that will apply in our new individuated proposals to intoxicated offenders.⁸² The harm-offence reasonableness nexus correlates with potentiate liability and the ambit of criminal responsibility attached to awareness of harm as a moral agent. A defendant who has created a dangerous situation is held to be under a criminal responsibility to mitigate the harm via proportionate reciprocal acts of disengagement: in *Miller* when the defendant accidentally set alight a mattress he became under a responsibility to counteract the damage to the property at risk by telephoning the fire brigade or householder; and in *Evans* the defendant’s supply of drugs supplied to her younger half-sister engendered prospective duties focused upon contacting hospital authorities or other effective care providers.⁸³ The essence is that legitimate focus is accorded to the criminal responsibility of a morally blameworthy defendant who fails to regard the interests of others or risks attendant to culpable (in)activity.⁸⁴ In a generalised context attribution of culpability, aligning together concepts of preventing and supervening fault, is posited by awareness of potential harmful effects attached to lack of moral responsibility. This model for the intoxicated offender may be contextualised in Anglo-American standardisations by evaluation of treatment in four identifiable situations and *dépeçage* principles adopted: Dutch Courage and drinking to commit specific offences; pathological intoxication and imbibing of “therapeutic” intoxicants; involuntary intoxication (outwith alcoholism); and basic intent offences *simpliciter*. The subsequent Parts to this article then concentrate specifically on the alcoholic offender and inter-relationship of potentiate liability within partial defences.

80. R v. Evans, [2009] EWCA (Crim) 650, [2009] 1 W.L.R. 1999 (Eng.). See also Glenys Williams, *Gross Negligence And Duty Of Care in “Drugs” Cases: R v Evans*, CRIM. L.R. 2009, 9, 631.

81. Reed, *supra* note 78.

82. *Id.* at 136-37.

83. *Id.*

84. Sullivan, *supra* note 71.

A. *Dutch Courage: Drinking to Commit Specific Crimes*

The potentiate liability principles apply with broad effect to intoxication induced with the purpose of committing crime. An individual actor who drinks to provide Dutch Courage to commit any designated offence, specific or basic, abjures responsibility to others and is morally culpable to an indefensible extent.⁸⁵ In terms of temporal individuation of offence-definition nexus the prior fault awareness at T1 ought to be added to the unlawful commission of *actus reus* elements at T2 without delineation to inculcate the morally blameworthy agent. Potentiate liability ought to be holistically transmogrified to “Dutch Courage offenders” and to any offence without categorisation: “The actor’s liability for the offence may be based on his conduct at the time he becomes voluntary intoxicated and his accompanying state of mind as to the elements of the subsequent offence.”⁸⁶

By way of postulation, if a defendant forms an intent to kill his wife and then drinks heavily to give himself the courage to do the deed, he would undoubtedly be guilty of murder if, when he shot his wife, he intended to kill her; the fact that the alcohol had removed his fear of completing the deed would be totally irrelevant. If, however, the intoxication “removed” his *mens rea* at T2, yet he still managed to kill his wife, an argument may exist as to liability or otherwise for the specific intent offence of murder. A similar dilemmatic situation would be implicated if the accused, having formed an intent to kill his wife, drinks a large amount of alcohol which induces a latent disease of the mind so that he is unable to appreciate the nature and quality of his acts and in this state kills his wife. Both situations were addressed by Lord Denning in *Attorney General for Northern Ireland*,⁸⁷ where he said:

If a man, whilst sane and sober, forms an intention to kill and makes preparation for it, knowing it is a wrong thing to do, and then gets himself drunk so as to give himself Dutch courage to do the killing, and whilst drunk carries out his intention, he cannot rely on his self-induced drunkenness as a defence to a charge of killing, nor even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that he was incapable of an intent to kill. So also when he is a psychopath, he cannot by drinking rely on his self-induced defect of reason as a defence of insanity. The wickedness of his mind before he got drunk is enough to condemn

85. Roger Shiner, *Intoxication and Responsibility*, 13 INT’L J.L. & PSYCHIATRY 9, 9 (1990); Chester Mitchell, *The Intoxicated Offender - Refuting the Legal and Medical Myths*, 11 INT’L J.L. & PSYCHIATRY 77, 77 (1988); Alan R. Ward, *Making Some Sense of Self-Induced Intoxication*, 45 CAMBRIDGE L.J. 247, 247 (1986).

86. See Paul H. Robinson, *Causing the Conditions*, *supra* note 35, at 35 (finding the actor’s liability at the time he becomes intoxicated properly accounts for different levels of culpability as to causing the subsequent offense).

87. *Att’y Gen. for N. Ireland v. Gallagher*, [1961] UKHL 2, [1963] A.C. 349.

him, coupled with the act which he intended to do and did do.⁸⁸

In both perspectives, envisaged by Lord Denning, there is a problem in that at the time the defendant perpetrated the *actus reus* (T2) he did not possess the *mens rea* and at the time he had the *mens rea* (T1) he did not bring about the *actus reus*. On the other hand, it seems entirely reasonable to say that if a man plans to kill his wife or indeed any lesser crime of violence, drinks to such an extent that he loses his ability to appreciate what he is doing and then while in this state for which he is criminally responsible, kills his wife, he should be convicted of murder.⁸⁹ Potentiate liability and preventing fault implicate liability for all types of offences in this regard, general or specific, predicated upon awareness of harmful effects directly linked to lack of moral responsibility. It is almost as if the individual actor is using himself as an innocent agent, but it is an agency disregarding the interests of others or risks attendant to culpable activity.⁹⁰ A *fortiori* liability is implicated if the defendant is aware that excessive drinking triggers in him a dangerous and aggressive pattern of behaviour.

B. Pathological Intoxication and Non-Dangerous Therapeutic Drugs

Anglo-American constructs of intoxication draw parallels in terms of pathological intoxication where the physiological responses attendant to ingestion are unforeseeable, and demarcations apply between dangerous / non-dangerous drug-taking.⁹¹ The normal rule for basic intent crimes, imputing

88. *Id.* at 381. This view appears to be equally applicable to the new loss of control defence, under sections 54-55 of the Coroners and Justice Act 2009. In the recent Court of Appeal case, *R v. Asmelash*, [2013] EWCA (Crim) 157, [17] (Eng.), it was suggested by counsel that the partial defence should not be available where the defendant had been drinking to give himself Dutch courage for some violent action.

89. William Wilson, *Involuntary Intoxication Excusing the Inexcusable*, 1 RES PUBLICA 25 (1995).

90. A corollary applies here to the decision in *Ryan v. R* (1967) 121 CLR 205, 205 (Austl.), *vis-à-vis* self-induced automatism. The defendant robbed a service station threatening the cashier with a sawn-off rifle; the rifle was loaded and the safety catch was off. He attempted to tie up the cashier with one hand while pointing the rifle at him with the other. Unfortunately, the cashier made a sudden movement and Ryan shot him dead. The appellant contended that he had been startled by the sudden movement and had pressed the trigger "involuntarily". The majority in the High Court of Australia took the view that he had voluntarily placed himself in a situation where he might need to make a split-second decision and the fact that he so responded by pulling the trigger did not make that act an involuntary act in the nature of an act done in a convulsion or epileptic seizure. It was conduct to which attributional liability applied in terms of criminal responsibility and similarly for the intoxicated offender in all types of Dutch courage situations. *Id.*

91. Lawrence P. Tiffany & Mary Tiffany, *Nosologic Objections to the*

constructive liability by the *Majewski* application of “recklessness”, is overtaken by an alternative standardisation of recklessness where intoxication arises from drugs taken for therapeutic reasons: “If [D] does appreciate the risk that [failure to take food / taking the non-dangerous drug] may lead to aggressive, unpredictable and uncontrollable conduct and he nevertheless deliberately runs the risk or otherwise disregards it, this will amount to recklessness.”⁹² In essence, faultless self-induced intoxication by drugs is to be regarded as involuntary intoxication, and therefore outside the scope of the *Majewski* rule.⁹³ These overarching principles were enunciated in *Bailey*,⁹⁴ where the defendant was a diabetic requiring insulin to control sugar levels but failed to follow the medically prescribed treatment, and subsequently claimed that he had assaulted the victim during a period of unconsciousness caused by hypoglycaemia. There was no evidence to suggest that he was aware that failure to take sufficient food might lead to him becoming aggressive or dangerous, and so potentiate liability did not apply. In similar vein the agitated defendant in *Hardie*,⁹⁵ who had taken valium tablets for the first time in order to calm nerves after a relationship ended, and then set fire to a bedroom, arguably had no appreciation of the risk created by the disorientation, and *Majewski* is inapplicable if the drug taken is “wholly different in kind from drugs which are liable to cause unpredictability or aggressiveness.”⁹⁶

Criminal Defense of Pathological Intoxication: What do the Doubters Doubt?, 13 INT’L J.L. & PSYCHIATRY 49, 49 (1990).

92. *Bailey*, [1983] 1 W.L.R. at 765 (Eng.).

93. By way of comparison see *R v. Quick*, [1973] 1 Q.B. 910 at 922 (Eng.) (“A self-induced incapacity will not excuse . . . , nor will one which could have been reasonably foreseen as a result of either doing, or omitting to do something, as, for example, . . . failing to have regular meals while taking insulin.”); LAW COMMISSION SCOPING PAPER, INSANITY AND AUTOMATISM (Law Com SP, 2012); Adam Jackson, Nicola Wake & Natalie Wortley, *Insanity and Automatism: A Response to the Law Commission: Part 1*, CRIM. L. & JUSTICE WEEKLY, 176, 50, 731-33 (2012); Adam Jackson, Nicola Wake & Natalie Wortley, *Insanity and Automatism: A Response to the Law Commission: Part 2*, CRIM. L. & JUSTICE WEEKLY, 176, 51-52, 752-54 (2012). *But see* LAW COMMISSION, DISCUSSION PAPER, INSANITY AND AUTOMATISM (Law Com SP, 2013) (recommending that faultless self-induced intoxication in this context should fall within the parameters of a newly proposed “Recognised Medical Condition” defence).

94. *Bailey*, [1983] 1 W.L.R. at 760 (Eng.).

95. *R v. Hardie*, [1984] EWCA (Crim) 2, [1985] 1 W.L.R. 64 (Eng.); DAVID ORMEROD, SMITH AND HOGAN’S CRIMINAL LAW 314 (Oxford Univ. Press 2011).

96. *See Hardie*, [1985] 1 W.L.R. at [70]. “Since drinking alcoholic liquor is not usually followed by gross intoxication and does not usually lead to the commission of serious injuries, it follows that persons who commit them while grossly intoxicated should not be punished, unless at the time of the sobriety and voluntary drinking, they had such prior experience as to anticipate their intoxication and that they would become dangerous in that condition.” HALL,

It is within the boundaries of pathological intoxication and separate treatment for therapeutic drug-taking that our schematic template for potentiate liability and prior fault derivations of fair labelling receives the clearest endorsement from extant juridical precepts. Criminal responsibility attaches only to a defendant who is morally culpable and who with awareness disregards the interests of others or risks attendant to harmful conduct. The term “recklessness” is used in a particularised context of risk-taking awareness, and in a generalised sense, not requiring foresight of the *actus reus* of any particular crime as mandated in purposive criminal recklessness specificity. Instead, it is utilised to identify recklessness as moral culpability or otherwise and via transmogrification of awareness of a risk that the actor will become aggressive or dangerous (at T1 stage).⁹⁷ Prior fault applies in a pithy sense that reflects the earthy realism behind appropriate criminalised behaviour in this sphere derived from harmful moral agency.⁹⁸

C. Involuntary Intoxication

An individual may not be responsible for his intoxicated state, and consequently moral blamelessness may attach at the T1 stage of potentiate liability. A person may become involuntarily intoxicated in a variety of ways: his drinks may have been laced or he may have been tricked into taking drugs without his knowledge or the drugs may have been forcibly administered. The *Model Penal Code* response has been to establish a presumptive defence for involuntary intoxication⁹⁹ to all types of criminal offence, but

supra note 65, at 556.

97. It is submitted that the word “recklessness” was utilised by the appellate courts in *Bailey* and *Hardie* to refer to the “fault” required by the individual actor in bringing about the condition of automatism. In order for the inculcation of an offence requiring subjective reckless it is apparent that a defendant would need to have been “subjectively reckless” in terms of a different connotation of lack of moral responsibility (preventing fault) in bringing about his or her condition.

98. See SIMESTER & SULLIVAN, *supra* note 27, at 637 (asserting that the essence underlying juridical precepts in this substantive arena, “is a commendable reluctance to subject persons taking drugs for therapeutic benefit to the regime of social protection endorsed by the House of Lords in *Majewski*”).

99. Intoxication which is “not self-induced”. The drafters of the *Model Penal Code* used the term “self-induced” in order to avoid confusion regarding the term “involuntary”, which could be seen to include duress or coercion. Although this article refers to involuntariness throughout in relation to the alcohol dependent defendant, it should be borne in mind that the term is not intended to encompass duress and coercion in this context. There is no statutory definition of “involuntary” intoxication in English law; however, the courts have similarly adopted a restrictive view of the concept. For example, a drink that is surreptitiously laced with alcohol will constitute involuntary intoxication. *R v. Allen*, CRIM. L.R. 1988, 698 (Eng.). Whereas underestimating the potentiate effects of substances will not. *R v. Eatch*, CRIM. L.R. 1980, 650

only where constitutively the actor is deprived of “substantial capacity to conform his conduct to the law.”¹⁰⁰ The resonance herein is computation with uncertain principles related to automatism where capacity for self-control is lost.¹⁰¹ The boundaries between automatism / involuntary intoxication are blurred in this respect, and the solipsistic line-drawing engagement precipitated has precluded common law adoption by many U.S. jurisdictions.¹⁰² The extant position in English law is laid out in the House of Lords judgment in *Kingston*,¹⁰³ and the general principle unfortunately remains that unless relevant as a denial of *mens rea* defence, the moral blamelessness or qualitative culpability of an act does not affect inculcation.¹⁰⁴ The involuntarily intoxicated “offender” remains liable if it is proved that the external elements of a crime were committed at T2 stage with the offence-definitional fault specificity.¹⁰⁵ The gradation of moral culpability only impacts on gravamen of sentence.

It is submitted that substantive doctrinal principles operate capriciously against destabilised “offenders” who have been involuntarily intoxicated. Potentiate liability is not invoked at the T1 stage of temporal individuation, and the morally blameless offender ought to be able to raise an inference for fact-finder determination that but for the disinhibition created involuntarily and without responsibility at T1, no harmful effects at T2 would have been engendered: “The non-conviction of the blameless should be a pervasive principle of substantive criminal law limited only by the need to theorise and practice criminal law as a system of rules and by the exigencies of forensic practicability.”¹⁰⁶ The defendant should have the opportunity to argue that the

(Eng.).

100. MODEL PENAL CODE § 2.08 (4) (a) and (b); Fingarette, *Addiction and Criminal Responsibility*, *supra* note 9, at 424 n.56; *see also* Ingle, *supra* note 43, at 644 (suggesting that, “the involuntary intoxication defense is illusory. Like the Loch Ness monster, it is often discussed, sometimes searched for, but ultimately never convincingly documented”).

101. ASHWORTH, *supra* note 24, at 203-04. *See generally* R v. Coley, McGhee and Harris [2013] EWCA (Crim) 223; R v. Oye [2013] EWCA (Crim) 1725.

102. Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2247 (1992). *See also* Ronnie Mackay, *Intoxication as a Factor in Automatism*, CRIM. L.R. 1982, 146 (“Problems stem from the fact that intoxication is regarded as a plea which is separate and distinct from automatism when this is plainly not so.”).

103. R v. Kingston, [1994] UKHL 9, [1995] 2 A.C. 355 (Eng.); Bob Sullivan, *Involuntary Intoxication and Beyond*, CRIM. L.R. 1994, 272; Stephen Gardner, *Criminal Defences by Judicial Discretion*, 111 L.Q.R. 177, 177 (1995); John Spencer, *Involuntary Intoxication as a Defence*, 54 CAMBRIDGE L.J. 12, 12 (1995).

104. *See* SIMESTER & SULLIVAN, *supra* note 27, at 638–39.

105. As Loughnan notes, “[w]here the moral culpability underpinning the legal approach to voluntary intoxication is absent, the effects of that approach are unpalatable.” Loughnan, *supra* note 10, at 304.

106. Sullivan, *supra* note 71.

allegorical Mr. Hyde personification at stage T2 would not have occurred to Dr. Jekyll without involuntary intoxication at T1 creating disequilibrium and destabilisation. The persuasive burden should rest on a defendant to address lack of preveining fault in this contextualisation.¹⁰⁷

The adoption of a reverse burden affirmative defence, focusing on lack of preveining fault, may be supported by three separate arguments highlighted in disparate sections of the commentary to the *Model Penal Code*: (i) most importantly the constitutive facts and attitudinal behaviour (character personification) are within the ambit of the individual actor to fruitfully produce for the court, including motivational pathways; (ii) instances of this type of defence predicated on lack of preveining fault or culpable awareness at T1 will occur very infrequently, and when they do arise the defence is often unlikely, subject to correction by the defendant; and (iii) the focus on lack of potentiate liability and no disregard for the interests of others at T1 creates an affirmative defence of exceptional pathology attached to moral legitimacy exculpating the radically destabilised “offender”.¹⁰⁸

D. Basic Intent Offences Simpliciter

It is time to acknowledge that Anglo-American intoxication doctrine has created a legal fiction in terms of imputed liability for basic intent offences.¹⁰⁹ This constructive liability is predicated not on criminal recklessness but criminal responsibility of a volitional agent, and the prior fault lies in voluntary intoxication. It is attributional culpability derived from potentiate liability at T1 temporal individuation, and applies irrespective of conscious advertence to the risk of ultimate harm. Fair labelling and doctrinal coherence requires a specific offence¹¹⁰ detailing the inculpatory nature of preveining fault, and potentiate liability, mirroring the German Code standardisation:

Whosoever intentionally or negligently puts himself into a drunken state by consuming alcoholic beverages or other intoxicants shall be

107. See generally FLETCHER, *supra* note 71.

108. See MODEL PENAL CODE AND COMMENTARIES, §5.01, 361 (Official Draft 1962 and Revised Comments 1985).

109. See WILSON, *supra* note 24, at 231.

110. See Rebecca Williams, *supra* note 22 (suggesting, in a different context to potentiate liability, a bespoke offence of “committing (the *actus reus* of offence X) while intoxicated” and suggesting that this “could [in principle] apply across the board”); LAW COMMISSION, LEGISLATING THE CRIMINAL CODE: INTOXICATION AND CRIMINAL LIABILITY 60–61; ¶ 263(2), (Law Com No 229, 1992) (introducing plans for criminal intoxication—“guilty of doing the act while in a state of voluntary intoxication”). See generally Dimock, *The Responsibility of Intoxicated Offenders*, *supra* note 22 (arguing that the “[Canadian courts] treatment of intoxicated offenders is inconsistent across [the intoxication rule] categories and offends important principle[s] of criminal justice and legality”).

liable to imprisonment of not more than five years or a fine if he commits an unlawful act while in this state The penalty must not be more severe than the penalty provided for the offence which was committed while he was in the drunken state.¹¹¹

It is the commission of an unlawful act whilst in a state of voluntary intoxication to which potentiate liability ought to apply in our recalibration of Anglo-American standardisations. The position may be different, however, in the context of a large cadre of offenders who assert that their intoxication is involuntary because of addiction to alcohol or other intoxicants. The boundaries of the *Majewski* bifurcation appear inapposite to the intoxicated alcoholic “offender” who kills as a result of this condition. The delimitation in the U.S., viewing alcoholism as only relevant to denial of “substantial capacity” within self-induced automatism, remains unduly constraining and inapt. It is our perspective, addressed in the subsequent parts of this article, that the condition of alcoholism for the purposes of diminished responsibility, and as a partial defence to murder, must be treated more expansively in our *dépeçage* identifications. The reforms to English law contained in the Coroners and Justice Act 2009, as interpreted by recent juridical authorities, and operating in tandem with novel proposals on classificatory systems, constitute a template for beneficial harmonisation. The first drink need not be taken involuntarily at the T1 stage of individuation, but rather potentiate liability principles mandate a wider consideration of preventing culpability and responsibility.

111. Die Übersetzung [German Criminal Code], Nov. 13, 1998, BGBl I [FEDERAL LAW GAZETTE] § 323a, amended by Article 3 of the Law of Oct. 2, 2009, translated by PROF. DR. MICHAEL BOHLANDER. See LOUGHNAN, *supra* note 10, at 315. (arguing that this approach would “make overt the connection between intoxication and criminal liability, sabotaging the myth that intoxication is some kind of ‘defence’ to a criminal charge”); GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 564 (Stevens and Sons 1961) (As Williams poignantly enquired, “[i]f a man is punished for doing something when getting drunk that he would not have done when sober, is he in plain truth punished for getting drunk?”); PAUL H. ROBINSON & JOHN M. DORLEY, JUSTICE, LIABILITY AND BLAME 105-15 (Westview Press 1995) (discussing the varying determinations of liability with respect to a person’s pre-intoxication culpability when committing the offense); See generally THOMAS VORMBAUM, A MODERN HISTORY OF GERMAN CRIMINAL LAW (Michael Bohlander ed., Springer 2013). However, the low level maximum penalty in Germany has sparked controversy. German case law illustrates that in some cases where the maximum penalty has been considered insufficient, the courts have reverted to the *action libera in causa* doctrine which arguably undermines the purpose of section § 323a. Kai Ambos and Stefanie Bock, *Germany*, in GENERAL DEFENCES: DOMESTIC, AND COMPARATIVE PERSPECTIVES (Michael Bohlander & Alan Reed eds., Ashgate Publ’g 2014) (forthcoming). See also, Gerhard Kemp, *South Africa*, in GENERAL DEFENCES: DOMESTIC, AND COMPARATIVE PERSPECTIVES (Michael Bohlander & Alan Reed eds., Ashgate Publ’g 2014) (forthcoming).

IV. THE MODEL OF ALCOHOLISM

Anglo-American jurisprudence has struggled to appropriately attribute fault where the chronic alcoholic defendant is concerned, and deontological reasoning has produced bright-line principles, which frequently results in the alcoholic's condition being considered irrelevant to the question of criminal responsibility. The law proceeds on the basis that an individual's conduct is within his / her control and as a result it would not be unjust to attribute fault.¹¹² In contrast, behavioural and medical sciences consider that symptoms of substance-use disorders are invariably external manifestations of a pre-existing cause.¹¹³ The notion that an individual's actions are pre-determined is at odds with legal conceptions of culpability and fault attribution, and it is, therefore, unsurprising that gradations of addiction, which straddle the analytical divide between voluntariness and involuntariness, remain in a befuddled law-psychiatry hinterland.¹¹⁴ This Part of our article outlines the standardisational and definitional perspectives that underpin conflict between the law and psychiatry, and categorisation of the chronic alcoholic's conduct as voluntary or involuntary, in terms of attributional criminal liability. It is suggested herein that this categorisation is fundamentally important in terms of appropriate fault attribution. As noted in Part I, where a defendant's intoxication is deemed to be voluntary at the T1 stage, this intoxication is conjoined with the external elements of the offence at the T2 stage in order to construct liability. In murder cases, *D*'s voluntary intoxication at T1 will only have a bearing on *D*'s culpability at the T2 stage if the prosecution fails to establish the requisite *mens rea*, and this has significant consequences for the alcohol dependent defendant.

Two polarised schools of thought exist *vis-à-vis* alcohol dependence syndrome.¹¹⁵ The first considers alcoholism a recognised condition over which the sufferer exercises no intelligible control, and accordingly as a potentiate form of diminished responsibility in terms of reconstitutive criminal

112. See generally ASHWORTH, *supra* note 24.

113. Boldt, *supra* note 102, at 2304.

114. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 86–113 (Harvard Univ. Press 1987) (discussing the differences between intentionalism and determinism and how liberal discourse privileges the former over the latter). For the purposes of this article we refer to alcohol dependence, addiction, chronic alcoholism, and alcoholism interchangeably. It should be noted, however, that dependence may be “a normal body response to a substance” and is not always symptomatic of addiction. AM. PSYCH. ASS'N, SUBSTANCE-RELATED ADDICTIVE DISORDERS (2013).

115. See LAW COMMISSION, INSANITY AND AUTOMATISM: SUPPLEMENTARY MATERIAL TO THE SCOPING PAPER, *supra* note 19, at 21, ¶¶ 2.58-2.59 (identifying that the first school views alcoholism as a disease, whereas the second school views it as a habit).

liability.¹¹⁶ The second regards addiction as a pattern of learned behaviour resulting from psychological and societal influences.¹¹⁷ Medical and behavioural sciences may be clearly aligned with the former view, which proposes a “less autonomous view of drunkards”¹¹⁸ and suggests that events are the product of an amalgamation of pre-existing factors rendering them inevitable.¹¹⁹ The latter approach is compatible with “intentionalist” criminal justice theory which imposes liability on the assumption that individuals are rational, “phenomenological” and “free will oriented” and accordingly accountable for their conduct.¹²⁰ Imposing liability on the alcohol dependent defendant is counter-intuitive to proponents of the strict determinist approach, which regards individual behaviour as “structuralist” and “amoral”, thereby deserving neither approbation nor reproach.¹²¹ This conflict between “intentionalist” and “determinist” accounts of human conduct has engendered a blurred philosophical compromise, viewing behaviour through a legal prism where individuals are regarded as criminally liable for their conduct in the absence of an applicable defence.¹²² The effect is that complete

116. Julia Tolmie, *Alcoholism and Criminal Liability*, 64 MOD. L. REV. 688, 688–92 (2001); see also MARTIN WIENER, RECONSTRUCTING THE CRIMINAL: CULTURE, LAW AND POLICY IN ENGLAND 1830–1914 295 (Cambridge Univ. Press 1990) (identifying that, as early as 1879, it was argued that “drunkenness was an affliction in which self-control is suspended or annihilated”).

117. FINGARETTE, HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE, *supra* note 9, at 102 (“Heavy drinkers are people who have over time made a long and complex series of decisions, judgements, and choices of commission and omission that have coalesced into a central activity [i.e. heavy drinking].”); Fingarette, *Addiction and Criminal Responsibility*, *supra* note 9, at 431 (“A very large proportion of new addicts in the United States today are young, psychologically immature, occupationally unskilled, socially uprooted, poor and disadvantaged.”); Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the “Disease Concept of Alcoholism”*, *supra* note 9, at 806 (arguing that alcoholics are not without control over their actions, indeed “on the whole, the alcoholic has chosen this way to handle his problems in life”). See generally VALVERDE, *supra* note 11. See generally MORSE, *supra* note 11.

118. WIENER, *supra* note 116, at 294; see also *id.* at 295–96 (noting that, in 1879, the British Medical Association helped in the cause of “full medicalization of dipsomania” and passing the Habitual Drunkards Act).

119. Boldt, *supra* note 102, at 2304.

120. KELMAN, *supra* note 114, at 86 (emphasizing “the indeterminacy of action and, correlatively, the ethical responsibilities of actors”); HALL, *supra* note 64, at 166–67 (discussing that because defendants are “reasonable” men, “the objective method of fact-finding and the objective standard of liability function accurately and justly in most cases”); Tolmie, *supra* note 116, at 689–92 (discussing the differences between the disease model and the habit model, wherein the latter model reflects the intentionalist theory). It was noted in *Bailey v. United States* that a person “is not to be excused for offending simply because he wanted to very, very badly.” 386 F.2d 1, 4 (5th Cir. 1967).

121. KELMAN, *supra* note 114, at 86.

122. See generally ASHWORTH *supra* note 24.

exculpation will only be permitted where actions may be identified as so pre-determined that the normative presumption of free will is rendered nugatory or, alternatively, where the alcoholic's criminal responsibility for those actions is so impaired that the partial defence of diminished responsibility applies, and this rationale is considered below. This approach to criminal liability is set against the backdrop of an underlying conflict between the "strictly logical" approach, as outlined in Part I, which dictates that intoxication evidence should always be relevant to questions of culpability, and the "absolutist" position, which contends that it would be dangerous to permit a voluntarily intoxicated defendant to escape criminal liability on account of that intoxication.¹²³ Anglo-American attempts to satiate both camps have resulted, as stated in Part I of this article, in voluntary intoxication evidence being relevant only where it negates the *mens rea* for a specific intent offence in English law, and for offences requiring knowledge or purpose in the U.S.¹²⁴ For lesser intent crimes, intoxication evidence is used as a basis to constructively impute liability.¹²⁵ It is only where the defendant's intoxication is involuntary, not self-induced or pathological in nature, that it may have a significant bearing upon the attribution of fault liability,¹²⁶ and we have suggested alternative remodeling centred around potentiate liability and reverse burden in this sphere.

The difficulty in cases involving the chronic alcoholic, however, is that the defendant invariably exhibits determinist and intentionalist features in tandem. A predominant aspect of the syndrome is an inability to control alcohol consumption, but numerous studies demonstrate that those suffering from withdrawal symptoms frequently and volitionally refrain from alcohol intake and many consume intoxicants without becoming addicted.¹²⁷ The notion that the alcohol dependent defendant may

123. Child, *supra* note 28.

124. See *Majewski*, [1977] A.C. at 474-75; MODEL PENAL CODE, § 2.08(1) ("Except as provided in Subsection (4) of this Section [pathological or not self-induced], intoxication of the actor is not a defense unless it negatives an element of the offense."); LAW COMMISSION, INTOXICATION AND CRIMINAL LIABILITY, *supra* note 29, at ¶ 1.58 (concluding that neither the strictly logical approach nor the absolutist alternative are ideal); Simester, *supra* note 42, at 3-14.

125. See *Majewski*, [1977] A.C. 443, and the MODEL PENAL CODE § 2.08 (explaining intoxication relevance and available defences); see also LAW COMMISSION, INTOXICATION AND CRIMINAL LIABILITY, *supra* note 29; Simester, *supra* note 42, at 14 (discussing the evidentiary nature of the intoxication doctrine).

126. *Id.*

127. FINGARETTE, HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE, *supra* note 9, at 34-38; Fingarette, *Addiction and Criminal Responsibility*, *supra* note 9, at 432 n.93; Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism"*, *supra* note 9, at 804-05.

retain some capacity to choose whether to consume alcohol suggests that the normative presumption of free will has not been completely displaced.¹²⁸ These concerns have resulted in a judicial reluctance to accept the disorder as a valid form of concessionary mitigation. The focus in extant English and U.S. law has been to distinguish voluntary from involuntary intoxication when determining whether the defendant's condition should exist as a valid form of exculpation, rather than accept, as we propound, that the true state of affairs is more complex and individuated between these fictionalised boundaries. The U.S. courts have been inclined to regard intoxication arising from the condition as voluntary. The disorder is regarded as a latent characteristic in the offender, which results in a propensity to consume alcohol.¹²⁹ This suggestion has been heavily criticised as speculative and unsupported.¹³⁰ Nevertheless, this characterisation is fundamentally at odds with notions of exculpation, and, therefore, the defendant's condition is often irrelevant to questions of culpability. In England, more recent jurisprudential authority suggests that the disorder might impair the defendant's responsibility, but it does not totally abrogate or displace free will. The result has been to recognise that alcohol dependence syndrome may have a bearing upon the defendant's culpability, but only in the most exceptional cases,¹³¹ and only to a partial extent.

V. DIMINISHED RESPONSIBILITY AND ALCOHOL DEPENDENCE SYNDROME

The bifurcatory categorisation of the chronic alcoholic's conduct as voluntary or involuntary, and no distinctive hues in-between, is demonstrative of a reluctance to deviate from an antediluvian template pertaining to intoxicated offending as outlined in Parts I and II of our article. This obsession with traditional intoxication doctrine, and inculcated policy considerations,¹³² has led U.S. courts to standardise alcohol dependent defendants according to normative societal expectations of the reasonable sober person. It is our contention that it is inappropriate and inapt to hold the mentally disordered offender

128. See generally Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87.2 J. CRIM. L. & CRIMINOLOGY 482 (1997) (noting how courts expand exculpatory effects of intoxication).

129. V. Dole & Marie Nystander, *Methadone Maintenance and Its Implications For Theories Of Drug Addiction*, in THE ADDICTIVE STATES 359 (A. Wickler ed., 1968).

130. AVRAM GOLDSTEIN, ET AL., THE PRINCIPLES OF DRUG ADDICTION 474 (1969); see also DELONG, *The Drugs and Their Effects*, in DEALING WITH DRUG ABUSE: A REPORT TO THE FORD FOUNDATION (1972).

131. JONATHAN HERRING, ET AL., INTOXICATION AND SOCIETY: PROBLEMATIC PLEASURES OF DRUG AND ALCOHOL (Palgrave MacMillan 2013).

132. See generally LOUGHNAN, *supra* note 10.

to this standard, and that the alcoholic defendant's condition ought to be considered more broadly in terms of criminal responsibility and attributional fault liability. The revised diminished responsibility plea in English law, within the purview of the Coroners and Justice Act 2009, and as recently interpreted by the Court of Appeal, provides an appropriate *via media* in terms of accounting for the chronic alcoholic's condition in order to appropriately attribute fault in murder cases, and recognises the responsibility-culpability nexus that should be determinative to this category of "offender". Potentiate liability principles should be deployed more widely in terms of recognition of mental disorder conditions that affect culpability thresholds, and a more balanced appreciation of voluntary / involuntary intoxication is urgently needed.

A review of the contradictory *Model Penal Code* approach is central to our analysis, and provides that "intoxication of the actor is not a defense unless it negatives an element of an offence requiring knowledge or purpose."¹³³ As highlighted in Part I, this constitutes a failure to establish an element of the offence, which may have the effect of reducing a murder conviction to one of manslaughter,¹³⁴ and, as such, it is not a "true" defence, in contrast to other cognate defences.¹³⁵ If, however, the defendant's intoxication is not self-induced or is pathological in nature, and, as such, he lacks substantial capacity to appreciate its criminality or to conform his conduct to the requirements of the law,¹³⁶ he will be entitled to an outright acquittal.¹³⁷ The focus of the U.S. courts has, therefore, been to distinguish "between incapacity and indisposition, between those who can't and those who won't, between impulse irresistible and impulse not resisted."¹³⁸ This approach is akin to trying to pinpoint the exact moment at which Dr. Jekyll lost control and was taken over by Mr. Hyde. It ignores the interim period where Dr. Jekyll was "losing hold of his original and better self . . ." ¹³⁹ The imputation is that the chronic alcoholic is viewed in the U.S. through the legal prism of automatism rather

133. MODEL PENAL CODE § 2.08(1); *see also id.* § 2.08(2) (showing where recklessness establishes an element of the offence, an actor's unawareness of self-induced intoxication is immaterial).

134. *See id.* § 44.02 (rejecting the murder-by-degrees approach); *see also* LAW COMMISSION, MURDER, MANSLAUGHTER AND INFANTICIDE (Law Com No 304, 2006) (recommending the rejection of a hierarchical restructuring of homicide offenses).

135. Andrew Simester, *Intoxication is Never a Defense*, 1 CRIM. L.R. 3, 14 (2009).

136. MODEL PENAL CODE AND COMMENTARIES §§ 2.08, 3, 363.

137. *Id.* § 2.08(4)

138. *United States v. Moore*, 486 F.2d 1139, 1182 (D.C. Cir. 1973); *see also* Bonnie, *supra* note 21 (asserting lack of objective basis for determining undeterrable from the merely undeterred).

139. STEVENSON, *supra* note 1, at 59.

than involuntary intoxication. It is only where there has been a total lack of volitional conduct (the language of non-insane automatism) that alcohol dependence is supererogatory. If this threshold is not reached then the intoxicated “offender” is treated within the purview of voluntary intoxication and potentiate liability applies in this circumscribed sphere. In this regard, the alcohol dependent defendant’s conduct is assessed according to the normative expectations society has of the sober person, and the risks that would have been aware to non-alcoholics in terms of preventing fault and criminal liability. The external elements of the offence at T2 are aligned with the defendant’s “voluntary” consumption of alcohol at the T1 stage, and liability is accordingly established, even though the actor was operating under the baneful influence of the syndrome. The defendant’s intoxication is only relevant at the T2 stage where the offence is regarded as requiring specific intent, and the substance use prevented the formulation of the culpable state of mind. This principle applies whether or not the defendant suffers from alcohol dependence syndrome.¹⁴⁰ Potentiate liability in a consequentialist sense is obscured in terms of legitimate import and moral blameworthiness.

The narrow view that there exists an element of reasoned choice when an addict knowingly uses the substance to which he is addicted, rather than participating in a treatment or rehabilitation programme,¹⁴¹ has also resulted in the rejection of alcohol dependence syndrome as a bespoke mental disease or defect, within U.S. jurisdictions.¹⁴² The outcome is that the chronic alcoholic is unable to rely upon the syndrome in order to raise the insanity defence,¹⁴³ which provides that a person is not to be held criminally responsible for his acts if, at the time of that conduct and as a result of a mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or conform that conduct to the requirements of the law.¹⁴⁴

140. MODEL PENAL CODE § 2.08(1); *see also* LOUGHNAN, *supra* note 10.

141. *Moore*, 486 F.2d at 1183.

142. *Heard*, 348 F.2d at 44.

143. *Bailey*, 386 F.2d at 3-4; *see also* *United States v. Coffman*, 567 F.2d 960, 963 (10th Cir. 1977); *Yassen v. United States*, 1129 U.S. 94 (1974) (being involuntarily under the influence of drugs at the time of the crime is not a legal equivalent of insanity); *Moore*, 486 F.2d at 1181; *United States v. Romano*, 482 F.2d 1183, 1196 (5th Cir. 1973); *United States v. Stevens*, 461 F.2d 317, 321 (7th Cir. 1972); *Berry v. United States*, 286 F. Supp. 816, 820 (E.D. Pa. 1968) (rev. on other grounds), 412 F.2d 189 (3d Cir. 1969); *Green v. United States*, 383 F.2d 199, 201 (D.C. Cir. 1967) (cert. denied), 390 U.S. 961 (1968); *Gaskins v. United States*, 410 F.2d 987, 989 (D.C. Cir. 1967); *United States v. Freeman*, 357 F.2d 606, 625 (2d Cir. 1966); *see also* Fingarette, *Addiction and Criminal Responsibility*, *supra* note 9, at 424-25 (asserting that the medical profession lacks a consensus over whether addiction is a disease).

144. *Blake v. United States*, 407 F.2d 908, 916 (5th Cir. 1969) (en banc).

Intoxication¹⁴⁵ is not sufficient to establish a mental disease¹⁴⁶ and the “terms ‘mental disease or defect’ do not include abnormality manifested by repeated criminal or otherwise anti-social conduct.”¹⁴⁷ Alcohol addiction per se is erroneously regarded as the external manifestation of a latent character defect, which results in a propensity to consume intoxicants, and is, therefore, incompatible with exculpatory doctrines in the U.S.:¹⁴⁸

A mere showing of . . . addiction, without more, does not constitute “some evidence” of mental disease or insanity so as to raise the issue of criminal responsibility.¹⁴⁹

Societal acknowledgement that certain mental diseases should be relevant to questions of criminal responsibility does not extend to alcohol dependence syndrome,¹⁵⁰ and in this regard, the definition of “mental disease or defect” is considered to be a matter of legal and not medical judgment.¹⁵¹ Individuation characteristics are engrafted whereby the defendant’s “anti-social” conduct, in terms of repetitively drinking to excess, at T1, is adjoined with the external elements of the offence at T2 and the defendant’s alcohol dependence syndrome will only be considered relevant in limited circumstances.

The courts have reluctantly allowed substance dependence evidence to be presented in court where it is used to establish that at the time of the offence, the defendant was suffering from a psychological condition, which pre-dated the physiological dependence,¹⁵² or that the alcohol was used in a bid to alleviate or assuage the symptoms of an underlying condition, for example, depression or anxiety disorder.¹⁵³ In these cases, substance dependence evidence is utilised to prove that the defendant suffered from the underlying condition at the time of the offence

145. Intoxication means a disturbance of mental or physical capacities resulting from the introduction of substances to the body. MODEL PENAL CODE § 2.08 (5)(a).

146. MODEL PENAL CODE, § 2.08(3) (1962).

147. *Id.* § 4.01(2) (1962).

148. Dole & Nystander, *supra* note 129; AVRAM ET AL., *supra* note 130; *see also* DELONG, *supra* note 130, at 212.

149. *Heard*, 348 F.2d at 44. *See also Doughty*, 396 F.2d at 130 (stating that imprisoning a chronic alcoholic does not constitute “cruel and unusual punishment” under the 8th Amendment).

150. *Freeman*, 357 F.2d at 625.

151. *State v. Lyons*, 731 F.2d 243, 246 (5th Cir. 1984). The criminal law cannot “vary legal norms with the individual’s capacity to meet the standards they prescribe, absent a disability that is both gross and verifiable, such as the mental disease or defect which may establish irresponsibility.” MODEL PENAL CODE AND COMMENTARY §§ 2.09, 6 (Tentative Draft No. 10, 1960).

152. *Robinson v. California*, 370 U.S. 660, 672 (1962); *Watson v. United States*, 439 F.2d 442, 460 (D.C. Cir. 1970); *Gaskins*, 410 F.2d at 989; *Heard*, 348 F.2d at 499; *Green*, 383 F.2d at 201.

153. *United States v. Cooper*, 465 F.2d 451, 452 (9th Cir. 1973); *United States v. Carter*, 436 F.2d 200, 201–02 (D.C. Cir. 1970).

and not to prove alcohol dependence per se.¹⁵⁴ Similarly, where the defendant suffers from permanent or transient psychosis as a result of the repeated insult from the intoxicants, evidence of the defendant's addictive behaviour is admissible in order to prove that psychosis.¹⁵⁵ Where the ingestion of alcohol causes a mental disease or defect outwith substance dependence per se, the defendant will normally be able to rely upon that mental disease or defect to support his contention that he lacked criminal responsibility, notwithstanding the fact that the defendant's alcohol intake was voluntary.¹⁵⁶ Evidence of alcohol dependence syndrome will be relevant at the T2 stage where it is used to establish that at the time of the offence the defendant suffered from damage to the brain or nervous system;¹⁵⁷ brain pathology or induced psychosis; or an alternative disorder as a result of the physiological dependence.¹⁵⁸ It is only where the dependence syndrome is so severe that it results in brain damage or an equally damaging condition that it will be relevant to the defendant's culpability, and, even then, its practical utility is doubted:

To us it seems to rest on the proposition that, assuming . . . addiction itself is neither a mental disease nor a defect, yet the two are often to be found in association, so that an addicted person is more likely to suffer from some mental disorder than is one who is not addicted. By a parity of reasoning, since combat veterans as a group are self-evidently more likely to have suffered the loss of a physical member than is the populace at large, evidence of whether a party is a combat veteran should be received on the issue whether he has lost a leg. Or, to take a less extreme example, since because of light skin pigmentation persons of Scandinavian ancestry are more subject to skin cancer than are others, the family tree of a suitor should be received in evidence when his skin cancer is at legal issue. The flaw in both illustrations

154. *Lyons*, 731 F.2d at 2463.

155. *Fitts v. United States*, 484 F.2d 108, 113 (10th Cir. 1960); *People v. Kelly*, 516 P.2d 875, 882-83 (Cal. 1973).

156. *Commonwealth v. Sheehan*, 383 N.E.2d 1115, 1119 (Mass. 1978).

157. JOHN BURKOFF & RUSSELL WEAVER, *INSIDE CRIMINAL LAW* 233 (Aspen Publishers 2008). "[T]he great weight of legal authority clearly supports the view that evidence of . . . addiction, standing alone and without any other physiological and psychological symptoms involvement, raises no issue of a mental disease or defect." *Lyons*, 731 F.2d at 245. In *Lyons*, the defendant (Lyons) was charged with twelve counts of knowingly and intentionally securing controlled narcotics by misrepresentation, fraud, deception and subterfuge in violation of 21 U.S.C. § 843 (a)(3) (1976) and 18 U.S.C. § 2 (1976). *Id.* at 244. At trial, Lyons attempted to rely on the insanity defence, asserting that he lacked substantial capacity to conform his conduct to the requirements of the law as a result of the physiological and psychological effects of his drug dependence. *Id.* Cf. *R v. Tandy*, [1989] 1 W.L.R. 350 (CA) (insanity defence only available if addiction rendered consumption of alcohol involuntary and intoxication impaired defendant).

158. *Robinson*, 370 U.S. at 672; *Watson*, 439 F.2d at 460; *Gaskins*, 410 F.2d at 989; *Heard*, 348 F.2d at 989; *Green*, 383 F.2d at 201.

seems evident: where evidence bearing directly on a legal question is available, that involving tangential matters, even though perhaps logically relevant in theory, is of small practical value.¹⁵⁹

A further anomaly applies in that the *American Law Institute* was prepared to accept pathological intoxication, the status of which is still being examined,¹⁶⁰ as providing an affirmative defence, while rejecting alcohol dependence syndrome unless equated with brain damage or an alternative mental disorder as a valid form of mitigation. Pathological intoxication is defined as the rapid onset of acute intoxication following consumption of alcohol, which is insufficient to cause intoxication in most people.¹⁶¹ In this regard, the condition could be categorised as involuntary on the basis that the defendant is unaware that the substance would intoxicate him “to the extent it did.”¹⁶² The *Model Penal Code* distinguishes “intoxication which is not self-induced”, defined as “merely accidental”, from “pathological intoxication” which is intoxication which takes the individual by surprise.¹⁶³ The drafters of the *Model Penal Code* noted a particularised rationale for this bespoke category:

[A] provision was required because of a concern that bizarre behavior caused in part by an abnormal bodily condition (in some cases, in others the atypical intoxication can be related to mental disturbance), would not seem to result from “mental disease” and thus would not fall under section 4.01 [the insanity defence].¹⁶⁴

The effect is to allow an affirmative defence where the defendant suffers from a mental condition short of insanity, notwithstanding the voluntary consumption of alcohol.¹⁶⁵ A more nuanced view has been applied to the pathologically intoxicated offender that ought to apply similarly to the alcoholic. In both situations it is potentiate liability and preventing fault at the T1 stage of inculcation that is fundamental in terms of culpability and criminal responsibility. Unfortunately, this contemporary

159. *Lyons*, 731 F.2d at 246-47.

160. See Tiffany, *Pathological Intoxication and the Model Penal Code*, *supra* note 43, at 768 (providing an in-depth analysis of the flaws inherent within arguments that pathological intoxication is not a valid condition); Tiffany & Tiffany, *supra* note 91, at 49-75. See generally Note, *Pathological Intoxication and the Voluntarily Intoxicated Criminal Offender*, 1969 UTAH L. REV. 419 (1969).

161. MODEL PENAL CODE § 2.08(5).

162. Tiffany, *Pathological Intoxication and the Model Penal Code*, *supra* note 43, at 768. See also Paul H. Robinson, *Causing The Conditions*, *supra* note 35.

163. Tiffany, *Pathological Intoxication and the Model Penal Code*, *supra* note 43, at 768.

164. MODEL PENAL CODE AND COMMENTARIES § 2.08, 7, 12 (Tentative Draft No. 9, 1959).

165. Tiffany, *Pathological Intoxication and the Model Penal Code*, *supra* note 43, at 768.

approach to pathological intoxication has met resistance amongst the States, on grounds that the availability of an affirmative defence is too broad and also over confusion regarding the true nature and extent of the condition.

The exclusionary approach to alcohol dependent defendants is mistakenly supported by a number of academicians who universally claim that concepts of addiction cannot be “usefully adapted to the context of legal argument.”¹⁶⁶ The suggestion is that studies which show that drinkers volitionally abstain from alcohol “believe the myth” of loss of control, and, as such, alcoholism is simply a “way of life”, rather than a disease;¹⁶⁷ moreover, there “is no reason to assume whatever is a medically recognised symptom must be legally involuntary. A symptom is simply an indicator or manifestation of disease.”¹⁶⁸ This reductionist perspective ignores the fact that alcoholism is a recognised condition over which the sufferer may exercise no intelligible control.¹⁶⁹ It does not follow that alcohol dependency syndrome should not be considered a relevant factor in terms of assessing culpability, simply because the defendant’s free will has not been completely displaced. It is not self-induced automatism and total destruction of volitional control that is at issue, but rather partial lack of responsibility at T2 affected by blameworthiness at T1. The alcoholic’s “decision” to consume alcohol at the T1 stage is fundamentally different from the decision made by the sober person. The present situation, which categorises conduct as sane or insane, and the chronic alcoholic’s intoxication as voluntary or involuntary, is unjust since it fails to consider the “wide range of rational and control capacities” exhibited by defendants.¹⁷⁰ Where the defendant’s intoxicated state is the by-product of a disease his “moral culpability is attenuated” such that it is appropriate that the condition is considered when attributing fault.¹⁷¹

If criminal punishment should be proportionate to desert, as virtually all criminal law theoreticians believe, blanket exclusion of doctrinal mitigating claims and treatment of mitigation solely as a matter of sentencing discretion is not fair.¹⁷²

166. Fingarette, *Addiction and Criminal Responsibility*, *supra* note 9, at 413-34.fn42.

167. FINGARETTE, *HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE*, *supra* note 9, at 99. MORSE, *supra* note 11.

168. Fingarette, *Addiction and Criminal Responsibility*, *supra* note 9, at 424.

169. Tolmie, *supra* note 116, at 688.

170. Stephen Morse, *Diminished Rationality: Diminished Responsibility*, OHIO ST. J. CRIM. L. 289, 289 (2003). *See generally* Stephen Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 24 (1984).

171. ARLIE LOUGHNAN, *supra* note 10, at 307.

172. Morse, *Diminished Rationality: Diminished Responsibility*, *supra* note 170, at 297. Attempts to afford consideration to a defendant’s mental

In cases where a defendant's alcohol dependence syndrome potentially has a bearing upon his responsibility for the offence, it is appropriate that the condition is considered in terms of preventing liability and criminal responsibility: "[t]he proper way to protect ourselves from the dangerously mentally ill is not through distortion of the criminal justice system," but by ensuring that blame is appropriately assigned.¹⁷³ An alternative approach predicated on the defendant's impaired capacity would be preferable, and the mechanistic bright-line standardisations in the U.S. to mental disorder, including alcoholism, have been unfortunate, and mistakenly predicated on improper judicial constructs of either insanity or automatism.

Attempts to introduce a partial diminished responsibility plea to the U.S. occurred by sleight of hand "through the judicial back door."¹⁷⁴ Disinclination to permit a concessionary defence, or "an all-embracing unified field theory" which could exculpate "anyone whose capacity for control is insubstantial"¹⁷⁵ resulted in the diminished capacity defence¹⁷⁶ being met with almost "universal hostility".¹⁷⁷ Of the five successful attempts to introduce the mitigation for murder, four were removed upon adoption of the *Model Penal Code*¹⁷⁸ and the fifth was abolished following public

abnormality through the doctrines of diminished responsibility and extreme mental or emotional disturbance have proved largely unsuccessful. LAW COMMISSION, PARTIAL DEFENCES TO MURDER App. F, ¶¶ 5-6 (Law Com No 290, 2004). See generally Douglas Brown, *Disentangling Concessions to Human Frailty: Making Sense of Anglo-American Provocation Doctrine through Comparative Study* 39 N.Y.U. J. INT'L L. & POL. 675 (2007).

173. Robinson, *Causing The Conditions*, *supra* note 35, at 1.

174. Morse, *supra* note 170, at 24.

175. *Moore*, 486 F.2d at 1182.

176. The term "diminished capacity" is used interchangeably to refer to the partial defence of diminished responsibility and also a denial of *mens rea* for offences requiring purpose or knowledge as per section 2.08 of the *Model Penal Code*. The latter categorisation is misleading on the basis that section 2.08 is not used to consider whether the defendant exhibits a lower level of culpability, rather it has the effect of reducing a murder conviction to one of manslaughter where the defendant lacks the requisite *mens rea* for the offence charged. References made to diminished capacity and / or diminished responsibility throughout this article apply to the partial defence rather than murder reductions predicated on a lack of *mens rea*. See generally Paul H. Robinson, *Abnormal Mental State Mitigations of Murder: The U.S. Perspective*, in LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES (Michael Bohlander & Alan Reed eds., Ashgate Publ'g 2011). See also Morse, *supra* note 170, at 24.

177. Phillip E. Has, *Drug Addiction of Related Mental State as Defense to Criminal Charge*, 73 A.L.R.3d 16, 16 (1991).

178. MODEL PENAL CODE § 1.05 (1). See also, Brown, *supra* note 172, at 675. The diminished responsibility defence exists in limited form where it is explicitly included in codified homicide schemes. HAW. REV. STAT. § 701-102 (West 2002); OHIO REV. CODE ANN. § 2901.03 (LexisNexis 2005); OR. REV. STAT. ANN. § 161.035 (West 2001); UTAH CODE ANN. § 76-1-105 (West 2008).

rioting in response to the decision in *People v White*.¹⁷⁹ White had assassinated Mayor Moscone and Harvey Milk in 1978. At his trial for first-degree murder, White successfully pleaded diminished capacity on grounds of a depressive condition. During the course of the trial it was suggested that a symptom of the depression was White's compulsion for junk food. Diminished responsibility subsequently became derisively dubbed the "twinkie defense",¹⁸⁰ before being dismissed as little more than "tea leaves and crystal balls."¹⁸¹ Commenting on the risks associated with the diminished responsibility defence, the drafters of the *Model Penal Code* stated:

By evaluating the abnormal individual on his own terms, [diminished responsibility] decreases incentives for him to behave as if he were normal. It blurs the law's message that there are certain minimal standards of conduct to which every member of society should conform. By restricting the extreme condemnation of liability for murder to cases where it is warranted in a relativistic sense, diminished responsibility undercuts the social condemnation. In short, diminished responsibility brings formal guilt more closely in line with moral blameworthiness, but only at the cost of driving a wedge between dangerousness and social control. The MPC does not recognise diminished capacity as a distinct category of mitigation.¹⁸²

The effect is to adjudge the chronic alcoholic according to normative standards of societal behaviour,¹⁸³ and to an individuated allegorical Dr. Jekyll personification that is heavily prescribed, in an aim to deter him from criminal conduct. This personified approach to culpability is fundamentally flawed on the basis that deterrence cannot be achieved by punishing an individual for acts beyond their control.¹⁸⁴ It ignores the fact that the defendant may not have had the capacity and opportunity to conform his conduct to the requirements of the law as a result of the baneful effects of the syndrome,¹⁸⁵ and thereby inappropriately

179. 172 Cal. Rptr. 612, 612 (Cal. Dist. Ct. App. 1981); CAL. PEN. CODE § 188 (West 2003); *People v Bobo*, 271 Cal. Rptr. 277, 290 (Cal. Dist. Ct. App. 1990). See also the film, THE TIMES OF HARVEY MILK.

180. Kelly Snider, *The Infamous Twinkie Defense-Fact or Fiction?*, 9 ANNALS AM. PSYCHOTHERAPY ASSOC. 42, 43 (2006).

181. Jay Ziskin, Ph.D LL.B, Professor, Psychology, Cal State, Un Los Angeles, at the hearings held Tuesday, December 4, 1979, in Doris Hardyman, Comment, *The Diminished Capacity Defense in California; An Idea Whose Time Has Gone?* 3 Glendale L. Rev. 311, 319 (1978-79).

182. MODEL PENAL CODE AND COMMENTARIES § 210.3(1)(b).

183. ASHWORTH, *supra* note 24.

184. Boldt, *supra* note 102, at 2289. "Men are not to be hanged for stealing horses, but that horses may not be stolen." GEORGE SAVILE (MARQUIS OF HALIFAX) CHARACTER OF KING CHARLES THE SECOND: POLITICAL, MORAL AND MISCELLANEOUS THOUGHTS AND REFLECTIONS 114 (J & R Tonson 1750). See also Ingle, *supra* note 43 (stating that punishment will not deter antisocial behaviour when the conduct is not a product of the defendant's own volition).

185. HERBERT HART, PUNISHMENT AND RESPONSIBILITY (Oxford Univ. Press 2008).

treats the chronic alcoholic as a “mere vehicle through which to deter others.”¹⁸⁶ Punishment is inequitably attached to the conduct of a defendant whose mental abnormality may have substantially impaired his or her decision-making capacity at the time of the offence.¹⁸⁷ The inappropriate attribution of fault liability in cases of this context cannot be justified on public policy grounds, and a more enlightened template is needed to reflect potentiate liability and “actual” responsibility at the T1 stage of intoxication.¹⁸⁸

A contradictory approach applies to partial defences in general in that the *American Law Institute* was prepared to accept a “substantial enlargement” of the traditional plea of provocation in order to embrace psychological failings on the part of the defendant.¹⁸⁹ The formulation was never meant to create a conjoined standardisation, embracing diminished responsibility within the boundaries of mental disturbance: the doctrine reduces a murder conviction to manslaughter where the defendant kills in response to an extreme mental or emotional disturbance, for which a reasonable explanation or excuse is provided.¹⁹⁰ The provision met with considerable resistance amongst the states, with not a single state being prepared to adopt the “Extreme Mental or Emotional Disturbance” defence in its entirety.¹⁹¹ Of the few states to adopt the provision, most repudiated the term “mental”.¹⁹² This is reflective of a generalised reluctance to accept murder reductions to manslaughter predicated on mental abnormality within the U.S.,¹⁹³ and effectual rejection of alcohol dependence

186. *Moore*, 486 F.2d at 1240-41 (Wright J., dissenting)

187. Boldt, *supra* note 102, at 2247,

188. See Paul H. Robinson & John M. Darles, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454-55 (1997) (stating that liability should be proportionate to the person’s level of culpability towards the conduct constituting the offense).

189. James Chalmers, *Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism*, CRIM. L.R. 2004, 198, 211.

190. MODEL PENAL CODE AND COMMENTARIES § 210.3(1)(b).

191. LAW COMMISSION, PARTIAL DEFENCES TO MURDER, *supra* note 172, at App. F, ¶ 5. See also Susan Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 RUTGERS L.J. 197, 202 (2005) (stating that Arkansas is one of the few jurisdictions that followed the *Model Penal Code*’s extreme and mental or emotional disturbance rule). The problems associated with delimiting the scope of the EMED defence have resulted in controversial case law and confusion at appellate court level. See, e.g., *Parker v. Matthews*, 132 S. Ct. 2148, 2151-53 (2012) (deciding whether the Sixth Circuit erred in rejecting the Kentucky Supreme Court’s interpretation of extreme emotional disturbance in Kentucky’s murder statute). See also Stephen Garvey, *Passion’s Puzzle*, 90 IOWA L. REV. 1677, 1690 (2005) (explaining that few jurisdictions have adopted the *Model Penal Code*’s extreme emotional disturbance in place of traditional provocation).

192. LAW COMMISSION, PARTIAL DEFENCES TO MURDER, *supra* note 172, at App. F, ¶¶ 5-6.

193. Morse, *supra* note 170, at 24. See also Brown, *supra* note 172 (discussing the unwillingness of American jurisdictions to reduce murder to manslaughter on the basis of mental abnormalities).

syndrome as a relevant ground for abjuration of criminal responsibility outwith automatism or insanity.

The inherent injustice in failing to consider alcohol dependency syndrome as a potentiate partial defence to murder when assessing a defendant's culpability was recently highlighted by the Privy Council following the Trinidad and Tobago case of *Daniel*,¹⁹⁴ engaging a 25 year-old defendant, with no previous convictions. On the day of the killing, the defendant had smoked "blacks"¹⁹⁵ and consumed vast quantities of rum. According to his evidence, the defendant had driven his friend and the victim to a secluded area where they listened to rock music. When the victim rejected the defendant's sexual advances, "a demon" rose up inside him and he choked her for over a minute,¹⁹⁶ before slitting her throat and stabbing her in the chest and stomach. At trial, it was argued that the defendant did not have the requisite *mens rea* for murder due to intoxication. The partial defence of diminished responsibility was not raised.¹⁹⁷ The jury found that the defendant had the requisite *mens rea* and the trial judge subsequently issued the death penalty.¹⁹⁸

The defendant appealed to the Privy Council,¹⁹⁹ following the Court of Appeal's refusal to consider fresh evidence which intimated that the defendant was suffering from a personality

194. *Daniel v. The Queen*, [2012] UKPC 15 (P.C.) (appeal taken from Trinidad and Tobago).

195. "Blacks' are marijuana cigarettes rolled with crack cocaine." *Daniel*, [2012] UKPC at [7].

196. The defendant told police, "[i]t was a demon inside my head . . . I did not know what I was doing. I was seeing a dark object in front of me and I did not know what it was. I was not seeing or hearing Suzette in front of me." *Daniel*, [2012] UKPC at [7].

197. OFFENCES AGAINST THE PERSON ACT, 1861, 24 and 25 Vict., c. 11, § 4A (1) Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the murder. (2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder.

Id. The provision is identical to the original English diminished responsibility plea, under s.2 of the Homicide Act 1957, considered below.

198. For an assessment of the use of the death penalty in retentionist States, see INTERNATIONAL COMMISSION AGAINST THE DEATH PENALTY, THE DEATH PENALTY AND THE MOST SERIOUS CRIMES (DPIC Jan. 2013), available at http://www.icomdp.org/cms/wp-content/uploads/2013/02/Most-serious-crimes_final_6Feb2013.pdf (outlining a country by country overview of criminal offences punishable by death).

199. It was also suggested that the evidence casts doubt upon the voluntariness and therefore the admissibility of the statement that he made to the police under caution, however, the main submission relates to the partial defence. *Daniel*, [2012] UKPC at [1].

disorder,²⁰⁰ alcohol dependence and drug induced psychosis, which may have had a “direct impact on [his] level of cognitive and social functioning”²⁰¹ at the time of the offence.²⁰² The prosecution alleged that Daniel should not be entitled to rely on the partial defence on grounds that the initial decision not to raise diminished responsibility at the trial was a tactical one. It was asserted that the psychiatric reports available at the time had the potential to undermine the defence argument that the defendant lacked the requisite *mens rea*.²⁰³ The Privy Council accepted that it is well-established that one of the factors likely to weigh heavily against the reception of fresh evidence in an appeal is “a deliberate decision by a defendant whose decision-making facilities are unimpaired not to advance before the trial jury a defence known to be available.”²⁰⁴ The Privy Council concluded, however, that the diminished responsibility defence was not raised because the initial psychiatric reports did not suggest that the plea was

200. It was noted that this Daniel’s personality disorder did not include “anti-social” or “sadistic sexual aspects.” *Daniel*, [2012] UKPC at [19]. Emotionally Unstable (Borderline) Personality Disorder is defined by the World Health Organisation as:

A personality disorder in which there is a marked tendency to act impulsively without consideration of the consequences, together with affective instability. The ability to plan ahead may be minimal, and outbursts of intense anger may often lead to violence or ‘behavioural explosions’; these are easily precipitated when impulsive acts are criticised or thwarted by others. Two variants of this personality disorder are specified, and both share this general theme of impulsiveness and lack of self-control.

WORLD HEALTH ORGANISATION, INTERNATIONAL STATISTICAL CLASSIFICATION OF DISEASES AND RELATED HEALTH PROBLEMS 10TH REVISION (ICD-10), available at <http://apps.who.int/classifications/icd10/browse/2010/en> [hereinafter WHO]

201. *Daniel*, [2012] UKPC at [19].

202. *Id.* at [18].

203. *Id.* at [20]. The initial psychiatric reports suggested that the defendant was “not mentally ill but [had] a personality disorder with . . . psychopathic features” and that “it is not possible to make a case for insanity or diminished responsibility for the alleged commission of this murder as these personality disorders do not constitute an abnormality of mind that could support such a position.” *Id.* at [10] and [12]. It is not uncommon for the diminished responsibility plea to be precluded to those defendants suffering from psychopathic personality disorder. *See also, e.g.*, *Galbraith v H.M. Advocate*, (2002) J.C. 1 (Scot.). *See also* James Chalmers, *Partial Defences to Murder in Scotland: An Unlikely Tranquility*, in *LOSS OF CONTROL AND DIMINISHED RESPONSIBILITY: DOMESTIC, COMPARATIVE AND INTERNATIONAL PERSPECTIVES* 167-83 (Michael Bohlander & Alan Reed eds., Ashgate Publ’g 2011); SCOTTISH LAW COMMISSION, REPORT ON INSANITY AND DIMINISHED RESPONSIBILITY ¶ 3.40 (Scottish Law Com No 195, 2004). The Scottish diminished responsibility plea was recently codified under section 168 of the CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010.

204. *R v Erskine and Williams*, [2010] 1 W.L.R. 183 [90] (quoting *R v Criminal Cases Review Commission, Ex p Pearson*, [1993] 3 ALL ER 498, 517.

available, and further noted that a tactical decision should not result in conclusive objections in every case since “the overriding discretion conferred on the court enables it to ensure that, in the last resort, defendants are sentenced for the crimes they have committed, and not for psychological failings to which they may be subject.”²⁰⁵ The decision in *Daniel* has a particular resonance for Anglo-American categorisations of intoxicated offenders. It is vitally important that “psychological failings” of a defendant, including alcoholism, are brought to the attention of fact-finders as part of their normative assessments in a murder case. In this context, the “salutary words” of the Privy Council in *Daniel* provide a reminder that it is essential to properly reflect on gradations of culpability and responsibility of the destabilised offender.²⁰⁶

The position in England is that alcohol dependence syndrome may be relied upon for the purposes of the diminished responsibility defence within constrained boundaries.²⁰⁷ The partial defence represents a bespoke form of mitigation, which has the effect of reducing a murder conviction to one of voluntary manslaughter where the defendant’s abilities are substantially impaired²⁰⁸ as a result of the defendant suffering from a mental abnormality short of insanity.²⁰⁹ Previously there had been a “rigid dichotomy between sane or insane, responsible or not responsible, bad or mad.”²¹⁰ Diminished responsibility in this respect supplied the law with “a new moral and social barometer” upon which a mentally abnormal defendant’s lower level of responsibility could be measured.²¹¹

Under the original wording of section 2 of the Homicide Act 1957 the defendant was required to prove²¹² an “abnormality of mind.” Fact-finders were mandated to consider whether the abnormality of mind arose from a condition of arrested or retarded development of mind or any inherent causes, or alternatively, whether the abnormality was “induced by disease or injury.” The jury was charged to determine whether the abnormality of mind “substantially impaired” the defendant’s “mental responsibility” for the killing.

The English courts initially struggled with the notion of an

205. *Daniel*, [2012] UKPC at [23].

206. *Id.*

207. Homicide Act 1957, s.2 (1) as amended by the Coroners and Justice Act 2009, s. 52.

208. *R v Ramchurn*, [2010] EWCA (Crim) 194. *See also* Nicola Wake, *Substantial Confusion Within Diminished Responsibility*, 75 J. CRIM. L. 12 (2011); *R v Lloyd (Derek William)*, [1967] 1 Q.B. 175 (Eng.).

209. LAW COMMISSION, PARTIAL DEFENCES TO MURDER, *supra* note 172, at ¶¶ 7.6-7.7.

210. *Id.* at ¶ 6.52.

211. REED & WAKE, *supra* note 15, at 184.

212. On the balance of probabilities.

intoxicated defendant being afforded the concessionary defence, and provided a straitened test that alcohol dependence syndrome would only be relevant if the defendant suffered brain damage as a result, as in the U.S., or alternatively, if the first drink consumed on the day of the killing was truly involuntary.²¹³ It was treated as axiomatic in *Tandy* that intoxication *simpliciter* was incapable of founding a plea of diminished responsibility.²¹⁴ In essence, the defendant's voluntary consumption of alcohol at T1 was coalesced with the external element of the offence at the T2 stage, and any evidence of involuntariness in the supervening period was considered irrelevant in terms of attributional fault liability, unless the defence could establish that the defendant had suffered brain damage as a result of the condition.

The question of whether the defendant "did not or could not resist his impulse" was considered irrelevant where the first drink of the day had been voluntary.²¹⁵ The chemically dependent offender attributionally either lacked the capacity to resist the urge to drink or was responsible for his conduct and should be held accountable.²¹⁶ The judiciary's treatment of chemically dependent offenders could be likened to distinguishing between an alcoholic who does not have the money to purchase alcohol and the alcoholic who has a bottle of whiskey in the kitchen.²¹⁷ By the time the first has acquired the means to purchase alcohol he may be suffering from withdrawal, in which case, his behaviour is ostensibly involuntary and the diminished responsibility defence would be available. In the second instance, the defendant may have voluntarily consumed the alcohol in a bid to delay or prevent the onset of withdrawal symptoms and use of the partial defence would be prohibited.²¹⁸ A bizarre process of temporal individuation resulted, whereby the mitigating doctrine would be unavailable to the defendant who consumed intoxicants in the supervening period between the initial decision to ingest alcohol and withdrawal occurrence. The idea that every drink consumed by the

213. R v Tandy, [1989] 1 W.L.R. 350 (CA).

214. "We recognise that cases may arise hereafter where the accused proves such a craving for drink or drugs as to produce in itself an abnormality of mind but that is not proved in this case. The appellant did not give evidence and we do not see how self-induced intoxication can of itself produce an abnormality of mind due to inherent causes." R v Fenton, [1975] 61 Cr. App. R. 261. See also R v Wood, [2008] EWCA (Crim) 1305; [2008] 2 Cr. App. R. 34, 507 [23]; R v James Stewart, [2009] EWCA (Crim) 593; [2009] 2 Cr. App. R. 30, 500 [26] and [29].

215. Andrew Ashworth, *Diminished Responsibility: Defendant Diagnosed as Suffering from Alcohol Dependency Syndrome but Having Sustained no Brain Damage as a Result*, CRIM. L.R. 2008, 976, 978.

216. Jonathan Goodliffe, *R v Tandy and the Concept of Alcoholism as a Disease*, 53 MOD. L. REV. 809, 809-14 (1990).

217. Bob Sullivan, *Intoxicants and Diminished Responsibility*, CRIM. L.R. 1994, 156.

218. *Id.*

chronic alcoholic had to be involuntary was antithetical to psychiatric understanding of the disease:²¹⁹

Very few, if any alcoholics will be permanently in a condition where the immediate consumption of alcohol is required to prevent or assuage the symptoms of withdrawal from alcohol. Routinely alcoholics will consume alcohol before withdrawal symptoms arise or become distressing.²²⁰

The court's pre-eminent focus on the behavioural aspects of alcohol dependence syndrome,²²¹ in the absence of a contextual evaluation of the other symptoms and mental processes of the disease,²²² fundamentally undermined the rationale underpinning the partial defence by failing to recognise that a complete destruction of the defendant's free will was not required for his liability to have been substantially impaired.²²³

Judicial recognition of this failure has resulted in a more contextualised *dépeçage* approach in this arena, which requires jurors to focus on the defendant's mental abnormality and ignore the effects of any alcohol voluntarily consumed. The House of Lords²²⁴ in *Dietschmann*²²⁵ advocated that jurors should be directed to focus on the underlying abnormality rather than the intoxication *per se*. Lord Hutton identified that the issue is not whether the defendant would have carried out the killing in the absence of the intoxication, but whether, if he did kill, he killed under diminished responsibility. As a result, the defendant's voluntary consumption of alcohol at the T1 stage will not preclude the availability of diminished responsibility, where the defence is able to establish that the alcohol dependence syndrome substantially impaired the defendant's responsibility for murder at the T2 stage. Potentiate liability principles have constrained impact in abjuring "partial" but not full responsibility on the commission of the *actus reus* at the T2 stage of individuation. Reviewing *Dietschmann*, the appellate court in *Wood*²²⁶

219. Reed & Wake, *supra* note 15, at 183-206.

220. Sullivan, *supra* note 217, at 156.

221. Namely, whether the defendant was capable of resisting the impulse to drink.

222. See Tolmie, *supra* note 116, at 668-709 (receiving approval in *R v Wood*, [2008] EWCA (Crim) 1305 [35]). See also LAW COMMISSION, INSANITY AND AUTOMATISM, SUPPLEMENTARY MATERIAL TO THE SCOPING PAPER, *supra* note 19, at ¶ 2.58 (explaining the different models of alcoholism and alcohol dependency syndrome).

223. RONNIE MACKAY, MENTAL CONDITION DEFENCES IN CRIMINAL LAW 8 (Oxford Univ. Press 1995).

224. See generally *The Supreme Court*, JUDICIARY OF ENGLAND AND WALES, <http://www.judiciary.gov.uk/about-the-judiciary/introduction-to-justice-system/the-supreme-court.htm> (last visited Jan. 27, 2014) (showing that the House of Lords is now the Supreme Court).

225. *R v. Dietschmann*, [2003] UKHL 10, [2003] 1 A.C. 1209.

226. *Wood*, [2008] EWCA (Crim) 1305.

subsequently considered that in future cases fact-finders would be required to “focus exclusively on the effect of alcohol consumed by the defendant as a direct result of his illness or disease and ignore the effect of any alcohol consumed voluntarily.”²²⁷ It was no longer the case that the repeated insult from the intoxicants had to result in brain damage, as in the U.S., or alternatively, that every drink consumed on the fatal day was involuntary before the syndrome would be regarded a relevant factor in terms of potentiate liability and attributional criminal responsibility. The decision in *Wood* represented a significant relaxation of the Court of Appeal’s ostensibly “phenomenological, forward looking [and] free will oriented”²²⁸ view of chemically dependent offenders. Nevertheless, the test articulated in *Wood* which required “the jury to ‘separate out’ . . . each and every drink”²²⁹ in order to determine “the degree of voluntariness and involuntariness” in the defendant’s drinking²³⁰ represented a judicial reluctance to deviate from traditional “intentionalist” theory.²³¹ In practice, it will be almost impossible for jurors to distinguish between voluntary and involuntary intoxication at the T1 stage where the chronic alcoholic is concerned. A rigid analytical divide between voluntariness and involuntariness in this arena is arguably a misnomer and ought not to be the principal focus in cases of this context. The *dépeçage* approach to fault attribution in cases involving the chronic alcoholic reflects the view that the defendant’s responsibility is lower than that of the reasonable and sober person, regardless of whether the first drink of the day was consumed voluntarily.

Notwithstanding the inherent difficulties associated with requiring jurors to separate out each drink of the day, the effect of the ruling in *Wood* is that alcohol dependency syndrome has the potential to reduce murder to manslaughter in two situations. The first essentially mirrors section 2.08(1) of the *Model Penal Code* and operates where the “effect of the intoxication is so extreme” that the prosecution is unable to prove the requisite intention for murder—a decision for fact-finders as part of “folk wisdom” on the effects of voluntary intoxication.²³² The second arises where, again the necessary intention for murder is proven, notwithstanding the consumption of alcohol, but partial exculpation applies on the basis of diminished responsibility.²³³ In this regard, the

227. *Id.* at [41].

228. KELMAN, *supra* note 114, at 86. This emphasises “the indeterminacy of action and, correlatively, the ethical responsibilities of actors.” *Id.*

229. Stewart, [2009] EWCA (Crim) 593 at [28].

230. Ashworth, *supra* note 215, at 978.

231. See the discussion in part III.

232. Stewart, [2009] EWCA (Crim) 593 at [29]. *Model Penal Code* section 2.08(1), as noted, applies to offences requiring knowledge or purpose.

233. Stewart, [2009] EWCA (Crim) 593 at [29].

diminished responsibility defence represents an appropriate *via media* through which the alcohol dependent defendant's lower level of culpability can be assessed. It identifies that in order to appropriately attribute fault the various gradations of mental disorder identified in medical and behavioural sciences must be recognised, and recent reform to the diminished responsibility plea under the Coroners and Justice Act 2009 provides an appropriate template for beneficial harmonisation within the U.S.

VI. RECENT DEVELOPMENTS: A NEW INTERNATIONAL CLASSIFICATORY SYSTEM

The recently revised diminished responsibility plea provides an appropriate aperture through which to consider the chronic alcoholic's criminal responsibility in murder cases, and it is suggested herein that an equivalent form of mitigation is considered in the U.S. To raise the revised plea successfully the defendant must now prove, on the balance of probabilities,²³⁴ that at the time of the killing he was suffering from an "abnormality of mental functioning" arising from a "recognised medical condition."²³⁵ Jurors will be required to consider two issues in order for the partial defence to be satisfied. First, fact-finders will have to assess whether the recognised medical condition substantially impairs the defendant's ability to (a) understand the nature of the defendant's conduct; (b) form a rational judgement; or (c) exercise self-control.²³⁶ Secondly, jurors will be required to determine whether the mental abnormality provides an explanation for the killing.²³⁷ An explanation will be provided "if it causes, or is a significant contributory factor in causing" the person to carry out that conduct.²³⁸

The revised plea is demonstrative of a discernible move

234. Placing the burden of proof on the defendant is compatible with the European Convention on Human Rights, Art. 6(2); *R v. Lambert, Ali, & Jordan*, [2000] EWCA (Crim) 3542, [2002] Q.B. 1112. *See also* *Lilburn v. HM Advocate*, [2011] HCJAC 41 [11] (holding that the burden of establishing the diminished responsibility plea rests on the defendant). *See also* *R v. Foye*, [2013] EWCA (Crim) 475; Andrew Ashworth, *R v. Foye (Lee Robert): diminished responsibility - Homicide Act 1957 s2(2)*, CRIM. L.R., 2013, 839. *But see* Andrew Ashworth, *Insanity and Automatism: A Discussion Paper*, CRIM L.R. 2013, 787 (questioning the sustainability of the reverse burden in diminished responsibility cases should the Law Commission's recommendations in relation to the "Recognised Medical Condition" defence be taken forward).

235. Coroners and Justice Act, 2009, c.25, § 52(1)(a).

236. *Id.* § 52(1A).

237. *Id.* § 52(1B).

238. Ronnie Mackay, *The Coroners and Justice Act 2009 – Partial Defences to Murder (2) The New Diminished Responsibility Plea*, 4 CRIM. L.R. 2010, 290, 292. *See generally id.* at 297-300 (discussing this element of the concessionary defence).

towards medicalisation of the concessionary defence²³⁹ and the Royal College of Psychiatrists rightly suggested that the “recognised medical condition” requirement would encourage experts to confine their diagnosis to those accepted in the international classificatory systems of mental disorders (WHO ICD-10 and AMA DSM).²⁴⁰ The first²⁴¹ appellate court case to apply the “recognised medical condition” requirement has very recently highlighted that this definitional change may have more significant consequences than initially thought.²⁴² In *Dowds*,²⁴³ the appellant was a 49 year-old college lecturer, with no previous convictions, who stabbed his partner to death after having consumed vast quantities of alcohol. According to his evidence, both were habitual binge drinkers and there had been a long history of violence between them, mostly initiated by her, and usually when one or both had been drinking. The defendant claimed to have no recollection of the events, which led to the victim’s death, but accepted that he must have been responsible for her wounds. Dowds was convicted of murder after the jury rejected the loss of control defence²⁴⁴ and concluded that Dowds had intended to cause serious bodily harm. At the outset of the trial, Wait J. ruled that the *Majewski* principle was determinative, and voluntary intoxication was only relevant to specific intent offences, and operated as a denial of the requisite *mens rea*, and accordingly transient acute intoxication was insufficient to raise the partial defence of diminished responsibility.²⁴⁵

239. Louise Kinnefick, *Introducing a New Diminished Responsibility Defence for England and Wales*, 74 MOD. L. REV. 750, 757, (2011).

240. LAW COMMISSION, MURDER, MANSLAUGHTER AND INFANTICIDE, *supra* note 134, at ¶ 5.114. *See also* Kinnefick, *supra* note 239, at 757 (discussing that psychiatric classification systems would prove more important in establishing “recognised medical conditions”, making it a requirement there exist a medical basis for diagnosis). *See also* R v. Bunch, [2013] EWCA (Crim) 2498.

241. *See* Nicola Wake, *Psychiatry and the New Diminished Responsibility Plea: Uneasy Bedfellows?*, J. CRIM. L. 76 (2) 122-29 (2012) (noting that the instant case (*R v. Brown*) was the first which required the court to assess diminished responsibility in new terms, meaning that a revised plea would require a “recognised medical condition”); *See also* R v Brown (Robert), [2011] EWCA (Crim) 2796, [23] (determining that one of the reasons for this amendment is to provide a “greater equilibrium” between law and medicine, which is why the level of mental ability must arise from a recognised medical condition).

242. Kinnefick, *supra* note 239, at 757.

243. Dowds, [2012] EWCA (Crim) at [2].

244. Coroners and Justice Act, 2009, §§ 54-55.

245. This sits in contradistinction to the approach adopted in the seventeenth and eighteenth century where defendants would raise informal defences / pleas on the basis of diminished responsibility arising from acute intoxication or a plea linking the intoxication with Insanity. Dana Rabin, *Drunkenness and Responsibility for Crime*, J. BRITISH STUDIES 44, 457-477 (2005). The close connection between intoxication and insanity suggests that

The defendant appealed, arguing that the amendments made to section 2 of the Homicide Act 1957,²⁴⁶ within the purview of section 52 of the Coroners and Justice Act 2009, meant that acute voluntary intoxication²⁴⁷ may give rise to the concessionary defence and thus reduce a murder conviction to one of voluntary manslaughter. The defence's argument was that section 2(1) of the 1957 Act, as amended,²⁴⁸ requires that at the time of the killing the defendant must have been suffering from an "abnormality of mental functioning" arising from a "recognised medical condition". The ICD-10 contains at F10.0, the condition of "Acute Intoxication".²⁴⁹ Acute intoxication is, therefore, a "recognised medical condition" and thus presumptively his intoxication involved an impairment of mental functioning, which may have affected his ability to form a rational judgement and / or exercise self-control.²⁵⁰ Accordingly, Dowds asserted that the newly formulated defence should have been left to the jury.

In policy terms, it is "unremarkable"²⁵¹ that the English Court of Appeal emphatically rejected the appeal on the basis that voluntary acute intoxication, whether from alcohol or an alternative substance, is not capable of founding diminished responsibility,²⁵² since the defendant's argument runs counter to the established *Majewski*²⁵³ principle, as outlined in Part I, that voluntary intoxication is not a defence, save upon the limited question of whether a "specific intent" has been formed.²⁵⁴ Lord

the "criminal law employed a minimally differentiated conceptualisation of the abnormal mental states that might exculpate an individual." LOUGHNAN, *supra* note 10, at 177.

246. Coroners and Justice Act, 2009, § 52.

247. For the purposes of the partial defence, it was not contended that Dowds was an alcoholic or clinically dependent on drink. He was a heavy but elective drinker. He held down a responsible occupation, which required him to be alert and clear-thinking. *Dowds*, [2012] EWCA (Crim) 281.

248. As amended by the Coroners and Justice Act, 2009, § 52.

249. Acute intoxication is defined by the World Health Organisation as "[a] transient condition following the administration of alcohol or other psychoactive substance, resulting in disturbances in level of consciousness, cognition, perception, affect or behaviour, or other psychophysiological functions and responses." WORLD HEALTH ORGANISATION, MANAGEMENT OF SUBSTANCE ABUSE, available at http://www.who.int/substance_abuse/terminology/acute_intox/en/index.html.

250. [2012] EWCA (Crim) 281 [33].

251. Rudi Fortson, *R v Dowds*, [2012] EWCA (Crim) 281, available at <http://www.rudifortson4law.co.uk/legaldevelopments12.php> (accessed on Jan. 27, 2014).

252. This is in line with the position prior to the 2009 Act reforms. *R v Fenton*, (1975) 61 Cr App R 261; *Dietschmann*, [2003] UKHL 10; *R v Wood*, [2008] EWCA 1305; *Stewart*, [2009] EWCA (Crim) 593.

253. [1977] AC 443. See generally Andrew Simester, *supra* note 42, at 3-14 (arguing that the intoxication doctrine should not be seen as a defence, but rather as a doctrine which imposes constructive liability on the actor).

254. Lord Justice Hughes considered that "it would have been a strange

Justice Hughes, delivering the unanimous judgment of the appellate court, was of the view that if Parliament intended to alter the law on voluntary intoxication it would undoubtedly have made this intention explicit,²⁵⁵ and it was not possible to infer such an intention from the adoption in the new formulation of the expression “recognised medical condition,”²⁵⁶ Their Lordships were careful to outline that the ruling applies only in the context of voluntary intoxication *simpliciter* which is uncomplicated by alcoholism or dependence.²⁵⁷ In this regard, the earlier Court of Appeal decisions in *Wood* and *Stewart* have been impliedly reaffirmed, and alcohol dependence syndrome will continue to be relevant in assessing a defendant’s culpability for murder in English Law under the reformulated plea. As noted, the voluntary consumption of alcohol at T1 will not preclude the availability of the partial defence where the defendant suffers from alcohol dependence syndrome. In cases of this context, the focus should be on whether the defendant’s abnormality “substantially impaired”²⁵⁸ the defendant’s ability to understand the nature of his conduct; form a rational judgment; or to exercise self-control.²⁵⁹ This *dépeçage* approach to criminal liability provides an individuated response through which the alcoholic defendant’s culpability can be assessed in light of the syndrome. It is not the identification that alcohol dependence is a medically recognised condition *per se*, but it is the fact that the severity of the syndrome

result if the merciful relaxation of a strict rule of law had ended, without any Parliamentary intervention, by whittling it away to such an extent that the more drunk a man became, provided it stopped short of making him insane, the better chance he had of an acquittal . . .” *Dowds*, [2012] EWCA (Crim) at [17].

255. “The exception which prevents a defendant from relying on his voluntary intoxication, save upon the limited question of whether a ‘specific intent’ has been formed, is well entrenched and formed the unspoken backdrop for the new statutory formula. There has been no hint of any dissatisfaction with that rule of law. If Parliament had meant to alter it, or depart from it, it would undoubtedly have made its intention explicit.” *Asmelash*, [2013] EWCA (Crim) at [22] (The Lord Chief Justice of England and Wales citing LJ Hughe’s comments in *Dowds* with approval).

256. *Dowds*, [2012] EWCA (Crim) at [35].

257. *Id.* at [34].

258. *Ramchurn*, [2010] EWCA (Crim) 194; *see also* Wake, *supra* note 208, at 15 (stating that the term substantial impairment will continue to be used in courts); *R v Lloyd* (Derek William), [1967] 1 Q.B. 175 (holding that substantial impairment being defined as something between trivial and total was correct).

259. *Dowds*, [2012] EWCA (Crim) at [11]. *See also* *Dietschmann*, [2003] UKHL 10 (discussing where there is a mental abnormality and intoxication, the Court said the jury must “ignore the effects of intoxication and to ask whether, leaving out the drink, the defendant’s other condition(s) of mental abnormality substantially impaired his responsibility for the killing”); *Wood*, [2008] EWCA (Crim) at [16] (stating that alcohol dependency syndrome produces changes in the brain which would make the actor incapable of self control or sound judgment, which could be argued as an abnormality).

may, in limited circumstances, have a bearing on the defendant's criminal responsibility that justifies the reduction from murder to manslaughter, and potentiate liability applies at T1 individuation as an abjuration of responsibility, albeit partial. This template ought to also apply in the U.S. in terms of a more empathetic approach to the intoxicated offender and mental condition defence treatment.

The approach their Lordships adopted in relation to acute intoxication in *Dowds* has been extended to cover the concessionary loss of control defence in English law. The partial defence applies where the defendant kills subject to a loss of control; the loss of control must be attributable to at least one of two qualifying triggers. The first qualifying trigger is satisfied by a thing said or things done or said (or both), which constituted circumstances of an extremely grave character, and caused the defendant to have a justifiable sense of being seriously wronged.²⁶⁰ The second qualifying trigger requires the defendant to fear serious violence from the victim against the defendant or another identified person.²⁶¹ The defendant's charge will be reduced from murder to voluntary manslaughter where the jury concludes that a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the same circumstances, might have acted in the same or a similar way to the defendant.²⁶² In this context, all of the defendant's circumstances will be considered except those whose only relevance is that they bear on the defendant's general capacity for tolerance and self-restraint.²⁶³

In the recent case of *Asmelash*,²⁶⁴ the Court of Appeal assessed whether the voluntary consumption of alcohol could fall within the "defendant's circumstances" for the purposes of the partial defence of loss of self-control.²⁶⁵ The Lord Chief Justice for

260. The "seriously wronged" trigger. The Coroners and Justice Act, 2009, §§ 54(1)(b) and 55(3), (4)(b).

261. The "fear" trigger. The Coroners and Justice Act, 2009, §§ 54(1)(b) and 55(3), (4)(a)-(b), (6)(c).

262. *Id.* § 54(1)(c).

263. *Id.* § 54(3).

264. [2013] EWCA Crim 157.

265. *Id.* at [21]. The Crown Court Bench Book stated:

D's circumstances would include the consumption of alcohol. The jury will no longer be directed that a reasonable man is a sober man. The jury will need to decide whether a man in these circumstances (including the consumption of drink) but nevertheless possessing a normal degree of tolerance and self-restraint might act as D did. It is suggested that the jury may still be directed that D's conduct is to be judged by the standard of the person who retained a normal degree of tolerance and self-restraint even if that person had consumed alcohol as D did.

[2013] EWCA Crim at [17]. This suggestion was criticised as ignoring the wording of the loss of control defence. *Id.* at [20]. See also David Ormerod's

England and Wales cited with approval the initial trial judge's direction which required jurors to ignore the defendant's intoxication and apply *Majewski* standardisations:

Are you sure that a person of [defendant's] sex and age with a normal degree of tolerance and self restraint and in the same circumstances, but unaffected by alcohol, would not have reacted in the same or similar way?²⁶⁶

The impact is that voluntary intoxication at the T1 stage will not preclude the availability of the loss of control defence at T2; the defendant's conduct is assessed according to the standards of the ordinary sober person. This approach is clearly aligned with the *Law Commission's* recommendation that atypical mental states, such as intoxication and irritability, should be omitted from consideration on the basis that they constitute factors which bear on the defendant's general capacity to exercise adequate self-control.²⁶⁷ The court was persuaded by the "compelling reasoning"²⁶⁸ in *Dowds* and accepted that the term "unaffected by alcohol" should be implied into the loss of control defence, otherwise "the floodgates would be open for every violent drunk would say 'I must be judged against the standards of other violently disposed drunken people even though I may be like a lamb when I am sober.'"²⁶⁹ In practical terms, it was considered illogical to apply a discrete rule to the loss of control defence, given that in many cases the partial defences are raised simultaneously.²⁷⁰ Importantly, their Lordships noted that a gravitational approach would apply where the defendant suffers from alcohol dependence syndrome and is ruthlessly taunted regarding that condition (to the extent that it amounts to a qualifying trigger) in which case the syndrome would constitute part of the circumstances for consideration.²⁷¹ In this regard, the

comments:

Section 54(3) only appears to exclude a circumstance on which D seeks to rely if its *sole* relevance is to diminish D's self-restraint. This could open the opportunity for D to adduce all sorts of evidence. In particular, D might claim that his intake of alcohol or other intoxicants was a relevant circumstance and that the intoxication did not simply diminish his self-restraint, but also had some other relevance—e.g. that it caused a relevant mistake. This may amount to no more than a plea of lack of intent on grounds of intoxication, but it will make directing the jury more complex.

DAVID ORMEROD, SMITH AND HOGAN'S CRIMINAL LAW 526 (Oxford Univ. Press 2011).

266. *Asmelash*, [2013] EWCA Crim at [15] (emphasis added).

267. LAW COMMISSION, MURDER, MANSLAUGHTER AND INFANTICIDE, *supra* note 134. See also *R v. Dawes, Hatter and Bowyer*, [2013] EWCA (Crim) 322.

268. *Asmelash*, [2013] EWCA Crim at [24].

269. *Id.* at [15].

270. *Id.* at [24].

271. *Id.* at [25].

ruling suggests that alcohol dependence syndrome would be relevant at the T2 stage of individuation, notwithstanding the voluntary consumption of alcohol at T1, in that jurors would be required to consider whether an ordinary person “of the defendant’s sex and age with a normal degree of tolerance and self-restraint and suffering from alcohol dependence syndrome would have acted in the same or a similar way.” Despite the obvious problems associated with requiring jurors to answer hypothetical questions of this nature, this nuanced approach reflects the general consensus in English law that alcohol dependence syndrome potentially impacts upon the defendant’s level of criminal responsibility. In this regard, cases such as *Asmelash* and *Dowds* reaffirm that a *dépeçage* approach ought to be adopted to the chronic alcoholic in order to engage in a fair and valid assessment of the defendant’s culpability.

Further grist to the mill pervades the outcome in *Dowds* by their Lordships’ recognition that Parliament did not formally make reference to the ICD-10 and DSM in the Coroners and Justice Act 2009.²⁷² This is attributed to the the disparity between the requirements for an impairment to be recognised by the international classificatory systems and the level mandated in law.²⁷³ Accordingly, the presence of a “recognised medical condition” is a necessary, but not always a sufficient condition to raise the issue of diminished responsibility.²⁷⁴ The effect is to imply that in certain cases the defendant will be required to prove something beyond a “recognised medical condition” before he may satisfy that aspect of the partial defence.²⁷⁵ Although the international classificatory systems were not explicitly written into the statutory formula, the rationale for including the “recognised medical condition” requirement was to ensure a greater balance between the law and psychiatry.²⁷⁶ The idea that the courts will be required to determine which recognised medical conditions are valid for the purposes of the partial defence is inimical to this aim.²⁷⁷

Nevertheless, it is unsurprising that this juridical bar has been attached to the defence, in light of the array of “disorders” potentially applicable (for example, “unhappiness”,²⁷⁸ “irritability

272. [2012] UKPC 15 [35].

273. *Id.* at [30].

274. *Id.* at [40].

275. However, the Court of Appeal provided no further guidance in relation to this tacit requirement. *See generally* Nicola Wake, *Diminished Responsibility: Raising the Bar?*, (2012) JOURNAL OF CRIMINAL LAW 76 (3) 193-97.

276. *R v Brown* (Robert), [2011] EWCA Crim 2796 [23]; LAW COMMISSION, MURDER, MANSLAUGHTER AND INFANTICIDE, *supra* note 134, at ¶ 5.114.

277. Wake, *supra* note 275, at 193-97.

278. *Dowds*, [2012] UKPC at [31]. *See also* World Health Organisation, ICD-10 (R45.2), available at:

and anger”,²⁷⁹ “suspiciousness and marked evasiveness”,²⁸⁰ “pyromania”,²⁸¹ “paedophilia”,²⁸² “sado-masochism”,²⁸³ “kleptomania”,²⁸⁴ “exhibitionism”,²⁸⁵ “sexual sadism”²⁸⁶ and “intermittent explosive disorder”²⁸⁷) which, although recognised by the international classificatory systems, appear to be incompatible with criminal law principles of exculpation. The ruling implies that the aforementioned conditions will be insufficient to satisfy the “abnormality of mental functioning” requisite, despite existing as “recognised medical conditions”. The Court of Appeal’s reservations regarding conditions like “intermittent explosive disorder”, or *instinctual monomanias*, which manifests itself in impulsive acts of aggression, reflects the general public policy conceptualisation of aggressive and combative behaviour as inculpatory conduct, despite the condition originally being denoted as a form of partial insanity. In this regard, *dépeçage* selectivity is adopted to individuated concerns in order to maintain a balance between acknowledging that a defendant’s mental disorder may have an impact on his legal responsibility, whilst protecting the public.

Alcohol dependence syndrome, pre-and-post the Coroners and Justice Act 2009, has been jurisprudentially determined to constitute a valid basis upon which to claim the partial exemption of diminished responsibility in English law. Nevertheless, it is likely that the divergent approaches adopted in terms of categorising mental and behavioural disorders under each of the international classificatory systems will present problems in future cases involving substance related disorders. The ICD is designed to be a comprehensive guide to all diseases and related health issues and is used by a vast array of health professionals in a variety of countries of different sizes, cultures and resources. In contrast, the remit of the DSM is much narrower, focusing upon psychiatry and clinical psychology in the U.S.²⁸⁸ The result is that

<http://apps.who.int/classifications/icd10/browse/2010/en> (last accessed on Jan. 27, 2014).

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* See also AMERICAN PSYCHIATRIC ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 569 (4th ed. 1994).

286. *Id.* at 573.

287. *Id.* at 663-67.

288. Pathological intoxication manifests itself through outbursts of “irrational, combative, destructive behaviour.” R Kendell, *The relationship between DSM-IV and ICD-10*, (1991) J. ABNORMAL PSYCHOLOGY, 100, 297–301, 299–300. “It is important to note that the definition of mental disorder included in the DSM-5 was developed to meet the needs of clinicians, public health officials, and research investigators rather than all of the technical

variations between the criteria-set wording in the DSM and the WHO have the potential to lead to equivalent conditions “being defined differently” and this “undermines the credibility of the entire diagnostic process.”²⁸⁹ This difficulty is illustrated by conceptual differences in the diagnostic criteria for patients whose substance use does not meet the criteria for substance dependence ICD-10.²⁹⁰ The ICD-10 criteria-set for “harmful use”²⁹¹ focuses on the detrimental effect substance use has on the patient’s health, for example, episodes of depressive disorder secondary to alcohol consumption. In contrast, the criteria for “Substance-Induced Disorders”²⁹² under the DSM-5 emphasises the “problematic behavioral and psychological changes associated with intoxication.”²⁹³ The focus of the ICD is on the biological deficit²⁹⁴ whereas the DSM considers the abnormal behaviour of the individual.²⁹⁵ In a practical context, such disparities may result in disputes between the prosecution and the defence in terms of which criteria-set to adopt. In light of *Dowds*, the judiciary might advocate that harmful use per se is incapable of satisfying the diminished responsibility plea. Nevertheless, distinguishing between harmful use/ substance abuse for the purposes of the diminished responsibility plea may be rendered difficult in light of the DSM-5’s re-categorisation of abuse and dependence into a single disorder of graded clinical severity.²⁹⁶

Amendments to the international classificatory systems in the DSM-V and forthcoming ICD-11 manuals are designed to align core versions of the ICD and DSM manuals by ensuring that

needs of the courts and legal professionals.” AM. PSYCH. ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

289. Michael B. First, *Harmonisation of ICD-11 and DSM-V: Opportunities and Challenges*, 195 BRIT. J. OF PSYCHOL. 382 (2009).

290. *Id.* at 382-90.

291. WHO, *ICD-10*, 69, available at <http://www.who.int/classifications/icd/en/bluebook.pdf> (defining “harmful use” as “[a] pattern of psychoactive substance use that is causing damage to health . . . e.g. episodes of depressive disorder secondary to heavy consumption of alcohol”).

292. (The American Psychiatric Association category of “Substance Induced Disorders” includes intoxication, withdrawal and other substance induced mental disorders (e.g. substance induced psychotic disorder and substance induced depressive disorder). AM. PSYCH. ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

293. First, *supra* note 289, at 382-90. AM. PSYCH. ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013).

294. Seymour L. Halleck, *Responsibility and Excuse in Medicine and the Law: A Utilitarian Perspective*, L. AND CONTEMP. PROBS. 127, 133 (1986).

295. *Id.* at 133, 136.

296. See Reed & Wake, *supra* note 15, at 183, 191 (discussing the combination of both disorders as well as a graded system of determining clinical severity). AM. PSYCH. ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 485-87 (5th ed. 2013).

category names, glossary descriptions and criteria are identical.²⁹⁷ At present “trivial” differences in the wording of criteria-sets and the threshold number of symptoms for the diagnosis of substance dependence often result in substantial differences in diagnoses.²⁹⁸ Medical experts have the option of which diagnostic criteria to adopt when assessing a defendant’s condition in cases like *Wood*, and this renders it more likely that dissonance will operate on the extent to which that “recognised medical condition” is capable of constituting an “abnormality of mental functioning” for the purposes of the revised plea.²⁹⁹ For example, the ICD-10 and the criteria requires a minimum of three symptoms from a list of six for diagnosis whereas the DSM-V may be satisfied by evidence of two symptoms from eleven indicators.³⁰⁰ It is clear that disparate diagnostic methods contribute to the “uneasy fit between theoretical views that urge the predominant moral significance of activities on the one hand, and the [criminal law’s] everyday practices of assigning blame and granting excuses on the other.”³⁰¹ The mental gymnastics that jurors engage in when determining whether the defendant’s responsibility is “substantially impaired” will invariably be exacerbated by the conflicting testimony provided by medical experts.³⁰² The U.S. courts have heavily criticised doctrines which appear to divide “decision-making authority” between fact-finders and expert witnesses.³⁰³ However, suggestions that the use of medical testimony should be prohibited

297. INTERNATIONAL ADVISORY GROUP FOR THE REVISION OF ICD–10 MENTAL AND BEHAVIOURAL DISORDERS, SUMMARY REPORT OF THE 3RD MEETING OF THE INTERNATIONAL ADVISORY GROUP FOR THE REVISION OF ICD–10 MENTAL AND BEHAVIOURAL DISORDERS (World Health Organization 2008), *available at* http://www.who.int/mental_health/evidence/icd_summary_report_march_2008.pdf (last accessed on Jan. 27, 2014). See *generally*, THE WORLD HEALTH ORGANISATION, ICD-11 BETA DRAFT *available at*: <<http://apps.who.int/classifications/icd11/browse/l-m/en>> (last accessed, Feb 20th, 2014).

298. First, *supra* note 293, at 384 (discussing how modern systems which are “intended to create a shared language” have the potential to create “epistemic blinders that impede progress toward valid diagnoses”); SUMMARY REPORT OF THE 3RD MEETING OF THE INTERNATIONAL ADVISORY GROUP FOR THE REVISION OF ICD–10 MENTAL AND BEHAVIOURAL DISORDERS, *supra* note 297, at 155.

299. For discussion on the problems associated with conflicting psychiatric testimony in diminished responsibility cases, see Nicola Wake, *supra* note 241, at 122-29. See also *R v Brown (Robert)*, [2011] EWCA Crim 2796 [23].

300. First, *supra* note 293, at 382-90. See also Reed & Wake, *supra* note 15, at 183-206. AM. PSYCH. ASS’N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 490-91 (5th ed. 2013).

301. Boldt, *supra* note 102, at 2252.

302. Matt Gibson, *Intoxicants and Diminished Responsibility: The Impact of the Coroners and Justice Act 2009*, CRIM. L.R. 2011, 909-924, 920. *R v. Bunch*, [2013] EWCA (Crim) 2498.

303. *Betha v. United States*, 365 A.2d 64, 89 (D.C. Cir. 1976).

in order to protect the public profoundly undercuts the “moral credibility”³⁰⁴ of the criminal law: “[p]roportionality between blameworthiness and liability is sacrificed [where] potentially erroneous convictions [are permitted] in exchange for an increased ease of prosecution.”³⁰⁵ As identified in the DSM manual, many of these difficulties stem from the importation of the DSM and ICD-10 into settings for which they were not designed:

The use of the DSM-5 should be informed by an awareness of the risks and limitations of its use in forensic settings. When DSM-5 categories, criteria, and textual descriptions are employed for forensic purposes, there is a risk that diagnostic information will be misused or misunderstood. These dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis.³⁰⁶

In recognising that “one size does not fit all”³⁰⁷ the WHO published three specialised versions of the ICD-10 for use in primary care,³⁰⁸ clinical practice,³⁰⁹ epidemiological and clinical studies,³¹⁰ and intends to introduce similar documents to run alongside the ICD-11. A specialised approach needs to be adopted *vis-à-vis* the diminished responsibility plea, and a tabulated

304. Paul H Robinson, *supra* note 176, at 299. *See also* Paul H Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (discussing why the justice system’s shift in focus from punishment of past crimes to preventative detention is a poor move); Paul H Robinson, Geoff Goodwin & Michael Reisig, *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940 (2010) (explaining how deviation from the principles of justice undermines the moral credibility of the justice system); PAUL H ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 109-33, 175-212 (Oxford Univ. Press 2008) (discussing incapacitation and the utility of empirical desert as a distributive principle).

305. ROBINSON, *supra* note 26, at 66. *See also*, *R v Cannings*, [2004] 1 All ER 725; Bernadette McSherry, *Expert Testimony and the Effects of Mental Impairment: Reviewing the Ultimate Issue Rule*, 24 INT’L J. L. & PSYCHIATRY 13 (2001).

306. AM. PSYCH. ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS* 25 (5th ed. 2013). *See generally* DOWDS, [2012] 1 W.L.R. at [30].

307. Geoffrey M Reed, *Toward ICD-11: Improving the Clinical Utility of WHO’s International Classification of Mental Disorders*, 41 PROF. PSYCHOL. RES. AND PRAC. 457, 461 (2010).

308. WORLD HEALTH ORGANIZATION, *DIAGNOSIS AND MANAGEMENT OF COMMON MENTAL DISORDERS IN PRIMARY CARE* (1998), *available at* http://whqlibdoc.who.int/hq/1998/WHO_MSA_MNHIEAC_98.1.pdf (last accessed Jan. 27, 2014).

309. WORLD HEALTH ORGANIZATION, *CLINICAL DESCRIPTIONS AND DIAGNOSTIC GUIDELINES* (1992), *available at* <http://www.who.int/classifications/icd/en/bluebook.pdf> (last accessed Jan. 27, 2014).

310. WORLD HEALTH ORGANIZATION, *DIAGNOSTIC CRITERIA FOR RESEARCH* (1993), *available at* <http://www.who.int/classifications/icd/en/GRNBOOK.pdf> (last accessed Jan. 27, 2014).

regulatory approach is needed to beneficially promulgate the questioning of “recognised medical condition[s]” for the purposes of a re-standardised partial defence on both sides of the Atlantic.³¹¹

There is a “world of difference” between cases of homicide where the defendant killed whilst voluntarily intoxicated and killings committed under the influence of alcohol dependency syndrome,³¹² and, as such, the focus in cases involving substance use disorders should be upon the defendant’s mental abnormality, rather than on conceptualisations of voluntariness. Despite the difficulties associated with delimiting the diminished responsibility plea, it provides a viable route of partial exculpation where the defendant’s responsibility is reduced, notwithstanding the fact that he may have been acting voluntarily. The fact that the defendant’s first drink may have been voluntary at T1 does not preclude the availability of the partial defence at T2, providing all elements of the concessionary defence are satisfied. This *dépeçage* approach to alcoholic defendants who kill avoids the rigid voluntary / involuntary categorisation and permits the jury to assess whether the defendant’s culpability was affected by mental disorder in terms of potential liability: “if an offender’s liberty is to be infringed . . . it must be as a consequence of . . . wrongful conduct that is properly attributable to the will of the actor and not to some ‘disease’ . . .”³¹³

311. This could be achieved by the commission of a Working Group comprised of members of the judiciary, legal practitioners, psychiatrists, clinical psychiatrists and members of the World Health Organisation and American Psychiatric Association, with the aim of producing a Code of Practice akin to the specialised versions of the ICD. Rudi Fortson, *R v Dowds* [2012] EWCA Crim 281, available at <http://www.rudifortson4law.co.uk/legaldevelopments12.php> (last accessed Jan. 27, 2014). The Law Commission have recently indicated that the “recognised medical condition” requirement under section 2 of the Homicide Act 1957 (as amended by section 52 of the Coroners and Justice Act 2009) ought to have been statutorily qualified. The Commission’s recommendations for a new “recognised medical condition” defence which would replace the current insanity defence would only be available where the defendant suffers from a “qualifying” medical condition, and acute intoxication and personality disorders are to be specifically excluded for such purposes. LAW COMMISSION, DISCUSSION PAPER, INSANITY AND AUTOMATISM *supra* note 19.

312. LAW COMMISSION, PARTIAL DEFENCES TO MURDER, *supra* note 172, at ¶ 5.45 (Dr Keith Rix).

313. Richard C Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA L. REV. 2245, 2289 (1992). See also Barbara Hudson, *Punishing the Poor: a Critique of the Dominance of Legal Reasoning in Penal Policy and Practice*, in PENAL THEORY AND PRACTICE (Antony Duff et al., eds., 1994), 302.

VII. CONCLUSION

It is our contention that a new *via media* is urgently needed in Anglo-American standardisations applicable to the intoxicated offender, utilising *dépeçage* selectivity to individuated concerns. A new schematic template, on a principled edifice, is required to properly reflect fair labelling and achieve doctrinal coherence. As such, it is necessary to re-examine potentiate liability linked to actual criminal responsibility across the spectra of intoxication imputations. The demands of substantive transparency and moral credibility determine that the quintessential inquiry as to “blameworthiness” in relation to any intoxicated offender should focus upon lack of individuated responsibility in terms of preventing fault and attributional liability. It is inapt to focus instead on cognitive states of imputed recklessness and thereby to amorphously construct a conviction on an imputed legalised fiction.

There must exist a moral legitimacy for inculcating the intoxicated “offender” who commits basic intent crimes without the prevalence of the designated offence-specific *mens rea* element at the time of the offence. It is provided by standardisation of potentiate liability for preventing fault. The principles herein stand as a corollary to acknowledged principles of supervening fault and “responsibility” attached to creation of a dangerous situation. Inculcated policy rationalisations are derived from abjuration of individual responsibility and consequentialist effect attached to lack of care as a moral agent determinative of inculcation, and not cognitive states of falsely imputed *mens rea*. Moral culpability should effectively apply in that an individual party must take responsibility for elective choices—drinking or taking drugs. The *éminence grise* of potentiate liability for intoxicated behaviour involves a standardisation of harm prevention as part of the legitimate factorisation of conduct criminalisation, and this coalesces with awareness creating inculpatory responsibilities.

Potentiate liability and preventing fault may be beneficially adapted to a number of different postulations engaging the intoxicated “offender” in *dépeçage* normalisations. An individual actor who drinks to provide Dutch Courage to commit any designated offence, specific or basic, abjures responsibility to others and is morally culpable to an indefensible extent. In terms of temporal individuation of offence-definition nexus the prior fault awareness at T1 ought to be added to the unlawful commission of *actus reus* elements at T2 without delineation to inculcate the morally blameworthy agent of all crimes. The concatenation is that it is almost as if the individual actor is using himself as an innocent agent, but it is an agency disregarding the interests of others or risks attendant to culpable activity. The imputation is that attributional liability is morally legitimate if the defendant is aware that excessive drinking triggers in him a dangerous and

aggressive pattern of behaviour.

Potentiate liability and preventing fault principles are of supererogatory effect within the boundaries of pathological intoxication and separate treatment for therapeutic drug-taking. Criminal responsibility attaches only to a defendant who is morally culpable and who with awareness disregards the interests of others or risks attendant to harmful conduct. The term “recklessness” is used in a particularised context of risk-taking awareness and in a generalised sense, not requiring foresight of the *actus reus* of any particular crime as required in purposive criminal recklessness specificity. Instead, it is utilised to identify recklessness as moral culpability or otherwise, and via transmogrification of awareness of a risk that the actor will become aggressive or dangerous (at T1 stage).

It is our view that substantive doctrinal principles operate capriciously against destabilised “offenders” who have been involuntarily intoxicated. Potentiate liability is not invoked at the T1 stage of temporal individuation, and the morally blameless offender ought to be able to raise an inference for fact-finder determination that “but for” the disinhibition created involuntarily or without responsibility at T1 then no harmful effects at T2 would have been engendered. The burden should rest on a defendant to address lack of preventing fault in this regard. The focus on lack of potentiate liability and disregard for the interests of others at T1 creates an affirmative reverse burden defence of exceptional pathology attached to moral legitimacy in exculpating the radically destabilised “offender”.

A legalised fiction has been created in Anglo-American intoxication doctrine in terms of imputed liability for basic intent offences. This constructive liability is predicated not on criminal recklessness but criminal responsibility of a volitional agent, and the prior fault lies in voluntary intoxication. It is attributional culpability derived from potentiate liability at T1 temporal individuation, and applies irrespective of conscious advertence to the risk of ultimate harm. Fair labelling and doctrinal coherence require a specific offence detailing the inculpatory nature of preventing fault and potentiate liability, and a template prevails in German law standardisations.

The rejection of alcohol dependence syndrome as a bespoke “mental disease or defect” for the purposes of the insanity defence by the U.S. courts, has resulted in the condition being regarded as voluntary for the purposes of attributing criminal liability. In the absence of a full diminution in “substantial capacity” (equated with automatism), the alcoholic defendant is standardised according to the normative expectations that society has of the reasonable sober person, and the flawed rules pertaining to traditional intoxication doctrine apply. The law is viewed in black and white terms, whereas distinctive hues ought to apply to

different categorisations and gradations of substance abuse disorder. Fair labelling requires that an appropriate partial defence is available in murder cases where the defendant suffers from alcohol dependency syndrome or an alternative mental disorder; and reduced culpability levels apply in terms of preventing fault in that a “world of difference” exists between cases of homicide where the defendant killed whilst voluntarily intoxicated, and killings under the influence of alcohol dependency syndrome. It is our recommendation that the reformulated diminished responsibility plea in English law, within the purview of the Coroners and Justice Act 2009, may operate as a cathartic panacea to the rigid and mechanistic system imposed by the *Model Penal Code*, and reflects a new standardisation to intoxicated “offenders” encompassing legal and psychiatric conceptualisations of alcohol dependence syndrome, aligned with proposed amendments to the international classificatory systems. Potentiate liability principles determine that it is not a bifurcatory divide between voluntary and involuntary intoxication that should apply to the alcoholic offender, but rather a dissonance attached to partial and full responsibility at the T1 stage of individuation that is determinative, tied to an acknowledgement of the prevailing medical condition.

The reductionist approach to intoxicated offending, which imposes criminal liability by attempting to categorise the defendant’s conduct as voluntary or involuntary, is outmoded and the basis upon which criminal liability is constructed is inherently unfair. It is imperative that a more nuanced approach, utilising *dépeçage* principles to individuated scenarios is adopted on both sides of the Atlantic. A more transparent approach is required in order that defendants are appropriately punished for the crimes they commit, rather than on the basis that they voluntarily consumed alcohol at an earlier point in time, or on grounds of some psychological failing. When philanthropic Dr. Jekyll first took the potion that would transform him into the allegorical Mr. Hyde, he was unaware of the risk that Hyde would unlawfully kill Sir Danvers Carew.³¹⁴ The time is ripe for Dr. Jekyll and Mr. Hyde to be treated in accordance with their potentiate liabilities and criminal responsibilities properly addressed in a new reflective template.

314. STEVENSON, *supra* note 1, at 20-21.

