MENS REA EVALUATED IN TERMS OF THE ESSENTIAL ELEMENTS OF A CRIME, SPECIFIC INTENT, AND DRUNKENNESS

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I. INTRODUCTION

In this article, I intend to discuss in some detail the recent decision of the British Columbia Court of Appeal in *Regina v. Resener.*[1] In my opinion the decision is wrong. The case is of considerable interest because it alludes to three important legal issues, but does not expressly attempt to clarify any of them. These issues can best be expressed in the following questions: 1. What are the essential elements of a crime? 2. Does the crime of indecent assault require a general or a specific intent? 3. Can drunkenness be a defence only to a specific intent crime? Thus, after analyzing and disagreeing with the *Resener* decision, I intend to comment on each of these issues in an effort to clarify the confusion that surrounds them.

II. ANALYSIS OF *Regina v. Resener*

The accused was charged with indecently assaulting a seven year old girl who lived with her parents in the accused's home. Resener came home drunk one night and was subsequently found on a bed with the little girl. There was a blanket over their heads and shoulders and Resener was found rubbing her vagina with his hand. At trial, Resener testified that he could not remember the alleged assault. There was a considerable amount of testimony as to his drunken state.

The trial judge directed the jury that if the accused was too drunk to form an intent "to assault indecently," then he must be acquitted on the charge of indecent assault. However, to be acquitted on the lesser offence of common assault, the accused must have been so drunk as to be incapable of applying force intentionally. On the basis of the above direction, Resener was convicted of common assault. The Crown appealed to the British Columbia Court of Appeal objecting to the trial judge's direction that there must be an intent "to assault indecently." The Court of Appeal agreed with the Crown; as a result, they set aside the acquittal and ordered a new trial on the charge of indecent assault.

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[1] 64 W.W.R. (n.s.) 257 (B.C. 1968).

The appeal was heard by five judges, four of whom gave individual judgments. However, their reasons for judgment were, in substance, the same.[2] The issue was defined by Chief Justice Davey as "whether a specific intent to act indecently is an essential ingredient of indecent assault."[3] If the court found that indecent assault requires a specific intent "to assault indecently," then drunkenness, according to the second proposition laid down in *Beard*,[4] may have rendered the accused incapable of forming this specific intent. But the court was of the opinion that if only a general intent was required, then drunkenness could be no defence. According to *The Queen v. George*,[5] "a man cannot rebut the presumption that he intended the act of violence he has been proved to have done by seeking to establish that he was too drunk to be able to form an intent to do it."[6] Accordingly, the Court of Appeal tried to determine whether a specific intent "to assault indecently" was, in fact, an essential ingredient of indecent assault. Relying on *Rex v. Louie Chong*,[7] the interpretation of section 141 of the Criminal Code,[8] and the distinction between specific and general intent given in *The Queen v. George*,[9] the court came to the conclusion that a specific intent "to assault indecently" is not an essential element of the crime of indecent assault.

I respectfully submit that the court's reasons for such a finding are, in law, erroneous. On the basis of *Rex v. Louie Chong*,[10] the court concluded that "it is the circumstances as a whole that make an act indecent, not the state of mind of the actor revealed by his words."[11] In effect, the court said than an intent "to assault indecently" is not necessary. It is the circum-

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[2] Bull, McFarlane, Branca and Nemetz, JJ., all applied what was said by Davey, C.J.B.C., in Regina v. Redwood, unreported, but decided December 15, 1966: "[A] special intent to assault indecently is not an ingredient of the offence of indecent assault. An assault becomes indecent, not because of any special intention of the offender, but because of the circumstances under which it is committed, either by reason of its very nature, or because of the surrounding circumstances, including words and gestures of the accused, if its nature is ambiguous."

[3] *Supra* note 1, at 259.

[4] Director of Public Prosecutions v. Beard, [1920] A.C. 479, at 501-02.

[5] [1960] Sup. Ct. 871, 34 Can. Crim. 1, 128 Can. Crim. Cas. Ann. 289.

[6] *Supra* note 1, at 277 (Branca, J.).

[7] 32 Ont. L.R. 66, 23 Can. Crim. Cas. Ann. 250 (1914). The Supreme Court of Canada approved and applied this case in The King v. Quinton, [1947] Sup. Ct. 234, 3 Can. Crim. 6, 88 Can. Crim. Cas. Ann. 231. In *Louie Chong*, Mr. Justice Middleton, said:

> It appears to me that an act in itself ambiguous may be interpreted by the surrounding circumstances and by words spoken at the time the act is committed. Mr. Moss conceded that if a man took hold of a woman and attempted to drag her into a brothel, that would constitute an indecent assault. It is in each case a question of fact whether the thing which was done, in the circumstances in which it was done, was done indecently. If it was, an indecent assault has been committed.

[8] *Id.* at 67. CRIM. CODE § 141 provides in part: "Every one who indecently assaults a female person is guilty of an indictable offence . . . ."

[9] [1960] Sup. Ct. 871, at 890 (Ritchie, J.) and at 877 (Fauteux, J.).

[10] *Supra* note 7.

[11] Regina v. Resener, 64 W.W.R. (n.s.) at 260.

stances surrounding the act that make the act indecent, not the mind of the actor. Thus an intent to assault plus circumstances of indecency are all that is necessary to constitute the crime of indecent assault. In this respect, if there are no circumstances of indecency, then the crime is only common assault. However, I contend that the court's application of *Rex v. Louie Chong* was unequivocally and blatantly wrong.

It is true that Mr. Justice Middleton in *Louie Chong* said that the indecency of an act depends on the whole circumstance surrounding the act. But this reference was made in relation to a completely different problem. In that case, the accused seized hold of a fifteen year old girl against her will, and offered her money to go with him for an immoral purpose. The girl cried out and threatened the accused with arrest, whereupon the accused left. The issue in this case was whether there can be a conviction for an indecent assault, although the act constituting the assault is not in its nature indecent. All that was done by the accused was to take hold of the girl against her will. This act, by itself, is not indecent. It was in this context that Middleton said that if the act that was done (though not indecent in itself), was done under indecent circumstances, then this is an indecent assault. There was no plea by the accused that he did not intend to assault the girl indecently. Indeed, his voluntary act of offering money and asking the girl to go with him for immoral purposes, in the absence of any evidence to the contrary, negated all chance of entering such a plea. The required intent or *mens rea* for an indecent assault was in no way an issue in this case. It was the sufficiency of the act that was in question. Middleton, in saying that it is the circumstances surrounding the act, that make the act indecent, in no way intended to suggest that an intent "to assault indecently" is not an essential element of indecent assault. Middleton's words were only in reference to the required *actus reus*, not the required *mens rea*. Thus, the court's conclusion that an intent "to assault indecently" is not an essential element of indecent assault, in so far as it is based on *Rex v. Louie Chong*, is clearly wrong.

Three judges [12] said that a specific intent "to assault indecently" is not indicated in section 141 of the Criminal Code, [13] and thus, such a specific intent is not an essential element of that crime. I respectfully submit that this conclusion is also wrong. Not all crimes in the Criminal Code are defined in reference to a definite state of mind. Consider section 232 of the Criminal Code, which deals with assaulting a peace officer. It simply states that every one is guilty of an indictable offence who "assaults a public officer

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[12] *Id.* at 263. Justice McFarlane (Bull, J. concurring) said: "The *Criminal Code* does not indicate any ingredient of special or specific intent with relation to the element of indecency." Mr. Justice Branca said: "Indecent assault is defined in the *Criminal Code* and its definition does not include a specific intent as one of its constituent ingredients." *Id.* at 275.

[13] *Supra* note 8.

or peace officer engaged in the execution of his duty . . . ." [14] There is no indication that an "intent to assault a police officer" is an essential element of the offence. It could be argued that an intent to assault is all that is required. If the person assaulted turns out to be a police officer, then the crime is complete whether or not the accused knew the victim was a police officer. [15]

The British Columbia Court of Appeal was faced with this problem in *Regina v. McLeod* [16] some fifteen years before *Resener*. The accused assaulted a police officer in plain clothes. At the time of the assault, the accused did not know, nor did he have any reason to believe, that the victim was a police officer. He was charged with assaulting a police officer in the execution of his duty. The Crown contended that "an accused may be convicted of assaulting a person as a police officer although he has not the remotest idea that such person is a police officer." [17] Fortunately, the court did not accept this contention. Mr. Justice Davey said that "knowledge that the victim is a peace officer is an essential ingredient of the offence. The magistrate found on the facts that the accused had no reason to know, and did not know, the complainant's status, which finding we must accept. Therefore the crime charged was not proven." [18] What Davey was actually saying, although not in express words, is that the lack of knowledge that the victim was a police officer, prevents the accused from forming an intent to assault a police officer. It is this special or specific intent to assault a police officer that is essential. Lack of knowledge that the victim is a police officer negates this special intent, and without this special intent, there is no crime of assaulting a police officer. Although the Criminal Code did not indicate that a special intent to assault a police officer was an essential ingredient, the British Columbia Court of Appeal, by necessary implication, held that it was. There are many other examples where the Criminal Code has not specified a particular state of mind, but where the courts have said that such a particular state of mind must exist, in order to prove the crime charged. [19]

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[14] Crim. Code § 232 provides in part:

> . . . .
> (2) Every one who
> (a) assaults a public officer or peace officer engaged in the execution of his duty, or a person acting in aid of such an officer;
> . . . .
> is guilty of an indictable offence and is liable to imprisonment for two years.

[15] The Queen v. Reynhoudt, 107 Commw. L.R. 381 (Austl. High Ct. 1962). This argument was in fact accepted by a three to two majority. However, see the strong dissent of Chief Justice Dixon, *id.* at 386-87. *See also* R. v. Galvin [No. 2], [1961] Vict. 733.

[16] 14 W.W.R. (n.s.) 97 (B.C. 1954).

[17] *Id.* at 100.

[18] *Id.* at 108.

[19] *See* Regina v. Vandervoort, [1961] Ont. W.N. 141; R. v. Hornbuckle, [1945] Vict. L.R. 281; R. v. Daly, [1968] Vict. 257 (1965). *But see* Regina v. Boucher, 40 W.W.R. (n.s.) 663 (B.C. 1962).

As indicated above, three judges in *Resener* held that since the Criminal Code does not *expressly* indicate that a specific intent "to assault indecently" is an essential element, then such an intent is not essential. Clearly their conclusion can not be supported by such an argument.

The final basis for the Court of Appeal's decision that a specific intent "to assault indecently" is not an essential element in indecent assault is the distinction between specific and general intent given in *The Queen v. George.* The distinction made therein between two types of intents is a valid distinction. I shall comment later as to the relevance of such a distinction. The unfortunate part of *George* is that the words chosen to describe the two different types of intents are inaccurate and misleading. Crimes requiring a specific intent according to *The Queen v. George* are only those crimes constituted by acts done with the ulterior intention of furthering or achieving an illegal object as opposed to those crimes constituted by acts done for an immediate end.[20] Thus in theft, a specific intent is required because it is not "an intent to take" that is the required *mens rea*, but rather "taking with the intent of depriving the owner." The taking is done with an intent of achieving an illegal object, that is, depriving the owner of his goods. In the case of common assault, the hitting is not done with any further illegal object in mind. Therefore, the Supreme Court says this is a general intent. Thus, if this is the criterion for distinguishing general and specific intent, then it can be said that indecent acts are not done with any further illegal object in mind. They are directed only to their immediate end, that is the lustful desires of the perpetrator. Thus "an intent to assault" and "an intent to assault indecently," though two entirely different intents, fall under the category of general intent. Therefore, in one sense, it is correct to say, as Mr. Justice Davey said in *Resener*,[21] that a *specific* intent to assault indecently is not an essential element of indecent assault on the basis of the distinction made in *The Queen v. George.* However this implies that an *ordinary* or *general* intent "to assault indecently" is not an essential element of indecent assault. But *The Queen v. George* did not stand for that proposition. All it should have stood for in *Resener* is that an intent "to assault indecently" can not be referred to as specific. As has been illustrated, an intent "to assault indecently," according to the distinction laid down in *The Queen v. George*, must be classified as general. But *George* in no way suggests that an intent to assault indecently is not an essential element of indecent assault. It simply says that if this is the required intent, then it must be called a general intent, not a specific intent. Therefore, Chief Justice Davey's statement that, on the basis of *The Queen v. George*, a *specific* intent to assault

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[20] The Queen v. George, [1960] Sup. Ct. 871, at 890.

[21] Regina v. Resener, 64 W.W.R. (n.s.) 257, at 259: "Without attempting an exhaustive analysis of their judgments [Ritchie and Fauteux, JJ. in The Queen v. George], I consider it follows from them that *a specific intent to assault indecently* is not an essential ingredient of the crime of indecent assault, as distinguished from *mens rea*, which may be established, among other ways, by a general intent to assault." (Emphasis added.)

indecently is not an *essential* ingredient of the crime of indecent assault is wrong in as much as it implies that a general intent "to assault indecently" is not an essential element of indecent assault. It is only correct in so far as it states that an intent "to assault indecently," whether essential or not, cannot be called specific.

Thus, the Court of Appeal's decision that an intent "to assault indecently" is not an essential ingredient of indecent assault is wrong in as much as that proposition does not logically follow from the authorities cited. *Rex v. Louie Chong*, the interpretation of section 141 of the Criminal Code, and the distinction between specific and general intent given in *The Queen v. George*, do not support the conclusion of the court. The court has said that an intent to assault combined with indecent circumstances surrounding that assault is sufficient to convict for indecent assault. I respectfully submit that this has done and can do, grave injustice. Surely the legislature never contemplated convicting a person for indecent assault if that person at no time knew his acts were indecent. Yet the British Columbia Court of Appeal would ascribe such an intent to the legislature. A thousand illustrations could be given to show the injustice of such a state of the law, and although one may feel they are so obvious that none are necessary, I will give at least one illustration.

In *Regina v. McLeod*,[22] the accused was charged with assaulting a police officer. The charge arose out of a fight between two youths in which a plain-clothed constable attempted to intervene. The accused, a spectator and completely unaware that the intruder was a constable, attempted to pull him off the two contestants telling him to mind his own business. The constable then quite violently pushed him aside, and the accused responded to this attack. The constable then drew his gun and slapped the accused in the face with it. The fight broke up, and the spectators and two contestants quickly dispersed. The British Columbia Court of Appeal held that knowledge that the intruder is a police officer is an essential element of the offence of assaulting a police officer. In other words, the accused must intend to assault a police officer. An intent to assault an ordinary person who actually turns out to be a police officer will not suffice. McLeod was found guilty of common assault, but was acquitted on the charge of assaulting a police officer.

A slight extension of the facts in *McLeod* will show the type of injustice possible if *Resener* is followed. Suppose the constable in this case was actually a woman constable who happened to be dressed as a male for a particular assignment. While carrying out that assignment, she came across a youthful skirmish and attempted to break it up. The accused, like McLeod, tried to prevent the interference, unaware that the intruder was either a constable or a woman. In the resulting struggle, the accused ripped the constable's shirt off, and to the shock of the milling spectators, a half naked woman stood before them.

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[22] Regina v. McLeod, 14 W.W.R. (n.s.) 97 (B.C. 1954).

If the accused were charged with indecent assault and assaulting a police officer, what would be the result? On the basis of *Regina v. McLeod*, the accused's lack of knowledge that the intruder was a police officer would be a good defence to the charge of assaulting a policeman. According to *Resener*, it is the circumstances as a whole that make an act indecent, not the state of mind of the actor; an intention to do an indecent act is not essential. Thus on the basis of *Regina v. Resener*, the accused's lack of knowledge that his acts were indecent would not be a good defence to a charge of indecent assault. The fact that the accused had the intent to assault combined with the fact that, by chance, the assault was actually indecent is sufficient to convict for indecent assault. Yet according to *McLeod* which, I submit, was rightly decided, the fact that the accused had the intent to assault combined with the fact that, by chance, the person assaulted turned out to be a constable, is not sufficient to convict on a charge of assaulting a police officer. There does not appear to be any logical or just rationale for acquitting the accused on one aggravated assault because he did not intend it, and yet convicting the accused for another aggravated assault although again he did not intend it. Surely such a state of the law is not only unjust to the accused but also untenable in a rational system of criminal law.

It is hoped that this illustration has shown that the rationale in *Resener* is unjust, that the legislature never intended such a result, and that therefore the decision in *Resener* can not, and must not, be accepted in the future.[22a]

I have commented in some detail on *Regina v. Resener* because, as mentioned in the introduction, it touches on three important legal issues, none of which have been dealt with either in a consistent or satisfactory manner in the past. It is the confusion with respect to these three issues that has obscured the concept of *mens rea* and produced many illogical and untenable decisions. These issues have already been stated in the following three questions: (1) What are the essential elements of a crime? (2) Does this particular crime require a specific or general intent? (3) Can drunkenness be a defence *only* to a specific intent crime? *Resener* is a prime example of how confusion of these issues can result in an untenable decision. Thus to avoid similar confusion in the future, I propose to discuss each of these issues in a little more detail.

III. The Essential Elements of a Crime

For the purpose of analysis, a crime is usually divided into two elements, *actus reus* and *mens rea*. *Mens rea* is the mental element of the crime. Thus, the *actus reus* consists of all the elements in the definition of a crime except those that refer to the accused's state of mind.

Canadian courts have had little difficulty in determining the *actus reus* of individual crimes. This is not surprising since all common-law offences

[22a] See however Regina v. Pharo, 12 Can. Crim. (n.s.) 151 (Ont. Cty Ct. 1970) where *Resener* was applied.

have been codified.[23] Thus the *actus reus* of assaulting a peace officer in the execution of his duty[24] has at least three elements: there must be (1) an assault (2) on a peace officer (3) who is assaulted in the execution of his duty. If one of these elements is not present, there can be no conviction for that crime. At best, the accused is guilty of an impossible attempt which is punishable,[25] nonetheless, provided the necessary mental element is present. Thus, if *A* intentionally assaults *B* whom he believes to be a peace officer in the execution of his duty, but who, in fact, is not a peace officer, then *A* cannot be convicted of assaulting a peace officer since an essential element of the *actus reus* is missing. However, *A* did have the the necessary intent, and thus, he is guilty of an impossible attempt. In practice, however, it is customary to charge *A* with common assault. However the authorities should not overlook the alternative charge of attempting to assault a police officer. To further illustrate the simplicity of determining the *actus reus*, consider the crime of indecent assault on a female.[26] The *actus reus* again consists of three elements. The victim must be female, there must be an assault, and the assault must be indecent in itself, or surrounded by indecent circumstances.[27] In *Regina v. Resener*, if the victim had not been a girl, or if there had been no indecent circumstances, Resener could not have been convicted of indecent assault whether he intended an indecent assault or not. At best, he would be guilty of an impossible attempt.[28]

As can be seen, the objective requirements or elements of the *actus reus* are quite easy to determine since the crime is defined. However, courts have not consistently determined the requisite mental element for each crime. In fact, it has been suggested that courts "acquit or convict, arguing on the doctrine of *mens rea*, without knowing how *mens rea* could provide a reason for conviction or acquittal."[29] This seems to be true in many cases. A major source of the problem lies in the application of the Criminal Code. The code does not define the state of mind necessary for each crime, and when it does, this state of mind is often not clear. The American Law Institute has recognized this problem in their criminal law, and as a result, the Model Penal Code specifically defines the requisite mental element.[30] A major revision of the Canadian Criminal Code along these lines would be indispensable.

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[23] *See* CRIM. CODE § 8.

[24] *Id.* § 232 (2)(*a*).

[25] *Id.* § 24(1). Attempts are punishable whether possible or not.

[26] CRIM. CODE § 141.

[27] *See* Rex v. Louie Chong, 32 Ont. L.R. 66, 23 Can. Crim. Cas. Ann. 250 (1914).

[28] CRIM. CODE §§ 24(1) and 141. Of course, there is also the alternative charge of common assault.

[29] Binavince, *The Doctrine of Mens Rea in Canada and Germany*, 7 PROCEEDINGS INT'L SYMPOSIUM ON COMP. L.—(1966), [hereinafter cited Binavince, *Mens Rea*].

[30] MODEL PENAL CODE § 2.02 (Proposed Official Draft, 1962). *See also* Wechsler, *Codification of Criminal Law in The United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, at 1435-37 (1968).

In Canada, crimes may be committed intentionally, recklessly, negligently, or strictly. Most crimes under the Criminal Code are committed intentionally, or recklessly. There are few negligent crimes. For example, there is no such crime as negligent rape. However, many statutory crimes are committed strictly; once the act is done, no further mental element is required. The accused is strictly liable regardless of his intent or motives. Once the proscribed harm has been realized the offender is liable regardless of the extreme caution he might have observed. These are referred to as strict liability crimes and, unfortunately, have increased in alarming number in the past fifty years. Since strict liability crimes require no mental element, the decisions regarding such crimes have been fairly consistent and rational. The crimes that have been most abused by the courts are those crimes which demand intention or recklessness as the necessary mental element.

For the purpose of this article, I intend to treat intention and recklessness as one mental element. I will refer to both mental elements as simply intention. I do this realizing that many authors [31] have taken great pain to distinguish between intention and recklessness. For example, intention, for Granville Williams, is knowledge of the circumstances plus a desire that the consequences result or a foresight that the result is certain. Whereas he views recklessness as a state of mind where one activity is pursued with knowledge that a proscribed harm will probably or possibly follow, yet he carries on that activity nonetheless. In other words, he knowingly creates risk. [32] However, the courts have generally tended to treat these two states of mind simply as intention. I likewise intend to use only one mental state called intention. Thus, when I speak of intention, I mean (a) knowledge of the factual elements of the crime, (b) foresight of the consequences of the criminal act *regardless of the probability of their occurrence*, and (c) knowledge of the causal connection between the act and the harm. [33] If the courts consistently analyzed all intentional crimes in relation to these three elements of intention, then the doctrine of *mens rea* would receive the rational treatment that it deserves. I contend that before a court can rationally say that a person intends a particular crime, these three elements of intention must be present. This can be easily illustrated.

A. *Knowledge of the Factual Elements of the Crime* [34]

By this, I mean all the relevant elements of the *actus reus*; that is, all the elements, other than the mental state, that give the crime its offensive nature. In this regard, the court in *Regina v. McLeod* realized that it was ridiculous to say that a man intended to commit the crime of assaulting a

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[31] C. KENNY, OUTLINES OF CRIMINAL LAW 36-37 (19th ed. J. Turner 1966); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 112-17 (2d ed. 1960) [hereinafter cited HALL, PRINCIPLES]; G. WILLIAMS, CRIMINAL LAW (The General Part) 38-42 and 53-58 (2d ed. 1961) [hereinafter cited WILLIAMS, CRIMINAL LAW].

[32] WILLIAMS, CRIMINAL LAW at 53.

[33] Binavince, *Mens Rea* at 86-93.

[34] *Id.* at 86.

peace officer unless he knew the victim was in fact a peace officer. Knowledge that the man is a peace officer is one of the elements that makes this particular crime offensive. Yet it has been illustrated that the same court, fifteen years later, said a man can intend the crime of indecent assault although he did not know the assault was indecent. Indecency certainly is one of the elements that makes this crime offensive. It seems ridiculous to say that indecent assault is an intentional crime in the light of *Resener*.

The real problem is that the Criminal Code has not sufficiently set out exactly what elements must be known, yet the courts, although apparently aware of this shortcoming, have failed to lay down any concrete rules of their own. As a result the cases are confusing and hard to rationalize. I suggest that the only hope for the establishment of a rational application of intention in this regard is for the courts to say that *intention refers to all the relevant factual elements of the crime*, unless a particular crime states otherwise.[35] Recognition that intention must apply to all the elements of the *actus reus* has been made by most text writers.[36] The interspersing of the words "willingly" and "knowingly" in the Criminal Code by the legislature can not serve as a rational basis for determining whether intent applies to all the elements or only a particular few. It is up to the courts to unequivocally state that intention applies to all the elements of the *actus reus* unless the legislature has *expressly* stated otherwise.

Thus, in *Regina v. Resener*, the court should have held that the requisite mental element in indecent assault is an intent that goes to all the essential elements, that is "an intent to assault a female indecently." Conceivably, some people would maintain that such an approach would allow, on occasion, socially abhorrent actors to escape unpunished. However, if the legislature deems that certain acts should be punished whether intentional or not, as they have in the case of sexual relations with girls under fourteen, then such an unfavourable acquittal would prompt them to amend the Criminal Code so as to *expressly* state what factual knowledge is not essential. In this way, intention with regard to the elements of a crime would receive a consistent and rational treatment. It could then be said, without tongue in cheek, that this crime is intentional.

B. *Foreseeability of Consequences*[37]

It is on the basis of foresight of consequences that many authors have made the distinction between intention and recklessness.[38] If the conse-

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[35] *See* CRIM. CODE § 138 which states in part: "[W]hether or not he believes that she is fourteen years of age or more, ..."

[36] See HALL, PRINCIPLES at 19; WILLIAMS, CRIMINAL LAW at 31; R. PERKINS, CRIMINAL LAW 750 (2d ed. 1969). *See also* THE MODEL PENAL CODE § 2.02(4) (Proposed Official Draft, 1962).

[37] For a comprehensive discussion of the theory I am advancing, see E. BINAVINCE, DIE VIER MOMENTE DER FAHRLASSIGKEITSDELIKTE 157-88 (1969). *See also* Binavince, *Mens Rea* at 90.

[38] *Supra* note 31.

quences foreseen are not almost absolutely certain, then these authors say the act is not intentional, but rather reckless. I contend that if the consequences are foreseeable, regardless of the probability of their occurrence, then the actor must be said to have intended them. An actor, before doing an act, foresees certain possible consequences of that act. Some consequences will be highly certain; others will be more remote. But if the actor foresees these remote consequences and nonetheless does the act, then if these remote consequences do in fact occur, he can not, in my opinion, be heard to say: "I did not intend them." Acceptance of such a plea is confusing intention with motive or desire. For example, *A* may intend to throw a rock through *B*'s window. Before he does so, *A* realizes *B*'s grandmother may be sitting in the living room in her favourite chair by the window as she often does. *A* thinks *B*'s grandmother is a great old lady, but *A* hates *B* and therefore wants to throw a rock through *B*'s window. *A* decides that the chance that *B*'s grandmother will be hit by the rock even if she is in the living room is very slim, and therefore, he throws the rock which does in fact shatter the window and hit *B*'s grandmother on the head. In my opinion, *A* can not be heard to say he did not intend to hit the grandmother. True, he did not *desire* that the rock hit *B*'s grandmother. This was not his motive for throwing the rock. But motive and intention are often two different things. I contend that if *A* really did not intend to injure *B*'s grandmother, then he never should have thrown the rock.

Generally, the courts have made this distinction and refused to acquit simply because the actor did not *desire* the harm. This is probably because the accused's motives for acting are, in most cases, socially unacceptable, and thus, courts find little difficulty in saying the accused intended this act. However, when the accused's motives are of high social value, and the criminal act is one of those crimes to which there is no special defence, then the courts' apparent understanding of the situation breaks down as witnessed in *Rex v. Steane.* [39]

On occasion, the courts have destroyed the notion of intention completely by saying that foresight of consequences is objective rather than subjective. In this respect, it is interesting to observe that the doctrine of *mens rea* was founded on a subjective basis, then tended towards an objective

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[39] Rex v. Steane, [1947] 1 K.B. 997, [1947] 1 All E.R. 813 (Ct. Crim. App.). Steane was charged with doing acts likely to assist the enemy with intent to assist the enemy. He read German news broadcasts in order to protect his wife and children from German retaliation—a socially acceptable act. This was an obvious duress situation, but duress is not recognized as a defence to treason. Thus the court was forced to say that Steane did not have the specific intent to assist the enemy in order to acquit him. But this confuses intention with desire and motive. Steane's motive for acting was to save his family and he had no desire to assist the enemy. Thus the court said he did not have the specific intent to assist the enemy. But if Steane's motive for acting was money and he had no desire to assist the enemy, then he should likewise be acquitted. However, I do not think the court would have come to the same conclusion.

basis and now has returned to the subjective basis.[40] For Hale, Hawkins and Blackstone, *mens rea* was the evil intent of the wrong-doer. But in the nineteenth and early twentieth centuries, Bentham, Austin, and finally Holmes felt the notion of evil intent was inadequate for the protection of general security. Holmes, particularly, developed a theory of objective liability. If the act or consequences were thought harmful to the general welfare, then once the act was done the actor was guilty regardless of his intent.[41] However, since World War II, there has been a concerted effort to re-establish subjective liability with the noted proponents being Williams, Hall, Mueller, and Turner. Nonetheless, the objective approach has not completely vanished in our courts, though its vestiges are thin.[42] Hopefully, these vestiges will disappear completely, and the foresight of the illusive reasonable man will never again replace that of the actual offender. To say that a man is presumed to intend the consequences of his act because a reasonable man would have foreseen these consequences "is merely to adopt another fiction, and to disguise the truth."[43] To say a crime is intentional in such a case would be meaningless.

C. *Knowledge of the Causal Connection between the Act and the Harm*[44]

Finally, the courts, on occasion, mutilate the notion of intention in order to convict the accused of the crime his dastardly act has perpetrated. Rather than apply the notion of intention on a rational basis and charge the accused with alternative crimes, the courts say the accused intended the harm that his acts have caused although he was not aware that this particular act caused the proscribed harm. Such reasoning is a violation of the theory of concurrence; that is, there must be a logical concurrence of the act and the intent. Even the Privy Council violated this doctrine in *Meli v. The Queen.*[45]

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[40] For a detailed discussion of this shifting trend, see Binavince, *The Ethical Foundation of Criminal Liability*, 33 FORDHAM L. REV. 1 (1964); Dubin, Mens Rea *Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, at 351-60 (1966).

[41] For a critical discussion of the objective theory of Holmes, see HALL, PRINCIPLES at 450-54. The ultimate extension of this objective theory was clearly expressed by one American commentor. See Lévitt, *Extent and Function of the Doctrine of Mens Rea*, 17 ILL. L. REV. 578, at 579 (1923): "I believe that in our criminal law of today the intent of the so-called criminal is not an element of the crime he commits; . . . . The intent has nothing to do with the crime. The intent has much to do with the treatment of the offender."

[42] *See* the strong dissenting opinions in Regina v. Rees, [1956] Sup. Ct. 640, at 658 (Fauteux, J.); Beaver v. The Queen, [1957] Sup. Ct. 531, at 554 (Fauteux and Abbott, JJ.); and Regina v. King, [1962] Sup. Ct. 746, at 755 (Locke and Judson, JJ.). *See also* Mewett, *The Shifting Basis of Criminal Law*, 9 McGILL L.J. 124, at 134-37 (1963). *But note* Director of Public Prosecutions v. Smith, [1961] A.C. 290 (1960) has been expressly reversed by section 4 of the Criminal Justice Act (North Ireland) 1966, and more recently by section 8 of the Criminal Justice Act 1967 (England).

[43] Commonwealth v. Pierce, 138 Mass. 165, at 178 (1884).

[44] Binavince, *Mens Rea* at 87.

[45] Meli v. The Queen, [1954] 1 W.L.R. 228, [1954] 1 All E.R. 373 (P.C.).

I will illustrate this point by giving a fact situation similar to that in *Meli*. *A* intends to kill *B* and lures *B* to *A*'s hunting lodge for that purpose. While there, *A* hits *B* over the head intending to kill *B* and thinking in fact that he actually has killed *B*. I will refer to this as act number one. *A* then takes *B*'s body and rolls it down a large hill hoping to leave the impression that *B* fell and killed himself. This is act number two. *B* is later found, and it is discovered that the cause of death was not the blow on the head, but rather exposure to the elements. Act one was accompanied with an intent to murder. But in act two, obviously, there was no intent to murder. *A* thought *B* was dead. Act two was accompanied by an intent to dispose of a dead human body. However, the Privy Council has refused to analyze the situation in this light. They view the two acts as one transaction and convict for murder. They take the intent in act one and combine it with the harm realized by act two and thereby mutilate the notion of intention and violate the doctrine of concurrence. In effect, they say *A* intended the consequences of act two (death) when in fact he had no knowledge that act two realized the proscribed harm.

I contend that the two acts must be viewed separately. *A* can be convicted for attempted murder regarding act one since he had the intent to murder. *A* can be convicted for an impossible attempt to offer indignities to a dead human body [46] for act two since he had the intent to dispose of a dead body. *A* may possibly be convicted of manslaughter for act two as well, if he was negligent in not realizing *B* was still alive when he rolled *B* down the hill. In Canada, since capital punishment has almost been completely abolished, a court could take this rational approach to the notion of intention and still sentence *A* to as heavy, or even heavier punishment than by following the illogical rationale adopted in *Meli*. Unfortunately, I feel the adoption of such an approach in Canada is unlikely in the near future in light of the heavy judicial opinion to the contrary. [47]

To sum up, it can be said that the courts' treatment of the elements of a crime have been less than satisfactory. The courts have had no serious problem in determining the essential elements of the *actus reus*, but their analysis of the requisite mental element has caused countless problems, and has resulted in endless confusion. The crux of the problem lies in a consistent formulation and application of the concept of intention. The wording of the Criminal Code must take a large part of the blame for the confusion. It is submitted that the courts' adoption of two simple propositions would remedy much of the confusion and re-establish the notion of intention on a rational basis. First, intention should apply to all essential elements of the *actus reus* unless expressly stated otherwise. Second, before a person can be said to *intend* a crime three elements are necessary: knowledge of factual

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[46] CRIM. CODE § 167(*b*). *See also* CRIM. CODE § 24(1) (impossible attempts).

[47] Regina v. Bernard, 130 Can. Crim. Cas. Ann. 165 (N.B. 1961); Regina v. Church, [1965] 2 W.L.R. 1220 (Ct. Crim. App.); *but see* Regina v. Popoff, 125 Can. Crim. Cas. Ann. 116 (B.C. 1959). For a further discussion of these cases in this context, see Binavince, *Mens Rea* at 88-90.

elements, foresight of the consequences, and realization that this act caused that harm. The onus is on the courts to act. The courts ought not to confuse, confound and mutilate criminal law notions in order to give effect to what they expect the legislature meant, but never expressed. If the application of a rational notion of intention by the courts yields a result the legislature never intended, let the legislature then amend.

IV. The Notion of Specific and General Intent

John Austin said that "words are our tools, and, as a minimum we should use clean tools: we should know what we mean and what we do not, ..." [48] Words are designed to elucidate concepts. Thus a relevant test of the appropriateness of a word is to examine what the word tells us about the meaning of the concept. If a word does not unequivocally add anything to the meaning of a concept, then it should be discarded. It is in this context that I intend to examine the adjectives "specific" and "general" which are so frequently affixed to the notion of intent.

The leading Canadian case on the apparent distinction between specific and general intent is *The Queen v. George.* [49] In that case, both Mr. Justice Fauteux [50] and Mr. Justice Ritchie [51] expressed their opinion as to the difference between specific and general intent. Mr. Justice Fauteux has suggested that intention as applied to acts can be considered either in relation to their purpose or apart from their purpose. [52] He would call the former specific intent and the latter general intent. It is submitted that Professor Hall would have much difficulty fitting such a statement into his means-end analysis of intention. Hall feels that "[t]he most common of human experiences is the direction of conduct toward the attainment of goals." [53] For Hall, such conduct involves an end sought (purpose), a deliberate functioning to reach that end or purpose which manifests the intentionality of the conduct, and finally, the reasons for seeking that end or purpose, that is, the motive. In my opinion, such an analysis of intentional conduct is sound. Consider, for a moment, any act that is commonly referred to as intentional. *A* intentionally breaks *B*'s window. *A*'s purpose is to break the window. *A*'s deliberate functioning towards that purpose, that is, picking up a rock and aiming it at the window, manifests his intention to break the window.

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[48] Quoted from Dubin, Mens Rea *Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 Stan. L. Rev. 322, at 326 n.12 (1966).

[49] [1960] Sup. Ct. 871.

[50] *Id.* at 877.

[51] *Id.* at 890.

[52] *Id.* at 877. He said: "In considering the question of *mens rea*, a distinction is to be made between (i) intention as applied to acts considered in relation to their purposes and (ii) intention as applied to acts considered apart from their purposes. A general intent attending the commission of an act is, in some cases, the only intent required to constitute the crime while, in others, there must be, in addition to that general intent, a specific intent attending the purpose for the commission of the act."

[53] Hall, Principles at 76.

His reason for breaking the window, that is, hatred of *B*, is his motive. Thus, if all acts are directed toward the attainment of an end or purpose, they should not be considered apart from that purpose. Yet Mr. Justice Fauteux has suggested that intention as applied to acts can be considered apart from their purpose and that such intent is called general intent. By this analysis, he concludes that crimes like common assault are general intent crimes.

To test the validity of this analysis, let us examine a little closer the crime of common assault. Justice Fauteux has suggested that the necessary mental element in common assault is intention considered apart from the purpose of the acts. I suggest this is not so. *A* may hit *B* intentionally, but *A*'s purpose must be examined before he can be convicted for common assault. For example, if *A*'s purpose was to defend himself, there is no assault. Likewise, if *A* intentionally hit *B* for the purpose of knocking him off a railroad track, and thus preventing *B* from committing suicide, *A* is not guilty of common assault. However, if *A* hits *B* intentionally and *A*'s purpose for doing so reveals no excuse or justification, then *A* is guilty of a common assault. Thus intention as applied to acts should not be considered apart from their purpose because their purpose may reveal an excuse or justification for the intentional application of force.

Although I do not agree with the exact expression of Mr. Justice Fauteux's distinction between specific and general intent, he has given two examples of what he intended this distinction to mean. He has said that an intent to assault is a general intent, but the intent in theft is specific.[54] The requisite mental element in theft is "taking another's goods with intent to deprive, temporarily or absolutely." The difference between the intent in assault and the intent in theft seems to be that the acts constituting the assault need not be done with a particular purpose. *Any* purpose for intentionally applying force will suffice if it does not reveal an excuse or justification. However the acts constituting theft will suffice *only if* they are done for a purpose which includes an intent to deprive the owner temporarily or absolutely.

Mr. Justice Ritchie, in his expression of the distinction between specific and general intent,[55] seems to come closer to the analysis expressed above. Rather than consider intention as applied to acts *apart* from their purpose, he suggests considering intention as applied to acts done to achieve an immediate end in contrast to acts done with the specific and ulterior motive and intention of furthering or achieving an illegal object. Thus, for Mr. Justice Ritchie, general intent crimes are those crimes in which the acts are

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[54] *See* CRIM. CODE § 269(1)(*a*) which provides in part:
Every one commits theft who fraudulently and without colour of right takes, . . . with intent,
(*a*) to deprive, temporarily or absolutely, the owner . . . .

[55] *Supra* note 51. He said: "In considering the question of *mens rea*, a distinction is to be drawn between intention as applied to acts done to achieve an immediate end on the one hand and acts done with the specific and ulterior motive and intention of furthering or achieving an illegal object on the other hand."

intentionally done only for their immediate end. However, specific intent crimes are those crimes in which acts are done with the ulterior motive of achieving an illegal object which goes beyond the immediate end of the act. Mr. Justice Ritchie tries to elucidate this idea by saying that acts done with a specific intent "*are* the product of preconception and are deliberate steps taken towards an illegal goal." [56] He goes on to emphasize this point by saying that acts done with a general intent "*may* be the purely physical products of momentary passion . . . ." [57] Then relating all this to the situation in *George*, he suggests that "[a] man, far advanced in drink, *may* intentionally strike his fellow in the former sense [that is, not by accident or honest mistake] at a time when his mind is so befogged with liquor as to be unable to formulate a specific intent in the latter sense [that is, preconceived and deliberately directed to an illegal goal]." [58] All this tends to leave the impression that acts done with a general intent *cannot* be preconceived and done in deliberate steps. This is not true. Many acts, done with a general intent, are preconceived and performed in deliberate steps. A common assault may arise out of momentary passion or it may be preconceived. This is not the distinguishing element. The important point is that acts done with a specific intent go beyond the achievement of an immediate end to include the furthering or achieving of a special end or object. Although Mr. Justice Ritchie did not expressly say so, the achievement of this special end is an essential element expressed in the definition of the crime. [59]

Thus, *The Queen v. George* has distinguished specific and general intent. Although some criticism can be raised as to the verbal expression of this distinction, the courts intended meaning is made quite clear from the crimes illustrated. Common assault requires a general intent because the act of hitting, whether preconceived or not, goes only to the immediate end of injuring the victim. However, in robbery, the assault is done with the further intent of facilitating the theft, rather than simply injuring the victim.

Admittedly, there is a real distinction between what the Supreme Court of Canada calls specific intent and general intent. It is true that some acts are done with an immediate purpose while others are done with a further purpose. But the important question is whether this distinction is relevant. Does it serve a useful purpose in analysing individual crimes?

I respectfully submit the distinction is not necessary, and thus it should be abandoned. The real problem is to determine what intent is required for each different crime. In a general way, the requisite intent is an intent to

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[56] *Id.* (emphasis added).

[57] *Id.* (emphasis added).

[58] *Id.* (emphasis added).

[59] See CRIM. CODE § 24(1) ("intent to commit an offence"); § 35 ("intent to cause death or grievous bodily harm"); § 79(1)(*a*) ("intent to cause an explosion"); § 202(*a*) ("he means to cause bodily harm for the purpose of"); § 214 ("with intent that the child shall not live"). *See also* §§ 216, 218, 219, 232, 233, 269 and 288 as further examples of a "special end or purpose" being expressly included in the definition of a crime.

do the proscribed harm. But the proscribed harm is defined in the elements of the *actus reus*. Thus, "an intent to do all the essential elements of the *actus reus*" is the requisite intent of the different individual crimes. I have tried to show that one cannot intend the proscribed harm unless there is knowledge of the factual elements of the *actus reus*, realization of the causal connection between the act and the harm, and foresight of the consequences. Further, intent must go to *all* the essential elements of the *actus reus*, unless expressly stated otherwise. In such an analytical framework, the distinction between specific and general intent is irrelevant and unnecessary.

When a crime requires a specific intent, this intent is expressed in the definition of the crime.[60] The required mental element of such a crime is an intent to do all the essential elements of the *actus reus* plus the special or additional intent specifically expressed in the crime. The sum total of these intents equals an intent to do the proscribed harm. In robbery, the essential elements of the *actus reus* are an assault and a theft. Thus, the accused must intend to assault a person and intend to steal from him. But these intents by themselves are not sufficient to convict for robbery. The Criminal Code expressly requires a particular intent that goes beyond the immediate purposes of the individual acts. The assault must be done with the intent to steal.[61] Thus if *A* assaults *B*, knocking *B* to the ground and rendering him unconscious, and at the same time, *B*'s wallet accidentally falls out of his pocket and *A* decides to take it, he has not committed robbery. *A* had an intent to assault and an intent to steal. But the assault was not done *with an intent to steal* as the code specifically requires. *A* should be convicted of assault and theft, but not robbery.

Thus, in determining the essential intent for each crime, the Criminal Code sometimes assists by specifically expressing part of the requisite intent. This is done when the intent to do the essential elements of the *actus reus* will not be sufficient in themselves to constitute an intent to do the proscribed harm, as was illustrated in the case of robbery. When a specific intent is expressly stated in the definition of a crime, the question as to the necessary mental element of that crime is partially answered. To go on and say that this intent is a specific intent that goes beyond the intent to do the *actus reus* is only to state the obvious and in no way aids in determining the requisite mental element that is not expressed. The proper analysis of the problem is simply to state that the requisite mental element in different crimes is the intent to do the proscribed harm. This will necessarily include an intent to do all the essential elements of the *actus reus* as well as any other intent that may be included in the definition of the crime. The ethical basis for criminal liability is not whether the accused had a specific or general intent, but whether the accused intended the proscribed harm.[62]

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[60] *Supra* note 59.

[61] *See* CRIM. CODE § 288(*c*).

[62] Binavince, *The Ethical Foundation of Criminal Liability*, 33 FORDHAM L. REV. 1 (1964).

However, the distinction between specific and general intent seems to be too thoroughly ingrained in judicial decisions to be abandoned. Subject to two qualifications, I do not think that the distinction is harmful, though I feel it is unnecessary. The first qualification is with regard to the adjectives used to describe the two types of intents.[63] If acts are directed toward ends, as Professor Hall suggests, then all intentional acts are specific. In this sense, it is confusing to call certain intents specific and other intents general. The point the Supreme Court is making is that some acts must be done with an intent that goes beyond the immediate end for the acts. It is submitted that the words additional intent or ulterior intent convey this meaning better than the words specific intent.

The second qualification is the more important one. The essential question for determining criminal liability is not whether the accused had a specific or general intent, but whether the accused intended the proscribed harm. If a distinction is going to be made between specific and general intent, there should not be one set of rules that apply to specific intent and another set of rules that apply to general intent. However, this has occurred with regard to the defence of drunkenness, and the result is devastating. The question of criminal liability is no longer determined on the rational basis of whether the accused intended the proscribed harm but instead on an irrelevant distinction between specific and general intent.

In *Rex v. Beard*, Lord Birkenhead said drunkenness is only a defence if it renders the accused incapable of forming the specific intent essential to constitute the crime.[64] *The Queen v. George*, while giving a limited definition to specific intent, adopted the statement of Lord Birkenhead without comment or qualification.[65] The combination of these two cases has unduly limited the defence of drunkenness. I intend to discuss in some detail how this situation arose, to illustrate the effect it is having on certain cases and to advocate the establishment of the defence of drunkenness on grounds which are consistent with the basis of criminal liability.

V. Specific Intent and Drunkenness

The history of drunkenness[66] as a defence holds the key to understanding its present day scope. Prior to 1800, drunkenness was never considered

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[63] Most text writers have criticized the use of "specific" and "general" in describing intent. See HALL, PRINCIPLES at 142-44; WILLIAMS, CRIMINAL LAW at 49; Mueller, *On Common Law Mens Rea*, 42 MINNESOTA L. REV. 1043, at 1046 (1958); Beck and Parker, *The Intoxicated Offender—A Problem of Responsibility*, 44 CAN. B. REV. 563, at 580-87 (1966) [hereinafter cited Beck & Parker, *The Intoxicated Offender*]; Synowicki, Note, 2 OSGOODE HALL L.J. 231, at 235 (1961); Sommerville, Note, 22 U. TORONTO FAC. L. REV. 133, at 134-35 (1964).

[64] [1920] A.C. 479, at 501-02.

[65] [1960] Sup. Ct. 871, at 878-79 and 891.

[66] See Singh, *History of the Defence of Drunkenness in English Criminal Law*, 49 L.Q.R. 528 (1933).

a defence to crime;[67] in fact, it was sometimes considered an aggravation.[68] The first signs that voluntary drunkenness would be given some consideration appeared in the early nineteenth century.[69] However, it was not until *Rex v. Meakin*[70] in 1836 that drunkenness came to be considered in relation to its effect on intent. Drunkenness was considered again two years later in *Regina v. Cruse*[71] on a charge of assault with intent to murder. Mr. Justice Patteson directed the jury that although drunkenness is no excuse for crime, yet it is often of very great importance in cases where it is a question of intent and that a person may be so drunk as to be utterly unable to form any intention at all, and yet may be guilty of very great violence. However the uncertainty of any exact rule regarding drunkenness can be seen in *Regina v. Monkhouse.*[72] Mr. Justice Coleridge, referring to, but refusing to accept the exact wording of, Patteson's statement regarding drunkenness in *Cruse*, said the question is a more subtle one. He referred to drunkenness only as a partial answer that must be proved by the accused.[73] This case is of particular note because it is the first time that the words "specific intention" are used in a case on drunkenness. Although no definition of these words are given, it seems clear that Coleridge simply meant the particular intent expressed in the indictment.[74] In nearly all the cases in which drunkenness was raised, the crime charged included an expression of the particular intent required.[75] The courts held that if this intent was not present, then the crime was not proven, although they always reiterated the ancient doctrine that drunkenness does not excuse. Thus, absence, due to drunkenness, of

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[67] *Id.* at 536. *See also* Reniger v. Fogossa, 1 Plowdon 2, 75 Eng. Rep. 1 (K.B. 1551).

[68] *See* Beverley's Case, 4 Coke 123b, at 125a, 76 Eng. Rep. 1118, at 1123 (K.B. 1603).

[69] *See* Rennie's Case, 1 Lewin 76, 168 Eng. Rep. 965 (Sp. Assizes 1825); Marshall's Case, 1 Lewin 76, 168 Eng. Rep. 965 (Sum. Assizes 1830); Pearson's Case, 2 Lewin 144, 168 Eng. Rep. 1108 (Sp. Assizes 1835); Rex v. Thomas, 7 C. & P. 817, 173 Eng. Rep. 356 (Oxford Cir. Ct. 1837); *but see* Rex v. Carroll, 7 C. & P. 145, 173 Eng. Rep. 64 (Nisi Prius 1835).

[70] 7 C. & P. 297, 173 Eng. Rep. 131 (Nisi Prius 1836).

[71] 8 C. & P. 541, 173 Eng. Rep. 610 (Nisi Prius 1838).

[72] 4 Cox Crim. Cas. 55 (Central Crim. Ct. 1849).

[73] *Id.* at 56, where he states: "Drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention."

[74] *Id.* at 56. This is suggested by the words preceding the use of "specific intention" where Coleridge said: "So, if the defendant is proved to have been intoxicated, the question becomes a more subtle one; but it is of the same kind, namely, was he rendered by intoxication entirely incapable of forming *the intent* charged?" (Emphasis added).

[75] *See* the *Meakin* case, *supra* note 70, ("stabbing with intent to murder"); *Cruse, supra* note 71, ("inflicting an injury dangerous to life, with intent to murder"); *Monkhouse, supra* note 72, ("discharging a loaded pistol with intent to murder"); Rex v. Meade, [1909] 1 K.B. 895 (Ct. Crim. App.) ("assault with intent to cause death or grievous bodily harm").

an intent specifically set out in the charge allowed the courts to acquit on the basis that the crime was not proven without having to explicitly say that drunkenness excuses. The courts were trying to find a mitigatory rule regarding drunkenness, and thus, the negation of an intent specifically expressed in the indictment seemed to serve this purpose.

The concept of specific intention survived despite its lack of judicial reiteration for a number of years.[76] Mr. Justice Stephen in *Regina v. Doherty*[77] impliedly denounced restriction of drunkenness to specific intent crimes by attempting to relate drunkenness to criminal responsibility. Stephen said: "[B]ut although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering *whether he formed the intention necessary to constitute the crime.*"[78]

In 1909, the Court of Criminal Appeal in *Rex v. Meade*[79] summarized the authorities and concluded that the authorities expressed the doctrine that, *where intent is of the essence of the crime charged*, the intent may be disproved by showing the accused was so drunk he was incapable of forming the intent. In that case, the accused had brutally ill-treated the deceased woman, and she died as a result. The accused was charged with murder. If the accused intended to inflict serious bodily injury on the deceased, the crime was murder whether he intended to kill her or not. Thus, the court chose to state the rule in different terms.[80] Mr. Justice Darling was simply pointing out that foresight of consequences is an essential element of intent.[81] If a person is too drunk to foresee the consequences of his act, he cannot be said to intend those consequences. Mr. Justice Darling was illustrating one of the ways in which drunkenness could render the accused incapable of forming the necessary intent. *Meade* was followed in several cases[82] before the House of Lords handed down their decision in *Director of Public Prosecutions v. Beard*[83] which stated that the rule in *Meade* was too wide and limited the statement of the rule to the facts of that case. The law re-

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[76] See Beck & Parker, *The Intoxicated Offender* at 578-79.

[77] 16 Cox Crim. Cas. 306 (Nisi Prius 1887).

[78] *Id.* at 308 (emphasis added). *But see* J. STEPHEN, DIGEST OF THE CRIMINAL LAW 22 (5th ed. 1894) where he resorted to the use of the term "specific intention."

[79] [1909] 1 K.B. 895 (Ct. Crim. App.).

[80] *Id.* at 889-90.

> We desire to state the rule in the following terms: A man is taken to intend the natural consequences of his acts. This presumption may be rebutted —(1.) in the case of a sober man, in many ways: (2.) it may also be rebutted in the case of a man who is drunk, by shewing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, i.e., likely to inflict serious injury. If this be proved, the presumption that he intended to do grievous bodily harm is rebutted.

[81] See earlier discussion of that point in the text of this comment between notes 37 to 43.

[82] See Beck & Parker, *The Intoxicated Offender* at 579n.89.

[83] [1920] A.C. 479.

garding drunkenness in *Meade* had been stated in somewhat general terms, and as a result, it was widely interpreted as meaning that in any crime of violence, proof that the defendant was so drunk as not to realize his acts to be dangerous would relieve him from responsibility for them.[84] *Beard* tried to restrict *Meade* to cases where a specific intent is required.[85]

In *Director of Public Prosecutions v. Beard*, the House of Lords decided that a definite statement of the law regarding drunkenness was necessary. After a comprehensive review of the authorities, Lord Birkenhead stated three propositions regarding drunkenness.[86] It is the second proposition that has been most frequently cited and that is of interest at present. It states: "That evidence of drunkenness which renders the accused *incapable of forming the specific intent* essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent."[87] By these words, Lord Birkenhead restricted the defence of drunkenness to crimes that require a specific intent. Lord Birkenhead did not define specific intent, although he used it in seven different places[88] throughout his judgment. However, after considering the passage in *Regina v. Monkhouse* which first made reference to "specific intention,"[89] Lord Birkenhead illustrated what he understands as specific intention in the words: "Here again the appropriate question seemed to be whether the prisoner was so intoxicated as to be entirely incapable of forming *the intent charged*, that is, the intent to murder."[90] Thus, a specific intent, according to Lord Birkenhead, is that particular intent which is expressed in the indictment and which must be proved before the crime is complete. It has already been pointed out that most crimes of violence were set out in the indictment in such a way that a particular intent was required. However, Lord Birkenhead realized that sometimes a particular intent is not set out expressly in the indictment, but is implied in the crime itself. In *Meade*, the accused was charged with murder. Mr. Justice Stephen in *Regina v. Doherty* pointed out the intent for murder could be either an intent to murder or an intent to do grievous bodily harm.[91] In *Beard*, the accused was charged with murder but because of the murder felony rule, the only intent the Crown had to prove was an intent to rape, and if death ensued, then the accused was guilty of murder. But in *Meade*, it was necessary to show that death arose from violence done with intent to cause grievous bodily harm. Thus Lord Birkenhead said: "In *Meade*'s case, therefore, it was essential to prove

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[84] *See id* at 503.
[85] *See id.* at 504. *See also* Note, 34 HARV. L. REV. 78, at 80n.14 (1920).
[86] *Supra* note 84, at 500-02.
[87] *Id.* at 501-02 (emphasis added).
[88] *Id.* at 498, 499, 500, 501 and 504.
[89] *Supra* note 72.
[90] [1920] A.C. at 498 (emphasis added).
[91] 16 Cox Crim. Cas. at 307. He states: "What, then, is the intention necessary to constitute murder? Several intentions would have this effect; but I need mention only two in this case, namely, an intention to kill and an intention to do grievous bodily harm."

the specific intent [that is, wounding with intent to do grievous bodily harm or with intent to kill]; in *Beard*'s case it was only necessary to prove that the violent act causing death was done in furtherance of the felony of rape." [92]

In this manner, Lord Birkenhead illustrated that drunkenness can negate a specific intent, and I interpret that to mean a particular intent, when that intent is expressed in the indictment or implied in the crime, as it is in the case of murder. What Lord Birkenhead was indicating is that, *when intent is of the essence of a crime*, evidence of drunkenness is admissible to show the accused did not have that intent. It is true that he formulated his second proposition in terms of specific intent, but this is not surprising in light of the English practice of specifically setting out the requisite intent in the indictment. Lord Birkenhead shows the true import of his proposition when, right after discussing *Meade*, he says:

> I do not think that the proposition of law deduced from these earlier cases is *an exceptional rule applicable only to cases in which it is necessary to prove a specific intent* in order to constitute the graver crime—e.g., wounding with intent to do grievous bodily harm or with intent to kill. It is true that in such cases the specific intent must be proved to constitute the particular crime, but this is, on ultimate analysis, only in accordance with the ordinary law applicable to crime, for, speaking generally (and apart from certain special offences), *a person cannot be convicted of a crime unless the mens was rea.* Drunkenness, rendering a person incapable of the intent, would be an answer, as it is for example in a charge of attempted suicide. In *Reg. v. Moore* drunkenness was held to negative the intent in such a case, and Jervis C.J. said: "If the person was so drunk as not to know what she was about, how can you say that she intended to destroy herself?" [93]

Such a statement of the proposition seems to be in perfect accord with the first revered maxim of criminal law, *actus non facit reum, nisi mens sit rea.* As Lord Birkenhead pointed out, except for a few special offences which can be committed negligently or strictly, the accused cannot be convicted unless the intent accompanied the act; that is the *mens* was *rea.* If the accused was so drunk that he did not intend the proscribed harm, then it is only in accordance with the fundamental principles of criminal liability that he be acquitted of the crime charged. Whether he should be convicted of a separate offence called drunkenness or an aggravated offence of disorderly conduct is another question. [94] When intent is of the essence of a crime and the accused does not have that intent due to his drunkenness, it is both logical and consistent with the ethical foundations of criminal liability that the accused not be punished for that crime. However, it is highly illogical and plainly inconsistent with these principles that an accused be punished for an act done in a drunken stupor in one case and exempt from punishment in another case simply because the ambivalent flow of a pen happened to

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[92] [1920] A.C. at 504.

[93] *Id.* at 504 (emphasis added).

[94] See HALL, PRINCIPLES 552-57; Beck & Parker, *The Intoxicated Offender* at 607-09.

specifically include the necessary mental element in the definition of one crime and not in another.

The apparent soundness of Lord Birkenhead's wider statement, however, was strongly attacked by commentators.[95] It was even referred to as "rank heresy" by one commentator.[96] It has been suggested that the wider principle of *Beard* was so effectively attacked that it has never been judicially followed, and that as a result, the rule restricting drunkenness to specific intent crimes has become firmly embedded in the criminal law.[97] This may well be so, but since all the later English cases that applied *Beard* were cases that required a specific intent,[98] there was no reason to adopt the wider rule. However, whatever the reason may be, the wider statement of the law in *Beard* has never been expressly followed in England. Thus, although it has never been expressly denied, the continual reiteration of the narrower specific intent rule appears to have established it as the only proper rule. However, it is submitted that this is not a rational basis for limiting the scope of drunkenness; the narrower rule in *Beard* should be abandoned and the wider rule adopted.

In *MacAskill v. The King*,[99] the Supreme Court of Canada expressly adopted the last two propositions of Lord Birkenhead as the rules of law governing the defence of drunkenness in Canada. Thus, Canadian courts tacitly adopted the narrower statement of the law without giving any indication that a wider, more rational statement had also been expressed in *Beard*. I submit the reason, again, was that the Canadian cases applying *Beard* were all cases in which a specific intent was an essential element.[100] Thus, the

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[95] Singh, *History of the Defence of Drunkenness in English Criminal Law*, 49 L.Q.R. 528, at 544-45 (1933); Stroud, *Constructive Murder and Drunkenness*, 36 L.Q.R. 268, at 270-73 (1920); Note, 34 HARV. L. REV. 78, at 80 (1920).

[96] Note, 34 HARV. L. REV. at 80.

[97] See Beck & Parker, *The Intoxicated Offender* at 583.

[98] *See* Rex v. Betts, 144 L.T.R. (n.s.) 526 (Ct. Crim. App. 1930); R. v. Stone, [1937] 3 All E.R. 920 (Ct. Crim. App.); R. v. Jarmain, [1945] 2 All E.R. 613 (Ct. Crim. App.); Ruse v. Read, [1949] 1 K.B. 377; R. v. McCarthy, [1954] 2 All E.R. 262 (Ct. Crim. App.).

[99] [1931] Sup. Ct. 330, at 332, 55 Can. Crim. Cas. Ann. 81, at 82. However, if the opportunity of challenging the specific intent rule ever arises, it is hoped that defence counsel will at least argue that when the Supreme Court of Canada adopted the words of Lord Birkenhead in *Beard* as the rules governing drunkenness, it necessarily adopted the meaning assigned to those words by Lord Birkenhead. Lord Birkenhead, in what has been referred to as the wider rule, said that he did not intend these words to be "an exceptional rule applicable only to cases in which it is necessary to prove a specific intent." *See supra* note 93 and the text accompanying that note. Therefore, it could be argued that the Supreme Court, when adopting Lord Birkenhead's rule, likewise did not intend those words to be an exceptional rule applicable only to specific intent crimes.

[100] The King v. Spellman, 49 N.B. 200, 37 Can. Crim. Cas. Ann. 390 (1921) ("intent to kill"); MacAskill v. The King, [1931] Sup. Ct. 330 ("intent to kill or intent to cause grievous bodily harm"); Rex v. Martin, [1947] 1 W.W.R. 721, 88 Can. Crim. Cas. Ann. 314 (Alta. Sup. Ct.) ("shoot with intent to cause grievous bodily harm"); Taylor v. The King, [1947] Sup. Ct. 462, 89 Can. Crim. Cas. Ann. 209 ("intent to murder"); Rex v. McLaren, [1949] 1 W.W.R. 529, 93 Can. Crim. Cas. Ann. 296 (Alta.) ("intent to do grievous bodily harm during the commission of an offence"); Malanik v. The

narrower statement in *Beard* was sufficient. However, the Courts have never seemed to put any special stress on the fact that the proposition only applies to specific intent crimes. The only Canadian case in which *Beard* was applied when the intent was not specific, went unnoticed.[101] In *Rex v. Hand*, the accused pleaded guilty before a police magistrate to unlawfully having carnal knowledge of a four year old girl contrary to section 301 of the Criminal Code.[102] The accused then appealed to the British Columbia Court of Appeal to have his conviction quashed on the ground that his plea of guilty was made without any clear understanding of the effect of the plea. In allowing the appeal and ordering a new trial, Mr. Justice Bird said: "[E]vidence could have been led on his trial to show that due to drunkenness the accused, at and subsequent to the time of the alleged commission of the offence, had no knowledge of the incidents upon which the charge is founded, nor had he the capacity *to form an intent* if he did commit the assault—*Director of Public Prosecutions v. Beard*, [1920] A.C. 479, at p. 504."[103] The intent that Mr. Justice Bird is referring to is an "intent to have carnal knowledge." This is not a specific intent, but rather a general intent. The acts are directed to their immediate end, not a further ulterior end. However, Bird does not make any special note of the fact that this intent is general. It would seem, however, that he realized this because he refers to *Beard* at page 504 where the wider statement is given, and not at page 501-02 where the narrower specific intent rule is given. However, Mr. Justice Bird in no way suggests or intimates that he has done anything out of the ordinary by applying *Beard* at page 504. But what in fact he has done is adopt the wider principle in *Beard* for the first time in Canada. It is amazing that this adoption has gone unnoticed in light of the fact that *Rex v. Hand* has been explained and considered in several subsequent cases.[104]

However, the fatal blow to the adoption of the wider rule in *Beard*

Queen (No. 3), [1952] 2 Sup. Ct. 335, 103 Can. Crim. Cas. Ann. 1 ("intent to kill"); Regina v. Giannotti, [1956] 1 Ont. 349, 115 Can. Crim. Cas. Ann. 203 ("intent to kill").

[101] Rex v. Hand, 62 B.C. 359, [1946] 1 W.W.R. 421, [1946] 3 D.L.R. 128, 85 Can. Crim. Cas. Ann. 388.

[102] CAN. REV. STAT. c. 36 (1927). This is, in substance, the same as § 138 of the present Code.

[103] *Supra* note 101, at 360, [1946] 1 W.W.R. at 422, [1946] 3 D.L.R. at 129, 85 Can. Crim. Cas. Ann. at 389 (emphasis added).

[104] *See* Rex v. Milina, 62 B.C. 532, 86 Can. Crim. Cas. Ann. 374 (1946); Rex v. H. & H., [1947] 1 W.W.R. 49 (B.C. Sup. Ct. 1946); Rex v. Gordon, 3 Can. Crim. 26 (B.C. 1947); Rex v. Belton, [1947] 2 W.W.R. 241, 89 Can. Crim. Cas. Ann. 356 (B.C.); Regina v. Kennedy, 117 Can. Crim. Cas. Ann. 117 (B.C. 1956); Regina v. Pace, 50 Mar. Prov. 301, 48 D.L.R.2d 532 (N.S. Sup. Ct. 1964). All these cases considered Rex v. Hand in relation to the duty of a judge or magistrate in accepting a plea of guilty, but none seemed to notice, or at least mention, the relevance of Mr. Justice Bird's reference to *Beard* at page 504. See also TREMEEAR'S ANNOTATED CRIMINAL CODE 71-72 (6th ed. L. Ryan 1964) and CRANKSHAW'S CRIMINAL CODE OF CANADA 836-38 (7th ed. A. Popple 1959). Neither text mentioned Rex v. Hand in discussing the law of drunkenness in Canada. It is also interesting to note that the British Columbia Court of Appeal in Regina v. Resener either overlooked or ignored Justice Bird's statement in Rex v. Hand, a judgment of their very own court.

may well have been served by the unfortunate decision of *The Queen v. George.* As has been indicated, both Mr. Justice Fauteux and Mr. Justice Ritchie gave a fairly limited definition to the concept of specific intent. The decision is unfortunate because both judges, immediately after defining and limiting specific intention, quoted the second proposition in *Beard* (which restricts drunkenness to specific intent crimes) as the law in Canada without qualifying or commenting on that proposition.[105] By so doing, the Supreme Court of Canada has assumed, at least by implication, that the specific intent referred to in *Beard* has the same meaning as the definition of specific intent given in *The Queen v. George.*

However, manifestly, this is not the case. It has already been shown that Lord Birkenhead used the term specific intent to mean "the intent charged,"[106] that is, the intent expressed in the indictment. However, since it was common practice in England to specifically state the requisite intent in the indictment, the use of "specific" in this way did not have the effect of severely limiting the defence of drunkenness. Even so, Lord Birkenhead went on to say that this was not an exceptional rule and that, where the intent was not specifically set out, as in the case of attempted suicide, drunkenness could still negate that intent provided that it was an essential element of the crime.

In Canada, the Criminal Code does not usually include the requisite intent in the definition of a crime. Generally, the Code only includes the requisite intent when it is an intent that goes beyond, or is in addition to, the intent to commit the *actus reus.*[107] In other words, the Code only specifies the requisite intent when it is an additional or ulterior intent, that is, an intent that goes beyond the immediate purpose for the acts. Consequently, the meaning of specific intent in *The Queen v. George* is much more restricted than the meaning Lord Birkenhead assigned to specific intent in *Beard.* The net effect is that the defence of drunkenness has been drastically limited. As the law stands today, if a crime does not require a specific intent as defined in *The Queen v. George,* then drunkenness is no defence. Three startling examples of the undesirability of such a state of the law have occurred since *George.*

In *Regina v. Vandervoort,*[108] the accused was convicted of rape. The trial judge refused to allow the jury to consider evidence of the accused's drunkenness. He said: "Gentlemen, drunkenness is no defence in this case. That defence is not open to him in this particular trial."[109] Mr. Justice Aylesworth, in allowing the appeal and ordering a new trial, said: "It is clear that one of the essential elements demanding proof in a charge of rape is a *specific* intention by the accused to have intercourse without the woman's consent."[110] Aylesworth said that if the accused was too drunk

[105] [1960] Sup. Ct. at 878-79 and 891.
[106] *See* the text accompanying note 91.
[107] *See* note 59.
[108] [1961] Ont. W.N. 141, 130 Can. Crim. Cas. Ann. 158.
[109] *Id.* at 141, 130 Can. Crim. Cas. Ann. at 161.
[110] *Id.* at 142, 130 Can. Crim. Cas. Ann. at 162 (emphasis added).

to know the woman was not consenting, then he did not have the specific intent and thus, he should be acquitted.

It is submitted that the Court of Appeal was correct in saying that the accused must know that the woman was not consenting. Rape, by definition,[111] is sexual intercourse without the woman's consent. Knowledge that the woman is not consenting distinguishes an act of intercourse of any other nature from an act of rape. Thus, an intent to rape is an intent "to have intercourse without the woman's consent." But, is this intent general or specific?

The Ontario Court of Appeal has said that it is specific. The court cited *The Queen v. George* as authority for this conclusion. Mr. Justice Aylesworth quoted the distinction drawn by Mr. Justice Fauteux [112] and Mr. Justice Ritchie. [113] However, he ignored the substance of the distinction and relied solely on one sentence of Mr. Justice Ritchie's elucidation of that distinction. [114] I have already pointed out that this sentence is misleading. [115] Thus, the Ontario Court of Appeal ingeniously applied *George* in such a manner as to come up with the conclusion that the intent to rape is specific. I cannot agree with this conclusion. In rape, the act of intercourse is done to achieve an immediate end—the gratification of sexual desires—and not with an ulterior intent of furthering or achieving an illegal object. In robbery, the assault is done with the ulterior intent of furthering the act of theft. But in rape, the intercourse is done with no such ulterior intent. The definition of rape does not include any words such as "with intent to" or "for the purpose of" as in the cases of other specific intent crimes. It seems clear that if the Ontario Court of Appeal had applied the substance of the distinction made in *The Queen v. George*, they would have had to conclude that the intent to rape is a general intent. This would have forced the court either to convict, since drunkenness is only a defence to a specific intent crime, or to discard the specific intent rule and accept the wider statement of the law in *Beard*. Unfortunately, Mr. Justice Aylesworth avoided the issue by mistakenly concluding, on the basis of *The Queen v. George*, that the intent to rape is specific. [116]

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[111] *See* CRIM. CODE § 135.

[112] [1960] Sup. Ct. at 877.

[113] *Id.* at 890.

[114] *Supra* note 108, at 144, 130 Can. Crim. Cas. Ann. at 164. Mr. Justice Aylesworth quoted and relied upon the following statement of Justice Ritchie in The Queen v. George: "A man far advanced in drink may intentionally strike his fellow in the former sense at a time when his mind is so befogged with liquor as to be unable to formulate a specific intent in the latter sense."

[115] *See* the text following note 58.

[116] [1961] Ont. W.N. at 143, 130 Can. Crim. Cas. Ann. at 163. Paradoxically, Mr. Justice Aylesworth quoted a passage in *Beard* which suggested that drunkenness can negate an intent to rape. He goes on to say that "rape imports a specific intent . . . ." *Id.* at 143, 130 Can. Crim. Cas. Ann. at 163. But he failed to note that the passage in *Beard* was directly after the wider statement and was an attempt to show that even when *an intent is not specifically charged*, it can be negated by drunkenness as long as intent is of the essence of rape.

In *Regina v. Boucher*,[117] the accused was convicted of attempted rape. He appealed to the British Columbia Court of Appeal contending that the trial judge erred in failing to submit to the jury the question of his being so drunk that he did not know that the complainant was withholding her consent. The court held that such direction was properly omitted and dismissed the appeal.

Mr. Justice Sheppard said that the definition of rape precludes the question of drunkenness being raised to show the accused did not realize the woman was withholding her consent.[118] In other words, knowledge on the part of the accused that the woman did not consent is not an essential element. I cannot agree with this conclusion. I have tried to point out that the intent to rape includes knowledge that the woman has not consented; otherwise, there is only an intent to engage in intercourse, not rape. Then Mr. Justice Sheppard drew an analogy between *The Queen v. George* and the present case. He said that in *George* the intent to assault could be presumed from the accused's acts, and thus the intent to rape may be presumed from the accused's act of forced coition.[119] However, this conclusion ignores the fact that intercourse is often consented to, where assault is seldom, if ever, consented to. Thus, the intent to rape cannot necessarily be presumed from the accused's acts.[120] Sheppard then extended this argument to show that the intent to rape is not specific. He said: "Hence, rape is not one of those offences requiring a specific intent. Specific intent arises when the accused is charged with an offence having as a constituent thereof an intent beyond that intent to be presumed from what the accused did."[121] I do not think *George* based the distinction between specific and general intent solely on whether the intent can be presumed from the act done. The dlistinction seems to be whether the act was done for an immediate purpose or with an ulterior intent.

Mr. Justice Wilson defined the issue as "whether or not the crime considered involved a specific intent or only a general intent...."[122] He then said: "Quite simply, I cannot find that it does. The intent to apply force by coition seems to me to be as general and unspecific an intent as the intent to apply force by beating dealt with in the *George* case."[123] If this means that the intent to rape, like the intent to assault, is directed towards its immediate end rather than the achieving of a further end, then I must agree with the conclusion that the intent to rape is general. Having established that the intent to rape is general, Mr. Justice Wilson then relied on the *The Queen v. George* when he said: "[W]here no specific intent is involved, as in an

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[117] 40 W.W.R. (n.s.) 663, [1963] 2 Can. Crim. Cas. Ann. (n.s.) 241 (B.C. 1962).
[118] *Id.* at 672, [1963] 2 Can. Crim. Cas. Ann. (n.s.) at 250-51.
[119] *Id.* at 675, [1963] 2 Can. Crim. Cas. Ann. (n.s.) at 254.
[120] *See* R. v. Hornbuckle, [1945] Vict. L.R. 281, at 287. *See also* Somerville, Note, 22 U. TORONTO FAC. L. REV. at 136.
[121] *Supra* note 119.
[122] 40 W.W.R. (n.s.) at 686, [1963] 2 Can. Crim. Cas. Ann. (n.s.) at 266.
[123] *Id.*

assault, a man cannot rebut the presumption that he intended the act of violence he has been proved to have done by seeking to establish that he was too drunk to be able to form an intent to do it. Similarly in rape, when the violation of the woman is proved, the accused cannot be heard to say that he was too drunk to form the intent to do that which he has done."[124] I do not think Mr. Justice Wilson had to refer to the defence of drunkenness in terms of inability to rebut the presumption of intent. Quite simply, all that he need have said is that this intent is general, and on the basis of *Beard*, as adopted in Canada, drunkenness is no defence to a general intent crime. This is the law. The intent to rape is general; therefore, drunkenness can never negate this intent. Thus, the decision in *Boucher* is supported by law; the decision in *Vandervoort* is not. To achieve the desirable solution arrived at in *Vandervoort*, a court will have to discard the specific intent rule and accept the wider statement in *Beard*.

In *Regina v. Resener*, the Court of Appeal held that drunkenness is not a defence to indecent assault. Mr. Justice Davey defined the issue as "whether a specific intent to act indecently is an essential ingredient of indecent assault." [125] The court concluded that it is not, and thereby committed two errors. The first has been discussed in some detail. [126] *Rex v. Louie Chong* and the interpretation of section 141 of the Criminal Code do not support the conclusion that an intent to assault indecently is not an essential element. This conclusion is in violation of the first principle of a rational notion of intention: *intent must go to all essential elements of a crime unless expressly stated otherwise.* Secondly, all the judges, except Mr. Justice Branca, [127] referred to the intent to assault indecently as a specific intent. This is aptly illustrated in the words of Mr. Justice Davey quoted above in defining the issue in the case. However, I have already indicated that an intent to assault and an intent to assault indecently are both general intents according to *The Queen v. George* since they are done only for their immediate end. Thus, the Court of Appeal need only have said an intent to assault indecently is a general intent, and thus, drunkenness cannot negate this general intent. In my opinion, such a state of the law is undesirable because it overlooks the essential question of whether or not the accused intended the proscribed harm although, unfortunately, it is a proper application of the law as it exists today.

A final example of the undesirability of the specific intent rule regarding drunkenness can be seen by an examination of *Regina v. McLeod*. In that case, the Court of Appeal held that *mens rea* is an essential element of the offence of assaulting a peace officer while engaged in the execution of his duty. [128] Thus, the court concluded that knowledge by the accused that the victim is a peace officer is an essential ingredient of the offence. Mr.

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[124] *Id.* at 687, [1963] 2 Can. Crim. Cas. Ann. (n.s.) at 267.
[125] 64 W.W.R. (n.s.) 257, at 259 (B.C. 1968).
[126] See earlier discussion of this point between notes 10 to 12.
[127] *Supra* note 125, at 275.
[128] 14 W.W.R. (n.s.) 97, at 106-07 (B.C. 1954).

Justice Davey did not say this crime required a specific intent, but he did say that it required "specific knowledge"[129] that the victim was a peace officer. McLeod's mistake of fact, which resulted in his lack of this "specific knowledge," negated the necessary intent.

If McLeod's lack of knowledge that the victim was a police officer had arisen as a result of drunkenness, then likewise he would have had no intent to assault a police officer. However, the "intent to assault a peace officer" is a general intent since it is only directed to the immediate end of injuring a peace officer. This offence does not require a specific intent, that is, "to assault a police officer for the purpose of, or with intent to, achieve a further object." Thus, according to the specific intent rule in *Beard*, drunkenness is no defence. McLeod would have to be convicted, although the Court of Appeal has said that *mens rea* is an essential element and that the accused did not have the necessary *mens rea*.

It is submitted that all these cases show that the present limitation of the defence of drunkenness to specific intent crimes is appalling and untenable. In *Beard*, specific intent simply referred to the intent specifically set out in the indictment. Glanville Williams has pointed out there is no substantive difference between an intent specifically mentioned and one implied in the name of a crime.[130] Thus, the same substantive rules should apply to both intents. In *The Queen v. George*, the Supreme Court of Canada reserved the term "specific intent" to describe those intents that go beyond the immediate end for a particular act and are done with an ulterior or additional intent of achieving an illegal object. It is readily conceded that the mental process required to form a so-called specific intent may be much more complicated than that required to form certain general intents. Thus, drunkenness might quite easily prevent a person from forming a specific intent, whereas the same degree of drunkenness might not prevent the accused from forming a general intent. The best example of this is given in *The Queen v. George*. Admittedly, a person would have difficulty contending he was so drunk that he did not intend to assault another if it has been proven that he actually hit that person.[131] However, this is no reason for entirely excluding the defence of drunkenness in the case of general intent crimes. When intent is of the essence of the crime, the accused should not be convicted for *that* crime if he was so drunk that he did not actually have the necessary intent. The restriction of drunkenness to specific intent crimes is in opposition to any rational and ethical foundation of criminal liability.

What I am advocating is that drunkenness should be recognized as a

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[129] *Id.* at 110.

[130] WILLIAMS, CRIMINAL LAW at 49.

[131] However, such a situation is not entirely inconceivable. A man could be so drunk that he did not realize he was assaulting another person if, for example, he mistook the man for a tree or even a ghost. Likewise a man could be so drunk that he only intended to tap a person on the shoulder to get his attention, but not realizing his own strength and missing the man's shoulder, he quite violently hit the person in the face.

defence in the case of all intentional crimes, not simply specific intent crimes. Since there is no substantial difference between specific and general intent, the principles of justification for recognition of the defence of drunkenness with regard to specific intent should be equally valid for recognition of the defence of drunkenness with regard to general intent. The real problem is that the courts seem to have misunderstood the actual basis for the defence of drunkenness. Perhaps the use of the term "defence" has been partly to blame for the misunderstanding. Drunkenness is not actually a defence; the term "defence" has only been used in this article as a matter of convenience. Drunkenness is simply one possible cause of a mistake of fact, and a mistake of fact is not properly classified as a "defence" in the same way that self-defence and defence of third person are defences. Although mistake of fact is not, technically, a defence, courts have recognized for many decades that a mistake of fact may negate the requisite intent for any given crime. Since an essential element of the crime is missing (*i.e.*, intent), the accused can not be convicted for an intentional crime. Of course, mistake of fact is of no relevance in negligent crimes since all crimes of negligence necessarily involve a mistake or error. However, that aside, the point is that where a relevant mistake of fact exists, the accused's exculpation is not based on the fact that the accused has a defence or legal justification, but rather on the fact that an essential element of the crime (*i.e.*, intent) has not been proven. This is what the courts early in the nineteenth century were getting at when they continually reiterated that drunkenness is no excuse for crime and yet acquitted the accused on the basis that the crime as charged had not been proven. [132]

When mistake of fact negates the requisite intent, courts quite readily acquit the accused of the crime charged. There is no discussion of whether the requisite intent is specific or general. Likewise, when drunkenness causes a mistake of fact which negates the requisite intent, courts should acquit the accused of the crime charged regardless of whether that crime requires a specific or general intent. When a mistake of fact negates the requisite intent, the complete crime has not been proven regardless of whether the mistake was made by a drunk or a sober man. "Drunkenness is no excuse, but the crime as charged has not been proven!" What bothers all fair and just men is the fact that a drunk man is acquitted, yet in the eyes of the public, he is more blameworthy than the sober man who makes a reasonable mistake. I do not dispute the obvious difference in culpability between the drunk and sober man. However, I strenuously suggest that it is not the courts' duty to initiate a policy of punishing drunk men by convicting them of intentional crimes when no intent exists. Alternative methods of effecting this policy must be found. Courts should consider the possibility of conviction for criminal negligence causing bodily harm. If no negligent crime is applicable in an individual case, the accused must be acquitted. If Parliament does not agree with such acquittals, they have legislative power

[132] See the text following note 75.

to create a new offence of "drunkenness causing harm" or declare that the negligent commission of what are now "intentional crimes" shall henceforth be offences themselves.

One further point on the defence of drunkenness should be noted, that is, the proper direction to a jury. Once it is recognized that drunkenness is actually only the basis of a mistake of fact, then it is readily perceivable that drunkenness should negate any intent just as mistake of fact negates any intent. In this respect, the important question for the jury to decide is whether or not the accused intended the proscribed harm. In other words, did the accused's drunkenness cause him to make a mistake of fact which negates the necessary intent. However, the statement of the rule in *Beard* [133] has been interpreted as putting the question in the form of whether the accused had the *ability* to form the intent.[134] This is not the relevant question. The accused's liability should not be based on whether he had the *ability* to form the required intent, but rather, whether he *actually did* form the required intent. This was pointed out as early as 1955 in the following terms:

> Often in cases where a crime involving specific intent is at issue, the rule as to the effect of intoxication is framed in terms of mental capacity to form the intent rather than in terms of whether the requisite state of mind was actually present. It appears that a significant difference in result will occur depending upon which formulation a court uses. Since the degree of intoxication which would render a person mentally incapable of entertaining the requisite intent is unlikely to be short of that which renders him unconscious, if the jury were to follow such an instruction literally, it is doubtful that intoxication could ever be a defense. [135]

Section 35(4) of the Criminal Code of Malta is of interest in two respects. It accepts the defence of drunkenness for either specific or general intent crimes, the very position which I have throughout advocated. Further, it adopts the test as to whether the accused *formed* the requisite intent rather than whether he was *capable* of forming the necessary intent. It reads as follows:

> (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence. [136]

In *Broadhurst v. The Queen*, [137] the Privy Council dealt with section 35(4)

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[133] [1920] A.C. at 501-02. Lord Birkenhead said:

2. That evidence of drunkenness which renders the accused *incapable of forming the specific intent* essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent. (Emphasis added).

[134] *See* Malanik v. The Queen (No. 3), [1952] 2 Sup. Ct. 335; Capson v. The Queen, [1953] 1 Sup. Ct. 44 (1952); Regina v. Reece, [1954] Ont. 503; Regina v. Hilson, [1958] Ont. 665; Rex v. Hornbuckle, [1945] Vict. L.R. 281; Regina v. Vandervoort, [1961] Ont. W.N. 141; Regina v. Boucher, 40 W.W.R. (n.s.) 663 (B.C. 1962).

[135] Note, 55 COLUM. L. REV. 1210, at 1214 (1955) (footnotes omitted).

[136] CRIM. CODE OF MALTA § 35 (4).

[137] [1964] A.C. 441 (P.C. 1963).

of the Criminal Code of Malta, and as a result, Lord Devlin recognized the test that enquires into the accused's actual intent rather than his *incapability* of intending.[138] However, the test illustrated in *Broadhurst v. The Queen* seems to have been ignored in Canada. For example, the old test of "capability" was applied by the Saskatchewan Court of Appeal in the recent case of *Regina v. Hartridge*[139] in the following words: "As to drunkenness, the learned trial judge should have instructed the jury that if, on the evidence, they believe the mind of the appellant was so affected by alcohol as to render him *incapable of forming the specific intent* essential to the crime of murder, or had a reasonable doubt as to his capacity to form such an intent, then their verdict would be not guilty of murder but guilty of manslaughter."[140] However, there seems to be some small hope that the proper test will be adopted in the future as a result of the more recent case of *Regina v. Vandooren*[141] in which Mr. Justice Tysoe, for the entire British Columbia Court of Appeal, said: "If the evidence in this regard, [that is, evidence of drunkenness] considered with the other evidence, raised a reasonable doubt in the mind of the Magistrate *that the appellant had the purpose mentioned* in the *code* section, the appellant would be entitled to be acquitted."[142] Mr. Justice Tysoe has apparently adopted the test which enquires into whether the accused *actually formed the intent.* However, he does not expressly say he is accepting one test and rejecting another. In fact, immediately preceding the above statement, he speaks as if the "capability" test is the proper one. This leads the author to believe that the "actual intent" test was expressed inadvertently by Mr. Justice Tysoe. One can only wait for future cases to see if it will be applied. I fear it will not.[143]

VI. CONCLUSION

The specific intent rationale was initiated to mitigate the ancient doctrine that drunkenness is no excuse for crime. It crudely served its purpose when most crimes were defined in terms of the requisite mental element. But today, especially in light of the restricted meaning given specific intent in *The Queen v. George*, the distinction can no longer form the boundaries for the defence of drunkenness. Its continuation is seriously undermining the moral and ethical foundations of criminal liability in some cases,[144] and

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[138] For an excellent view on exactly what the *Broadhurst* case should stand for, *see* Beck & Parker, *The Intoxicated Offender* at 602n.191.

[139] 56 W.W.R. (n.s.) 385 (Sask. 1966). For further examples of this old test, see the cases of *Resener, Boucher,* and *Vandervoort.*

[140] *Id.* at 409 (emphasis added).

[141] [1969] 4 Can. Crim. Cas. Ann. (n.s.) 217 (B.C.).

[142] *Id.* at 220-21 (emphasis added).

[143] *But see* Laskin, J., (dissenting) in Perrault v. Reginam, 74 W.W.R. (n.s.) 607, at 615-16 (Sup. Ct. 1970).

[144] *See Boucher,* 40 W.W.R. (n.s.) 663, [1963] 2 Can. Crim. Cas. Ann. (n.s.) 241, where the accused did not intend rape, yet was convicted, and *Resener,* 64 W.W.R. (n.s.) 257 (B.C. 1968), where the accused did not intend an indecent assault, yet was convicted.

requiring courts of necessity to confuse and twist the notion of intention in order to do justice in other cases.[145] The proper solution to this problem is twofold. First, the courts must develop and define the notion of intention on a rational basis as well as unequivocally state that intention applies to all essential elements in the definition of the crime unless otherwise stated.[146] Second, the courts must adopt the wider statement of the law regarding drunkenness as expressed in *Beard*.[147] When intent is of the essence of a crime, evidence of drunkenness should be admissible to show the accused's intent did not go to all essential elements of that crime; that is, that the accused was so drunk that he did not have knowledge of *all* the relevant factual elements, or foresee the consequences, or realize that this act caused that harm. So stated, this simply means that the accused was so drunk that he *did not intend the proscribed harm.* Surely this should be the ultimate basis for determining an inebriate's criminal responsibility for the actual crime he has committed.

Once it is recognized that drunkenness is simply the basis of a mistake of fact, there should be no opposition to it being recognized as a defence to all intentional crimes. The fact that the person voluntarily consumed alcohol may indicate negligence on his part and render him liable to conviction for criminal negligence causing bodily harm. Perhaps also the legislature should seriously consider the formation of a new offence—drunkenness resulting in harm—with a wide flexibility in sentencing power in order to deal with the various types of harms and different circumstances involved in each offence. However, it is not the courts' duty, in the meantime, to continue convicting persons for intentional crimes when the accused, due to his drunkenness, did not have the requisite intent. Perhaps rightly so, the courts feel that such drunken behaviour is reprehensible and must not go unpunished. But if no adequate alternative charge exists in negligence, it is the courts' duty to acquit and wait for the establishment of an alternative offence by the legislature rather than convict the accused for an offence which the legislature has clearly deemed as "intentional."

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[145] In *Vandervoort*, [1961] Ont. W.N. 141, 130 Can. Crim. Cas. Ann. 158, the court was forced to conclude that the intent to rape is specific in order to allow the accused to show that he was too drunk to have the intent to rape.

[146] Thus, in Regina v. Resener, the court should have held that intention applies to all the elements of an indecent assault—and therefore the element of indecency—instead of saying it is the circumstances, and not the state of mind of the actor, that make an assault indecent.

[147] For those more "timorous souls" who are wary of increasing the scope of the defence of drunkenness, it should be noted that the adoption of the wider rule will not result in a landslide of acquittals. The standard of proof will be the same. The only change will be the removal of an artificial restriction of the defence of drunkenness to specific intent crimes and the substitution therefore of a principle which is consistent with the ultimate basis of criminal liability, namely, whether the accused intended the proscribed harm.