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“Intoxication in Criminal Law – An Analysis of the Practical Implications of the
Ivey v Genting Casinos case on the Majewski Rule”

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Introduction

The aim of this article is to consider the way intoxication works within criminal law, and how the application can differ depending on the category of the crime. In particular, it considers how the doctrine of intoxication applies to property offences, and how that application may be affected by the Supreme Court decision in *Ivey v Genting Casinos*. Due to the proportion of crimes committed containing an element of intoxication,¹ it is important that the law in this area works effectively and consistently, in order for all members of the public to understand their legal position. Specifically, the law should be fair on defendants but also should be interpreted in a way that protects public safety. There have been numerous debates² amongst academics about the intoxication doctrine, and whether it works in the way that protects the people it should.

Within England and Wales, many offenders commit crimes while under the influence of alcohol, making the law surrounding intoxication something of considerable importance. According to the March 2015 Crime Survey for England and Wales³; victims of violent incidents believed that the offenders were under the influence of alcohol in 47% of cases⁴. Despite the vast amount of alcohol related violent incidents, there seems to have been a decreasing number over the last ten years. Violent incidents in general have also decreased suggesting the proportion has remained similar. Between April 2005 and March 2015, the figures fluxuated, but the proportion remained between 45% and 55%.⁵ In the 2013/14 Survey⁶, in 54% of alcohol-related violent incidents the offender was aged

¹ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.1

² Eric Colvin, 'Codification and Reform of the Intoxication Defence' (1983) 26(1) Crim LQ 43

³ John Flatley, 'Violent Crime and Sexual Offences - Alcohol-Related Violence' (*Office for National Statistics*, 12th February 2015)

<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/compendium/focus/onviolentcrimeandsexualoffences/2015-02-12/chapter5violentcrimeandsexualoffencesalcoholrelatedviolence>> accessed 3rd September

2018

⁴ *ibid*

⁵ *ibid*

⁶ *ibid*

between 16 and 24 years old. In 42% of incidents, the offender was between 25 and 39 years old.⁷ This not only shows how commonplace offences involving intoxication are, but it presents the matter that it is an issue for the younger generation. This provides further evidence as to the importance of an appropriate body of law surrounding offences involving intoxication.

These statistics demonstrate the relevance of intoxication in relation to the Law. It further extends to the cost of crimes committed under the influence. In the UK, alcohol-related crime costs between £8 billion and £13 billion⁸. This highlights the importance of the law relating to intoxication in order to be fair and just for defendants as well as for the victims.

In most cases, law involving intoxication centres around the assumption that the intoxication is self-induced or voluntary⁹. Intoxication is often labelled as a defence¹⁰, however, that description tends to divide academics¹¹. Technically, there is no 'intoxication defence' that an individual can rely on, within either common law or statute. Rather, that the presence of intoxication can make it harder for someone to be prosecuted¹², and to this extent it resembles a defence.

The underlying principles of criminal law dictate that there has to be an actus reus and a mens rea, and that both elements must be proved by the prosecution beyond reasonable doubt in order for someone to be found guilty¹³. In order for a person (D) to be liable for any criminal offence, D must firstly commit the external element of that offence, called the actus reus¹⁴. This can include an act or potentially the failure to act¹⁵. In the case of a battery¹⁶, this could possibly include

⁷ Ibid

⁸ 'Alcohol statistics' (*Alcohol Concern*, 4th August 2016)

<<https://www.alcoholconcern.org.uk/alcohol-statistics>> accessed 3rd September 2018

⁹ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.15

¹⁰ A.P. Simester, 'Intoxication Is Never A Defence' (2009) *Crim. L.R.* 3, 3-14

¹¹ *ibid*

¹² Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.15

¹³ Martin Friedland, 'Beyond a Reasonable Doubt: Does it Apply to Finding the Law as Well as the Facts' (2015) 62(4) *Crim LQ* 428

¹⁴ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.19-1.14

¹⁵ *R v Pittwood* [1902] TLR 37

¹⁶ *R v Ireland* [1997] 3 WLR 534 (Steyn LJ)

D punching another (V). The external element of this crime would be the physical act of punching. In the case of a murder¹⁷, if D were to fatally stab V, the external element of this crime would be the physical act of stabbing V. In the case of a theft¹⁸, the external element would be the physical act of taking an item, for example taking a purse off a table. This element of the offence must be present in order to prosecute and convict D¹⁹.

The second part of a criminal offence involves an element of fault²⁰. Although this is not present in all criminal offences, it is the most relevant part of an offence in relation to intoxication. This element refers to the mental element of an offence, often referred to as the mens rea²¹. This varies dependent on the offence involved. In the case of the battery²² used above, the mens rea element would be either the intention for D to apply unlawful force through punching V or being reckless as to the application of such force. In the case of the murder²³, the mens rea would be the intention to kill or cause grievous bodily harm to V through the stabbing²⁴. In the case of the example of theft²⁵ given above, the mens rea would be dishonestly taking the purse from the table, with the intention of permanently depriving the owner of that purse. This would mean never to return the purse to the owner.

The prosecution is required to prove both the external element (actus reus) and the fault element (mens rea)²⁶. Generally, the physical element of criminal offences remains relatively simple to determine. However, understanding whether the mens rea element has occurred within a particular criminal act can cause a lot of difficulty to prove in court. In particular, it has more bearing than the actus reus does on how an offence is dealt with when it comes to the

¹⁷ Sir Edward Coke (Institutes of the Laws of England, 1797), R v Moloney [1985] AC 905

¹⁸ Theft Act 1968, s.1(1)

¹⁹ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.9-1.11

²⁰ *Ibid*, para 1.12

²¹ R v *Moloney* [1985] AC 905

²² R v *Ireland* [1997] 3 WLR 534 (Steyn LJ)

²³ Sir Edward Coke (Institutes of the Laws of England, 1797), R v Moloney [1985] AC 905

²⁴ R v *Moloney* [1985] AC 905

²⁵ Theft Act 1968, s.1(1)

²⁶ Martin Friedland, 'Beyond a Reasonable Doubt: Does it Apply to Finding the Law as Well as the Facts' (2015) 62(4) Crim LQ 428

intoxication doctrine. If this cannot be done due to the presence of intoxication, there is a possibility that D will be acquitted. This is however only with a certain class of offences, where the mens rea is that of 'specific intent' rather than 'basic intent'²⁷.

The terms 'basic' and 'specific intent' have been interpreted by both academics and by judges to mean different things. There is no universal or codified definition for either term²⁸. The distinction between them arose in the case of *Majewski*²⁹. The defendant in this case was charged with four counts of ABH and three counts of assaulting a police constable. He claimed that due to his voluntary intoxication, he did not have the appropriate mens rea in order to be convicted. It was found in this case that the crime was of basic intent, therefore he was unable to use his intoxication to prevent a conviction³⁰.

In this case, although all judges were unanimous on the resulting verdict, all but one out of the seven had varying judgements containing differing definitions of the terms 'basic' and 'specific intent'³¹. As the entire intoxication doctrine is interpreted based on the distinction between 'basic' and 'specific intent'- it seems that more clarity is needed when it comes to the definitions to ensure that the law can be interpreted in a fair and consistent way³².

'Basic intent' has been interpreted as meaning an offence that does not have a 'specific fault requirement of intention'.³³ This includes the offence of battery, as the mens rea element can include recklessness as to the application of force³⁴. If D was intoxicated, and he was throwing around his arms with clenched fists and accidentally punched V in the face, this could still potentially be a battery. In cases involving a 'basic intent' offence, the prosecution can establish the mens rea, even

²⁷ *DPP v Majewski* [1977] AC 443

²⁸ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 2.3

²⁹ *DPP v Majewski* [1977] AC 443

³⁰ *Ibid*

³¹ *DPP v Majewski* [1977] AC 443

³² Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.74

³³ *Ibid*, paras 2.4-2.7

³⁴ *R v Ireland* [1997] 3 WLR 534 (Steyn LJ)

if that required element was not actually present. Even if D did not have any foresight as to risk of injury at the time, the jury (or tribunal of fact) will be asked to decide whether D would have had the necessary mens rea if they had been sober³⁵. The presence of intoxication in these circumstances does not automatically prove the existence of mens rea, it allows the prosecution to ask the jury to consider whether they would have had it if they had not been intoxicated³⁶.

The judgements in *Majewski*³⁷ suggest that there are two types of 'specific intent' offences. The first labelled by Lord Elwyn Jones as a crime with 'ulterior intent'³⁸. This is where the mens rea of the crime goes beyond the actus reus³⁹. An example of this type of offence would be theft⁴⁰. The actus reus requires D to 'appropriate property belonging to another' for them to be found guilty of this offence⁴¹. The mere actus reus on its own does not actually constitute a crime. To pick up a pen of another person is technically 'appropriating property belonging to another'⁴². However, it would not be considered to be a theft due to the absence of the mens rea components. Simply appropriating an item in itself will not constitute a theft, the 'dishonesty' in relation to that appropriation and the 'intention to permanently deprive', will. Therefore, the criminal nature of this offence is nestled within the mens rea. It determines the criminal character of the entire crime⁴³. Compared to the definition of a 'basic intent' offence, the mens rea of theft does go beyond the actus reus, meaning it will be classed as a 'specific intent' crime.

Lord Simon identified the other type of offence as 'purposive intent'⁴⁴. This denotes simply an intention rather than recklessness⁴⁵. For example, with murder, the mens rea is either an intention to kill or the intention to cause serious harm⁴⁶.

³⁵ *R. v Aitken, R. v Bennett, R. v Barson* [1992] 1 W.L.R. 1006

³⁶ *DPP v Majewski* [1977] AC 443

³⁷ *DPP v Majewski* [1977] AC 443

³⁸ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 2.8

³⁹ *DPP v Majewski* [1977] A.C. 443

⁴⁰ Theft Act 1968, s 1(1)

⁴¹ *Ibid*, ss.3, 4 and 5

⁴² Theft Act 1968, ss.3, 4 and 5

⁴³ A.P. Simester, 'Intoxication Is Never A Defence' (2009) *Crim. L.R.* 3, 3-14

⁴⁴ *DPP v Majewski* [1977] A.C. 443, 480

⁴⁵ *Ibid*, (Simon LJ)

⁴⁶ *R. v Cunningham* [1982] A.C. 566, Homicide Act 1957, s1(1)

For this offence, recklessness would not suffice so it is an offence with purposive intent⁴⁷.

This distinction between basic and specific intent takes into account moral sensitivity by excluding specific intent offences from the doctrine. For offences with a more serious mens rea, an intoxicated wrongdoer is not held to the same standard as the most serious offender for that crime⁴⁸. Rather than intoxication acting as a defence, it really just prohibits the prosecution from being able to prove the presence of mens rea in cases where there is 'specific intent'.

The structure of this article reflects an important contrast between offences of violence and offences against property. With violent offences, generally there is some form of overlap of the actus reus between two separate offences within the same class. With both section 18⁴⁹ and section 20⁵⁰ for Grievous Bodily Harm ('GBH'), the actus reus is the same, the only differentiating factor is the mens rea⁵¹. This is the same distinction between murder⁵² and manslaughter⁵³. The result is the death of the victim, but the mens rea for each crime differs. One crime is specific, the other is basic. This allows for the prosecution to prosecute a defendant for section 20⁵⁴ and manslaughter when they are generally unable to prosecute for section 18 offences or murder. This is since both section 20⁵⁵ and manslaughter are of 'basic intent', whereas section 18 and murder are of 'specific' intent. Section I will discuss how intoxication works in relation to these offences. It will also highlight a brief overview of the rationale behind the way intoxication works for both 'specific' and 'basic intent' crimes.

As there are numerous property offences that fit within the definition of 'ulterior intent' and therefore 'specific intent', there is a potential for defendants to evade

⁴⁷ *DPP v Majewski* [1977] A.C. 443, 480

⁴⁸ A.P. Simester, 'Intoxication Is Never A Defence' (2009) Crim. L.R. 3, 3-14

⁴⁹ Offences Against the Person Act 1861, s.18

⁵⁰ *ibid*, s.20

⁵¹ *ibid*, ss.18 and 20

⁵² Sir Edward Coke (Institutes of the Laws of England, 1797)

⁵³ *R v Fenton* (1830) 1 Lew CC 179

⁵⁴ Offences Against the Person Act 1861, s.20

⁵⁵ *ibid*

liability when intoxicated. There are no offences that have an overlapping *actus reus* with theft, robbery and burglary and therefore have no corresponding offences that the defendant can be charged with. The issue with this is that the prosecution may be unable to prosecute a defendant for any type of property offence if the presence of intoxication prevents them from being able to establish the fault element of that offence. This inconsistency will be discussed further in Section II. This Section will also analyse the change made to the dishonesty test for theft. This change essentially transformed the original objective *and* subjective test into an objective test. This Section will explore the potential implications of the judgement in *Ivey v Genting Casino*⁵⁶ on the doctrine of intoxication and whether this change will affect the way offenders can be prosecuted in property cases involving intoxication.

Section III will go on to discuss potential ideas for reform in order to alleviate any problems discussed in the previous sections. Ideas will include all relevant reforms proposed by The Law Commission⁵⁷ as well as the potential relationship between proposed reforms and the changes arising from the *Ivey* decision. All ideas will then be analysed and compared to our current model, to understand whether reforms and codification would result in the desired effect on the justice system and society as a whole.

Although it can be argued that issues with intoxication tend not to cause many difficulties in practice, the doctrine should work in a way that allows for culpability to be taken into account. Individuals should be able to follow the law with the expectation that they will be judged accordingly. Issues with intoxication seem to be getting progressively worse, particularly due to the growing culture surrounding drugs. It is important to understand the way intoxication can and should be interpreted to validate the position for future offenders⁵⁸. This article aims to create a compromise between the importance of accurate culpability and public safety, with reference to the significance of codification.

⁵⁶ *Ivey v Genting Casinos UK Ltd (t/a Crockfords Club)* [2018] A.C. 391

⁵⁷ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009)

⁵⁸ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009), para 3.8

I. Offences Against the Person

Violent Offences – Basic Intent

To properly understand the relationship between ‘basic’ and ‘specific’ offences and the doctrine of intoxication, it is important to dissect the definitions of each offence. Assault and battery are examples of basic intent offences, as they both require an element of recklessness as the mens rea. They can be committed with intent; however, it is important to note that recklessness *could* suffice. The definitions for both assault and battery are set out in case law, neither have a statutory definition. The definition for assault is where D ‘intentionally or recklessly causes V to apprehend immediate unlawful personal violence’⁵⁹. The mens rea for this crime can either be intentional, or it can be that D was reckless as to whether any apprehension was caused to V.

The definition of battery is the ‘unlawful application of force by the defendant upon the victim’⁶⁰. The mens rea of this offence includes any ‘intentional or reckless touching’, it doesn’t even need to be “hostile, rude or aggressive”⁶¹. As both battery and assault include an element of recklessness, both will therefore be offences of basic intent. Both offences will still be basic intent offences even though it is possible to have an intention other than recklessness⁶². The elements of recklessness are always subjective⁶³, meaning that it depends on D’s genuine belief. It requires that D ‘foresees and appreciates some risk’⁶⁴.

The offence of Actual Bodily Harm⁶⁵ (‘ABH’) is also a basic intent offence. The definition in statute is ‘an assault occasioning ABH’⁶⁶. Although, it has been

⁵⁹ *Fagan v MPC* [1969] 1 Q.B. 439

⁶⁰ *R v Ireland* [1997] 3 WLR 534 (Steyn LJ)

⁶¹ *Faulkner v Talbot* [1981] 3 All ER 468 (Lane LJ)

⁶² Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.43

⁶³ *R v Caldwell* [1981] 1 All ER 961

⁶⁴ *R v Parmenter* [1991] 94 Cr App R 193

⁶⁵ Offences Against the Person Act 1861, s.47

⁶⁶ *ibid*

determined to include a battery occasioning ABH⁶⁷ through case law. The mens rea is therefore the same as it is for assault and battery, depending on which offence resulted in the injury. No additional mens rea is required, only that D either 'intended or was reckless as to the injury inflicted'⁶⁸, with some appreciation of the risk involved.⁶⁹ As recklessness can suffice for the mens rea, this results in ABH being an offence of basic intent.

This is also how mens rea is exercised in the offence under section 20⁷⁰ for GBH. There are two offences of GBH, which can be used to highlight how the intoxication doctrine works in practice when it comes to violent offences. The first one, under section 20⁷¹ is the lesser of the two offences as it is classed as a basic intent offence. The definition of this offence is that D has to 'unlawfully and maliciously wound or inflict any GBH on another person'⁷². The mens rea required for this offence is that D has either the intention to cause wounding or GBH, or that they are reckless as to the causing of some harm⁷³. The rules of subjective recklessness will apply here too so D only has to foresee the risk of some harm rather than serious harm⁷⁴.

The only difference separating ABH and section 20⁷⁵ GBH from the offences of assault and battery, is the criminal consequence rather than the conduct itself. For ABH and GBH⁷⁶, the maximum penalty is 5 years imprisonment⁷⁷, whereas for assault and battery, the maximum penalty is 6 months⁷⁸. This is evidence that the level of punishment changes depending on the severity of the consequence, rather than the conduct itself.

⁶⁷ *R v Miller* [1954] 2 All ER 529

⁶⁸ *R v Roberts* [1971] EWCA Crim 4

⁶⁹ *R v Spratt* [1990] 1 WLR 1073

⁷⁰ Offences Against the Person Act 1861, s.20

⁷¹ *ibid*

⁷² Offences Against the Person Act 1861, s.20

⁷³ *R v Savage* [1991] 94 Cr App R 193

⁷⁴ *R v Parmenter* [1991] 94 Cr App R 193

⁷⁵ Offences Against the Person Act 1861, s.20

⁷⁶ *ibid*

⁷⁷ 'Offences Against the Person, Incorporating the Charging Standard' (CPS, 12 November 2018) < <https://www.cps.gov.uk/legal-guidance/offences-against-person-incorporating-charging-standard> > accessed 10 January 2019

⁷⁸ *Criminal Justice Act 1988*, s.39

Unlawful act manslaughter works in a similar way to ABH and GBH in that the result of the offence categorises how D will be prosecuted, even though the mens rea remains the same. The definition of unlawful act manslaughter requires D to 'commit an unlawful act which results in the death of another'⁷⁹. For this type of manslaughter, it must be established that there was an unlawful act, and that all elements of that act are proven⁸⁰. Other types of manslaughter will not be discussed throughout this project. The unlawful act must also have been dangerous, which means that there must be the 'risk of some harm, albeit not serious harm'⁸¹. It does not need to relate to the 'ensuing death'⁸². This means that the unlawful act can be any of the basic intent crimes explained above, therefore the mens rea will still be subjective recklessness. The maximum sentence is however life imprisonment⁸³ due to the extreme nature of the consequence of such an offence. However, this is not how the sentencing works in practice when the offence is in relation to intoxicated offenders.

All of the offences described above are basic intent offences, as they involve an element of recklessness. In the case of *Majewski*, it was held that although the presence of intoxication will not act as a substitution for the mens rea, the tribunal of fact are directed to consider whether D would have foreseen the relevant risk if he had been sober⁸⁴. The *Majewski*⁸⁵ rule therefore has the effect that the relevance of the intoxication is severely diminished. This said, there has been confusion amongst academics⁸⁶ about the effect that intoxication has on the prosecution of basic intent crimes. Some interpret the decision in *Majewski*⁸⁷ as meaning that the presence of intoxication essentially proves that the fault element is present⁸⁸. That the intoxication alone will provide evidence of some form of

⁷⁹ *R v Cato* [1976] 1 WLR 110

⁸⁰ *R v Lamb* [1967] 2 QB 981

⁸¹ *R v Church* [1965] 2 WLR 1220 (*Edmund-Davies LJ*)

⁸² *DPP v Newbury* [1977] AC 500

⁸³ 'Homicide: Murder and Manslaughter' (CPS, 18 March 2019) <

<https://www.cps.gov.uk/legal-guidance/homicide-murder-and-manslaughter>> accessed 15 April 2019

⁸⁴ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.16-1.20

⁸⁵ *DPP v Majewski* [1977] A.C. 443

⁸⁶ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.17

⁸⁷ *DPP v Majewski* [1977] A.C. 443

⁸⁸ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.17

recklessness. This has proved not to be the case⁸⁹. The significant effect that the *Majewski*⁹⁰ rule has had simply prevents D from using their intoxication to prove that the mens rea element was not there. However, this is only when the intoxication is voluntary and for basic intent crimes⁹¹.

There are arguments against this method, as some believe that it undermines the basic principles of criminal law. There is the requirement of establishing the mens rea and actus reus⁹² throughout criminal law, however the way the intoxication doctrine works makes it so the mens rea does not have to be established in cases involving basic intent offences. This is described as the simple definitional logic rule, as these academics believe that the law should be followed as it is. They believe that if the fault element cannot be proved, there should be no conviction, even with basic intent offences⁹³. This will be discussed further once 'specific intent' crimes have been explained.

Violent Offences – Specific Intent

This simple definitional logic approach is however taken when it comes to prosecuting specific intent crimes, even when there is an element of intoxication present⁹⁴. If an offence cannot be established with the mens rea of recklessness, the crime will then be of specific intent. The core examples of specific intent offences are murder and section 18 GBH. When D commits one of these offences whilst intoxicated, it is possible for that intoxication to prevent the mens rea from being established⁹⁵.

⁸⁹ *R v Richardson* [1999] 1 Cr. App. R. 392

⁹⁰ *DPP v Majewski* [1977] A.C. 443

⁹¹ *Ibid*, 498, Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 2.35-2.38

⁹² A.P. Simester, 'Intoxication Is Never A Defence' (2009) *Crim. L.R.* 3, 3-14

⁹³ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.21, 1.39, 1.49-1.52, 1.58-1.62, 2.29-2.33

⁹⁴ *Ibid*, paras 1.21, 1.39, 1.49-1.52, 1.58-1.62, 2.29-2.33

⁹⁵ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.58

With section 18 GBH, the actus reus is exactly the same as a section 20 offence. The only difference lies within the mens rea. It is more serious as an offence, which is reflected in the sentence as it carries a maximum prison sentence of life⁹⁶. The mens rea for this must be an intention to cause GBH or wounding, recklessness as to that result will not suffice⁹⁷.

The relationship between murder and unlawful act manslaughter is very similar. Although not set out in statute, the definition of murder is the 'unlawful killing of a human being... with malice aforethought'⁹⁸. The mens rea of this has been interpreted to mean the 'intention to kill or cause GBH'⁹⁹. The result of this offence is the death of another person, similarly to unlawful act manslaughter as discussed above. If both elements of murder are established, D will receive a mandatory life sentence¹⁰⁰. Unless any of the three partial defences to murder apply, the court cannot pass a lower sentence even in mitigating circumstances¹⁰¹.

The presence of intoxication can prevent the mens rea from being established by the prosecution as both murder and section 18¹⁰² GBH are specific intent offences¹⁰³. It is left to the jury to decide whether they believe that D had the required state of mind at the relevant time for that offence¹⁰⁴. This means that if D commits a specific intent crime when intoxicated, this does not guarantee them any form of a 'defence'. Intoxication can simply be used to prevent the prosecution from establishing the mens rea of the offence. This would then result in either an acquittal or a different conviction¹⁰⁵ such as one of the basic intent crimes within

⁹⁶ 'Offences Against the Person, Incorporating the Charging Standard' (CPS, 12 November 2018) <<https://www.cps.gov.uk/legal-guidance/offences-against-person-incorporating-charging-standard>> accessed 19 January 2019

⁹⁷ Offences Against the Person Act 1861, s.18

⁹⁸ Sir Edward Coke (Institutes of the Laws of England, 1797)

⁹⁹ *R v Cunningham* [1982] AC 566, Offences Against the Person Act 1861, s.18

¹⁰⁰ 'Homicide: Murder and Manslaughter' (CPS, 18 March 2019) <<https://www.cps.gov.uk/legal-guidance/homicide-murder-and-manslaughter>> accessed 15 April 2019

¹⁰¹ 'Sentencing – Mandatory Life Sentences in Murder Cases' (CPS) <<https://www.cps.gov.uk/legal-guidance/sentencing-mandatory-life-sentences-murder-cases>> accessed 12 January 2019

¹⁰² Offences Against the Person Act 1861, s.18

¹⁰³ *DPP v Majewski* [1977] A.C. 443, 480

¹⁰⁴ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 2.30

¹⁰⁵ *DPP v Majewski* [1977] A.C. 443, 499

the same bracket. The jury are instructed to “have regard to all the evidence... and on that basis to ask themselves whether they feel sure that at the material time the defendant had the requisite intent”¹⁰⁶ i.e. the jury must weigh up all evidence presented in order to make a decision to the defendant’s intent. The presence of intoxication in relation to specific intent crimes provides difficulty for the prosecution to prove all elements of the offence beyond reasonable doubt¹⁰⁷.

Ultimately, the presence of intoxication can prevent someone from being charged with murder if it thwarts the prosecutions attempt to prove there was an intention to kill or cause GBH. If this occurs, the prosecution can then prove the elements from unlawful act manslaughter instead. The difference in culpability between a sober murder and an intoxicated murder will then be represented by the offence charged and the sentence passed. Similarly, both section 18¹⁰⁸ and section 20¹⁰⁹ have the same actus reus with differing mens rea, allowing section 20¹¹⁰ to be used when section 18¹¹¹ cannot be due to intoxication. This was pointed out by Professor Ashworth:

“Murder and wounding with intent are crimes of specific intent, and there is no great loss of social defence in allowing intoxication to negate the intent required for those crimes when the amplitude of the basic intent offences of manslaughter and unlawful wounding lies beneath them – ensuring D’s conviction and liability to sentence”¹¹².

By allowing offenders to still receive some form of conviction, it allows the intoxication doctrine to work well in practice.

¹⁰⁶ *Sheehan* [1975] 1 WLR 739

¹⁰⁷ *Woolmington v DPP* [1935] UKHL 1

¹⁰⁸ Offences Against the Person Act 1861, s.18

¹⁰⁹ *Ibid*, s.20

¹¹⁰ Offences Against the Person Act 1861, s.20

¹¹¹ *Ibid*, s.18

¹¹² Ashworth, *Principles of Criminal Law* (5th ed, 2006) p 212

This is further reflected by Law Commission's decision in their 1993 report¹¹³ to abandon their earlier recommendation¹¹⁴ to abolish the *Majewski* rule on the grounds that they had no preferred alternative and believed the rule worked well in practice. The *Majewski* rule does seem to offer fair prosecution for offenders in relation to voluntary and violent offences. The practicalities of using a corresponding offence to still attain some form of conviction should be extrapolated and used in relation to other offences, particularly in relation to property offences.

The Subjectivism v Absolutism Debate

Sometimes, criminal courts interpret the law by using strict subjectivism¹¹⁵. 'Strict subjectivism' denotes a simple interpretation of the law. Practically speaking, the court will examine the case at hand and apply the law in consideration of the circumstances of the case. If the courts interpret law this way in all cases with involvement of intoxication, it is likely to encourage grave public policy concerns. If the law were to work in this way for specific *and* basic intent offences, it would set a dangerous precedent. This being, the more intoxicated a person becomes, the less culpable they are. It would turn intoxication into a defence, as the prosecution would struggle to prove mens rea even for all classes of offences, including basic intent¹¹⁶. It would potentially encourage voluntary intoxication as a tactic for evading liability.

The arguments for and against this approach discuss the balance between public policy and adhering to the underlying principles of criminal law. Some believe that it is more important to stay with strict definitional logic¹¹⁷. If the law requires the proof of the actus reus and mens rea beyond reasonable doubt in basic intent

¹¹³ Law Commission, *Intoxication and Criminal Liability* (Law Com No 127, 1993) paras 4.47, 5.1, 5.24, 7.4

¹¹⁴ *Ibid*

¹¹⁵ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.59-1.62

¹¹⁶ *ibid*, paras 1.53-1.59

¹¹⁷ *Ibid*, para 2.31

offences, then the presence of intoxication should not change this. Professor Sir John Smith¹¹⁸ suggested that the House of Lords should:

*'Recognise that if a particular mens rea is an ingredient of an offence, no one can be convicted of that offence if he did not have the mens rea in question, whether he was drunk at the time or not'*¹¹⁹.

This is a fair argument as it uses the underlying principle of all criminal offences. If someone commits an offence without the relevant mens rea for a basic intent crime, they should not be held to the same level of culpability as someone that did have the relevant mens rea. For example:

Example 1A - If D punched V with the intention of punching them, and that punch results in V having a black eye, D would be charged and most likely be convicted of ABH. Using the definition stated earlier, the offence of battery would be satisfied due to the unlawful application of force and the intention to apply that force. The offence of ABH would also be satisfied due to the result of the unlawful force.

Example 1B - If D was dancing in a busy club whilst severely intoxicated with clenched fists and decided to swing his arms around, then accidentally punched V resulting in a black eye, D would be charged and most likely convicted of ABH. Although there was no intention to commit battery, the mens rea of the offence can also be satisfied through recklessness. No additional mens rea is required for ABH. Even though D was intoxicated, it is likely that when sober he would foresee some level of risk to injury resulting from his conduct.

Both examples show a large gap between the potential culpability of offenders of the same crime. Although mitigating and aggravating factors would be taken into account when sentencing, the same label would be given to both offenders. There is understandably an argument as to why this is classed as unfair.

¹¹⁸ Ibid, para 2.33

¹¹⁹ *Criminal Law Review* [1975] 574

There is however also an argument that becoming intoxicated in the first place is enough to warrant some form of accountability. Professor Glanville Williams¹²⁰ explained ‘it would be inimical to the safety of all of us if the judges announced that anyone could gain exemption from the criminal law by getting drunk’¹²¹. This demonstrates that by allowing the presence of intoxication to act as a full defence, public safety would be ignored.

Lord Simon¹²² argued that allowing all offenders to evade liability on the basis that they lacked the requisite fault on account of their intoxication, would ‘leave the citizens legally unprotected from unprovoked violence’¹²³. It would allow an attacker to deprive themselves of “the ability to know what he was doing by getting himself drunk”. Then, they would be held to be innocent of that crime¹²⁴.

Criminal courts could take an absolutist view instead, which would prevent D from being able to use intoxication to escape liability for any crime. This approach would only focus on D’s conduct and the result of that conduct rather than the mens rea element affected by intoxication. This would mean that even in specific intent cases, the prosecution could still prove that D had the required mens rea by ignoring the intoxication. There are positives to this approach, particularly the benefits it could have in relation to public safety as stopping offenders from being able to rely on intoxication would act as a deterrent for many.

However, following this approach would totally undermine one of the main principles of criminal law: that both the actus reus and the mens rea must be established. Other than with strict liability offences, it must be proved that D had the required mens rea of the crime, as well as the required actus reus. By using an absolutist approach, prosecutors would be able to use the presence of intoxication to imply a mens rea that was not actually present, for both basic intent *and* specific

¹²⁰ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.54

¹²¹ G. Williams, *Textbook of Criminal Law* (2nd ed, 1983) p 466

¹²² *DPP v Majewski* [1977] A.C. 443, 476 (Simon LJ)

¹²³ *Ibid*

¹²⁴ *Ibid*, (Russell LJ)

intent crimes¹²⁵ . Using this approach for all offences wouldn't just undermine criminal law; it would also allow for a monumental difference in the moral culpability between the offence committed and the offence that D would then be charged with. For example:

Example 2A – If D intentionally plans then stabs his wife 18 times resulting in her death, he would be charged and most likely convicted of murder.

Example 2B – If D stabs a stranger at a party resulting in his death because he believed he was stabbing a pillow due to voluntary intoxication - it is likely that he would not be charged and convicted of murder. If courts were to take an absolutist approach to specific intent crimes, then it is likely that D would be charged with murder. This is since only the result of the crime would be taken into account rather than the actual mens rea as well as other circumstances.

There would be a huge mismatch in moral culpability if the absolutist approach were to be used in specific intent offences, namely the more serious of offences¹²⁶. Clearly, the moral culpability in these two examples is very different from each other. Due to the fact in cases of murder, a mandatory life sentence is given in all cases where partial defences are not used, both offenders in examples **2A** and **2B** would be given the same sentence. Taking the absolutist approach in relation to specific intent offences would encourage huge disproportionate sentencing and labelling for intoxicated offenders compared to sober offenders.

Even though this approach would encourage the importance of public safety, it would also encourage unfair charges brought against offenders. There would be a huge gap between the moral culpability of committing a murder and the moral culpability of becoming intoxicated. However, just because this approach would be unfair to impose on specific intent crimes, there are advantages to using it for basic intent crimes.

¹²⁵ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.56-1.61

¹²⁶ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.56-1.59

The moral culpability of committing a basic intent crime could be similar to the moral culpability of becoming intoxicated. Lord Simon¹²⁷ held:

*'A mind rendered self-inducedly insensible through drink or drugs, to the nature of a prohibited act or to its probable consequence is as wrongful a mind as one which consciously contemplates the prohibited act and foresaw its probable consequence'*¹²⁸. This suggests that the recklessness of becoming intoxicated is also similar to the recklessness required by offences like assault, battery and criminal damage. By knowing that there are links between intoxication and violent and reckless behaviours, it should prevent people from allowing themselves to voluntarily enter that state¹²⁹.

Even when it comes to prosecuting basic intent crimes, the foreseeability when sober is also taken into account. The approach is not entirely absolutist in nature. It was shown in *Richardson*¹³⁰ that foreseeability will be considered. It will, however, be decided on a case-by-case basis. Lord Elwyn-Jones¹³¹ proposed the following:

*'When recklessness establishes an element of the offence, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such awareness is immaterial'*¹³².

This shows that although strict definitional logic is not used and should not be used for basic intent crimes, there is still an element of flexibility when courts decide on the fate of offenders. There is still the option to consider circumstances of the offender in order to assess the mentality when sober in order to allow just and fair sentences that mirror the culpability shown when committing the offence¹³³.

¹²⁷ *DPP v Majewski* [1977] A.C. 443, 480 (Simon LJ)

¹²⁸ *Ibid*

¹²⁹ A.P. Simester, 'Intoxication Is Never A Defence' (2009) *Crim. L.R.* 3, 3-14

¹³⁰ *R v Richardson* [1999] 1 Cr. App. R. 392

¹³¹ *DPP v Majewski* [1977] A.C. 443, 475 (Elwyn-Jones LJ)

¹³² *Ibid*

¹³³ *R v Richardson* [1999] 1 Cr. App. R. 392

Lord Edmund-Davies¹³⁴ suggested that the current law on intoxication represents the following:

*'A compromise between the imposition of inebriates in complete disregard of their condition, and the total exculpation required by the defendants actual state of mind at the time he committed the crime in issue'*¹³⁵.

This suggests that the current law works in a way that allows for a balancing act between strict subjectivism and an absolutist approach¹³⁶. Interpreting specific intent crimes by using strict subjectivism allows for intoxication to be considered if no mens rea is present. This allows for intoxicated offenders to have their liability reduced due to the fact their moral culpability was not the same as a sober offender for the same crime. An absolutist view is used for basic intent crimes due to the moral culpability of becoming intoxicated being similar to the moral culpability of committing the crime. This compromise explains the theory behind the distinction between basic and specific intent. It further explains the justification for the intoxication doctrine being used for basic intent crimes and not for specific intent crimes. Clearly this compromise works well for violent offences as the prosecution can still attain some form of conviction.

The courts have referenced three competing interests when deciding cases regarding intoxication:

1. The need to label defendants correctly;
2. The need to respect the requirements of fault; and
3. The need to protect the public from drunken violence.

The Court of Appeal decided to strike the balance of the three in favour of protecting the public¹³⁷. The law must also ensure that the interests of the accused are protected when it comes to sentencing. The judge and magistrates will 'always carefully take into account all the circumstances... before deciding which of the

¹³⁴ *DPP v Majewski* [1977] A.C. 443, 495 (Elwyn-Jones LJ)

¹³⁵ *Ibid*, 496

¹³⁶ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 1.58

¹³⁷ *R v Hatton* [2006] 1 Cr App R 16, *R v O'Grady* [1987] QB 995, *R v O'Connor* [1991] Crim LR 135

many courses open should be adopted'¹³⁸. This is evidence that not only public safety is considered, but fairness and rehabilitation of offenders is considered too.

¹³⁸ *DPP v Majewski* [1977] A.C. 443, 484 (Salmon LJ)

II. Property Offences

As analysed in Section I, violent offences against other people are assessed on a case-by-case basis in order to understand the affect any intoxication had on D. The basic intent divide works in a way that allows offenders committing specific intent crimes to still be prosecuted with another offence that holds a lower level of culpability. Although there will always be arguments against this method, the practical benefits of corresponding elements of certain offences seem to work without any major moral objections.

This section will discuss the effect intoxication has when an offender has committed an offence in relation to property instead of another person. In particular whether the recent case of *Ivey v Genting Casinos*¹³⁹ has an effect on the relationship between intoxication and property offences. Although this case was that of a civil matter, it has undoubtedly set a precedent in relation to the mens rea element of theft¹⁴⁰. It is interesting to analyse the new interpretation of dishonesty, and whether that interpretation will make theft and other property offences easier to prosecute. The new standard of dishonesty may result in a stricter position on intoxicated offenders.

One of the issues that many academics have with the way intoxication works is due to problems that arise in relation to offences regarding property¹⁴¹. This is generally due to the fact theft requires 'ulterior intent' to be established¹⁴². This Section aims to use hypothetical examples in order to create a more appropriate relationship between that of property offences and the intoxication doctrine. By analysing property offences thoroughly, there are potentially various ways that allow the relationship with intoxication to mirror the offences in Section I.

¹³⁹ *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 391

¹⁴⁰ *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 411

¹⁴¹ Eric Colvin, 'Codification and Reform of the Intoxication Defence' (1983) 26(1) Crim LQ 43, 53

¹⁴² *DPP v Majewski* [1977] A.C. 443, 460

Before the defendant (D) can be found guilty of theft¹⁴³, the prosecution must prove both the external elements and the fault elements of the offence. If D 'dishonestly appropriates property belonging to another with the intention to permanently deprive the other of it'¹⁴⁴, they will be guilty of theft. As introduced above, theft is a specific intent crime as it is an offence requiring ulterior intent¹⁴⁵.

This also relates to the offences of robbery and burglary. Firstly, robbery is an aggravated form of theft. The maximum sentence is life imprisonment¹⁴⁶, unlike theft with a maximum sentence of 7 years¹⁴⁷. To be found guilty of robbery, all the elements of theft must be established¹⁴⁸. However, there is an additional element of 'force or the threat of force on a person'¹⁴⁹ to occur immediately before or at the time of stealing¹⁵⁰. The mens rea of robbery requires the dishonesty element, the intention to permanently deprive element and the intention to threaten force or use force¹⁵¹.

It is further possible to be charged with two different types of burglary as well as a form of aggravated burglary. The first is when D enters a building, as a trespasser, with the intent to either steal anything in the building, commit GBH on anyone within that building or to commit any unlawful damage¹⁵². The mens rea of this offence is concerned with the intention upon entry into the building. There must be an intention to commit one of these three acts, and that must be done as a trespasser¹⁵³.

The second type of burglary occurs when D enters a building as a trespasser and steals, attempts to steal, inflicts GBH or attempts to inflict GBH¹⁵⁴. Although the

¹⁴³ Theft Act 1968, s.1

¹⁴⁴ *ibid*

¹⁴⁵ *DPP v Majewski* [1977] A.C. 443, 460

¹⁴⁶ 'Theft Act Offences' (CPS) < <https://www.cps.gov.uk/legal-guidance/theft-act-offences> > accessed 15 April 2019

¹⁴⁷ *ibid*

¹⁴⁸ *R v Robinson* [1977] Crim LR 173

¹⁴⁹ Theft Act 1968, s.8

¹⁵⁰ *R v Lockley* [1995] Crim LR 656

¹⁵¹ *R v Dawson* [1985] 81 Cr App R 150

¹⁵² Theft Act 1968, s.9(1)(a)

¹⁵³ *R v Collins* [1973] 3 WLR 243

¹⁵⁴ Theft Act 1968, s.9(1)(b)

mens rea of the trespassing element can be one of recklessness, there must also be the required mens rea for one of the other offences¹⁵⁵. For both types of burglary, the maximum sentence is 14 years for an offence in a dwelling and 10 years for other buildings¹⁵⁶.

To be convicted of aggravated burglary, D must have with him a firearm, imitation firearm, any weapon of offence, or any explosive¹⁵⁷ whilst entering a building (relevant to s.9(1)(a))¹⁵⁸, or at the time the offence is committed (relevant to s.9(1)(b))¹⁵⁹. There is no need to establish that D intended using the weapon¹⁶⁰, only the mens rea of one type of burglary as well as the intention to carry one of the items mentioned above¹⁶¹. For aggravated burglary, the maximum sentence is also life imprisonment¹⁶².

On the face of it, these property offences seem similar in structure to offences set out in Section I. With theft and burglary in particular with a lower sentence than robbery and aggravated burglary, they appear to be offences with lower culpability and sentences. This said, there is a significant difference between the offences set out here, and the offences set out in Section I that must be considered as it has a strong impact on the effectiveness of the intoxication doctrine. Due to all the offences above being that of ulterior intent, this indicates they will also be specific intent offences. If any of the offences are committed whilst intoxicated, the jury or magistrate will be directed to acquit if that intoxication makes it so the fault element cannot be established.

The use of intoxication in relation to offences in Section I can be effective in practice due to the existence of multiple offences with the same actus reus. As

¹⁵⁵ *R v Collins* [1973] 3 WLR 243

¹⁵⁶ 'Theft Act Offences' (CPS) < <https://www.cps.gov.uk/legal-guidance/theft-act-offences> > accessed 15 April 2019

¹⁵⁷ Theft Act 1968, s.10

¹⁵⁸ *Ibid*, s.9(1)(a)

¹⁵⁹ *Ibid*, s.9(1)(b)

¹⁶⁰ *R v Stones* [1989] 1 WLR 156

¹⁶¹ *R v O'Leary* (1986) 82 Cr App R 341

¹⁶² 'Theft Act Offences' (CPS) < <https://www.cps.gov.uk/legal-guidance/theft-act-offences> > accessed 15 April 2019

there are no offences that exist that have the same actus reus as theft and burglary, offenders will potentially be acquitted. Rather than acting as the deterrent that it should, the basic and specific intent distinction in relation to property offences may encourage intoxication amongst offenders.

Clearly, this engages some public policy concerns. It creates the sense that the priority is creating a fair judgement for the offenders, rather than the promotion of safety for others. If the proposed theory behind the offences in Section I is that the fault needed for all basic intent offences is equivalent to the fault of becoming intoxicated, this could also be argued for theft and burglary. The custodial sentence of which is less than the sentence for manslaughter.

It can be argued that by recklessly becoming intoxicated, there is a heightened risk of recklessness as well as other morally corrupt behaviour. This could lead to theft from another person or from another person's property. The culpability of becoming intoxicated and then committing theft or burglary should not warrant an acquittal. This would place an intoxicated thief in a better position than a sober thief, which only encourages wrongdoing rather than acting as a deterrent as it should.

Dishonesty

Theft has always been considered to be a specific intent offence due to the ulterior intent that has to be established. It is interesting to analyse the reasoning for this using the new test for dishonesty.

The original test for dishonesty was a two-part test¹⁶³, where jurors and magistrates were asked to consider two questions. The first question was whether the conduct complained of was dishonest by the objective standards of reasonable and honest people. If the conduct complained of was dishonest in comparison to this standard, the second question considered would be whether the defendant

¹⁶³ *R v Ghosh* [1982] EWCA Crim 2

would have realised that a reasonable and honest person would regard his conduct as dishonest¹⁶⁴. This test allowed an element of subjectivity. The answers to both of which had to be yes for the dishonesty element to be established. This test had been criticised for its ambiguity¹⁶⁵.

Jurors and magistrates are asked to take into account what D actually believed at the time of the offence, compared to the standards of a reasonable person. This has now been replaced by the decision in *Ivey v Genting Casinos*¹⁶⁶. In *Ivey v Genting Casinos*¹⁶⁷, the Supreme Court held that the second question in the *Ghosh*¹⁶⁸ test 'did not correctly represent the law and that directions based upon it ought no longer to be given by judges to juries'¹⁶⁹. The main issue that the Supreme Court had with this second element of the test was that 'the less a defendant's standards conform to society's expectations, the less likely they are to be held criminally responsible for their behaviour'. This element, therefore, would simply allow D to evade liability using the defence that their own standard of dishonesty was less than that of an honest and reasonable person¹⁷⁰. The Supreme Court, in this case, decided to set that standard for others to follow, rather than allowing potential defendants to set their own¹⁷¹.

The judges in *Ivey v Genting Casinos*¹⁷² argued that the *Ghosh* test had the effect that 'the more warped the defendant's standards of honesty are, the less likely it is that he will be convicted of dishonest behaviour'¹⁷³. In fact, the second limb of the *Ghosh* test practically eradicated the need for the first¹⁷⁴. It was argued that

¹⁶⁴ Ibid, Q.B. 1053, 1064

¹⁶⁵ Kenneth Campbell, 'The Test of Dishonesty in R. v. Ghosh' (1984) 43(2) Cambridge LJ 349, 351

¹⁶⁶ *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 391

¹⁶⁷ *ibid*

¹⁶⁸ *R v Ghosh* [1982] Q.B. 1053

¹⁶⁹ *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 391, 417

¹⁷⁰ Kenneth Campbell, 'The Test of Dishonesty in R. v. Ghosh' (1984) 43(2) Cambridge LJ 349, 357

¹⁷¹ *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 391, 411

¹⁷² *Ibid*

¹⁷³ *Ibid*, 409

¹⁷⁴ Muhammad Hasif, 'Ivey v Casinos: Reform to the Dishonest Principle' (2018) 2018 Sing Comp L Rev 108, 109

‘to adopt a subjective test is to abandon all standards but that of the accused himself, and to bring about a state of affairs in which Robin Hood would be no robber’¹⁷⁵. Originally, proving dishonesty when there was also the component of intoxication was extremely difficult due to this subjective consideration. The presence of which helped to define theft and other property offences as offences of ulterior intent.

Example 3A – D decides to take a purse from a table in a bar whilst intoxicated and decides to take it home with him; he does not return the purse.

Clearly, any reasonable and honest person would determine the conduct in **Example 3A** to be dishonest. The second limb of the test, however, would allow D to say that he believed his conduct was not dishonest compared to that objective standard. As the judges explain in the *Ivey*¹⁷⁶ case, this second limb makes it so D can excuse his behaviour with ‘his own warped standards’¹⁷⁷, potentially arguing he believed the purse was discarded by the owner even if this was not his true belief.

Using the new test, the second element would not need to be proved at all. Therefore, making it possible to establish dishonesty in cases of theft when intoxication is present. In the case of **Example 3A**, D would not be able to use the excuse that his own standard of dishonesty was different from that of a reasonable and objective person. Using the new test, if all other elements of theft were established, D would potentially be convicted. The new standard of dishonesty would only take into account the objective standard, which in this case would likely determine the conduct of D to be dishonest.

This new test would potentially allow the relationship between theft and the intoxication doctrine to be like the offences described in Section I. It may prevent offenders from using their own subjective standard skewed by their intoxicated

¹⁷⁵ *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 391, 410

¹⁷⁶ *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 391

¹⁷⁷ *Ibid*, 416

mind as a reason for fault not to be established. Although if D returned the purse the next day, theft might be impossible to establish due to the other mens rea element. This would still be consistent with the reflection of culpability.

Intention to Permanently Deprive

The issue then becomes the requirement for D to intend on permanently depriving the owner of their property. Even though the change to the dishonesty test could ensure more convictions for intoxicated thefts, it may be difficult for the prosecution to establish the element of the intention to permanently deprive.

If the dishonesty element can be established, it must be accompanied by the intention to permanently deprive the owner of the property. Confusingly, this does not necessarily require the intention of permanently depriving the owner of their property. This element will be established if there is the intention to treat the property as their own to dispose of regardless of the rights of the owner. Even borrowing or lending property may still allow this element to be established if the circumstances make it equivalent to an outright taking or disposal¹⁷⁸. This shows that the term 'intention to permanently deprive' is not an exhaustive definition; it can be interpreted quite broadly.

A mere borrowing is not enough to establish this element. However, if when the property is returned to the owner, it has 'changed state'¹⁷⁹ in such a way that 'all its goodness or virtue has gone'¹⁸⁰ then this can be enough.¹⁸¹

Example 4A – D becomes intoxicated, then on the way home decides to take a traffic cone from the street. The next day, he sees the traffic cone in his living room and leaves it there.

¹⁷⁸ *R v Coffey* [1987] Crim LR 498, CA

¹⁷⁹ *R v Lloyd, R v Bhuee, R v Ali* [1985] QB 829, 830

¹⁸⁰ *Ibid*

¹⁸¹ *Ibid*

This is a useful scenario to consider. In particular, as stealing traffic cones and other traffic signs when intoxicated is a very prevalent thing with student culture. Understanding the position that a lot of student offenders could be in is important since the new objective dishonesty rules. It is likely that an honest, reasonable and objective person would consider the conduct in this example to be dishonest. With the new standard, it would not matter whether D believed his conduct to be dishonest compared to those standards. Using the *Ghosh* test, it is likely that D would have been able to evade liability by using his own subjective and intoxicated reasoning. This example highlights how important the *Ivey* decision could become in relation to intoxicated offenders.

If the first four elements of theft are established in a case similar to **Example 4A**, it would also have to be proven that there was an intention to permanently deprive. As D in this example decided not to return the traffic cone the next day, it is possible that D could be convicted of theft¹⁸². It could be argued that due to his intoxicated mind, D did not have the intention to permanently deprive at the time the appropriation of the traffic cone occurred. However, it is possible for the intention to occur after the actual appropriation. By keeping the traffic cone at his own home, D has shown that he is treating the property as if it were his own regardless of the owners' rights¹⁸³.

If D had returned the traffic cone the next day; he would most likely not be convicted of theft. It is very unlikely that the second element of the mens rea could or would be proven if the property were to be returned. It is very unlikely that this would amount to an intention to permanently deprive.

As the law aims to act as a deterrent, the risk of being prosecuted for theft may encourage offenders to return any property that they may have appropriated due to an intoxicated mistake. This continues to accurately reflect the correct standard of culpability.

¹⁸² Theft Act 1968, s.1(1)

¹⁸³ Theft Act 1968, s.6(1)

This analysis shows that intoxicated offenders may still be prosecuted for theft even though it is considered to be a specific intent crime. With violent specific intent offences, the jury is asked to consider whether the requisite mens rea can be established based on the offender's conduct. This should in turn work the same way for property offences. This is another argument as to why intoxication is not considered to be a defence. The presence of intoxication will not automatically prevent someone from being convicted of a crime; it just acts as an obstacle to proving the requisite fault element in some cases. With theft, it is understandable as to why in the past, intoxication would prevent the mens rea from being established. With the new objective dishonesty test - dishonesty is far more likely to be established in cases involving intoxication. The only mens rea element that then has to be established is the intention to permanently deprive. This should now allow the relationship between theft and the intoxication doctrine to act as even more of a deterrent for offenders. If an offender appropriates property dishonestly according to a reasonable person's standards, they could be prosecuted if they do not return said property. This encourages better behaviour when that offender becomes sober. However, this is still only a proposed theory, convictions may have to rise in order to deter potential offenders.

Burglary

It is possible for burglary to work in a similar way to theft. Even if it cannot be classed as a basic intent offence, the mens rea can be broken down in a way that allows the fault element to be still established, even in cases where intoxication is present.

When analysing burglary under s.9(1)(a)¹⁸⁴, the first element that has to be established is that the offender must be a trespasser. They must either know they are a trespasser or be reckless as to whether they are trespassing¹⁸⁵. They can even have permission to enter the building but become a trespasser because they

¹⁸⁴ Theft Act 1968, 9(1)(a)

¹⁸⁵ *R v Collins* [1973] 2 WLR 243

do something they were not invited to do¹⁸⁶. If you 'invite someone into your house to use your staircase you do not invite him to slide down the banisters'¹⁸⁷. This highlights that 'trespassing' can be established using recklessness, making it easier for the prosecution to prove. As described in Section I, the level of culpability of becoming intoxicated could equate to the level of culpability required for trespassing.

The next element that must be established is the intention to either: steal an item; inflict GBH; or commit unlawful damage. Both GBH and criminal damage *can* be offences of basic intent; the intention of these offences can be that of recklessness. This means that the last two elements of burglary individually require basic intent only, if the intoxicated intention is to commit either GBH or criminal damage, even for an ulterior intent crime. This would also make it easier for the prosecution to establish.

Example 5A – D stumbles into a house that he believes is his friends due to his intoxication. It is actually the house next door. He enters with the intention to commit criminal damage, as he has decided to throw paint on a wall.

In this example, the element that D has to be a trespasser can be established, as this can be done through recklessness. There must also be an intention to commit criminal damage which can be satisfied in this case. Even though burglary is a specific intent crime due to the ulterior intent, it can be broken down and established when intoxication is present due to the various elements that are relatively simple for the prosecution to prove. Although theft is a specific intent crime, using the new dishonesty rules, there is the potential for theft to be established as part of the burglary element whilst intoxicated too.

This works in a similar way to burglary under s.9(1)(b)¹⁸⁸: The trespasser element can also be satisfied through recklessness¹⁸⁹. The second element is that D either

¹⁸⁶ *R v Jones & Smith* [1976] 1 WLR 672

¹⁸⁷ *ibid*

¹⁸⁸ Theft Act 1968, s.9(1)(b)

¹⁸⁹ *R v Jones & Smith* [1976] 1 WLR 672

intends to commit GBH or theft or actually commits GBH or theft. As with the first offence of burglary, it may be possible for the elements of each offence to be established even when intoxicated.

Although this analysis does not result in both theft and burglary being offences with basic intent due to the presence of ulterior intent - it is possible for offenders to secure a conviction despite committing the offences whilst intoxicated. Intoxicated offenders could be charged with theft in cases of theft or robbery, and burglary in cases of burglary and aggravated burglary. This allows the relationship that these offences have with the intoxication doctrine to mimic the relationship intoxication has with the offences in Section I. Thus, the offences of theft and burglary to act as the corresponding crimes for the more serious property offences.

III. The Law Commission Report Revisited

This Section aims to analyse the proposed reforms suggested by the Law Commission and to understand whether these proposed reforms would alleviate the problems discussed in Section II if they were ever to be enacted. Particularly focussing on whether any changes would now be necessary taking into account the change to the dishonesty test.

Law Commission Proposals

In the Law Commissions most recent report, they take accept that the current law set out in common law should be codified and set out in legislation.¹⁹⁰ They take a similar approach to the approach set out in Section I, in that the law should make a compromise between subjectivism and an absolutist approach. They agree with Stephen Gough's view that 'subjectivism is an unattractive and unnatural standpoint'¹⁹¹. They rebut the idea of simple definitional logic for the reason that it allows too much of a defence and also the idea of absolutist interpretation due to the mismatch in culpability¹⁹².

Their main aim throughout the most recent report is to codify the law and allow the *Majewski* rule to stand in a manner that is easier to understand and easier to interpret and apply¹⁹³. The Law Commission believes that the *Majewski* rule should be codified through statute. They proposed that this statute list should include the types of subjective fault that should always have to be proved by the prosecution when the offence has been committed whilst intoxicated. This includes the states of mind which have been held to be 'specific intent' at common law; the states of mind which would no doubt be regarded as 'specific intent' and the states of mind which should be treated as 'specific intent' as a matter of principle. This is on the ground that the external element committed with the

¹⁹⁰ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 3.11

¹⁹¹ S Gough, "Intoxication and Criminal Liability: The Law Commission's Proposed Reforms" (1996) 112 *Law Quarterly Review* 335, 337

¹⁹² Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) paras 1.48-1.62

¹⁹³ *Ibid*, para 3.18

required state of mind compared to the external element without the required state of mind would be fundamentally different¹⁹⁴.

The Law Commission also stated in their report that statute should exclude the element of subjective recklessness. This would mean that the subjective recklessness element in any offence would not have to be proven by the prosecution in cases where any lack of awareness was caused by voluntary intoxication¹⁹⁵. This would be relevant for offences labelled as basic intent offences in Section I. The Law Commission detailed that there should be a definitive test that would be applied in cases where subjective recklessness exists and explained that there should also be a body of rules that would allow the court to decide whether D was voluntarily intoxicated at the time of the offence or not¹⁹⁶.

This approach simply codifies the rules that exist currently with definitive definitions and tests when needed, then allows common law to develop in relation to unusual scenarios. This would allow the courts to naturally and progressively evolve the law based around the codified basics¹⁹⁷.

The report formed by the Law Commission sets out a new draft for their 'Criminal Liability (Intoxication) Bill in Appendix A¹⁹⁸, then explains throughout the report the reasons for each provision. One of the first things tackled is the notion of basic and specific intent, and how the Bill does not actually refer to that distinction. They do however retain the approach that this distinction stems from, in that some subjective fault elements must always be proved, and that some subjective fault elements, subjective recklessness, in particular, do not always have to be proved¹⁹⁹. Instead of using the term 'specific intent', they used the label of an offence with an 'integral fault element'²⁰⁰.

¹⁹⁴ Ibid, para 3.22

¹⁹⁵ Ibid, para 3.23

¹⁹⁶ Ibid, para 3.24

¹⁹⁷ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 3.31

¹⁹⁸ Ibid, Appendix A

¹⁹⁹ Ibid, para 3.33

²⁰⁰ Ibid, para, 3.34

In relation to an offence where the fault element is not an integral fault element (equivalent to specific intent) - the Law Commission propose that when D is intoxicated at the material time, they should be treated as 'having been aware at the material time of anything which D would have been aware of but for the intoxication'²⁰¹. This would apply to any relevant offence regardless of the degree of the intoxication, or whether the intoxication was brought on by alcohol or drugs²⁰². This is the first recommendation stated in the report.

The second recommendation relates to offences that have an integral fault element only, currently labelled as the specific intent offences. The recommendation states that if the definition of the offence charged would make it so the *Majewski* rule would not apply currently, then the prosecution should have to prove that D acted with that relevant state of mind²⁰³.

The third recommendation actually states the fault elements that should be included within the definition of an 'integral fault element'. This is one of the most criticised components that exists with intoxication currently. Although the second recommendation would make it so the actual state of mind rather than the offence itself would determine which rule would apply. This would stand to be an improvement on the current law. It would make it so each offence would be broken down into different fault elements, rather than being categorised based on the offence. Some elements of mens rea may be interpreted using the rule in recommendation one, and some using recommendation two, even though they both remain within the same crime²⁰⁴.

The Law Commission decided to put forward the idea that various fault elements should be excluded from the *Majewski* rule and should therefore always have to be proved by the prosecution. They include the intention to a consequence rather than intention as to conduct; the knowledge as to something (although not

²⁰¹ Ibid, para 3.35

²⁰² Ibid, para 3.36

²⁰³ Ibid, para 3.42

²⁰⁴ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 3.44

knowledge as to risk); and the belief as to something, fraud and dishonesty. It should be noted however that dishonesty was included within this recommendation before the test changed in *Ivey v Genting Casinos*²⁰⁵. It is unknown as to the opinion the Law Commission would have on including this within this recommendation now.

By analysing the position that the Law Commission suggests, it seems that the offences described in Section I would remain relatively unchanged. The position regarding the offences stated in Section II, however, should be analysed again, due to the issues stated with ulterior intent.

If the Law Commission would regard the dishonesty rule as being subject to the *Majewski* rule, then recommendation one would apply. It would, therefore, be easier in statute for the prosecution to prove dishonesty. This would follow the proposed method as discussed in Section II, where dishonesty could be established easily in relation to intoxicated offenders. This would make it so the prosecution would not have to prove dishonesty; it would simply be considered by the jury. However, this is an assumption, as the Law Commission did not include any rules on the changing of such longstanding criminal law principals. This may be something that would potentially evolve through case law rather than being set out in statute.

This intention to permanently deprive would come within one of the intents regarded in recommendation two as an 'integral fault element'. Although this would not make it so the prosecution could not prove this element beyond reasonable doubt, it would just make it so the jury would be directed to consider all circumstances, including the fact D, was voluntarily intoxicated and whether or not that affected the required element of fault. This is very similar to the hypothetical interpretation set out in Section II, where it is still possible for an offender to be convicted if the mens rea can still be established with the intoxication taken into account.

²⁰⁵ *Ivey v Genting Casinos (UK) Ltd (trading as Crockfords Club)* [2018] A.C. 391

The way that the recommendations work in relation to separating intents through individual elements of mens rea rather than basic and specific intent offences also works in a similar way to the hypothetical interpretation set out in Section II, specifically in relation to burglary. As the trespassing component of burglary includes an element of recklessness, when applying recommendation one, D would be considered as having been aware at the material time of anything that D would have been aware of had it not been for the intoxication²⁰⁶. It would be much easier for this component to be established. This would then be dealt with as a separate element of the crime, rather than the entire offence being labelled as specific intent. The next fault element would then be dealt with separately as well.

Criminal damage included within the definition of one type of burglary²⁰⁷ can be committed either intentionally²⁰⁸ or recklessly²⁰⁹. By using the recommendations proposed by the Law Commission, the fault element would be subject to the *Majewski* rule.

If a burglary included a criminal damage element, it is possible that the burglary would be easier to prosecute if the offender was intoxicated by using the proposed reforms. The *Majewski* rule would be applicable to both the trespassing element and the criminal damage element, which would not require the prosecution to have to prove any elements if they were present in a burglary. Rather than the entire offence being labelled as specific intent as the law does now due to the ulterior intent, the recommendations would allow for the offence to be broken up into the relevant fault elements. This would allow the court to analyse culpability on a more effective basis.

If a burglary included GBH, using the recommendations of the Law Commission, it is more likely that an offender would be convicted of burglary under s.9(1)(b)²¹⁰.

²⁰⁶ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 3.35

²⁰⁷ Theft Act 1968, s.9(1)(a)

²⁰⁸ *R v Smith* [1974] QB 354

²⁰⁹ *R v Stephenson* [1979] QB 695

²¹⁰ Theft Act 1968, s.9(1)(b)

As the offence would not be considered as a specific intent crime, it would be broken down into separate mens rea elements. This would work in a similar way to the burglary mentioned above, as the GBH²¹¹ component of the burglary would also be subject to the *Majewski* rule. It is likely that the intoxication, in this case, would not be considered by the jury; the fault elements would be considered as if the intoxication was not present at all.

For the offence of burglary²¹² where theft has to be either intended, or it has actually occurred, this would work in a slightly different way to the examples set out above. Taking each element of mens rea in turn, as this also requires either the intention to steal or any actual theft, there are actually more elements than with the previous examples. The trespassing element would be easy to establish using the recommendations due to the presence of potential recklessness.

As discussed in Section II, the mens rea of theft includes dishonesty and an intention to permanently deprive. Unlike with the examples set out above, these elements would not be subject to the *Majewski* rule according to recommendation 2 by the Law Commission. Specifically, with the intention to permanently deprive, the prosecution would have to prove this element, and the jury would be able to take into account the intoxication. If for example, D disposed of property that same night or sold it to another person, this would normally suffice in regard to this element. If D returned the property the next day when sober, it would be very difficult to prove this element.

These recommendations are definitely a step in the right direction, as codifying the law would allow the intoxication doctrine to be interpreted in a more definitive way with less room for inconsistency. There are still however further amendments that should be made in order to create more accessibility to convictions in relation to property offences. With these recommendations, they create a mismatch between the culpability and the chance of acquittal, particularly in relation to the branches of burglary. If the burglary relates to GBH or criminal

²¹¹ Offences Against the Person Act 1861, s.20, Theft Act 1968, s. 9(1)(b)

²¹² Theft Act 1968, s.9(1)(a) and s.9(1)(b)

damage, the *Majewski* rule will apply. Whereas, when theft is present, the *Majewski* rule will not apply. The mismatch in convictions would be too high compared to the culpability needed for each branch of the offence.

The Law Commission does also state that when determining the nature of the fault element when it is an integral fault element, whether there is an alternative offence of recklessness or not should be taken into consideration²¹³. This implies that through the evolution of case law, this can be taken into consideration, particularly when looking at the offences held in Section II. By allowing courts to take this into consideration, it may then allow the law to evolve in a way that secures convictions for theft when the offender is voluntarily intoxicated. There is still an argument that the rules on this should be codified.

If the Law Commission recommendations were to be codified, it would allow the relationship between the intoxication doctrine and the offences within Section I to work as they do now. It would make sure they were implemented in a fair and consistent way with scope for evolution in unusual cases. The relationship between the doctrine and the offences in Section II would potentially be more appropriate. If each property offence were to be broken down into separate integral fault elements, it is likely that the dishonesty element would not be subject to the *Majewski* rule. The intention to permanently deprive element would not be subject to the *Majewski* rule, however this element would be far easier to prove when an offender later becomes sober. More codification surrounding the fault elements of theft would definitely be needed, particularly now the dishonesty test has changed. Generally, the recommendations relating to Section I and Section II, in particular, can be interpreted in a way that sways more towards an absolutist approach. Potentially making it so offenders can still be charged with property offences, even if committed whilst intoxicated. The relationship between the Law Commissions Proposals and the Ivey case should be evaluated further in order to analyse the effects of Ivey on the Intoxication Doctrine.

²¹³ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009) para 3.51

Conclusion

Throughout this project, it has become clear that although the *Majewski*²¹⁴ rule has benefits both in theory and in practice with certain offences, there are also a lot of problems and concerns. Particularly coming from the lack of codification as well as the problems through interpretation amongst property offences and offences that occur through an involuntary intoxication. Considering even the judges within the *Majewski*²¹⁵ case had differing opinions on basic and specific intent, clearly, some form of clarification and codification would be beneficial.

With offences against the person, the *Majewski*²¹⁶ rule works well in practice due to the nature of the corresponding offences. As all offences that have a specific intent also have a basic intent offence with the same actus reus, the prosecution can still secure a conviction, even in cases with intoxication present.

There are various arguments that suggest the way the intoxication works is unsatisfactory. Some suggest that by allowing the effect of the intoxication doctrine on basic intent crimes, it undermines a very important rule of law - that all elements of a criminal offence must be proved by the prosecution beyond all reasonable doubt. The theory behind the way this works in practice is that it will fail to provide a full defence in order for intoxicated offenders to evade liability. It seems to be an absolutist approach to interpreting the law. Yet, this has proved not to be the case through common law²¹⁷. Offenders are still able to evade liability if they would not have been culpable when sober.

There are also various arguments about intoxication being taken into account for specific intent crimes. If the courts were to take an absolutist approach to interpret specific intent crimes, intoxication would not be taken into account at

²¹⁴ *DPP v Majewski* [1977] A.C. 443

²¹⁵ *Ibid*

²¹⁶ *Ibid*

²¹⁷ *R v Richardson* [1999] 1 Cr. App. R. 392

all. Although this would have obvious public safety benefits, it would create a monumental difference between the culpability of committing a serious offence with a sober intention, compared to when intoxicated. The *Majewski*²¹⁸ rule currently does not apply to specific intent crimes. However, rather than allowing a defence for intoxicated offenders, it simply allows the intoxication to be taken into account when assessing the element of fault, potentially then preventing a conviction.

This allows a compromise between the absolutist and the subjective approach. The absolutist approach is used for basic intent crimes, allowing for convictions to be attained in order to protect the public, and the subjective rule is used for specific intent crimes in order to protect the importance of taking culpability into account. This is however only how the doctrine works with violent offences that have committed when offenders have been voluntarily intoxicated.

Generally, the relationship between intoxication and violent offences works in a consistent and fair manner. Considering the *Majewski*²¹⁹ rule was created with violent offences in mind, it works as a concept in theory and in practice. The doctrine works in a way that offers the public an element of safety, as well as fairness for offenders. The manner in which it works should be extrapolated and applies to other areas of criminal law in order to improve their relationship with intoxication.

The manner of codification suggested by the Law Commission would also add an element of consistency. As the *Majewski*²²⁰ rule works well in practice, codifying it would ensure fairness. The method incorporated in Australia should also be looked at if the *Majewski*²²¹ rule was ever to be codified. This would allow for offenders to use their intoxication to evade liability in relation to specific intent crimes *unless* they have committed an offence whilst intoxicated before. This would add another element of public safety to legislation.

²¹⁸ *DPP v Majewski* [1977] A.C. 443

²¹⁹ *Ibid*

²²⁰ *ibid*

²²¹ *DPP v Majewski* [1977] A.C. 443

Involuntary intoxication should and tends to be immune from the rule set in *Majewski*²²². When an offender commits an offence without the requisite mens rea in *any* type of crime, and the failure to establish the mens rea has arisen from an involuntary intoxication, no conviction will be granted. The reasons for this are relatively clear. The issues with involuntary intoxication arose in the case of *Kingston*²²³. This case set a dangerous precedent, as it takes an absolutist approach in regard to involuntary intoxication.

It was decided that even though the offender, in this case, did not choose to become intoxicated, however, was still held to be liable for all that occurred thereafter. This was a very controversial decision, as his drugged intent was held to be intent. It seems very unfair to equate an involuntary and drugged intent with a sober intent. The suggested recommendations by the Law Commission, if they were ever to be enacted, may reduce the effects of the precedent set in *Kingston*. It would potentially allow for intoxication to be taken into consideration, even if the fault element could be proved by the prosecution. If it were ever to be codified, this would offer a far superior form of culpability assessment for offenders that have committed crimes whilst involuntarily intoxicated.

On the face of it, the property offences discussed in Section II, namely theft, burglary, aggravated burglary and robbery, seem similar to the offences discussed above. Theft and burglary require a lower level of fault than robbery and aggravated burglary as well as resulting in a lower sentence if convicted. Theft also has corresponding actus reus elements with robbery, and burglary has corresponding actus reus elements with aggravated burglary. The issue, however, remains that all four offences are ones of specific intent, therefore providing no basic intent offences that the prosecution can prosecute the offender for when intoxication has prevented them from proving the mens rea required. This is clearly a public policy concern.

²²² *ibid*

²²³ *Kingston* [1995] 2 AC 355

The *Ivey* case suggests the way theft and other property offences may work in the future, could mimic the format that offences discussed in Section I work in practice. Instead of being seen offences of ulterior intent, they may instead be seen as basic intent offences. As long as all of the actus reus elements of theft can be established, offenders may be able to be prosecuted for theft, even if they were deemed to be so intoxicated that they did not know what they were doing. If an individual awoke from an intoxicated state and they realised that they had taken something that did not belong to them; if they decided not to return such property, they could potentially still be liable for theft. This is due to the fact an 'intention to permanently deprive' can occur after the original appropriation²²⁴. The only element left to establish would be the dishonesty. Due to the new test in *Ivey v Gentings Casinos*, this may now be possible to establish, even in cases involving intoxication. If an offender were to appropriate property belonging to another whilst intoxicated, it would be down to the tribunal of fact to determine whether the offender was doing so dishonestly. This test would not take into account the subjective opinion of the offender himself, only the objective opinion as to whether the offender was dishonest compared to the standard of a reasonable person. Theft, may therefore, still be prosecuted when an offender is intoxicated, as long as the property is not returned.

In a case where an individual awakes from an intoxicated state and they realise they have appropriated property belonging to another; and they return that property as soon as is reasonably practicable, it is unlikely they would be prosecuted for theft. This is due to the fact all five elements of theft have to be established, including an intention to permanently deprive. Although the definition of dishonesty has changed, this will not impact the prosecution where they are unable to prove beyond reasonable doubt, all of the other elements to the offence. This does however continue to highlight the fault of individuals and how that fault should impact on their sentence or lack thereof. This would add an additional level of deterrence, as any intoxicated offender would be encouraged to return any property once they awake from their intoxicated state.

²²⁴ Theft Act 1968, s.6(1)

This would work in a similar way when the offender is charged with burglary. This is due to the breakdown of the elements of burglary being possible to prove by the prosecution individually. As recklessness is possible to establish even when the offender is intoxicated, the prosecution would only then be required to prove the additional element of theft, GBH, or criminal damage. Using the analysis of the *Ivey* case, theft may be possible to prosecute even when the offender is intoxicated. This is also the case for s.20 GBH²²⁵ and for criminal damage²²⁶ as they both stand as basic intent offences. This also slightly mirrors the method suggested by The Law Commission, by assessing each element of an offence individually in cases involving intoxication.

Incorporating the Law Commissions reform proposals into the law in England and Wales would allow only integral fault elements of offences to be immune from the *Majewski*²²⁷ rule. This would therefore allow each mens rea element to be dealt with separately, rather than each crime being labelled either specific or basic intent. This would then transpire into elements of theft and burglary being subject to the *Majewski*²²⁸ rule. This would allow the offences to be judged on a case-by-case basis by the jury, making it so the offences in Section II would be analysed in a much more succinct and consistent way.

This method would also allow for the relationship between intoxication and the offences described in Section II to mimic the relationship between intoxication and the offences described in Section I. This would allow the prosecution to charge offenders with both theft and burglary when intoxicated as they would for s.20 GBH and manslaughter. This would also provide a method of being able to prosecute an offender that has committed either robbery or aggravated burglary, with theft or burglary instead. An in-depth analysis of the effects of *Ivey* therefore seem to create corresponding crimes for both robbery and aggravated burglary, making it so the prosecution are still able to attain convictions when an

²²⁵ Offences Against the Person Act 1861, s.20

²²⁶ Criminal Damage Act 1971, s.1(1)

²²⁷ *DPP v Majewski* [1977] A.C. 443

²²⁸ *Ibid*

offender is intoxicated. This would mimic the method used between murder and manslaughter and s.18 GBH and s.20 GBH. This method has been described as working well in practice with few moral objections²²⁹.

Although the analysis of *Ivey* in this manner would see to resolve such a heavily disputed area in law, it remains only a theory of a more appropriate practical format. Until codified, it is unknown as to how effective this change would be and how many more prosecutions would result.

²²⁹ Law Commission, *Intoxication and Criminal Liability* (Law Com No 314, 2009 paras 1.28 and 5.29

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