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The Classification of Crimes and the Special Part of the Criminal Law

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1. Mental States and ‘Activity’ Conditions: A Summary of the Argument

Classification of diverse, but related, phenomena is intended to advance knowledge and is in some sense a basic intellectual tool, or mode, of human thought. In the criminal law, sound classification may act (inter alia) as a heuristic guide to what is, morally speaking, at stake in the crimes classified in a given way. Crimes fall to be classified in different ways, ways that will give salience to different kinds of moral distinction between them. Accordingly, the classification may be morally contentious. For example, burglary was formerly classified exclusively as a property crime in English law. This was simply because the crime always commences with the proprietary wrong of ‘entry as a trespasser’. This classification is, however, in a way just a matter of convenience, a way of bringing all instances of burglary under one statutory umbrella. There is at least as strong a moral case, based on a ‘fair labelling’ argument, for classifying the crime according to the criminal intention with which a defendant enters as a trespasser; and, at least in one instance, entry as a trespasser with intent to commit a sexual offence, that is how the crime is now classified. The classification with which I will be concerned here is the well-known and well-established

* I am especially grateful for the painstaking work done on previous drafts of this paper by Antony Duff and Andrew Simester, and for the thought-provoking comments of Ken Simons, which have (I hope) saved me from some embarrassing errors.

1 Mala prohibita as against mala in se, property crimes as against violent offences, inchoate crimes as against completed crimes; and so forth.

2 Theft Act (England and Wales) 1968, s. 9.


4 Sexual Offences Act 2003, s. 63.
classification of crimes as either ones of ‘general’ (or basic) intent, or ones of ‘specific’ intent.

In law, the main function of this distinction is to provide the theoretical basis for differentiating between crimes—those of specific intent—where evidence of voluntary intoxication is (if relevant) admissible to show that a defendant lacked the mental element, and crimes—those of general, or basic, intent—where such evidence is (even if relevant) inadmissible for this purpose.\(^5\) As we will see (and as the phraseology implies), the general–specific intent distinction has traditionally been understood as a distinction between kinds of mental element. Broadly speaking, recklessness or negligence (and cognate terms) are cast as the basic or general forms of ‘intent’, whereas intention alone is what is meant by ‘specific intent’.\(^6\) In essence, my claim will be that whilst this understanding has proved workable enough, it has theoretical flaws and may hence lead to confusion in practice. It needs to be remodelled in a more sophisticated way. The distinction needs to be recast as a distinction between crimes that hinges primarily on whether the wrong underlying the crime presupposes that the defendant is ‘active’, or is ‘passive’, in producing the prohibited outcome.

First, there are crimes whose sole or, at least, central manifestation is when the defendant succeeds in bringing about the relevant result as he or she intends (or tries to do this). In such crimes, the success (or the attempt to be successful) constitutes the underlying wrong. Secondly, there are crimes whose focal case is one in which, whether in the course of positive acts or through inactivity, the defendant fails (more or less culpably) to prevent a relevant result he or she was duty bound to avoid. Here, the simple bringing about of that result, in these circumstances, amounts to the commission of the underlying wrong. When the distinction is recast in this way, it is primarily with respect to the role that the defendant’s (in)activity plays in constituting or bringing about the wrong that crimes are to be classified, in order to determine (assuming one is set to do this) whether evidence of voluntary intoxication should be admissible to deny the mental element.

\(^5\) See U.S. Model Penal Code, Art 2, s. 2.08(2); Crimes Act (NSW) 1900, s. 428D; Australian Criminal Code Act 1995, s. 8.2(2); Pakistan Criminal Code 1860, s. 86. On the attempts to dispense with the distinction in common law jurisdictions, see Stephen Gough, ‘Surviving Without Majewski?’ [2000] Crim LR 719. The distinction may also (a closely related point) mark the distinction between crimes—those of specific intent—where an honest mistake of fact as to the absence of a definitional element of the crime need not be reasonable, and crimes—those of general intent—in which such a mistake must be both honest and reasonable, if it is to acquit: People v Mayberry 542 P 2d 1337 (Cal. 1975); Ind. Code Ann. 35-41-3-7 (West 1998), discussed in Joshua Dressler, Understanding Criminal Law (3rd ed., New York: Lexis, 2001), at 155–6.

\(^6\) Burglary, for example, is a crime of ‘specific intent’, in so far as it requires that the defendant enter as a trespasser with the (specific) intention of committing a particular crime or range of crimes. So, evidence of voluntary intoxication is admissible to raise a doubt whether, when the defendant knowingly entered as a trespasser, he or she had the specified criminal intent.
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Classification would no longer hinge on the nature of the mental element, as such, in those crimes, in the way that the basic-specific intent distinction makes it hinge.

The nature of the change that I have in mind is set out in § 4 and § 5, where a fourfold distinction is drawn between, on the one hand, (a) crimes of ‘specific’ intent, (b) crimes of ‘specific’ mens rea, and (c) crimes of ‘ulterior’ intent, the three kinds that exemplify or are parasitic upon the ‘trying’ account of wrongdoing, and, on the other hand, ‘general intent’ crimes, the kind that exemplify the ‘duty failure’ account of wrongdoing. Before explaining these distinctions fully, however, in § 2.1 I will explain why the classification of crimes is a special part concern, before going on in § 3 to provide the background to the main discussion through an examination of the traditional understanding of the general-specific intent distinction.

2. Classifying Crimes: A General Part, or a Special Part Concern?

The classification of crimes is a special part concern, rather than a general part concern, in that it constitutes one dimension of the theory of the special part of the criminal law. On the one hand, the theory of the special part of criminal law divides into a normative theory of criminalisation (a theory explaining which wrongs should, and which should not, be crimes), and a theory of the classification of criminal wrongs.\(^7\) The special part itself is concerned simply with the nature of individual criminal wrongs. So, being classificatory issues, whether rape involves a wrong more akin to an invasion of property than to the infliction of physical injury,\(^8\) whether being ‘addicted to the use of narcotics’ is a pure status offence or an offence involving prohibited conduct,\(^9\) and whether murder is a crime of ‘specific intent’, are all matters for the theory of the special part of the criminal law. By way of contrast, an argument over the meaning of ‘sexual intercourse’ can be confined to the meaning that notion should have within the law of sexual offences; and when the argument has that character, the issue is a purely special part issue. For, important and difficult

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\(^7\) Classificatory theories, in so far as they are normative, are only indirectly normative, in that, as I have just indicated, their main purpose is to sharpen our moral—and hence legal—grasp of the wrongs in question, whatever normative consequences, if any, this sharpening up process may have. I shall not be concerned here with the normative aspect—focused on the harm principle—of the theory of the special part.


though the argument may be, no issue bearing on the classification of crimes is at stake.

On the other hand, the general part of the criminal law is constituted by doctrines (insanity; necessity; provocation; *actus non facit reum nisi mens sit rea*; and so forth) applicable to some section of, or to all of, the special part of the criminal law. Its focal concern is with the meaning that those individual doctrines should have, when they have an application (‘should there be an objective test in provocation cases?’; ‘should the definition of insanity be wide enough to cover emotional disorders?’; and so forth). By way of contrast, the theory of the general part of criminal law divides (like the theory of the special part) into two: a theory of the classification of criminal law doctrines, and a normative theory of which doctrines should be applicable within the criminal law, and if applicable, how widely applicable. The classificatory aspect is concerned, for example, with whether (if ever) duress can justify rather than merely excuse conduct, and with whether diminished capacity is best understood as a denial of responsibility or as an excuse.¹⁰ The normative aspect is concerned with whether, for example, criminal liability should ever be wholly strict, with whether duress should be a defence to murder, with whether voluntary conduct should be a pre-requisite of criminal liability, with whether poverty or deprivation should in itself be an excuse; and so on.¹¹

The general and special part of the criminal law, and the theory of the general part, can (although they need not) be treated as in some sense uniquely the preserve of criminal lawyers and criminal law theorists.¹² Whilst, for example, assault is a tort as well as a crime, and whilst insanity has civil law implications as well as criminal law ones, there can always be an argument that when criminal conviction is in issue, special meanings should be given to the meanings of ‘assault’ and ‘insanity’ within the criminal law that might be inappropriate (usually, meaning inappropriately narrow) within the civil law. By way of contrast, the theory of the special part of the criminal law does not seem to be uniquely a concern of criminal lawyers. The classification (as opposed to definition) of wrongs is unlikely to differ when those wrongs are being treated as tortious rather than as criminal wrongs.


¹¹ There are, for example, very obviously distinctions between different kinds of doctrines that might be applied within the criminal law, such as those concerned with responsibility *per se* (like insanity), excusable doctrines (like duress), doctrines connected to a concern for fair labelling, such as *actus non facit reum nisi mens sit rea*, and so forth.

¹² I ought to add that the general and special parts of the criminal law, as I have defined them, do not exhaust the concerns of the criminal lawyer. There are also what might be called ‘threshold questions’, such as the jurisdictional extent of the criminal law. I should add that the two sides to the theory of the general part can, of course, be interrelated. For example, whether duress is best seen as an excuse or as a justification (the classificatory issue), might affect our views on how widely, if at all, it is appropriate to permit the defence to be pleaded (the normative issue).
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Of those who have written about the distinction between the general and the special part of the criminal law, closest to the view I espouse is that of Gardner:

The special part supplies the details of particular criminal offences and arranges them into families. The general part, meanwhile, is made up of doctrines that cross the boundaries between (some or all of) these different families of criminal offences.¹³

Gardner separates out ‘the details of particular criminal offences’, from their arrangement ‘into families’, a distinction that obviously maps on to my distinction between the special part itself, and the aspect of the theory of special part that is concerned with classifying offences. He does not, as such, distinguish between different aspects of the general part of the criminal law itself—what he calls ‘doctrines that cross the boundaries between (some or all of) . . . criminal offences’—and what I call the theory of the general part, concerned either with the classification of such doctrines, or with the question whether particular doctrines should or should not have an application to some or all criminal offences. In place of this, he has a threefold, essentially classificatory distinction, between the ‘auxiliary’, ‘supervisory’, and ‘definitional’ dimensions to or aspects of the general part of the criminal law. For Gardner, the supervisory general part of the criminal law contains mandatory, permissive or advisory (as the case may be) ‘guiding principles for the creation, interpretation, and application of new criminal laws’,¹⁴ such as *actus non facit reum nisi mens sit rea*. The definitional general part of the criminal law is concerned with ‘doctrines that specify how crimes (and defences to crime) are to be defined. They provide the linguistic and conceptual apparatus of the law’.¹⁵ The definitional part is thus concerned with whether, for example, mental elements such as intention and recklessness should bear the same meaning wherever they play a role in the construction of criminal wrongs. If they should, then they have become part of the definitional general part, and can hence become an example of the way in which (at a more abstract level) the law gives effect, if that is what it purports to do, to the maxim—derived from the supervisory general part—*actus non facit reum nisi mens sit rea*.

So far, I hope that there seems to be a good deal that is complementary about the way Gardner divides the general part of the criminal law into sections, and the way I do so.¹⁶ For Gardner, also to be included in the general part of the criminal law is the ‘auxiliary’ part of the criminal law, ‘the automatic or semi-automatic creation of various parasitic modes of criminal liability . . . those dealing with inchoate forms of liability, and those

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¹⁵ *Ibid*.

¹⁶ What Gardner shows is that criminal law doctrines can themselves be classified, according to the kind of work they are meant to do within the criminal law.
dealing with secondary participation in crime’. 17 This seems right, but there is arguably an over-simplification, one that takes us to the heart of my concerns in this essay, notwithstanding the helpfulness of thinking of these species of liability as—in terms of the harm principle—‘auxiliary’. Details marking out the individual character of the wrong to which the inchoate or participatory forms of liability relate, may make it right to think of the individual inchoate offence or mode of participation as an aspect of the special rather than the general part. 18 Let me focus on inchoate forms of liability. To begin with, certainly, the question whether the creation of inchoate forms of liability (or, for that matter, of modes of secondary participation) should be automatic or semi-automatic is a question for what I am calling the normative dimension to the theory of the general part of the criminal law: the part concerned with doctrine-applicability questions. Secondly, the question of what word or phrase is best suited to capture the essence of the actus reus of an attempt, whatever the crime being attempted—‘dangerous proximity’, 19 say, or ‘more than merely preparatory act’, 20 and so forth—is an issue straightforwardly for the general part itself. For, it is a question about the meaning(s) to be given to doctrines—what Gardner called the ‘definitional’ general part—that it has already been decided should have an application more or less generally. 21 Thirdly, however, when it comes to the mental element—the particular intention—required for attempts, we have an ingredient of the inchoate offence that firmly connects it with the special part of the criminal law. Surely, for example, when it comes to the question whether a defendant who is guilty of attempted rape is a ‘sex offender’, the fact that he or she is guilty of an attempt to commit rape, rather than of rape itself, and thus that he or she offends against the auxiliary rather than against the special part (in Gardner’s terms) of the criminal law, should not affect our judgement that a positive answer to the question is appropriate? Considered in terms of the mental element, attempted rape can be regarded as just one member of a family of what are, broadly speaking, sexual offences (such as assault with intent to rape, burglary with intent to rape, and plain sexual assault).

This, admittedly brief, discussion of how different aspects of a crime or doctrine can be considered as general or as special part concerns, depending on their nature, sets the stage for discussion of the law’s approach to evidence of intoxication, and hence of the significance of the distinction it commonly employs between crimes of general and crimes of specific intent, to shape that approach. The question whether evidence of (voluntary)
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intoxication should in principle, either generally or only in some cases, be admissible to bolster a denial of mens rea, and the question whether ‘being intoxicated’ should be regarded as in some circumstances an excuse in its own right, are questions stemming from a concern with the normative dimension to the theory of the general part of the criminal law (the part concerned with doctrine-applicability questions). By way of contrast, for example, the legal definition of an ‘intoxicant’, the precise nature of the distinction between voluntary and involuntary intoxication, and the effects intoxication is deemed to have on the mind and body, are straightforward general part concerns. Like the idea of ‘proximity’ in the law governing attempts, they are doctrines meant to have some consistency of meaning across all of the crimes to which—in virtue of answering the questions set for us, in that regard, by the normative dimension to the theory of the general part—it has been decided that they should apply.

Now, when it comes to the relevance of (theory of) special part issues to the legal significance of intoxication evidence, there is more than one approach that the law could take. It could simply permit the admissibility of such evidence to turn solely on its relevance to the presence or absence of the particular mental element (if any) at stake in individual crimes. This would be, obviously, to allow the character of the special part itself to determine admissibility. Ostensibly (although not, as we will see, in fact), such an approach is encouraged by the Model Penal Code, and in particular by its well-known insistence that someone is not to be convicted of a criminal offence unless, ‘he acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offence’. On this approach, intoxication, even if voluntary, would clearly be relevant and hence admissible as evidence bolstering a denial that a defendant acted ‘purposely, knowingly [or] recklessly’, when a criminal offence was in part defined by one of those mental elements. For, all of them involve—loosely speaking—subjective states of mind, such as a specific intention or foresight, that evidence of intoxication might persuade a court that D did not act on or with, at the material time. By way of contrast, intoxication would not be relevant to any crime that could be committed through negligence, because one of the effects intoxication is deemed (as a general part matter) to have, is the tendency to make one more careless and incompetent: the very element

22 On which, see G R Sullivan, ‘Making Excuses’, in A P Simester and A T H Smith (eds.), Harm and Culpability (Oxford: Oxford University Press 1996), at 131–52. This possibility is not further considered here.


24 City of Minneapolis v Altimus, 238 NW 2nd 851 (1976); R v Eatch [1980] Crim LR 650.


of culpability that the prosecution is seeking to prove. On this approach, thus, one permits the applicability of intoxication doctrines to be more or less wholly dictated by the character—subjective or objective—of mental elements within the special part itself.

This approach, a key part of the ‘subjectivist’ agenda within criminal law theory, is not, however, the approach taken in (I believe) the vast majority of common law, or former common law, jurisdictions. Whilst there is, of course, much variety in these approaches, central to almost all of them is a distinction drawn from the classificatory dimension to the theory of the special part of criminal law, the distinction between crimes of general and crimes of specific intent. It is this distinction that commonly determines when evidence of (voluntary) intoxication will be admissible to deny the mental element in crimes. I will be seeking to defend a more sophisticated version of it here, in pursuit of a deeper understanding of how crimes can be classified.

3. General and Specific Intent: Refining the Traditional Approach

Most legal systems have rules specifically designed to restrict at least to some extent the use of evidence of intoxication to bolster a denial of culpability (broadly construed). This is because, by way of contrast with, say, tiredness, people frequently intentionally become intoxicated, despite knowing that intoxication has effects—impaired motor control and judgement, inattentiveness, short-temperedness, increased aggressiveness—associated with making one more likely to commit crimes in some circumstances. When people do this they are thus knowingly responsible for bringing about the very conditions on which they now seek to rely in defence; and, save in very limited circumstances not relevant here, that is something the law

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28 The prosecution must, of course, show that the defendant was negligent with regard to bringing about some particular consequence—such as death, injury, or damage—but it is hard to see how evidence of intoxication could assist a defendant to show that he was not negligent in that regard.


31 For instance, even if one is the cause of one’s own insanity one can still plead insanity. In some instances, it may also be that one can plead a justificatory defence, such as necessity, even if one was the cause of the conditions of necessity. So, even if it is my loud yodelling that starts a landslide, I may still be justified in breaking into your mountain hut to seek refuge: see further, Alan Brudner, ‘A Theory of Necessity’ (1987) 7 Oxford Journal of Legal Studies 339. On the position where self-defence is concerned, see Andrew Ashworth, ‘Self-Defence and the Right to Life’ (1975) Cambridge LJ 272.
commonly regards as undermining the moral and legal basis of a defence.\textsuperscript{32} It is one thing, though, to say that it is no defence, as such, to be intoxicated, or to say that evidence of intoxication cannot bolster a ‘confession-and-avoidance’ plea of duress or provocation. It is, or would appear to be, another thing to say that evidence of intoxication (whether or not voluntary) cannot be adduced to constitute or bolster a claim that the mental element required for conviction of the crime itself in question was or may have been absent. Surely, it might be said, if any one of the essential ingredients of the crime itself is absent, the defendant must be acquitted because the crime has not taken place, and it cannot matter why that ingredient is absent. This is the subjectivist line of argument, outlined at the end of § 2, the argument that most common law jurisdictions reject (in whole or in part). What do those jurisdictions have, by way of doctrine, in its stead? In England and Wales, it has been the judge-made distinction between basic (or general) and specific intent, a distinction designed to place restrictions on the admissibility of self-induced intoxication as evidence that the defendant lacked the mental element for the crime.\textsuperscript{33} That distinction has also found its way—with that same design in mind—into a number of criminal codes in current or former common law jurisdictions. So, for example, the Australian Federal Criminal Code Act 1995, s. 8.2(1) says that ‘evidence of self-induced intoxication cannot be considered in determining whether a fault element of basic intent existed’ (my emphasis), and similar provisions have been enacted in some individual Australian States.\textsuperscript{34}

It has been claimed that the US Model Penal Code ‘discarded’ the common law distinction between basic or general intent and specific intent;\textsuperscript{35} but that is true only if one takes this distinction to be a distinctly old-fashioned one marking a boundary between crimes requiring proof of nothing more than ‘wickedness’, in some general and ill-defined sense, as the \textit{mens rea}—these being the basic or general intent crimes—and crimes requiring a more ‘specific’ mental element, such as intention, dishonesty,

\textsuperscript{32} One cannot, for example, plead duress, if the threatener was a member of the violent gang one had oneself voluntarily joined, in full knowledge of the gang’s activities: \textit{R v Sharp} [1987] QB 853.


\textsuperscript{34} See, e.g., Crimes Act (NSW) 1990, s. 428D. ‘in determining whether a person had the \textit{mens rea} for an offence other than an offence of specific intent, evidence that a person was intoxicated at the time of the relevant conduct: (a) if the intoxication was self-induced—cannot be taken into account.’ The Australian law is illuminatingly discussed by Gough, above, n. 5, at 720–6. See also the harsher provision in s. 86 of the Pakistan Criminal Code of 1860: ‘In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered without his knowledge or against his will.’

\textsuperscript{35} Dressler, above, n. 5, at 138.
recklessness, and so forth. In fact, the Model Penal Code does rely on, even though it does not clearly articulate, a distinction between basic and specific intent. The reliance is clear when, in § 2.02(2)c, the Code says that in cases where the defendant is voluntarily intoxicated, he or she can be regarded as acting recklessly—*even if* he or she was not consciously aware at the time of the risk of doing the harm in question—*if* the risk of which he or she was unaware is one of which he or she would have been aware, if sober. The American Law Institute commentary on this clause rationalises it by saying that ‘it is not unfair to postulate a general equivalence between risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk’. This notion of ‘equivalence’ (also relied on in a minority of English cases) seems controversial, since like is not necessarily being compared with like. If the charge is, say, driving without due care and attention, then perhaps such equivalence exists. At least for the purposes of criminal conviction, though, there scarcely seems to be compelling analogical force in a comparison between, for example, the risks created by becoming intoxicated, and the risk, on a theft charge, that the defendant will put goods-for-sale into his or her own bag rather than into an authorised shopping basket. In fact, neither the Australian Federal Criminal Code nor (at least on most views) English law, place reliance on the ‘equivalence’ argument. They simply rule evidence of self-induced intoxication to be inadmissible as part of a defendant’s case that he or she lacked the mental element in crimes of basic intent, perhaps in something like the same way that one might (more generally) rule purely self-serving, previous out-of-court statements to be inadmissible, when tendered in support of a defendant’s plea. Be that as it may, the important point to note about the Model Penal Code explanation is that, by way of contrast with the position where recklessness can be proved, it is not supposed that there is an ‘equivalence’—in point of provable mental element—between, say, forming a particular intention and becoming drunk, or between acting dishonestly and becoming drunk. So, through a contrast between crimes that may be committed recklessly (*or, a fortiori*, through gross negligence) and crimes where a more ‘specific’ mental element is required, the Model Penal Code continues to employ the basic-specific intent distinction. That brings me to the precise nature of the distinction between crimes of basic and of specific intent.

36 High-level judicial disapproval of the use of ‘wickedness’, without more, as an explanation of the mental element in crime can be found in English cases from at least the beginning of the eighteenth century: see the judgment of Holt CJ, in *R v Maugridge* [1707] Kel 119.
37 American Law Institute, Comment to § 2.08, 359. Broadly speaking, this is much the same rationalisation as that given by Lord Elwyn-Jones in *DPP v Majewski* [1977] AC 443.
38 See, e.g., *DPP v Majewski* [1977] AC 443. See also *DPP v Majewski* [1977] AC 443, where majority support can be found for this view, despite support also being given for the ‘equivalence’ view in some of their Lordship’s speeches.
It has sometimes proved tempting for legislators, courts, and commentators to understand the distinction between basic and specific intent in terms of a distinction between a mens rea extending only ‘as far as’ the actus reus (basic intent crimes), or as far as the conduct element thereof, and mens rea ‘going beyond’ that actus reus (specific intent crimes). In the latter case, the crimes are also known—for obvious reasons—as crimes of ‘ulterior’ intent (a kind of crime further discussed in § 4). Although intelligible enough on its face, this (minority) view is not an attractive way of thinking about the distinction, in general, because—in the intoxication context, at least—it detaches the distinction from its key rationale, namely that of indicating the crimes respecting which evidence of self-induced intoxication may, or may not, be employed as evidence showing that the defendant lacked the mental element. As has been pointed out often enough, murder is on almost everyone’s list of crimes of specific intent, in that evidence of voluntary intoxication may be used to show that the defendant lacked the intent to kill (where that is required for a murder conviction), but the mens rea clearly does not go beyond the actus reus, and so murder is not a crime of ulterior intent. Conversely, and contrary to Smith and Hogan’s claim that, ‘where an ulterior intent is required, it is obvious that recklessness is not enough’, there are crimes where the mental element goes beyond the actus reus, but where evidence of self-induced intoxication is none the less inadmissible as a means of seeking to deny the mental element, because the mental element in question is recklessness. If the defendant is charged with the offence in England and Wales, contrary to s. 1(2) of the Criminal Damage Act 1971, of recklessly destroying or damaging property, being reckless as to whether life is endangered thereby, he or she is charged with a crime of ulterior ‘intent’ (more accurately, of course, a crime of ulterior mens rea); but the ulterior element of mens rea being recklessness, it has long been clear that a defendant cannot seek to deny that ulterior mental state by claiming that he or she was too (voluntarily) drunk to notice the potentially life-endangering consequences of his or her reckless and damaging or destructive actions. As the U.S. Model Penal Code clearly implies, and as English law (putting aside some wrinkles) has come to accept, the distinction between crimes of general or basic and of specific intent does not lie here. It lies in a distinction of some kind between, on the one hand, crimes that may be committed through


41 For more detailed examination, see Jeremy Horder, ‘Crimes of Ulterior Intent’, in Sinister and Smith, above, n. 22, 153.

42 R v Sheehan and Moore [1975] 1 WLR 739; State v Ludlow 883 P. 2nd 1144 (Kan 1994).


44 ibid., at 88.

recklessness or negligence (or through analogous forms of mens rea, such as a want of due care and attention), and on the other hand, crimes that may only be committed with an in some sense more ‘specific’ mental element, such as intention or dishonesty. In §4 below, I will try to do something to draw out this distinction in a way that enables us to avoid Smith and Hogan’s gloomy view that:

The only safe conclusion seems to be that ‘crime requiring specific intent’ means a crime where evidence of voluntary intoxication negativing mens rea is a defence; and the designation of crimes as requiring, or not requiring, specific intent is based on no principle but on policy. In order to know how a crime should be classified for this purpose we can look only to the decisions of the courts.46

4. MENS REA AND WROGING SUCCESSFULLY
(OR TRYING TO)

Let me start afresh. We now know that it is common to distinguish between crimes that are, in whole or in part,47 ones of general or of specific intent by reference to whether the crime in question may be committed by recklessness (or negligence), in which case it is one of general or basic intent,48 or whether nothing less than proof of an intention to bring about the forbidden consequence will suffice as proof of the mental element, in which case it is one of specific intent.49 This way of drawing the distinction has come in for criticism, in that, for example, (i) whilst murder is treated as a crime of ‘specific’ intent, it can be satisfied by proof of foresight of virtual certainty (although in English law such foresight is sometimes treated as the same thing as an intention),50 and (ii) whilst, in English law, handling stolen goods does not require an intention that the goods be (or knowledge that they are) stolen—a belief that the goods are stolen will suffice—handling stolen goods is, in the relevant sense, a crime of specific intent,51 in that evidence of voluntary intoxication may be adduced by the defendant to support the credibility of a claim that he or she gave no thought to whether

46 Smith and Hogan, above, n. 43, at 243. 
47 A crime such as rape is traditionally thought of as a crime involving both specific and general intent elements, in that whilst there must be a specific intent to have intercourse, there need be only recklessness—or, as in English law, negligence—as to whether or not the intercourse intentionally engaged in was consensual. See further, Kyron Huigens, ‘Is Strict Liability Rape Defensible?’, in this volume. 
48 See MPC v Caldwell [1982] AC 341, and the summary of English law in Simister and Sullivan, above, n. 29, at 562, ‘[C]rimes of basic intent are crimes where intention or recklessness will suffice for conviction (their emphasis).’ See also People v Register (NY 1983) 457 NE 2nd 704, and the claim by Dressler, above, n. 5, at 324, ‘In modern language, self-induced intoxication typically constitutes reckless conduct.’ 
50 See Simister and Sullivan, above, n. 29, at 561–2. 
51 R v Durante [1972] 3 All ER 962, interpreting s. 22 of the Theft Act (England and Wales) 1968.
or not the goods were stolen when they were handled.52 I will explore the reasons why these examples have proven difficult below.

None the less, the distinction needs to be recast, rather than abandoned, as it contains an important classificatory insight. It should be regarded as reflecting, albeit in a distorted way, a distinction between crimes where the focal case of wrongdoing is the defendant’s active engagement in bringing about (or trying to bring about) some consequence, and crimes where the focal case of wrongdoing is the defendant’s (culpable) passivity, his or her failure to do enough to prevent an outcome. So, broadly speaking, ‘specific intent’ crimes are those where the focal case of the wrong is the case of being successful (or trying to be), in bringing about the forbidden consequence. ‘General intent’ crimes, by way of contrast, are those where the wrong consists in more-or-less culpably bringing that consequence about, whatever else one was trying to do at the time. It is the latter kind of crime that may be committed by advertent or inadvertent carelessness. This modified view, whilst a step forwards, is still over-simplified. For it suggests that if and in so far as murder can be committed when killing did not constitute success for the killer, as when he or she knew the victim’s death was a certain consequence of something else he or she was trying to do (say, setting fire to an inhabited dwelling at night, in order not to kill but to claim on insurance at some later point), then murder will be a crime of general rather than of specific intent. Further refinement of the general-specific intent distinction will avoid this uncomfortable classification, but that is to anticipate.

The distinction between a defendant’s passivity and activity, where his or her doing wrong is concerned—the distinction between bringing about an outcome simpliciter and bringing it about successfully (or trying to)—is obviously an important distinction, morally speaking, when it comes to questions of credit and blame for conduct. I deserve credit for saving you from drowning if, in throwing a plank in your direction, I intended it to provide a means of floatation: here, saving you constitutes success for me. It would, though, be odd to give me the same (or, perhaps, any) credit if, not knowing you were there, I just happened to throw the plank in your direction, when I was jettisoning it because it was surplus to my requirements; and it would be even odder—wrong, indeed—to give me credit for saving you if, when I threw the plank, I intended it to kill you, but as luck would have it, from your perspective, it ended up being the means of your salvation. Very broadly speaking, we should concentrate our focus, in point of creditworthiness, on cases where I succeed in some worthwhile objective, or on cases where, even though I failed to achieve such an objective, I did at least make a meaningful effort to succeed.53 Contrariwise, thus, what about

53 For general discussion, see Gardner, above n. 13; R A Duff, Intention, Agency and Criminal Liability (Oxford: Blackwell, 1990). Clearly, a host of issues that cannot be dealt with here arise out of the claim. Is the credit due the same, if I put the same effort in, whether or not
the person who successfully does wrong (or tries to)? Is such a person thereby necessarily shown up in a worse moral light than the person who wrongs another accidentally, or who unjustifiably risks such a wrong, when the accident or risk-posing was the perpetrator’s fault?

Here, we must take care. The issue cannot be the straightforward one of how ‘much’ blame reckless wrongdoers or risk-posers must accept, as compared with those who successfully do wrong (or try to). The two kinds of case are largely incommensurable. So, for example, it may be fruitless to try to establish whether some (or all) mercy-killers are more, or less, to blame for killing than some (or all) drunken and reckless drivers who kill, since like is not being compared with like. Each kind of killer offends against a different, albeit related, norm, the former by acting for the wrong reasons and the latter by failing to act for the right (or for permissible) reasons. The mercy-killer offends against reasons not to succeed in killing, reasons one offends against if one acts on them specifically. The reckless driver-killer offends against reasons not to kill, or to bring about any other unwarranted injury or damage, simply because those consequences are unjustified setbacks to others’ interests, reasons one offends against if one fails to conform to them (where it is my conformity with the reason that counts, not the reason—explanation—for that conformity, which could be pure chance). 54

When I offend against reasons not to succeed (or to try to), the ‘fault’ element is obviously bound up intrinsically with the identification of what I have done, as an offence against those reasons. For, unless the commission of the wrong constitutes success for me, I would not have offended against those (kinds of) reasons. An offence may be wholly confined, in the circumstances in which it may be committed, to a norm based on such a reason: a reason not to (try to) succeed in committing a wrong. It is these crimes that are the clearest cases of crimes of ‘specific intent’. Consider a criminal attempt. Without an intention to commit the crime embedded in a trying, we cannot begin to make sense of the actus reus of an attempt, of the idea of a more than merely ‘preparatory’ or ‘proximate’ act. Few completed offences, however, are wholly confined in the circumstances in which they

I succeed? Do half-hearted attempts deserve any credit? Does an effortless success deserve more credit than a hard-working but failed attempt? If I save the world from nuclear disaster by accidentally tripping someone who is about the press the fatal button, thus thwarting him, surely I deserve a small element of credit? And so forth.

54 In my examples, then, the commensurable comparison is, on the one hand, between mercy-killers, and other killers for whom killing amounts to a success; and, on the other hand, between reckless driver-killers and others who kill accidentally but through negligence or recklessness. In drawing the distinction in this way, I rely on the account of reasons to succeed, and reasons not to fail (‘period’), provided by Gardner, above, n. 13. I am not confident that I have used the distinction with the precision that he does, but with luck that may not matter in the present context. The distinction is, of course, one familiar to legal theorists as distinguishing legal reasons as they apply to citizens (reasons to conform to those reasons), and legal reasons as they apply to officials of the system, and judges in particular (reasons to act on those reasons): see H L A Hart, The Concept of Law (Oxford: Oxford University Press, 1961), at 114–17.
may be committed to instances in which wrongdoing constitutes a success. Completed offences are almost always offences that may also be committed by advertent or inadvertent carelessness, in some form. However, for some completed offences—like murder, for example—the case in which the wrongful outcome constitutes success for the defendant is still the central or focal case, even though the offence may, exceptionally, extend beyond such instantiations; whereas, for some completed offences—like rape, for example—the case of bringing about the prohibited outcome intentionally is by no means the central or focal case. These differences will be addressed more specifically in § 5, where the former kind of completed offences will be designated crimes of specific mens rea, to distinguish them both from crimes of specific intent, pure and simple, as well as from crimes of general intent.

Putting this refinement on one side, for the moment, what we can now say is that the distinction between crimes of specific and of general intent marks a contrast between crimes—those of specific intent—where the fault element in successfully wrongdoing another is intrinsic to, or the central case of, the norm or reason against which the defendant acts, and crimes where the fault element, if any, is a product of wholly ascriptive rather than normative considerations. For Joseph Raz:

[N]ormative theory is primarily concerned with establishing what people ought to do... Who ought to realise which values and how is the main problem of normative theory. Its most important concepts are ought, reasons for action, rules, duties, and rights... The theory of ascription is concerned with the conditions in which blame or guilt can be ascribed to people... It is the job of normative theory to determine whose responsibility it is to realise this or that value... The theory of ascription deals with the ascription of blame and praise to people who fulfilled or failed to fulfil their responsibilities. It presupposes that we have a normative theory and studies the normative consequences of failure to conform to the requirements of normative theory.\(^5\)

When a defendant offends against a reason not to succeed in wrongdoing (or against a reason not to try to), when he or she is ‘active’ with regard to the wrongdoing, the success is partly constitutive of the normative failure involved: the defendant specifically ought not to have been (or sought to be) successful in doing what was done. Now, because, as Raz indicates at the end of the passage, ascriptive theory presupposes normative theory, this means that the purely ascriptive considerations bearing on such a case will not include the intention with which the act was undertaken. For sure, if, say, someone attempts to kill another, they can and should be blamed for trying to kill; but then, the ascription of blame is a ‘supervenient’ property. It flows simply from the nature of the normative failure involved in the

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attempt to succeed, and is not the product of further judgemental considerations.\textsuperscript{56}

By way of contrast, now consider the case in which a defendant offended against a reason not bring about some unjustified consequence \textit{simpliciter}: when he or she—whatever else he or she was doing—was passive with regard to the wrongdoing. A straightforward failure to \textit{conform} (whatever the reason for failure may be) is then the normative issue, and purely ascriptive considerations will therefore include the fault element, if any, in the offence. If, without justification, I destroy your garden shed, then I have failed to conform my conduct to the reasons there are to avoid such outcomes in acting, period: \textit{that is} my normative failure. If the law then withholds criminal liability on the grounds, say, that the destruction was the product of an unanticipated accident (a petrol can I had forgotten I had exploded into flames, and the flames spread to your shed, for example), it does so for the ascriptive reason that I am not sufficiently to blame to warrant criminal conviction.\textsuperscript{57} \textit{Mutatis mutandis}, a requirement, in point of blame, that I have foreseen or been aware of the risk of damage or destruction, if criminal conviction is to be warranted when the norm has been breached, is a substantive, additional (ascriptive) requirement. It is not merely a property of my conduct that supervenes or flows naturally from the nature of my normative failure.

This, admittedly complex, analysis helps us to give a simple answer to the question with which we began: why should voluntary intoxication be evidence admissible to bolster a denial by the defendant that he or she possessed the requisite mental element, in crimes of genuinely specific intent? The answer is that, where such crimes are in issue, the particular intent with which the defendant acts is not just a ‘definitional element’ (a weasel phrase, if ever there was one): it is intrinsic to the normative logic of the prohibition. So, to convict of the crime in the absence (for whatever reason, including voluntary intoxication) of the intent would be normatively self-defeating.\textsuperscript{58} Things may be otherwise, where the crime’s key normative

\textsuperscript{56} A purely ascriptive consideration in such a case, involving further judgemental considerations, might be, on the debit side, that the defendant premeditated the attempt, or, on the credit side, that the attempt was itself mistakenly believed to be in response to an imminent threat of death.

\textsuperscript{57} The contrast here reflects one between a duty to succeed in avoiding causing unjustified loss, period, and a duty to try to avoid causing unjustified loss, as explained by John Gardner, ‘Obligations and Outcomes in the Law of Torts’, in Peter Cane and John Gardner (eds.), \textit{Relating to Responsibility: Essays in Honour of Tony Honore on his 80th Birthday} (Oxford: Hart Publishing, 2001) 116, at 120. See also Gardner, above, n. 13.

\textsuperscript{58} In resisting this view, in \textit{Montana v Egelhoff} 518 US 37 (1996), Justice Scalia voiced the opinion that, ‘disallowing consideration of voluntary intoxication…comports with and implements society’s moral perception that one who has voluntarily impaired his own faculties should be responsible for the consequences’ (ibid., at 49–50). The weakness in this view, in so far as it is meant to apply to crimes of specific intent, is that where ‘the consequences’ themselves have not ensued unless the defendant acted with a particular intention, it is hard to see how it could make sense to ask whether he or she is responsible for them because he or she was voluntarily intoxicated when the harm was done.
failure is a failure to conform conduct to (broadly) outcome-focused reasons, reasons not to kill, injure, damage, or speed, etc., rather than the very different kind of normative failure, examined so far, that involves positively, successfully bringing about wrongdoing, or trying to. It is to the ‘failure-to-conform’ cases of normative failure, where the focal case is the defendant’s passivity with regard to the wrongdoing, that I now turn. As we will see, these are the crimes appropriately called crimes of general intent.

5. **Culpable Advertence, General Intent, and Specific Mens Rea Crimes**

Most completed crimes can be committed through advertent carelessness, even crimes traditionally thought of as ones of specific intent, like murder or theft. What has misled judges and theorists into treating murder and theft, in particular, as crimes of specific intent is that to be convicted of one of these crimes on the basis of advertent carelessness, that advertent carelessness must manifest itself in a certain (narrowly defined) way. There are, of course, reasons not to kill intentionally, and reasons not to try to kill; but few (former) common law jurisdictions confine the scope of murder, or its broad equivalent, to cases in which a defendant offends against such reasons. So, murder itself is not a pure case of specific intent. Murder cases include instances in which a defendant has killed whilst intending or attempting to do something else, yet in circumstances where not only was the risk of killing unjustified, but the defendant foresaw death or serious injury as virtually certain, or manifested extreme recklessness or indifference towards the occurrence of death. In the latter cases, as M. Cathleen Kaveny has argued, it is not the villain’s intention that condemns him or her, so much as the terrible moral (ascriptive) light in which what he foresaw as the almost certain result of his plans shows him:

> his gross disregard for the human lives foreseeably ended as a certain side-effect of his decision seems, in fact, aptly described both with the Scottish term ‘wicked recklessness’ and with the broad but more specific moral terms ‘homicidal’ and ‘murderous’.

Murder cases can, albeit rarely, be ones in which the defendant is condemned for a (normative) failure to conform to reasons not to cause death unjustifiably. This can only happen, though, when, to use Weinrib’s apt phrase, ‘the actor “as good as” tried or intended to kill his victim’. In such

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cases, conviction rests on a finding that death was foreseen as virtually certain to occur, or on the jury’s ascriptive judgment that there was ‘extreme’ or ‘wicked’ recklessness in killing,\(^{61}\) or that the killing stemmed from ‘an abandoned and malignant heart’.\(^{62}\) In these latter cases, then, the defendant is convicted on the basis of advertent carelessness, but only where its manifestation takes a special, morally heinous form, tantamount to—albeit distinct from—an actual attempt to kill.\(^{63}\) Such crimes are what can be called crimes of specific \textit{mens rea}.

We can now see why murder falls into the limited category of crimes that may be committed through advertent carelessness respecting which it is morally imperative, as subjectivists insist, that evidence of intoxication—whether or not voluntary—is permitted to bolster a denial of \textit{mens rea}. In theory, an act—say, hitting someone hard on the head with a blunt instrument—might be found to manifest extreme indifference or wicked recklessness with regard to causing death, even when it is accepted that the defendant’s intoxication meant that he or she did not appreciate the extent of the harm that might be done to the victim. Employing the inadmissibility account of the rule excluding evidence of voluntary intoxication,\(^{64}\) it might in theory be possible to say of such a case that the defendant would undoubtedly have been aware that death or serious bodily injury was virtually certain to occur, had he or she been sober. It might be possible to say, thus, that his or her failure to advert to that virtual certainty is morally and legally irrelevant, given the voluntariness of the intoxication (a point considered further below). In many jurisdictions it has seemed wrong, however, to permit juries to consider these possibilities, and hence to convict in the absence of actual awareness on the defendant’s part of (a certain degree of) risk that death or serious injury may result. Considerations of fair labelling require that no one be convicted of murder in the absence of such awareness.\(^{65}\) In this respect, however, murder (like theft) may be one of only a small number of exceptional cases, cases of specific \textit{mens rea}, amongst the large number of \textit{mala in se} where one wrongs the victim simply by failing to conform to the reasons not unjustifiably to do the harm. In the other cases of


\(^{62}\) Cal. Penal Code, 188 (West 1999).

\(^{63}\) See the sophisticated analysis of such cases in A P Simester, ‘Why Distinguish Intention from Foresight?’, in Simester and Smith, above, n. 22, 71.

\(^{64}\) See text at n. 34 above.

\(^{65}\) See \textit{DPP v Beard} [1920] AC 479, and Dressler, above, n. 5, at 326–7. The same argument obtains in theft cases, where, even if a defendant would certainly have foreseen it as virtually certain, had he or she been sober, that his or her action would permanently deprive another of their property, it seems wrong—for fair labelling reasons—to convict of theft in the absence of actual awareness that this would be the virtually certain result. That theft may be committed through advertent carelessness, in English law, is confirmed by the qualifications made to the definition of the requirement for an intention permanently to deprive, by s. 6 of the Theft Act 1968.
this kind, most legislatures and courts have treated the crimes in question—manslaughter, rape, wounding, criminal damage, and so forth—as ones in which, when they are committed through advertent carelessness, it is perfectly (morally, and hence legally) permissible to refuse to admit evidence of voluntary intoxication as a means of bolstering a denial that the mens rea. In these cases, proof of advertent carelessness simpliciter will suffice as proof of mens rea, and when that is true, the subjectivist argument against the inadmissibility of intoxication evidence to show that carelessness was inadvertent has seemed much weaker. Consider a case in which a defendant says, for example, ‘when I subjected the victim to non-consensual sexual intercourse, the problem was that I was too drunk to notice whether or not there was consent; but, the brute fact that I did not notice the absence of consent is the reason you must acquit’. In such instances, it has not seemed to courts in many jurisdictions that fair labelling considerations demand assent to this subjectivist contention.\(^{66}\) Why?

The answer seems to lie in the fact that the central or focal case of the wrong in crimes of specific mens rea, like murder and theft, is still the case of ‘active’ wrongdoing, the case in which the defendant offends against the reasons not to succeed in killing (or trying to kill), or to succeed in appropriating property without consent, even if those crimes extend somewhat beyond such instances. The instances in which there can be a conviction for murder or for theft, where the defendant offends against reasons respectively not to kill or to appropriate property without consent simpliciter—instances of failure to conform to the reasons, period, are the peripheral or exceptional instances. They are only included with the scope of the crime because of the high degree of moral fault involved (‘wicked recklessness’ etc.), where the defendant can be said to have ‘as good as’ wronged the victim successfully. That being so, it would be misleading to have a different set of ascriptive rules, such as different rules governing the admissibility of intoxication evidence, applicable to the latter—the exceptional—instances, that are not applicable to the former. For that would be to drive too great a wedge between what are meant to be, morally and legally speaking, cases fit for almost identical treatment, in that they are all, or all ‘as good as’, the active case of successfully wrongdoing.

By way of contrast, it is true by definition of at least some manslaughter cases, and also true of (say) rape, criminal damage, and wounding cases, that the instance in which the wrong is done intentionally is not, morally speaking, a ‘central’ case even if it is a bad case. To be sure, someone who is, say, satisfied with nothing less than non-consensual intercourse is worthy of the utmost condemnation; but so is the person who, knowing the victim might not be consenting, regards that matter as having no practical

significance, as compared with his desire for sex on any terms. In such instances, whilst there is still an obvious difference between the case of intentional wrongdoing and reckless wrongdoing, it is much less clear than it is in murder or theft cases that this difference should fundamentally affect the way that, morally speaking, we characterise the wrong. That is what makes such crimes ones of general or basic intent. Even in crimes where wrongdoing the victim successfully is not the central case, fair labelling considerations may still dictate that one should not suffer criminal conviction respecting one’s failure to conform to the relevant reasons without fault. None the less, the very fact that one’s failure occurs irrespective of fault means that, in the absence of the kind of special—‘central case’—considerations that dictate an exclusive focus on particularly heinous manifestations of advertent carelessness (as in murder and theft cases), the absence of advertence to the risk of such a failure need be given no special ascriptive significance, ahead of other ascription-relevant reasons for that failure, such as voluntary intoxication. Where general intent crimes are in issue, there is, if you will, a moral—and hence, legal—permission to give the absence of advertence special ascriptive significance, for fair labelling purposes, but no moral imperative that this course be taken.

6. Completing the Picture: Crimes of Ulterior Intent

We have now replaced the old specific–general intent distinction with a distinction between crimes of specific intent, constituted by cases in which the defendant succeeds in doing wrong (or tries to), as he intends, crimes of specific mens rea, where successfully wrongdoing is the central instance of the wrong, if not the only instance, and crimes of general or basic intent, where the central case of the wrong is a culpable failure to prevent something happening that one was duty bound to prevent, even if one can commit the wrong intentionally. For the sake of completeness, I should add a fourth category, crimes of ulterior intent. All criminal codes include important

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68 Especially when one bears in mind that one can restrict the possibility that convictions can be obtained in such circumstances, to cases in which the defendant would undoubtedly have appreciated the risk, had he or she been sober. For the Model Penal Code’s endorsement of this approach, see text following n. 46 above. See also Home Office (England and Wales), Violence: Reforming the Offences Against the Person Act 1861 (1998), Draft Bill clause 19, ‘[A] person who was voluntarily intoxicated at any material time must be treated—(a) as having been aware of any risk of which he would have been aware had he not been intoxicated; and (b) as having known or believed in any circumstances which he would have known or believed in had he not been intoxicated.’

examples of crimes—precursor offences—in which, whilst the defendant may not have reached the point at which he or she can be said to have tried to commit the offence, crucial to the conviction will still be a finding that he or she intended to commit the crime. Two examples are provided by the offences, in English law, of having anything in one’s custody intending without lawful excuse to use it to commit criminal damage, and of being in possession of a firearm with intent by means thereof to endanger life.  

These cases are really parasitic on the cases, like attempt, in which the reason not to try to commit the wrong is the reason against which the defendant offends, when committing the offence. They are hence, albeit more remotely, parasitic on the case of successfully doing wrong. I say ‘parasitic’, because whilst intention is just as central to the wrong, it comes in a different form. The intention is closer to the ‘thought’ or ‘bare’ form that is normally contrasted with intention-in-action, in a way well explained by Gardner and Jung:

Bare intentions are personal normative tools using which we change the structure of our future reasons for action. They are new second-order reasons which we evolve for ourselves, which operate to exclude certain existing operative and auxiliary reasons from our future practical thinking unless and until the emergence of further reasons necessitates their reconsideration. Bare intentions work to isolate interim conclusions in extended practical thinking...But it makes no sense to think of intention in action as having exclusionary force. By the time one acts with a certain intention, it is too late to do any excluding of considerations. The deed is done.

In one sense, of course, the defendant’s intention in cases of ulterior intent is not wholly confined to the realm of thought, because the possession of the firearm, say, is evidence of the intention ‘in action’. Hence, Gardner and Jung’s claim that ‘bare or future intention plays no role in the principles of mens rea’. However, the ulterior intent is manifested in an action—the possession—that is obviously not itself meant to bring about the crime in the way the defendant intends. In such cases, therefore, defendants are partly condemned in the light of their ‘second order reasons...interim conclusions in extended practical thinking’, to use Gardner and Jung’s language. Be that as it may, cases of ulterior intent will clearly also be cases in which evidence that defendants lacked the future intention due to voluntary intoxication cannot, morally intelligibly, be ruled inadmissible. For these are cases parasitic on the normative failure constituted by successfully wrongdoing. So, the intention with which they acted is, as in attempt cases, a crucial aspect of the norm against which they offend, and no mere matter of ascribing blame for something (else) wrong done.

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70 Offences, respectively, contrary to s. 1 of the Criminal Law Act 1977, s. 3 of the Criminal Damage Act 1971, and s. 16 of the Firearms Act 1968.


72 Ibid.
7. Conclusion

In a Consultation Paper in 1993, the Law Commission for England and Wales adopted Smith and Hogan’s view that there was no thread of principle linking the courts’ decisions to categorise crimes as ones of basic or of specific intent. The Commission hence advocated abandoning the distinction. In the Law Commission’s then view, evidence of voluntary intoxication should be permitted to bolster a denial of the mental element in all crimes, even ones of basic intent. This subjectivist change was designed to facilitate more complete acquittals in cases of intoxication, but it came with a ‘sop’ to defenders of a more objectivist approach. The Commission also recommended the creation of an offence of ‘dangerous intoxication’. A defendant stood to be convicted of this offence in cases where he or she had become ‘deliberately intoxicated to a substantial extent’, and had then caused one of certain listed harms, even if he or she was acting in a state of automatism at the time. This wildly exaggerated contrast between a basis for acquittal dictated by wholly subjectivist thinking, and a basis for conviction founded on a wholly unyielding ‘objectivism’, was, in the Law Commission’s later words, ‘rejected outright with cogent and persuasive reasons’. So, in their final Report, the distinction between general or basic intent, and specific intent, was restored. In particular, in the draft Bill (clause 1):

(2) If the person’s intoxication was voluntary and the allegation is in substance an allegation that at the material time he
   (a) acted intentionally with respect to a particular result,
   (b) had a particular purpose in acting in a particular way,
   (c) had any particular knowledge or belief, or
   (d) acted fraudulently or dishonestly,

evidence of his intoxication may be taken into account in determining whether the allegation has been proved.

I do not say that this sensible proposal reflects exactly the theoretical distinctions I have claimed underlie the distinction between general or basic and specific intent; but the Law Commission’s change of mind seems in some measure to justify the claim made at the start of the essay that there are some classifications which, morally speaking, we cannot do without.

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74 See text above, n. 46.
75 Law Commission, above, n. 73, at para. 6.31.