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GETTING DRUNK IN SINGAPORE AND MALAYSIA

A. P. **SIMESTER***

Just as in the Indian Penal Code, the intoxication provisions contained in ss. 85 and 86 of the Singaporean and Malaysian Penal Codes are described as 'General Exceptions', suggesting that they operate as affirmative (or 'supervening') substantive-law defences to criminal liability. It is argued in this article, however, that the primary function of these provisions is not to create a distinct legal defence. Rather, it is to enable the courts to convict persons who do not satisfy the *mens rea* requirements of a crime, when their lack of *mens rea* is because of intoxication. The sections permit us to treat such defendants as having *mens rea* when in fact they do not. As such, the provisions are mainly inculpatory, not exculpatory. They assist the prosecution, not the defendant. This claim will be defended both in principle and in terms of statutory interpretation. This article also discusses certain exceptions, where intoxication does operate as a true supervening defence.

At the level of principle and policy, there is a deep tension within the criminal law of intoxication. On the one hand, alcohol and drugs have a long-recognised association with unruly and dangerous behaviour, of the very kind that criminal law is designed to deter. In the early common law, drunkenness was regarded as an aggravating factor,[1] reflecting a perceived need for social protection against the kinds of casual violence that drunkenness so often fuels. In some jurisdictions, being intoxicated can be a criminal offence in its own right,[2] especially when it leads to unlawful acts by the defendant.[3]

On the other hand, it is also a long-standing principle that *actus non facit reum nisi mens sit rea*. The general rule in criminal law is that a person's behaviour does not become criminal unless it is perpetrated with '*mens rea*': *i.e.* with a specific mental element such as intention, rashness, or the like.[4] Rightly so. Requiring a

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* Professor, Faculty of Law, National University of Singapore; Fellow, Wolfson College, University of Cambridge. I am grateful to the anonymous reviewer for valuable comments, especially concerning terminology. Special thanks, too, go to Stanley Yeo for a range of suggestions and advice which greatly improved this article.

1 See *e.g.*, N. L. A. Barlow, "Drug Intoxication and the Principle of *Capacitas Rationalis*" (1984) 100 Law Q. Rev. 639.

2 At least when in public: see *e.g.*, *Licensing Act, 1872* (U.K.), 35 & 36 Vict., c. 94, s. 12; *Powell v. Texas*, 392 U.S. 514 (1968).

3 See *e.g.*, s. 323A(1) of the *German Penal Code*.

4 '*Mens rea*' is used here as a synonym for 'mental element', rather than 'fault element'. Helping to establishing culpability is not the only function of *mens rea*: Winnie Chan & A.P. Simester, "Four Functions of Mens Rea" (2011) 70(2) Cambridge L.J. 381. See also J. Gardner, "Wrongs and Faults"

mens rea element helps to ensure that defendants are not convicted of an offence unless they are at fault for committing it. When a blameless—morally innocent—person is convicted of an offence, she is a victim too. A criminal conviction is itself harmful. In this sense, *mens rea* elements help to protect the public from unfair convictions when things go wrong, even as the criminal legal system operates to protect the public from the wrongful acts of others.

The need to balance these two interests generates real difficulties in the context of intoxication. If D goes to a bar and voluntarily drinks so much that he no longer knows what he is doing, and while in that state attacks and injures another person, *prima facie* he lacks *mens rea* for the harm inflicted. In turn, this means that D does not satisfy the elements of the offence of voluntarily causing hurt under the *Indian Penal Code* and its international variants, including the Singaporean[5] and Malaysian Penal Codes. He does not satisfy the elements of the offence because he lacks the requisite awareness that injury is likely.[6] Yet at the same time, the need to protect the public is clearly engaged here. Moreover, there is a sense that D *is* at fault. The intoxication is self-inflicted. He is, in a direct causal sense, responsible for what happened next.

The law of intoxication mediates this tension. It does so by allowing for the conviction of voluntarily intoxicated defendants who inflict harm while lacking *mens rea* for that harm. However, as we shall see, the existing law in Singapore and Malaysia is extremely opaque, and much in need of legislative revision. This is not surprising. The formulation of intoxication rules has been problematic throughout the world, and the common law has been unsatisfactory both before and after Lord Macaulay drafted his penal code for India. In the discussion that follows, the interpretive difficulties faced locally are very much in common with those faced in interpreting the *Indian Penal Code* itself, and indeed in the common law. To navigate those difficulties, we need to be willing to rethink our approach to the interpretation and application of the intoxication rules.

I. Historical Background to the Singaporean Provisions: Actual *Mens Rea* Versus Capacity

It is helpful first to set out the text and background of the Indian and Singaporean provisions, which are contained in ss. 85 and 86 of the respective Penal Codes. (The Malaysian provisions are in substance the same as Singapore's,[7] and for convenience I will use the *Singaporean Penal Code* to represent both.) The Indian provisions

in A. P. Simester, ed., *Appraising Strict Liability* (Oxford: Oxford University Press, 2005) at 51, for a helpful distinction between the 'fault principle' and the '*mens rea* principle' in criminal law.

5 *Penal Code* (Cap. 224, 2008 Rev. Ed. Sing.) [*Singaporean Penal Code*]. Where references to the Penal Code are not country-specific, they are common to both the *Indian Penal Code* and the *Singaporean Penal Code*.

6 According to the terms of s. 321, "Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said 'voluntarily to cause hurt"'.

7 Contrast the law in Brunei, which remains the same as that of India: *cf. Public Prosecutor v. Abdul Muhin bin Hj Moksin* [1989] 2 M.L.J. 279 (H.C.).

remain as they were originally enacted in 1860, as follows:

> **Act of a person incapable of judgment by reason of intoxication caused against his will.**
> **85.** Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law: provided that the thing which intoxicated him was administered to him without his knowledge or against his will.
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> **Offence requiring a particular intent or knowledge committed by one who is intoxicated.**
> **86.** 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 to him without his knowledge or against his will.

These original provisions specifically mention a test of incapacity. By contrast, the intoxication rules for Malaya and Singapore were revised in 1935, following the decision in *Director of Public Prosecutions v. Beard*.[8] The relevant provisions now read as follows:

> **Intoxication when a defence.**
> **85.** — (1) Except as provided in this section and in section 86, intoxication shall not constitute a defence to any criminal charge.
> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—
> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
> (b) the person charged was, by reason of intoxication, insane, temporarily or otherwise, at the time of such act or omission.
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> **Effect of defence of intoxication when established.**
> **86.** — (1) Where the defence under section 85 is established, then in a case falling under section 85(2)(a) the accused person shall be acquitted, and in a case falling under section 85(2)(b), section 84 of this Code and sections 314 and 315 of the Criminal Procedure Code shall apply.
> (2) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.
> *Interpretation*.
> (3) For the purposes of this section and section 85 "intoxication" shall be deemed to include a state produced by narcotics or drugs.

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[8] [1920] A.C. 479 (H.L.) [*Beard*]. For a helpful discussion of the historical background, see Gerry Ferguson, "Intoxication" in Wing-Cheong Chan, Barry Wright and Stanley Yeo, eds., *Codification, Macaulay and the Indian Penal Code* (Burlington, VT: Ashgate, 2011) at 257 [Ferguson].

Similar revisions were rolled out in many British colonies at around the same time.[9] Unfortunately, the 1935 revisions failed to settle matters, partly because of the unsatisfactory nature of *Beard* itself. In *Beard*, the English judges had suggested that the key question was whether, because of intoxication, D lacked the *capacity* to form the *mens rea* required for the offence:[10]

> where a specific intent is an essential element in the offence, evidence of a state of drunkenness rendering the accused incapable of forming such an intent should be taken into consideration in order to determine whether he had in fact formed the intent necessary to constitute the particular crime. If he was so drunk that he was incapable of forming the intent required he could not be convicted…

Beard was at first very influential, and similar language to the *Beard* formulation can be found in *Public Prosecutor v. Seah Eng Joo*[11] and *Ismail bin U K Abdul Rahman v. Public Prosecutor*.[12] Compare for example, the analysis in *Public Prosecutor v. Daniel Lo Kiang Heong*:[13]

> On the issue of intoxication, I found that there was no evidence adduced by the accused to support his submission that his level of intoxication was so high that he was not aware of what he was doing. While he did smell of alcohol, he was alert enough at that time to be able to answer questions and to inform the officers of his encounter with his assailant in the bar. *He was not in a state of drunken stupor that he completely passed out*.

However, *Beard* is no longer regarded as good law.[14] Even more importantly, the actual (and, incidentally, *obiter dicta*) language used in *Beard* is not matched by the terms utilised in the reformulated Penal Code.[15] Reference to incapacity was removed in the 1935 revisions. Under both common law and the *Singaporean Penal Code*, if D's intoxicated state is to result in acquittal, it rests on the proposition that he *in fact* lacked the necessary *mens rea* for the offence, not on any finding about his *capacity* to form it. To be sure, s. 85(2) contains further criteria. As will be discussed below, the absence of *mens rea* is not by itself sufficient to warrant acquittal in cases falling within the terms of s. 85(2). But even that section now begins by asking whether D "did not know"—rather than whether D *could* not know. Therefore, the primary question is whether D *has* the *mens rea* for the offence, not whether D has the capacity to formulate the *mens rea* required. This point was seen clearly by the Privy Council, in the context of s. 86:[16]

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[9] See *e.g.*, the criminal codes of Kiribati, s. 13; Malta, s. 34; Tanzania, s. 14; Tonga, s. 21; Tuvalu, s. 13; Soloman Islands, s. 13; and Zambia, s. 13.

[10] *Beard*, *supra* note 8 at 499 (Lord Birkenhead L.C.).

[11] [1961] M.L.J. 252.

[12] [1974] 2 M.L.J. 180 (Sing. CA).

[13] [2007] SGDC 47 at para. 61 (emphasis added); although nothing turned on this way of putting the matter.

[14] See *e.g.*, *Director of Public Prosecutions v. Majewski* [1977] A.C. 443 (H.L.); *R v. Sheehan* [1975] 2 All E.R. 960 (C.A.) [*Sheehan*]; A. P. Simester *et al*., *Simester and Sullivan's Criminal Law*: *Theory and Doctrine*, 4th ed. (Oxford: Hart, 2010) at §18.3.

[15] The revision drafters appear to have been influenced by, but to have misunderstood, *Beard*. *Cf.* M. Cheang, *Criminal Law of Malaysia and Singapore*: *Principles of Liability* (Kuala Lumpur: Professional Books, 1990) at 160-1.

[16] *Broadhurst v. R* [1964] A.C. 441 (P.C.) at 461 [*Broadhurst*] (emphasis added). The relevant provision in the *Maltese Criminal Code* is identical to that found in the *Singaporean Penal Code*.

> Under subsection [86(2)] it would appear that drunkenness is to be taken into account for the purpose of determining whether the person charged had in fact formed any intention necessary to constitute the crime. The corresponding proposition laid down in *Director of Public Prosecutions* v. *Beard* is that evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent. *There is no mention in the Code of incapacity*. The proposition stated in *Director of Public Prosecutions* v. *Beard* is not altogether easy to grasp. If an accused is rendered incapable of forming an intent, whatever the other facts in the case may be, he cannot have formed it; and it would not therefore be sensible to take the incapacity into consideration together with the other facts in order to determine whether he had the necessary intent…
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> But superficially, at any rate, section [86(2)] of the Code and *Beard's* case approach differently the problem of proving intent. One way of approaching the problem is to say that it is always for the Crown to prove that the accused actually had the intent necessary to constitute the crime; and that that proof may emerge from evidence or statements made by the accused about his own state of mind or may be made by way of inference from the totality of the circumstances. Prima facie intoxication is one circumstance to be taken into account, and on this view all that section [86(2)] is doing is to make it plain that intoxication is not to be excluded. On the other hand, the sort of approach that is contemplated in *Beard's* case is that there must be proof (or at least some suggestion) of incapacity in order to rebut the presumption that a man intends the natural consequences of his acts.

Indeed, the former common law presumption that a man intends the natural consequences of his acts is no longer good law either.[17] Hence, even that alternative explanation of *Beard* cannot now be persuasive.

II. The Problem(s): Not an Affirmative Defence

It seems then that what matters for the intoxication provisions is whether D actually had *mens rea* rather than whether she had the capacity to form it. Still, that leaves a puzzle. How do these provisions actually work?

This question is not the only one that arises regarding these provisions. There are many issues to be debated concerning the burden of proof, the extent of intoxication required for the provisions to be invoked, and their application to knowledge rather than intention, amongst other matters. However, those issues are secondary. In order to address them, we need first to understand the basic nature and operation of the intoxication rules. It is at this fundamental stage that there is the greatest potential

[17] *Cf. Frankland v. R* [1987] A.C. 576 (P.C.) and *Parker v. R* (1963) 111 C.L.R. 610 (H.C.A.), rejecting *Director of Public Prosecutions v. Smith* [1961] A.C. 290 (H.L.). In *Yeo Ah Seng v. Public Prosecutor* [1967] 1 M.L.J. 231 at 234, the Malaysian Federal Court agreed that "judges in this country should avoid using this maxim in their summings-up to the jury when dealing with the question of intention in murder trials". Unfortunately, the presumption recently resurfaced in *Public Prosecutor v. AFR* [2011] 3 S.L.R. 653 (H.C.) at 672, in the context of s. 300(c) of the *Singaporean Penal Code*. However, the weight of authority is clearly against it.

for misunderstanding, not least by the drafters themselves of the *Indian Penal Code* and its revisions.

Misunderstanding is liable to spring from the idea that intoxication operates in law as a defence or general exception. Yeo, Morgan and Chan, for example, characterise it as a defence.[18] Koh, Clarkson and Morgan do so too.[19] Indeed, the courts have ruled that it is a 'defence' when allocating the burden of proof,[20] acknowledging that ss. 85 and 86 appear alongside the provisions allowing for self-defence, necessity, mistake, and the like within Chapter IV of the Penal Code which sets out 'General Exceptions'.

However, in terms of substantive law, it is submitted that this description is apt to mislead. With only minor exceptions,[21] the intoxication rules in the Indian, Singaporean, and similar Penal Codes do not create an affirmative defence. Indeed, one can go further. Given the fundamental structure of modern criminal law, *it is logically impossible for the core intoxication doctrine to operate as an affirmative, substantive-law defence*. This holds equally under the common law as it does under the *Indian Penal Code* and its regional variants. It holds, as will be argued below, notwithstanding that ss. 85 and 86 of the Penal Code themselves describe intoxication as a 'defence'.

III. The Fundamental Structure of Criminal Liability

It is tempting to start talking about intoxication with reference to ss. 85 and 86 of the Penal Code. But those sections do not work in isolation; they qualify and amend the general rules governing criminal liability. They come second, not first. In order to understand them, we need to understand what they qualify. We should begin, therefore, with some more foundational distinctions.

The possibility of 'General Exceptions' depends upon a basic division in the criminal law between offences and defences.[22] The offence elements are comprised of two main types: *actus reus* and *mens rea*. If a person performs the *actus reus* of an offence with the requisite *mens rea*, she commits a *prima facie* offence. But a *prima facie* offence will not be a crime if the defendant has what I will call a 'supervening' defence—sometimes called an 'affirmative' defence.[23] Hence, as Lanham observes, "as a matter of analysis we can think of a crime as being made up of three ingredients, actus reus, *mens rea* and (a negative element) absence of a valid defence."[24]

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[18] Stanley Yeo, Neil Morgan & Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 2nd ed. (Singapore: LexisNexis, 2012) at para. 25.2 *et passim* [*YMC*].

[19] K. L. Koh, C. M. V. Clarkson & N. A. Morgan, *Criminal Law in Singapore and Malaysia*: *Text and Materials* (Singapore: Malayan Law Journal, 1989) at 239: "the defence of [involuntary] intoxication".

[20] See *e.g.*, *Juma'at bin Samad v. Public Prosecutor* [1993] 3 S.L.R.(R) 338 (H.C.) [*Juma'at bin Samad*]; *Francis Antonysamy v. Public Prosecutor* [2005] 3 M.L.J. 389. See also Part IX, below.

[21] See Parts VII and VIII, below.

[22] *Cf.* A. T. H. Smith, "On Actus Reus and Mens Rea" in P. R. Glazebrook, ed., *Reshaping the Criminal Law: Essays in Honour of Glanville Williams* (London: Stevens and Sons, 1978) at 98.

[23] A. P. Simester, "Mistakes in Defence" (1992) 12 Oxford J. Legal Stud. 295 at 296. While I do not draw a distinction between these two terms here, for clarity I will generally prefer the term 'supervening', because the meaning of 'affirmative defence' can vary across jurisdictions and is sometimes used to refer to matters that the accused must prove—which is not quite the same thing and not what I have in mind.

[24] D. Lanham, "Larsonneur Revisited" [1976] Crim L. Rev. 276 at 276.

Normally, the *actus reus* and *mens rea* requirements (if any) are specified within the provision that creates the offence, whereas the supervening defences are available at large.[25] There may also be evidential differences. For example, in Singapore and Malaysia, supervening defence elements are subject to a reversed burden of proof, in contrast with *actus reus* and *mens rea* elements which must usually be proved by the prosecution beyond reasonable doubt.[26]

Supervening defences are distinct affirmative defences of substantive law. They should be distinguished from failure of proof defences, such as 'alibi'. Admittedly, lawyers are often inclined to say that a person has an 'alibi defence'. There is nothing wrong with that as a broader, non-technical usage, one familiar to judges and academics. However, it is important to recognise what kind of 'defence' it is. As a matter of substantive law, *alibi is not a supervening defence*. Rather, it supplies a reason to think that the defendant did not satisfy the *actus reus* requirement. If the alibi succeeds, the prosecution has failed to prove the elements of the *offence* beyond reasonable doubt.

Contrast general exceptions such as necessity[27] and private defence.[28] These are genuine supervening defences, which deny neither *actus reus* nor *mens rea*. Rather, they arise after the *prima facie* offence is proved, and seek to defend it by reference to the circumstances or condition of the actor who performs the *actus reus*.

Comprehended within this classic framework, the core rules of intoxication do not—indeed cannot—operate as a supervening defence. Defences only arise once *mens rea* is established. However, once *mens rea* is established, intoxication has very little role to play.[29] The main legal problems surrounding intoxication arise in situations where *the defendant lacks mens rea* (because of intoxication). And if the defendant lacks *mens rea*, supervening defences are irrelevant.

IV. Intoxication as an Alternative Route to Finding *Mens Rea*

There are two sides to this claim. First, consider a case under the Indian or Singaporean Penal Codes where the defendant does actually have *mens rea*. Suppose that D is (involuntarily) intoxicated. Someone has spiked his drink or his food. While in that condition, D attacks and injures V with intent to do so. Suppose further that D would not have acted as he did but for being intoxicated. None the less, in such a case, D straightforwardly commits the offence of voluntarily causing hurt. He satisfies the *actus reus* and *mens rea* of the offence. Subject to one special case,[30]

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[25] Although there may also be offence-specific defences ('special exceptions'), such as those available to murder within s. 300.

[26] See *Evidence Act* (Cap. 97, 1997 Rev. Ed. Sing.), ss. 103, 107; *Evidence Act 1950* (Malaysia), ss. 101, 105.

[27] *Singaporean Penal Code*, *supra* note 5, s. 81.

[28] *Singaporean Penal Code*, *supra* note 5, s. 96.

[29] This is not to deny that it has any role to play at all. In particular, there is a residual, supervening-defence function where D has *mens rea* but is intoxicated to such a degree that he does not know his conduct is wrong. This and other special cases will be addressed later in the text.

[30] See Part VII, below.

that is the end of the matter. The provisions of ss. 85 and 86 need not be invoked and D can be convicted straightforwardly.[31]

The same is true at common law. In *R v. Kingston*,[32] D went to P's flat by invitation to discuss a business proposition. Once there, he was given coffee that P had deliberately laced with drugs. D was then led by P to a bedroom where a young boy, also drugged, lay unconscious on the bed. D indecently assaulted the boy. P filmed the activity and subsequently sought to blackmail D. When the matter came to light, D was charged with indecent assault. His conviction was upheld by the House of Lords on the basis that D had *mens rea* at the time. D was aware of what he was doing; his claim was only that, but for being surreptitiously drugged, he would not have acted as he did. On these facts, intoxication was held to be irrelevant to the substantive law: a drugged intent is still an intent. No doubt the circumstances of the offence called for some mitigation of sentence. However, given that the respondent had *mens rea* and no supervening defence was available, D's conviction was inevitable.

Supervening defences are capable of exculpating when the *prima facie* offence is proved. The core intoxication doctrines do not do that. What, then, do they do?

To answer that question, consider now the opposite case. Suppose that D is intoxicated and while in that state, attacks V and causes him bodily injury, this time without thinking about the likelihood of doing so. In this case, D lacks the *mens rea* required for the offence of voluntarily causing hurt. It is not that he has a distinct substantive law defence. D simply does not satisfy the elements of the offence as specified in s. 321 of the *Penal Code*.[33] The burden to prove the *mens rea* requirement specified in s. 321 falls on the prosecution. *Ex hypothesi*, the prosecution cannot discharge that burden because D did not, in fact, have *mens rea*. D's 'defence'—his plea in answer to the prosecution—is not, 'I was intoxicated,' but rather, 'I did not have *mens rea*; I do not fall within the terms of s. 321.'[34] Intoxication is just a background fact that makes such a plea plausible.

So far, D is entitled to an acquittal. *Now*, however, the core intoxication rules come into play. Where they apply, their legal effect is to allow the courts to treat D as if he has *mens rea* even though, in fact, he does not. Inevitably, what this means is that the core intoxication doctrines are *inculpatory*, not excusatory. They give the prosecution an alternative route to establish the *mens rea* requirement. If the doctrinal elements are satisfied, the law will deem D to have *mens rea*—a legal fiction. As such, the intoxication rules aid the prosecution, not the defendant. Where

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[31] Contrast this with Stanley Yeo, Neil Morgan & Chan Wing Cheong., *Criminal Law in Malaysia and Singapore*, 1st ed. (Singapore: LexisNexis, 2007) at para. 25.18: "What of a situation where the intoxication was involuntary but the degree of intoxication was not so severe as to render absent the knowledge specified in s. 85(2)(a), or the intention referred to in s. 86(2)? The answer is that the accused will be convicted of the crime charged *since the requirements of the defence of intoxication were not satisfied*." No: D will be convicted because he has *mens rea*. The intoxication is irrelevant. In its second edition, *YMC* rightly amends this analysis (see *YMC*, *supra* note 18 at para. 25.19): "The answer is that the accused will none the less be convicted of the crime charged since he or she possessed the fault element.".

[32] [1995] 2 A.C. 355 (H.L.); reversing [1994] Q.B. 81 (C.A.).

[33] *Supra* note 6.

[34] Compare the more straightforward provision in the American Law Institute's *Model Penal Code* (Philadelphia: 1962), §2.08(1): except when involuntary or pathological, "intoxication of the actor is not a defense unless it negatives an element of the offense".

they apply, they relieve the prosecution of the need to prove that D actually had *mens rea*. It follows that those rules are not, in terms of substantive law, a defence.

V. Reconciling the Inculpatory Role of Intoxication with the Language of the Penal Codes

Looking at the scheme of the statute, this claim is obviously counterintuitive. The Penal Code itself situates the intoxication rules within the 'General Exceptions' chapter, alongside true supervening defences such as duress and private defence. Of course, as a matter of interpretation, placement alongside true defences within the structure of the Penal Code is not decisive; neither are the headings of individual sections.[35] Yet the inculpatory role claimed here for intoxication must still be reconciled with the language of the statute. It must be a permissible reading of the Penal Code provisions themselves.

As such, it needs to be explained how ss. 85-86 can exempt the prosecution from having to prove the statutory elements of an offence. Recall the text of s. 321:

> Whoever does any act with the intention of thereby causing hurt to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".

Section 321 requires proof of intention or knowledge of likelihood. How does the intoxication doctrine allow the courts to dispense with this explicit requirement? The primary work, it is submitted, is done by s. 85(1) in the *Singaporean Penal Code*: "Except as provided in this section and in section 86, intoxication shall not constitute a defence to any criminal charge".

This subsection takes over the role that is (and was) discharged by s. 86 of the *Indian Penal Code*. It implements the deeming part of the intoxication doctrine: where D lacks *mens rea* owing to intoxication, he shall be treated as if he has *mens rea*, unless some other part of ss. 85 and 86—notably ss. 85(2) or 86(2) in the *Singaporean Penal Code*—come to his aid and exempt him. In outline, the order of analysis is therefore as follows:

(A) Check whether the *mens rea* elements are satisfied. If they are, proceed to consider the supervening defences. If they are not:
(B) Ask whether the lack of *mens rea* was because of intoxication. If it was:
(C) Check whether any other part of ss. 85-86 (specifically, ss. 85(2) and 86(2) of the *Singaporean Penal Code*) applies to exempt D from the application of s. 85(1).[36] If not:
(D) Conclude that D is deemed to have *mens rea*, and proceed to consider any relevant supervening defences.

The statutory intent of these provisions, which this analysis articulates, is that where D lacks *mens rea* by reason of intoxication, he should none the less be convicted unless ss. 85(2) or 86(2) apply. It can readily be seen from this analytical sketch

[35] See *e.g.*, Francis Alan Roscoe Bennion, *Statutory Interpretation*, 5th ed. (London: LexisNexis, 2008) at ss. 215-6; John Bell and George Engle, eds., *Cross on Statutory Interpretation*, 3rd ed. (London: Butterworths, 1995) at 131-1.

[36] More on this below, here and in Part IX.

how natural it is to think of s. 86(2), in particular, as coming to D's aid in stage (C) by supplying a 'defence'. Yet this manner of thinking remains misleading. Section 86(2) is not generous in creating a defence for an otherwise guilty offender. It simply carves out an exception from the broader inculpatory doctrine, a space where the deeming provision in s. 85(1) does not apply. The role of s. 86(2) is merely to restrict the prosecutorial tool created by s. 85(1).

Stage (B) is also important. If D lacks *mens rea*, we must always ask, why? The question is not one of degree—of how intoxicated the defendant must be for the doctrine to apply. Some writers have suggested that the degree of intoxication may itself be important.[37] That thought is understandable and broadly appropriate. However, it lacks sufficient precision to be workable and, more importantly, it does not quite capture the statutory intent. What counts is whether D's lack of *mens rea* (when perpetrating the *actus reus*) *was attributable to his intoxication*. Perhaps D had only been drinking a little. Or perhaps he had drunk quite a lot, but the intoxication was irrelevant to the lack of *mens rea*. (Suppose that D collided with V, causing injury, but the collision was a genuine accident caused by E, a sober person who had tripped and fallen, pushing D into V's path.) In such cases, the deeming provisions of the intoxication doctrine do not and should not apply. They apply only when, as s. 85(1) contemplates, the denial of *mens rea* rests upon D's being intoxicated—that is, when D lacks *mens rea* because he was drunk or drugged.

Admittedly, this reading of s. 85(1) is not straightforward. One might reasonably doubt whether the subsection really does operate in the same way as s. 86 of the *Indian Penal Code*.[38] The Indian section is clearly a deeming provision on its face, whereas the same is not evident on the wording of s. 85(1). Its effect is not explicit, but a matter of inference. Thus, reconciliation with the statute is perhaps the weakest link in the argument for reading ss. 85 and 86 of the *Singaporean Penal Code* as being inculpatory in nature.

However, this objection is not specific to the argument made in this article. Reconciliation with the statute *presents exactly the same challenge* for those who think of intoxication as a supervening defence. Subscribers to that view *also* have to explain how and where the Penal Code authorises the court to disregard the clear terms of statutory offences such as s. 321. Section 321 explicitly requires proof by the prosecution of intention or knowledge on the part of the defendant before he can be convicted of voluntarily causing hurt. Where, if not by implication of s. 85(1), does the Penal Code allow a court to convict without satisfying that requirement? If intention or knowledge is not proved, s. 321 is not made out. There is no other provision in the Penal Code that can be read as allowing the essential *mens rea* elements set out in the statute to be bypassed.

VI. Explaining the 'Defence' Label

Why then do we tend to think of intoxication as a defence? We have noted already that it appears in the 'General Exceptions' chapter of the Penal Codes. The most plausible

[37] See *e.g.*, J. Brabyn, "Intoxication in Singapore: An Alternative to *Majewski*" (1986) Lawasia 60 at 61. I would not adopt Brabyn's suggestion that the intoxication must be "substantial". A better term, if one is needed to capture the approach here, would be 'material'.

[38] See Part I, above.

explanation for this classification, and for our intuitions, resides in the ambiguity of the word 'defence'. As was noted earlier, there is a wider non-technical sense in which any ground for an acquittal can be called a defence. In that wider sense, intoxication is a 'defence'. It is an evidential consideration which may be relevant to finding that D had no *mens rea*, and that *prima facie* D should be acquitted. It is a 'defence' in the sense that alibi is a 'defence'.

However, in terms of substantive legal doctrine, neither alibi nor intoxication is a defence. They do not supervene to generate an acquittal despite proof of the *actus reus* and *mens rea* elements of an offence. In the case of intoxication, indeed, it is quite the opposite.[39] The *fact* of intoxication generates a denial of *mens rea*, but the *legal doctrine* is inculpatory.

Writers sometimes fail to draw this distinction clearly. Consider the following passage:[40]

> [Some] cases which would be entitled to the *protection of the defence of intoxication* under the Indian Penal Code are excluded from its protection under the Penal Codes of Malaya. Thus, if a person unused to alcohol were to drink a powerfully intoxicating substance under the genuine belief that it was non-alcoholic and harmless, and as a result became drunk and committed a *crime*, he would be entitled, under the Indian Penal Code, to plead the defence of intoxication; but under the Malayan Codes he would [not] be entitled to plead the defence of intoxication … if he had drunk it as the result of a pure accident.

The use of 'defence' here is the broader one—intoxication merely supports the denial of *mens rea*. However, the writer slides from that non-technical usage toward the supervening sense of 'defence' when he suggests that D is being 'protected' from liability. That's exactly what substantive-law defences do: they supervene, following proof of the *prima facie* offence (*actus reus* and *mens rea* elements), to protect D from liability. But intoxication is not like that at all. The core intoxication doctrines kick in when D *lacks mens rea*. We would not naturally say that 'the defence of alibi is *protecting* D from liability'. Rather, D is not guilty because he didn't commit the *actus reus*; or at least, the prosecution cannot prove that he did. In the same way, neither should we say that the defence of intoxication is 'protecting' him. If D is not guilty, it is because he didn't have *mens rea*.

Notice, too, how the writer clouds this point by hypothesising that D, "as a result became drunk and committed a crime". Until the intoxication doctrines are deployed to aid the prosecution, *there is no crime*. Not even a prima facie one. The elements of the offence (say, of voluntarily causing hurt in s. 321) have not been satisfied. No doubt it would be correct to say that D, as a result, became drunk and committed *the actus reus of* a crime. However, except for strict liability offences, that has never been enough to show that D has committed a crime, even *prima facie*.

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[39] Subject to the special case noted in Part VII.

[40] W. E. D. Davies, "The Defences of Insanity and Intoxication in Malayan Criminal Law" (1958) M.L.J. lxxvi at lxxix (emphasis added).

VII. The Exception: Sometimes (Rarely) a Supervening Defence

In general, the main role of ss. 85(2) and 86(2) of the *Singaporean Penal Code* is to specify the cases where the inculpatory intoxication doctrine will not be applied; that is, where the deeming rule in s. 85(1) will not be invoked. That said, there are two situations where s. 85(2) can potentially operate as a true supervening defence, preventing conviction even though D does in fact have *mens rea*. Recall the terms of s. 85(2):

> (2) Intoxication shall be a defence to any criminal charge if by reason thereof the person charged at the time of the act or omission complained of did not know that such act or omission was wrong or did not know what he was doing and—
>
> (a) the state of intoxication was caused without his consent by the malicious or negligent act of another person; or
>
> (b) the person charged was, by reason of intoxication, insane, temporarily or otherwise, at the time of such act or omission.

Under this subsection, intoxication is available as a defence under certain circumstances if D did the *actus reus* when he "did not know that such act or omission was wrong or did not know what he was doing". Normally, if D "did not know what he was doing", he would lack *mens rea*. However, it is possible for D to have *mens rea*, yet fall within the scope of s. 85(2), when he does not know that his conduct is *wrong*. In that event, D will be entitled to a supervening defence if either the intoxication is 'involuntary' under paragraph (a), i.e. "caused without his consent by the malicious or negligent act of another person"; or if, under paragraph (b), D is, "by reason of intoxication, insane, temporarily or otherwise, at the time", in which case D falls to be dealt with as if he were of unsound mind.[41]

Such scenarios are likely to be rare in the extreme. In practice, the only kinds of cases where D might advertently do the *actus reus*, yet be entitled to a supervening defence of intoxication, are those where the intoxication triggers a condition analogous to insanity.

VIII. A Defence to Negligence?

There appears to be one further case that may be open to a supervening defence via s. 85(2). Suppose that D is charged with a negligence-based offence, which does not require awareness of the *actus reus*. If D inadvertently perpetrates the *actus reus* while drunk, *prima facie* he "does not know what he is doing". Yet he is likely to have *mens rea*, assuming that a sober, reasonable person would have recognised the risk. Should D none the less satisfy the involuntariness or insanity conditions in ss. 85(2)(a) or (b), a defence appears to be available to him.

Perhaps needless to say, this possibility is problematic. It arises only because of looseness in the phrase "does not know what he is doing". In contrast with the unsoundness of mind defence in s. 84, there is no requirement in s. 85(2) that D has to be *incapable* of knowing what he is doing. It seems to be sufficient that he does not notice the implication of his conduct. Given the opaque and unsatisfactory language

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[41] *Singaporean Penal Code*, *supra* note 5, s. 86(1).

of the provision, it is questionable whether this result was intended by those drafting the 1935 revision.

IX. Technical Issues, the Burden of Proof, and Reform

More generally, interpretation of the intoxication provisions gives rise to numerous technical difficulties, especially within the revised s. 85.[42] There is no good reason why the 1935 revisions should be expressed as obscurely as they are. Reform of both the original and revised versions is clearly desirable,[43] beginning with clearer recognition that the core intoxication doctrine is not a defence at all. A stronger conceptual grasp of the philosophical foundations of the doctrine might help to settle many of the issues surrounding its application, including the burden of proof.

Because intoxication is so often said to be a defence, it comes as no surprise that the courts have ruled that the burden of proving its application falls on the defendant:[44]

> Another aspect of s. 86(2) on which there is some controversy is whether the burden of proof falls on the accused person to prove on a balance of probabilities that he was so intoxicated that he did not form the necessary intention, or whether the burden remains on the prosecution to prove beyond reasonable doubt that, in spite of the intoxication, the accused person did form the requisite intention. I am inclined to favour the former view. Sections 85 and 86 are found in Ch 4 of the Penal Code which deals with general exceptions, for which the burden of proof falls on the accused persons by virtue of s 107 of the Evidence Act (Cap 97). Furthermore, s. 85(1) expressly refers to s. 86 as dealing with the "defence" of intoxication. Therefore, any evidence of intoxication does not affect the prosecution's case; in proving beyond reasonable doubt that the accused had the necessary *mens rea* the prosecution is entitled to treat the accused as if he were sober. The court may no doubt have to answer some rather hypothetical and artificial questions in the process, but this is preferable to a solution which is completely out of accord with the general scheme of the Penal Code and the Evidence Act. Furthermore, the scope of s. 86(2) generously extends to voluntary intoxication, a legal excuse which, in my view, can never put an accused in a more favourable position than another accused who pleads any of the other defences.

It was argued earlier that any analysis of s. 86 as creating an affirmative, substantive-law defence is problematic. Section 86(2), in particular, does not create any sort of defence at all. It merely restricts the scope of the inculpatory doctrine set up in s. 85(1). It follows that the onus should remain on the prosecution to show either that D in fact had *mens rea* (in the normal way), or that D would have had *mens rea* but for

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[42] For example, the Singaporean Courts have recently had to grapple with the overlap between s. 85(2) and the unsoundness of mind defence in s. 84, holding in *Tan Chor Jin v. Public Prosecutor* [2008] 4 S.L.R.(R) 306 (C.A.) [*Tan Chor Jin*] that insanity by reason of intoxication under s. 85(2)(b) is distinct from unsoundness of mind. It is submitted that the conclusion in *Tan Chor Jin* is compatible with the argument made in this article, and can be supported by viewing s. 85(2)(b) as an exception to the inculpatory nature of the core intoxication provisions.

[43] See especially Ferguson, *supra* note 8. Ferguson also considers the effect of intoxication on true defence elements such as self-defence (at 279-281)—a matter beyond the scope of this article.

[44] *Juma'at bin Samad, supra* note 20 at 345. See also *Suradet v. Public Prosecutor* [1993] 3 S.L.R.(R.) 265; *Indra Wijaya Ibrahim v. Public Prosecutor* [1995] 2 S.L.R.(R.) 442.

being intoxicated. (These represent stages A and B of the analysis in Part V above.) Since the operation of s. 86(2) is purely legal—merely stating which offences the deeming rule in s. 85(1) applies to—it has no implications for the burden of proof. The Privy Council saw this clearly in *Broadhurst*, in the passage quoted earlier:[45]

> One way of approaching the problem is to say that it is always for the Crown to prove that the accused actually had the intent necessary to constitute the crime; and that that proof may emerge from evidence or statements made by the accused about his own state of mind or may be made by way of inference from the totality of the circumstances. *Prima facie* intoxication is one circumstance to be taken into account, and on this view all that section [86(2)] is doing is to make it plain that intoxication is not to be excluded.

That leaves s. 85(2), which sometimes (albeit rarely) creates a supervening defence and sometimes limits the operation of s. 85(1). It is certainly undesirable for the burden in s. 85(2) to fall differently depending on which of those two roles it plays. Moreover, provided that the prosecution must prove that D would have had *mens rea* but for being intoxicated (thereby triggering the deeming rule in s. 85(1)), it is reasonable to then apply the *Evidence Act* and place the onus on D to show that he satisfies the conditions in subsection (2). This reading would avoid anomalies by leaving s. 85(2)(b) aligned with the burden of proof in unsoundness of mind cases. Further, it is arguably appropriate to require D to establish any claim that the intoxication was involuntary under s. 85(2)(a), since the question of how he got drunk seems to lie especially within D's own knowledge and experience. After all, D was there: as such, it need not be unreasonable to require D to explain himself.

Numerous anomalies remain. One is the requirement under s. 85(2)(a) that 'involuntary' intoxication be induced "by the malicious or negligent act of another person".[46] This restriction, much more severe than the one found in the *Indian Penal Code*, is profoundly unfair. If the cause of the intoxication (and remember that the degree of intoxication must be so great that D does not know what he is doing) is an 'innocent' one for which D is not culpable, it seems harsh to condemn him for performing forbidden acts while in such a state. The best examples of this problem are cases of unforeseen adverse reactions to medicines. Suppose, for example, that D is taken to hospital for surgery and is anaesthetised by a qualified person. Whilst under the influence of the anaesthetic, he punches the surgeon, being unaware of what he is doing. He lacks *mens rea* for any offence. Surely he ought not to be convicted?

Another anomaly is the restriction of s. 86(2) to offences involving intention. The matter was helpfully discussed in *Juma'at bin Samad*:[47]

> It is to be noted that an anomalous consequence of the drafting in s. 86(2) is that it applies only where the *mens rea* for an offence is intention, in contradistinction to offences requiring other forms of *mens rea* specified in the Penal Code, for example, knowledge or rashness. The result is somewhat disturbing; for example,

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[45] *Supra* note 16 at 461.

[46] In this context, 'malicious' is an old common-law term meaning rash or reckless. Thus s. 85(2)(a) requires that the third party be aware of the risk: *cf. R v. Cunningham* [1957] 2 Q.B. 396 (C.A.). *Contra YMC*, *supra* note 18 at para. 25-11, it does not require that the third party act with an attitude of malice.

[47] *Supra* note 20 at 344-5.

> s. 86(2) would apply to a charge of murder under s 300(a), (b) or (c) but not to a charge of murder under s 300(d). However, the words of the provision are clear and the consequences though discomfiting are not of such degree of absurdity as would justify the court departing from a literal interpretation.

Disturbing indeed. A conviction under s. 300(d) leads to severe penalties, including execution in Singapore. Yet, if s. 86(2) is taken literally, this penalty would be imposed on persons who had no idea what risks their conduct entailed. That surely was not the purpose of the 1935 drafters. Indeed, it seems probable that they missed altogether the point that while intention is a required *mens rea* element under the common law of murder (as in *Beard* itself), it is not always required under the Penal Code.

A purposive approach to the interpretation of s. 86(2) might suggest that the subsection applies also to knowledge, which for practical purposes is the cognitive equivalent of intention under the Penal Code. Just as "intending" a consequence sets a higher threshold than foreseeing it, so does "knowing" something to be true set a higher threshold than believing or suspecting it. Even in 1935, it was thought that the inculpatory intoxication doctrine should not be applied to the most serious offences of violence; hence the enactment of s. 86(2). That same purpose supports an extensive interpretation of 'intention' to include 'knowledge'. It still allows drunken offenders to be convicted—but of an offence that reflects their lesser culpability, rather than of the most serious offence available.

In closing this section, it is also worth noting that reform by abolition is a real option. Not every common law jurisdiction has special intoxication rules, and it is an open question whether such special rules, with all their complexity and confusion, are really needed. In a typical drunken assault, the defendant is hardly an automaton. He is severely disinhibited and, no doubt, his chosen course of conduct is influenced by the alcohol (or other substances) he has taken. But he still intends to hit someone:[48]

> [I]n cases where drunkenness and its possible effect on the defendant's *mens rea* is in issue, we think that the proper direction to a jury is, first to warn them that the mere fact that the defendant's mind was affected by drink so that he acted in a way in which he would not have done had he been sober does not assist him at all, provided that the necessary intention was there. *A drunken intent is nevertheless an intent.*

There seem to be very few cases where drunken violence occurs without *mens rea*,[49] and it is arguable that the confusion caused by the intoxication rules is not worth the true value they deliver. In Australia and New Zealand, for example, there are no special rules for deeming *mens rea*.[50] The absence of such deeming rules does not appear to prevent courts in those jurisdictions from convicting for alcohol-fuelled violence.[51]

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[48] *Sheehan*, *supra* note 14 at 964 (*per* Lane L.J.) (emphasis added).

[49] *R v. Lipman* [1970] 1 Q.B. 152 (C.A.) may be one such case, although in that case D was arguably negligent.

[50] *R v. O'Connor* (1980) 146 C.L.R. 64 (H.C.A.); *R v. Kamipeli* [1975] 2 N.Z.L.R. 610 (C.A.).

[51] Compare G. Orchard, "Surviving without *Majewski*—A View from Down Under" [1993] Crim. L. Rev. 426 and A. P. Simester & W. J. Brookbanks, *Principles of Criminal Law*, 3d ed. (Wellington: Brookers, 2007) at §11.2 with S. Gough, "Surviving without *Majewski*?" [2002] Crim. L. Rev. 719.

X. Conclusion

Writers and judges are sometimes exercised by their concern to argue that (voluntary) intoxication should never excuse wrongdoing. This worry misses the fact that, so far as the core intoxication doctrines are concerned, it does not. However, to see this, we must start from the basic principles of criminal law, and not lose sight of them. *Actus non facit reum nisi mens sit rea* nowadays means that, before convicting, the court must be satisfied that the defendant fulfilled both *actus reus* and *mens rea* elements of the offence charged.

Centuries ago, the common law regarded the absence of *mens rea* as an excuse.[52] It no longer does so, and *mens rea* is now a fundamental positive requirement of criminal liability. Once we accept that foundational precept—as modern criminal law does—it becomes logically impossible for the core intoxication doctrines to be a supervening defence, whether under the original *Indian Penal Code*, its 1935 revision, or even at common law. The 'defence' is no more than an assertion that D lacked *mens rea*; that the positive requirements of the offence have not been satisfied. The main function of our intoxication doctrines, both at common law and under ss. 85-86, is to secure D's conviction despite the fact that he does not fulfil the *mens rea* requirements specified for the offence. It enables the prosecution to override the statutory and common law requirement to prove the elements of the offence. This *cannot* serve a supervening defence function. And if the legislators ever thought otherwise, they were conceptually, necessarily, mistaken. But it seems more likely that they meant the language of defences in the same non-technical sense in which an alibi is a defence—not in terms of substantive legal doctrine.

[52] One vestige of this can be seen in the *Criminal Code Act 1899* (Qld.), s. 24 (the 'Griffith Code'), which omits *mens rea* requirements from most of its offence definitions but admits a general defence of reasonable mistake.