federal government moved into an area ordinarily handled by provincial governments. However, it must be noted that Parliament does have the constitutional power to establish its own courts and police agencies for the enforcement of federal laws, although generally speaking, Parliament has not seen fit to do so.

Let me summarize my conclusions. The ordinary criminal law adequately covers dangerous conduct by insurgents. Prosecutions of arrested persons, to be successful, must be conducted under the Criminal Code. The most legally-significant effect of the emergency legislation is to take away the requirement that police officers act reasonably. Do we want that kind of a law in Canada? Was it necessary to have such a terrifying social upheaval to achieve this result? I leave that very limited, but very significant, policy issue for each one of you to decide for yourself.

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A COMMON SENSE INQUIRY INTO THE PROBLEM OF THE INTOXICATED OFFENDER—PROPOSED AMENDMENTS TO THE CRIMINAL CODE OF CANADA

Let us begin with premises which, if not universally agreed upon, are at least well settled principles of law, namely that generally the law does not punish a person for his acts *per se*, whether unlawful or otherwise, rather it is only when such act is coupled with the particular mental element that it falls within the realm of the criminal law: *actus non facit reum nisi mens sit rea.*[1] This paper considers how, because of public policy, these requirements have been eroded insofar as the intoxicated offender is concerned. Confusion has arisen on an issue that, except for intoxicated offender cases, would seem to have been well settled and, it is submitted, is in strict legal theory still valid, namely: at what point in time must the accused have had the necessary *mens rea*?

A man voluntarily consumes alcohol or drugs to excess and subsequently assaults another man. Let us suppose that there is no dispute as to the accused's state of mind and that he was intoxicated to the extent that he had lost the ability to form the intention required. Accepting the above noted principles and leaving aside for the moment the con-

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1. See e.g. **R. v. Tolson** (1889) 23 Q.B.D. 168; 37 W.R. 716 Court of Crown Cases Reserved; **Brend v. Wood** (1946) 62 T.L.R. 462; 175 L.T. 306 Divisional Court; **Watts & Gaunt v. R.** 16 C.R. 290; [1953] S.C.R. 505; **Sweet v. Parsley** [1969] 1 A.E.R. 347; [1969] 2 W.L.R. 470 House of Lords.

siderations of general and specific intent, one would expect that of whatever else he might be guilty the accused was not guilty of assault, for he did not intend to do what he did. The law does not require intention to harm to substantiate an assault charge, but it does require intention to strike. Logically one would expect the verdict to be not guilty. The following cases serve to illustrate how the Courts have consistently rejected this reasoning.

The *Gallagher*[2] case, although by no means the first to enunciate the principles therein contained stands for the proposition that one cannot escape responsibility for his actions by consuming alcohol prior to the commission of an act and later pleading lack of intent. Drunkenness is *never* a defence *per se* to a criminal charge – it may, however, reduce a charge of murder to manslaughter or be of such degree that it will form the basis for an insanity plea (e.g. delirium tremens).[3] Consider the words of Lord Denning at p. 314 of *Gallagher* where he refers to the accused's state of mind:

> He knows it is wrong, but still he means to kill her. Then he gets himself so drunk that he has an explosive outburst and kills his wife. At that moment he knows what he is doing but he does not know it is wrong – he has a defect of reason at the moment of killing. If that defect of reason is due to the drink it is no defence in law. But, if it is due to the disease of mind, it gives rise to a defence of insanity.

At the same page he goes on to say:

> If a man whilst sane and sober forms an intention to kill and makes preparation for it knowing it is a wrong thing to do and then gets himself drunk so as to give himself Dutch courage to do the killing and whilst drunk carries out his intention he cannot rely on this self-induced drunkenness as a defence to a charge of murder nor even as reducing it to manslaughter. He cannot say that he got himself into such a stupid state that was incapable of an intent to kill. So also when he is a psycopath he cannot rely on his self-induced defect of reason as a defence of insanity. The wickedness of his mind *before he got drunk* (emphasis supplied) is enough to condemn him coupled with the act which he intended to do and did do.

Putting aside considerations of how well founded Lord Denning's views are insofar as precedent is concerned, one readily identifies the obvious inconsistencies with which we are left. The issue is no longer "What was the accused's state of mind at the time of the commission of the offence," but rather it is the question of how his mind became that way. It is submitted that on principle this latter consideration insofar as *mens rea* is concerned should not be relevant. Rather, the method by which the accused's mind became affected should be a separate concern entirely and the only evidence on state of mind relevant to any offence should be what was the state of mind at the time of the commission of the alleged offence.

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2. [1961] 3 A.E.R. 299 House of Lords.
3. See **D.P.P. v. Beard** [1920] A.C. 479; 14 Cr. App. R. 159 House of Lords.

The *Lipman*[4] case provides a useful summary of the law in this area. The defendant, a reformed alcoholic, began heavy drug use in 1965. While both he and his victim were under the influence of LSD Lipman claimed to have fallen into a trance and "plunged into the centre of the earth where he fought a den of monster snakes," then beating his victim and causing her death by stuffing a sheet into her mouth. The jury had no difficulty acquitting of murder apparently on the basis of lack of specific intent. However, by a ten to two majority, they convicted Lipman of manslaughter and sentenced him to six years in jail. The trial judge, after conviction, commented that "the accused had deliberately taken a dangerous drug producing hallucinations in order to give him pleasure. He did this with a view to going on a 'trip', a trip which rendered his mind irrational and deprived him of the control of his body." The judge concluded that persons taking drugs or drink who render themselves irrational and deprive themselves of all control do so at their own peril, and when in such a state they commit crimes such as the accused here did, they must be punished severely. The accused's appeal was denied on the basis that there is no need for the Crown to prove specific intent in a manslaughter charge and the accused could not successfully rely on his intoxicated condition to negative the requisite *mens rea* for manslaughter. The Court went on to consider the question of what mental element is required in order to substantiate a manslaughter charge and, following *R. v. Church*,[5] the Court recognized that "even in relation to manslaughter a degree of *mens rea* has become recognized as essential."[6] However the Court did not decide what the requisite *mens rea* is for manslaughter.

With respect *Lipman* is as illogical as *Gallagher*. We know that the law does not punish the involuntary consumer;[7] but because the law as it now exists will not punish the voluntary consumer for being intoxicated if he is acquitted of the substantive charge on the basis of lack of requisite intent, the Courts have consistently convicted. One illogical decision has led to another; and now the Courts are satisfied to rest their decisions on past case law.

Criticism of the law as exemplified in the above noted cases is based not on their final verdict but rather on their unsupportable reasoning. There is, it is submitted, nothing which on principle compels us to continue convicting persons of offences when it is clear that (a) the criminal law requires the accused to have a guilty mind *at the time* of

4. [1969] 3 A.E.R. 410 (C.A.).
5. [1965] 2 A.E.R. 72 C.C.A.
6. Supra footnote 4 at page 414.
7. See e.g. **R. v. King**, 1962 S.C.R. 746.

the commission of the alleged offence and (b) in a case involving an intoxicated offender the accused often does not, *at the time* of the *actus reus*, have a guilty mind. This somewhat unfortunate predicament has by no means gone unnoticed but has yet to be solved. David Napley's account[8] of the problem provides a concise recapitulation of how the law has been brought into disrepute by decisions being supportable only in terms of *stare decises*. Speaking of the conviction of an intoxicated person for manslaughter reduced from murder Napley points out:

> If the justification for a proposition of law lies in the fact that the cause of the punishment is the drunkenness which has led to the crime rather than the crime itself it should follow in logic that the same principle should apply to a charge of murder, and drunkenness which is self-induced should afford no greater defence there. Certainly it seems difficult for the law to have it both ways.[9]

Napley makes reference to the offence of drunk and dangerous but does not elaborate on how it might reasonably operate. What Napley undoubtedly contemplates is amendments to change the law in such a way that it punishes the intoxicated offender while "not bending the existing law by imputing to a man at the time of killing an intention or volition which he clearly no longer possesses, merely because he happened to have possessed it at an earlier point in time."[10]

Assistance is not readily available from other jurisdictions. A semblance of revision may be found in the Danish offence of drunk and dangerous; however the Danish code does not come to grips with the problem discussed here. Simply stated sec. 426 of the Danish Criminal Code provides that anyone who obstructs traffic or disturbs the peace or performs any acts against which special care or precautions are required is liable to imprisonment for six days. Sec. 453 provides that anyone who is drunk on the streets shall be fined. The Danish Road Traffic Act deals with impaired driving in a similar fashion to Canadian Legislation. The solution to the problem regarding *mens rea* and the intoxicated offender has not been solved or even dealt with in Denmark, except periphorally.

The writer proposes to deal with the problem in the form of suggested Criminal Code amendments, emphasizing that the remedy sought in this paper does not concern length of sentence or rehabilitation of the offender but rather with insuring that the law is framed on the basis of common sense and logic. Accordingly, the following sections are recommended for insertion into the Code:

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8. "The Legal Position in the United Kingdom" contained in **The Drunkenness Offence** by Cook, Gath and Hensman, Pergamon Press 1969 at page 79.
9. Ibid, at page 85.
10. Ibid, p. 85.

16A. (1) No person shall be convicted of an offence in respect of an act or omission on his part while he was intoxicated.

(2) For the purposes of this section a person is intoxicated when he voluntarily consumes alcohol or drugs when he knew or ought to have known their effects and is thereby rendered incapable of

(a) controlling his actions; and

(b) knowing that his acts or omissions are wrong.

(3) Everyone shall, until the contrary is proved, be presumed to be and to have been sober.

80A. Everyone who would have been found guilty of an offence but for the provisions of section 16A.(1) shall be deemed to have committed an offence punishable as follows:

(1) if the offence for which section 16A. has provided a defence is itself punishable on summary conviction, punishable on summary conviction; or

(2) if the offence for which section 16A. has provided a defence is an indictable offence, is guilty of an indictable offence and is liable to

(a) the same punishment as that to which an accused who is guilty of that offence would upon conviction be liable or

(b) a period of fourteen years

whichever is the shorter.

Two reactions to the suggested amendments are anticipated. There will be those who fear the inclusion of section 16A contending that the Courts have encountered enough difficulty administering the insanity test as set out in sec. 16 and this amendment would only create new problems. This need not be the case. The ramifications of finding an accused not guilty by reason of intoxication will not, as is demonstrated by sec. 80A, be as objectionable as finding an accused insane. And it is the case that much of the criticism of sec. 16 is based on the totally inadequate result of a decision of "not guilty but insane." Objection will undoubtedly be raised as to the practical application of sec. 16A; it is submitted however that a judge or jury would not encounter any insurmountable difficulty in deciding whether or not an accused person was intoxicated within the meaning of the amendment. The major practical change would be in the charge to the jury where they would be asked, in cases of intoxicated offenders, to rule specifically on the accused's mental state at the time he was alleged to have committed the offence.

The second reaction might well be that the proposed amendments

do not go far enough in their solution of the problem of responsibility and punishment. Even a cursory reading of the proposals clearly indicates that the amendments are by no means intended to bring about radical changes in the accused's legal responsibility insofar as the intoxicated offender is concerned. As was stated earlier the changes are remedial in nature with the twofold purpose of keeping the law in a state which may be logically explained and dealing justly with the intoxicated offender.

How then will the amendments work in practice? Let us follow through a hypothetical, supposing that the changes suggested have become law. Consider the fictitious illustration given by Lionel and John Solursh in their review of the effects of illusenogenic drugs on criminal responsibility.[11] Pat, a sixteen year old girl, was attending a church social. At some point in the evening the accused, Gerald, introduced himself to her and subsequently invited her back to his home to "do some hash." She accepted. While under the influence of the drug Gerald, with the help of a knife, succeeded in systematically ripping off her blouse and bra and finally raping her. Gerald is charged with rape. On the stand Pat admitted that after taking the drug Gerald seemed quite upset and was mumbling nonsense words including after the rape, "don't lock me in." Gerald admitted previous drug use. His testimony revealed that after taking the drug he felt himself slipping into a bad trip where his mother was stuffing him into a bottle of Alberto VO 5. He remembered nothing further except vain attempts to fight off his mother and an inability to control his movements. There was also evidence that Gerald may have reacted in the way he did as a result of the ingestion of harder drugs that evening.

Under the "new" Criminal Code, Gerald would be charged with rape under sec. 136. The trial judge would proceed as under the old code until the charge to the jury. At this point he would instruct them that if they were satisfied that the accused was intoxicated within the meaning of sec. 16A (2) they must return a verdict of "not guilty" on the rape charge. However, if they so find they must then consider the accused's guilt under sec. 80A as an included offence. The effect of an acquittal by reason of sec. 16A (1) in effect renders the accused guilty under sec. 80A (1) or (2) as the case may be.

We now have an accused person who, for the sake of argument, we shall concede, has

> (a) had sexual intercourse, without consent, with a female other than his wife contrary to sec. 136 of the Code,

11. Solursh Lionel P. and Solursh John M., **"Illusinogenic Drugs — Their Effects on Criminal Responsibility"** published for the Canadian Mental Health Association, 1969.

(b) acted under the influence of a drug to the extent that he had lost control of his actions and was incapable of knowing that his act was wrong,

(c) ingested a drug knowing that its effects may be dangerous to others or at the very least unpredictable.

Because he had not the requisite mental element to be convicted under sec. 136, he has been found guilty under sec. 80A (2) and becomes liable to a maximum penalty of fourteen years in prison. Thus, instead of being convicted of rape or one of its included offences and being subject to life imprisonment and to be whipped, the accused has been found guilty of committing an indictable offence while intoxicated. The final problem for consideration is sentencing.

The proposed amendments are not limited to removing anomalies in the law. The problem of how to deal with the intoxicated offender after verdict is dealt with as well. The usual considerations insofar as sentencing will be applied, with the hope that the accused will be dealt with and punished only for acts he has committed intentionally. We will therefore find that second offenders will be harshly dealt with and the accused's knowledge of alcohol's effects or the possible effects of ingestion will be of cardinal importance. Public policy, as was earlier stated, has dictated that even if an accused has acted under the influence of intoxicants, he must be punished. There is no doubt that severe punishment may comfort the victim or their family but we should be loath to sentence on this basis. The accused must be dealt with according to the long recognized principles of criminal justice and accordingly it is hoped that the proposed amendments will enable the presiding judge to sentence only for the accused's intentional acts, i.e. either the principle offence if sufficient drunkenness is not proved, or the intentional act of becoming drunk and dangerous if sufficient drunkenness is proved.

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A CRITICAL ANALYSIS OF BILL C-192: THE YOUNG OFFENDERS ACT

Small "l" liberals are perhaps the most maligned political group in America today. They draw the ire of the political right for being too permissive, and the contempt of the left for being too reactionary. In trying to be all things to all people, they please nobody. Their programs are often elaborate and costly but without firm direction. This "wishy-

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1. R.S.C. 1952, c. 160.