Alcohol should be eliminated as a defence.

This paper will illustrate how a miscarriage of justice can be avoided when examining the defence of voluntary intoxication. Given the serious nature of the offence, this paper will illustrate why mitigating factors should not form part of the trial to avoid miscarriages of justice. A brief analysis of involuntary intoxication will be discussed as it forms a vital part of the defence of 'intoxication'. As the *actus reus* and *mens rea* are the core elements of criminal law, a brief critical analysis of its effectiveness shall be considered in support of the defence of intoxication. Whilst basic intent and specific intent crimes form part of voluntary intoxication, this paper will not discuss these principles extensively. This paper will suggest that intoxication is removed completely as any form of defence to stop mitigation in criminal offences.

Walker stated that the purposes of criminal law are "*(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interest".*[1] This suggests that offences which are viewed as *mala in se* (serious offences) should be subject to punishment, as opposed to having the right to a reduced sentence through mitigating factors as this may reduce the risks of miscarriages of justice. From this it can be deduced that, if more individuals would be subject to harsher sentences this could lead to a decrease of the percentage of individuals re-offending as they would be subject to longer periods of rehabilitation. Additionally, in 2018 adult offenders released from custodial sentences of less than 12 months had a proven reoffending rate of 61.0%[2] compared to adults who served sentences of 12 months or more re-offended at a rate of 29.1%.[3]

Additionally, *Kirby* suggests that some of the current societal issues are temporarily fixed by the abuse of alcohol, which portrays that alcohol is more commonly used as a "gateway".[4] Moreover, if an individual finds themselves to be charged under the Road Traffic Act 1998, it is apparent that following Sentencing Guidelines,[5] the more

[1] N Walker, Proposed Official Draft, SS 1.02(1), The Aims of the Penal System, (1996)
[2] Ministry of Justice, 'Proven reoffending statistics quarterly bulletin, October 2018 to December 2018, available from: Proven reoffending statistics quarterly bulletin, July 2017 to September 2017 (publishing.service.gov.uk), accessed: 31/03/2021
[3] (n 2) 8
[4] T Kirby, 'Alcohol as a gateway drug:a study of US 12th graders', 82, (2012) J Sch Health
[5] Excess Alcohol (drive/attempt to drive) (Revised 2017) – Sentencing (sentencingcouncil.org.uk)

alcohol that is consumed the greater the sentence. However, an anomaly in criminal law allows mitigation to be considered during criminal trials regardless of the severity of the crime committed. This creates disproportionality, as *Ashworth* emphasized that "*ignorance of the criminal law is no defence to a criminal charge*",[6] showing that mitigation can potentially lead to an unjust acquittal. From this it can be deduced that mitigation should not permitted in criminal offences, unless the 'exceptional circumstances' are narrowed down to allow individuals who have impairment disabilities to rely upon as they would not be able to be judged against the sober-minded reasonable man. Additionally, if an individual is not sober-minded due to the use of alcohol then a defence of intoxication should not be used as an alternative option.

Consequently, as the defence of intoxication is subject to the ability of reliance upon mitigation, it is apparent that to serve justice towards the victims, harsher sentences should apply across all criminal offences relating to intoxication. This will decrease miscarriages of justice as aggravating factors will override mitigating factors (in *mala in se* offences – the greater the harm, the greater the sentence), especially when considering the seriousness of offences committed whilst being intoxicated.

This has been illustrated, in *Thomas*[7] where the Court of Appeal recognised that the defendant was not aware that the sexual crime against the child was in fact 'a crime' and reduced his sentence from four to two-and-a-half years. But ***Blackstone's*** stated that "*mistake of ignorance of the law 'is in criminal cases no sort of defence*".[8] From this it can be deduced that crimes of serious nature should not be subject to considerations of mitigating factors unless there is a proven record of learning disabilities, such as Autism which impair the understanding of an individual's everyday life, as following the principles set out by *Gardner*, "*those of us about to commit a criminal wrong should be put on stark notice*",[9] which further aligns with the suggested implementation of imposing harsher sentences in criminal law as Lord

[6] A Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid it', 74, (2011) MLR
[7] [2006] 1 Cr App R (S) 602
[8] W Blackstone, 'Commentaries of the Laws in England (1765 – 1769)', 4 Bl. Comm 24, (2005)
[9] 4 Bl. Comm 24, R. Keedy, 'Ignorance and Mistake in the Criminal Law', (1908), 22 Harv L R, 75

Bridge emphasized that "*the principle that ignorance of the law is no defence in crime is so fundamental*".[10]

Before establishing the components of intoxication, it is noteworthy to briefly evaluate the core elements of criminal law; *mens rea* and *actus reus.*

The Crown must follow the principles that *actus non facit reum nisi mens sit rea*, which suggests that a person is not criminally liable for his conduct unless his mind also be guilty as displayed by Lord Hailsham.[11] The *mens rea* of a crime is the necessity to prove that the defendant intended to inflict the harm as portrayed in *Woolin*[12]*.* Though, *Woolin* did not leave a degree of flexibility for the jury, as *Professor Norrie* outlined that the test in this case **was** intention, as opposed to the direction given to the jury of '**may**' find intention[13], which consequently left the Court of Appeal unwilling to interpret *Woolin* as a precedent. *Baxter*[14] portrays that the *actus reus* element must consist of an act that is voluntary, even though in this case the defendant was still charged after losing control of his vehicle due to a swarm of bees. This suggest that the accused, must engage in a forbidden act, one that is prohibited and punishable in criminal law.

Despite both elements of *actus reus* and *mens rea* being proved by the Crown, the defendant is entitled to an acquittal owing to some justification of excusing circumstances or condition.[15] *Hart* further explained that a person should only be acquitted if he has the "*capacity and fair opportunity to change or adjust his behaviour to the law*".[16]

When considering intoxication, it is important to establish whether the defence of involuntary and voluntary intoxication avoid miscarriages of justice.

Handler explained that, intoxication impairs a person's perception and judgement so that he may fail to be aware of facts, or to foresee results of his conduct, which he

[10] 1 KB 544, (n 5) - 2
[11] AC 476, 491-492
[12] [1999] Crim LR 532
[13] A Norrie, 'After Woolin' [1999] Crim LR 532; Norrie, Crime, Reason and History, 67-71
[14] [1958] 1 QB 277
[15] D. Ormerod & K Laird, Criminal Law, (15th Edt, 2015), Oxford University Press, 278
[16] Hart, HLA 'Punishment and Responsibility', (1969), 181

would have foreseen if he had been sober.[17] This suggests that the defendant will dispute the *mens rea* of the act to avoid conviction.

In *Beard*,[18] the courts recognised that intoxication was a defence only if it rendered the defendant incapable of forming the *mens rea*.[19] The onus of proof is on the Crown to establish that the defendant formed the *mens rea*. In *Kingston*,[20] the courts recognised that intention is enough to suffice *mens rea*, regardless of being under the influence of drugs or alcohol.

Where, because of involuntary intoxication, the defendant lacks the *mens rea* of the offence, he must be acquitted. This principle stands equally with public policy justifications and follows the rule of law that fairness follows the law.[21] This is illustrated in *Kingston*, where Lord Mustill stated that intoxication negates liability if it is '*based… on inability to form the mens rea as a result of some external factor which… he was not bound to forsee*'.[22] The external factor would refer to the involuntary drug/liquid that caused impairments in decision making via a third party. Whilst this principle ensures that the accused is not sentenced due to external factors, this also means that it will not stop the accused of exploiting the vagueness and claiming to have had their drink 'tampered with' despite a self-inducement circumstance, which would put a strain on the courts to distinguish from. On the other hand, section 6(5) of the Public Order Act 1986 requires the defendant to 'show' that his intoxication was not self-induced. Whilst these principles protect the accused from judicial error and wrongful incarcerations, on the other hand these acquittals leave victims being served with no justice.[23]

The exception rule around self-induced voluntarism states that if the defendant has voluntarily intoxicated himself so that the defendant was unconscious or 'acting' involuntary, that will provide no excuse for any crimes he commits while in the state of mind. This follows the principles set out by *Blackstones* that "*according to the ideal*

[17] P Handler, 'Intoxication and Criminal responsibility in England, 1819 – 1920',33, (2013), OJLS, 243
[18] [1920] AC 479
[19] ibid., 501-502
[20] [1944] 3 All ER 353
[21] J Towend, 'Fairness, Open Justice, Rule of Law', (2020), Information Law and Policy Centre
[22] D Ormerod & K Laird, Criminal Law, (15th Edt, 2015), Oxford University Press, 314
[23] V Tadros, 'Rape Without Consent', (2006), 26, OJLS, 516

rule of law, the law must avoid violating it, or build legal consequences".[24] This principle is critically important, in instances involving 'capacity to consent'.

Following the White Paper in 2002[25] and *Kamki*[26] if the claimant has voluntarily consumed alcohol but remained capable of choosing whether to engage in sexual acts and in their drunken state agreed to do so, this would not amount to rape. This suggests that if the individual is aware of the side effects of alcohol and agrees to sexual intercourse, the law does not permit the claimant to rely on intoxication as a defence. But in instances involving homicide through drunk driving, the defendant can be charged with manslaughter as opposed to murder, which leads to a lenient sentence. *Shelbrooke* stated that "*somebody who intoxicates themselves and then drives a vehicle that results in the death of someone else is clearly a manslaughter charge*".[27]

This statement creates inequality. In 2019, 62.2% of females have been subject to rape.[28] This therefore suggests that, had everyone in the stated figure been voluntarily intoxicated but could not refuse sexual interaction due to fear, the defence of intoxication provides such victims with minimum protection. From this it can be suggested that the principle set out by ***Blackstone's***[29] should apply as, individuals who kill because of drink driving should be subject to punishment as opposed to the right to mitigation. Whilst this may be viewed as a potential breach of Article 6 'the right to a fair trial',[30] however, the Human Rights Act 1998 is based on principles of fairness and equality. The defence of voluntary intoxication breaches Article 2 'the right to life', as rape victims are excluded from the defence of intoxication if they were under the influence of alcohol, but other areas of criminal law allow mitigation as part of the trial. This is equally recognised by Lord Simon who stated, "*to accede on behalf of the appellant would leave the citizen legally unprotected from unprovoked violence where such violence was the consequence of a drink*".[31]

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[24] (n 4)
[25] The Home Secretary, Protecting the Public – White Paper, (2002)
[26] [2003] EWCA Crim 2335
[27] A Mathews, 'Drink and drug drivers who kill motorists will be charged with manslaughter in shake up of criminal sentencing', 2016, MailOnline, accessed: 13/04/2021
[28]Anonymous, 'Number of rape offences in the United Kingdom', Statista, 2021, accessed from: < • England, Wales: rape statistics 2019 | Statista>, accessed: 13/04/2021
[29] (n 4)
[30] The Human Rights Act 1998
[31] [1977] AC 442, 476 / [1987] EWCA Crim 2

The principle of 'self-induced voluntarism is not a defence' could potentially create fairness in some instances, as it would uphold the public interest that it is applicable in *mala in se* offences. Additionally, individuals are aware of the consequences of alcohol. *Pietrangelo* stated that alcohol interference with the brain communication system.[32] This suggests that the consumption of alcohol may result in behavioural changes. These effects are known to individuals who have consumed alcohol previously. It is therefore apparent that voluntary intoxication should be removed as a defence from the criminal justice system, to stop the reduction of liability for the offence committed whilst under the influence of alcohol.

In 2018 11% of anti-social crimes were under the influence of alcohol.[33] This suggests that individuals will claim that their actions are due to the loss of control, which could lead to a decreased liability from a sentence to a fine if the individual displayed remorse. Intoxication and mitigation should therefore not be permitted to be used together in the criminal courts. Whilst minor offences such as 'youths kicking balls in inappropriate areas' should be excluded from this principle as *Lewis* stated this ensures that individuals are not "*punished for ordinary behaviours*",[34] *male in se* offences (homicide, rape) should not be permitted to rely on mitigation if they had consumed alcohol as the defendant voluntarily and knowingly consumed alcohol with the acknowledgement of its side effects. Additionally, Lord Salmon further emphasized that "*there is no case… when the courts were relaxing the harshness of the law in relation to drunkenness*". [35]

Moreover, the Court of Appeal distinguished between basic intent and specific intent crimes in *Heard*.[36] Where the defendant was reckless in which case the crime was one of basic intent, whereas where the defendant's *mens rea* consists of intention this would lead to a classification of a specific intent crime and in this instance the defendant is entitled to an acquittal. But Lord Elwyn-Jones LC stated that "*if a man of*

[32] A Pietralengo, 'The Effects of Alcohol on Your Body", Healthline, (2018), available from: < Alcohol's Effects on the Body | National Institute on Alcohol Abuse and Alcoholism (NIAAA) (nih.gov)>, accessed: 13/04/2021
[33] Anonymous, 'Alcohol Statistics', Alcohol Change, 2018, available from: <Alcohol statistics | Alcohol Change UK>, accessed: 13/04/2021
[34] S Lewis, 'Nipping Crime in the Bud? The Use of Antisocial Behaviour Intervention with Young People in England and Wales', (2017), 57, BR J Criminol, 1
[35] R v Heard [2007] EWCA Crim 125, 314
[36] [2007] EWCA Crim 125

his own volition takes a substance which causes him to cast off… no wrong is done to him by holding him answerable criminally".[37] This principle in *Majewski*, should apply across all crimes relating to drunkenness irrespective of whether the defendant was reckless or had intended to commit the crime. In addition, Lord Diplock supported the statement in *Majewski* by stating "*Majewski… is authority that self-induced intoxication is no defence to a crime*".[38] Irrespective of whether the defendant committed a basic or specific intent crime, the criminal charge should remain the same, as the offence committed whilst intoxicated does not change the nature of the offence committed. The continuing allowance of mitigation in specific intent crimes allows individuals to remain reckless. This is equally supported by *Mathew* who emphasized that "*no distinction should be drawn between specific intent and any other kind of intent*".[39] Moreover, in 1993 the Law Commission reached a conclusion that the rule in *Majewski* should be abolished. [40] But this has not been taken forward.

Additionally, pursuant to s. 8[41] the jury "(*b) shall decide whether he did intend or forsee that result*", whilst this appears to be a high threshold to satisfy, Lord Hill Watson in the unreported case of *Winchester*[42] directed the jury that *"if the accused had been too drunk to form the intention of assaulting the victim he must be acquitted of assault*".[43] This principle ultimately lowers the criterion for intention which may lead to an acquittal despite self-induced intoxication. From this it can be suggested that alcohol should be eliminated as a defence. Whilst drunkenness should be permitted as a defence in a self-defence situation,[44] but where intoxication is raised because of infliction of harm due to a voluntary intake, then the barriers to avoiding a miscarriage of justice could be decreased if intoxication is eliminated.

[37] DPP v Majewski [1976] 2 All ER 142 at 150
[38] R v Caldwell [1981] 1 All ER 961 at 967
[39] Smith and Hogan, Criminal Law, 3rd ed (1973) Oxford University Press, 151
[40] LCCP 127 (1993)
[41] The Criminal Justice Act 1967
[42] *Reg. v. Winchester* (unreported), Glasgow High Court, October 1955
[43] G Dingwall, 'Intoxicated Mistakes about the Need for Self-Defence', (2007), 70(1), MLR,
[44] Reg. v. Wardrope [1960] Crim.L.R. 770

To finalise this paper, it is apparent that *mala in se* offences should not be permitted to rely on mitigation in the courts unless in exceptional circumstances such as by having proven learning disabilities, as harsher sentences could lead to a decrease of re-offending. This would therefore support the theory that a miscarriage of justice could be avoided, because more individuals would fear their sentence as opposed to being given the ability of being 'reckless' and potentially acquitted through specific intent crimes. Additionally, whilst the complexity of involuntary intoxication remains in existence, it is apparent that this defence also ensures fairness around sentencing and protects individuals who have been under the influence of external factors. Contrary, victims who have been subject to these offences are ultimately left out of the justice system which creates a disproportionate balancing rule. Moreover, the defence of voluntary intoxication creates an unfair balancing principle; victims of rape are excluded from its application, but defendants who commit serious crimes can rely on mitigation to reduce their sentence? This paper attempted to illustrate that, intoxication should not be a 'defence', [45] and the unfairness of its application should ultimately lead to the elimination of its enactment.

Word Count: 2985

[45] A Simester, 'Intoxication is Never a Defence', [2009] 3 Crim LR ; LC 314, para 1.15

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