Nuancing Feminist Perspectives on the Voluntary Intoxication Defence

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ABSTRACT

The defence of voluntary intoxication, which has been back in the news as a result of the recent decision of the Ontario Court of Appeal in *R v Sullivan*, is frequently decried as antifeminist. Pursuant to the defence, defendants who acted while intoxicated to the point of automatism or severe psychosis may be acquitted. This article seeks to complicate feminist perspectives on the voluntary intoxication defence, showing that the issue of voluntary intoxication is far more nuanced than some suggest. After summarizing the state of the law of the voluntary intoxication defence and reviewing its prevalence in the jurisprudence, this article critically reflects on the voluntary intoxication defence and highlights how its removal contributes to the criminalization of mental illness and weakens crucial criminal law standards used to protect the most vulnerable — both problems from a feminist standpoint. The article concludes that a feminist analysis of the voluntary intoxication defence requires more nuanced policy discussions than those that have prevailed in the public sphere.

Keywords: voluntary intoxication defence; automatism; criminalization of mental illness; principles of fundamental justice; carceralism; feminism

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I. INTRODUCTION

Accused of any crime, a person can be acquitted by proving that they were under the effect of a drug, including alcohol, to the point of automatism or severe psychosis.[1] Automatism refers to a state in which a person has no conscious control over their actions and typically comes with subsequent amnesia.[2] Psychosis will generally have the requisite severity if it precludes the person from distinguishing right from wrong.[3] Where the drug is voluntarily ingested, the defence is known as a defence of voluntary intoxication.[4]

Long recognized in England before being rejected by the Supreme Court of Canada in 1977, the voluntary intoxication defence was reintroduced in Canadian law in 1994.[5]

The decision that reintroduced the defence, *R v Daviault*, involved a 74-year-old man accused of sexually assaulting a 65-year-old woman, who was partially paralyzed and used a wheelchair, after having drunk excessive quantities of alcohol.[6] The Supreme Court of Canada ordered a new trial, ruling that a person could be acquitted of any crime if intoxicated to the point of automatism or severe psychosis.[7] The decision was met with intense public outrage and significant scholarly criticism. The government rapidly

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1 I use "severe psychosis" for what courts typically call "insanity", as the latter term conjures and feeds prejudice against mentally ill persons. The term 'severe psychosis' is used in this way in *R v Bouchard-Lebrun*, 2011 SCC 58 at para 13 [*Bouchard-Lebrun*].

2 *R v Stone*, [1999] 2 SCR 290 at paras 155–56, 173 DLR (4th) 66 [*Stone*]; Harold Kalant, "Intoxicated Automatism: Legal Concept vs. Scientific Evidence" (1996) 23:4 Contemp Drug Probs 631.

3 *Bouchard-Lebrun*, *supra* note 1 at para 57.

4 Although neither a justification (the act was done but was not wrong, e.g. self-defence) nor an excuse (the act was done and is wrong but the defendant should not be punished, e.g. necessity or duress) because it negates an essential component of the offence, it is typically called a defence because the burden of establishing it lies on the defendant: *R v Sullivan*, 2020 ONCA 333 at para 3 [*Sullivan*].

5 For English law, see *DPP v Majewski*, [1976] UKHL 2 and *DPP v Beard*, [1920] AC 479 (HL (Eng)), cited by Justice Dickson in *Leary v The Queen*, [1978] 1 SCR 29 at 39, 74 DLR (3d) 103. The defence is said to have been abandoned in *Leary*, although the meaning and impact of the decision has been disputed.

6 [1994] 3 SCR 63, 118 DLR (4th) 469 [*Daviault*].

7 A new trial was ordered instead of an acquittal because the trial judge had used the wrong evidentiary threshold: he had acquitted the defendant because he believed he might have been extremely intoxicated and not because it was the most plausible explanation based on the evidence.

proposed adding section 33.1 to the *Criminal Code*, less than five months later,[8] prohibiting the voluntary intoxication defence in cases involving violations of physical integrity or assault.[9] Since then, doubts have loomed over the constitutionality of the provision.

In its June 2020 decision, *R v Sullivan*, the Ontario Court of Appeal declared section 33.1 unconstitutional, allowing the two defendants to invoke the voluntary intoxication defence.[10] One of the two defendants was acquitted, whereas a new trial was ordered for the other. Unlike Henri Daviault, neither of the two defendants were drinking or charged with sexual offences. Instead, both had suffered from drug-induced psychoses, leading to convictions of aggravated assault for David Sullivan and manslaughter for Thomas Chan.[11] The decision is binding on other courts in Ontario and will likely be persuasive in other provinces and territories.

As was the case following previous decisions invalidating section 33.1, the public's reaction to the judgment was profoundly negative, accusing it of reflecting an anti-feminist and pro-rape culture position. The Women's Legal Education and Action Fund claimed that it "risks sending a dangerous message that men can avoid accountability for their acts of violence against women and children through intoxication."[12] Reactions on social media

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8 Isabel Grant, "Second Chances: Bill C-72 and the *Charter*" (1995) 33:2 Osgoode Hall LJ 379 at 383–85. It received Royal Assent on July 13, 1995, nine and a half months after the *Daviault* decision.

9 The section only applies to 'general intent' offences. Voluntary intoxication remains for offences that require 'specific intent'. Typical specific intent offences include theft and murder, whereas general intent offences include manslaughter, sexual assault, and assault. Most offences require general intent and someone who lacks the specific intent of, say, murder can nevertheless be found guilty of manslaughter. These lesser included offences are a substantial reason why the voluntary intoxication defence is not as controversial for specific intent crimes.

10 *Sullivan*, *supra* note 4.

11 The language of automatism is used inconsistently in the jurisprudence. The Ontario Court of Appeal in *Sullivan* appears to have conflated automatism and psychosis, saying that "those who are in a state of automatism are incapable of appreciating the nature and quality of their acts or of knowing at the time of their conduct that it is morally wrong". (See Sullivan, *supra* note 4 at para 4). This is inconsistent with the Supreme Court's language and with the definition set up earlier.

12 Kayla Goodfield, "'A Painful Step Backwards': Calls for Appeal of Intoxication Ruling in Ontario Echo Throughout Canada", *CTV News* (5 June 2020), online: <toronto.ctvnews.ca/a-painful-step-backwards-calls-for-appeal-of-intoxication-ruling-in-ontario-echo-throughout-canada-1.4971355> [perma.cc/HH99-4RDA].

were particularly strong, mirroring unnuanced headlines such as '*A hall pass for rape?*'[13]

Although allowing voluntary intoxication defences may turn out to be antifeminist because it facilitates sexual assault and intimate partner violence and contributes to a culture of impunity around them, an informed outlook on the issues raised by this area of the law reveals important nuances that makes the debate substantially more complex. Nuances have been lost in public discussions surrounding the *Sullivan* decision: productive nuances.[14] In the hopes of guiding our conversations forward on the (anti)feminism of the voluntary intoxication defence, I offer a review of the voluntary intoxication defence and how it is used, followed by an examination of two critical issues relating to abolishing it: the criminalization of mental illness and the weakening of criminal law standards.

A. What is the Voluntary Intoxication Defence and How is it Used?

To understand the voluntary intoxication defence, it is crucial to understand the principles behind the defense, what kind and standard of proof must be met to succeed in using the defence, and how often the defence is used and successfully used. The voluntary intoxication defence functions to limit the punishment of those with little to no moral culpability.[15] It is extremely difficult for the defence to prove and is rarely used successfully, especially when it comes to alcohol.

1. The Principles Behind the Defence

Only the morally guilty can be punished and only in some degree of

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13 Sudbury Star Staff, "'A Hall Pass for Rape'?", *Sudbury Star* (6 June 2020), online: <www.thesudburystar.com/news/local-news/archaic-mind-set-sudbury-group-decries-court-decision-throwing-out-law-barring-self-induced-intoxication-as-defence-for-violence> [perma.cc/XE53-DSP3].

14 As Kieran Healy has pithily pointed out, nuance isn't always good. See Kieran Healy, "Fuck Nuance" (2017) 35:2 Soc Theory 118.

15 In the logic of *Daviault*, *supra* note 6 at 100, those who acted in a state of automatism or severe psychosis are morally innocent of the crimes (such as assault, sexual assault, or manslaughter) that they are accused of. However, they may carry moral culpability in other ways, as intimated by the Court's suggestion in *Daviault*, that Parliament could criminalize harming others while drunk.

proportion with their guilt.[16] Although the principle knows many exceptions and outright failures, it has been the driving concern behind the modern law of voluntary intoxication. One of the concerns at the heart of *Daviault* was the idea of taking the intention of getting drunk and holding it as an adequate substitute to intention to commit the criminal act in question.[17] Where the consequences of getting drunk are not foreseen, let alone intended, there is no common measure between the intent of intoxication and the intent of the crime. And the risks of psychosis or harm to others are rarely foreseen.[18] Holding otherwise, in the eyes of the Court, would have jeopardized the principle that there must be some proportionality between moral culpability and punishment.[19] It gives me pause that the correctness of the legal precedent disallowing the voluntary intoxication defence was first called into question at the Supreme Court level by Justices Bertha Wilson and Claire L'Heureux-Dubé, respectively the first woman and the most vocal feminists on the Supreme Court bench.[20]

Even if one accepts that getting intoxicated to the point of automatism or severe psychosis is morally reprehensible, voluntary intoxication is intertwined with the problem of moral luck. Automatism and psychosis caused by intoxication are far more common than are instances of violence committed while in a state of automatism or under severe psychosis. There is little readily ascertainable difference between those who gravely hurt others and those who do not. While propensity for violence could be conjectured, few people would not resort to violence under any situation

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16 Gross disproportionality violates section 12 of the *Canadian Charter*, which guarantees the right to be free form cruel and unusual punishment. See *Canadian Charter of Rights and Freedoms*, s 12, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*]; *R v Nur*, 2015 SCC 15. Gross disproportionality is also prohibited under section 7. See *R v Bernard*, [1988] 2 SCR 833 at 889, 1988 CanLII 22 [*Bernard*]; *R v Safarzadeh-Markhali*, 2016 SCC 14 at paras 70–72.

17 *Supra* note 6 at 90.

18 Or are overshadowed by other considerations. In the *Sullivan* case (*Sullivan*, *supra* note 4), David Sullivan regularly experienced (apparently non-violent) psychoses, but he became violent when he took a much, much larger dose of a prescription drug as part of a suicide attempt.

19 *R v Martineau*, [1990] 2 SCR 633 at 645–46, 109 AR 321. See also *R v DeSousa*, [1992] 2 SCR 944 at 964–66, 95 DLR (4th) 595 [*DeSousa*]; *Bernard*, *supra* note 16 at 889.

20 Their concurrence in *Bernard*, *supra* note 17 was cited approvingly by and was integral to the majority judgment in *Daviault*. Justice L'Heureux-Dubé concurred with the *Daviault* majority. Justice Wilson had since retired. Justice L'Heureux-Dubé also called for relaxing the threshold for allowing the voluntary intoxication defence in her dissenting opinion in *R v Robinson*, [1996] 1 SCR 683, 133 DLR (4th) 42.

whatsoever, and hallucinations during severe psychosis are hardly controllable. As I will detail later, David Sullivan seemingly believed that he was defending himself against evil aliens when he stabbed his mother and ran away when he realized that he was wrong. Moral luck poses a problem for the criminal law: people with the same intent, making the same plans, and acting the same way can lead to vastly different consequences.[21] Though the problem of moral luck arises throughout the criminal law, it is magnified in the context of voluntary intoxication because of the oft-remote nature of the foreseen risk and the sheer disproportion between the moral culpability associated with the relatively mundane act of getting drunk or high and the moral culpability associated with manslaughter or sexual assault. I suspect that many readers will have taken recreational drugs in a quantity sufficient to occasion psychosis at some point in their lives but were lucky enough to have a pleasant time instead.

2. Proving the Necessary Level of Intoxication

The voluntary intoxication defence is a bit of a misnomer.[22] The question is not so much whether the person is intoxicated than whether they have reached a mental state akin to automatism or severe psychosis.[23] As mentioned earlier, automatism is a state in which a person has no conscious control over their behaviour,[24] whereas severe psychosis involves a misperception of the world that prevents the person from distinguishing right from wrong.[25] Oftentimes, the person invoking voluntary intoxication has a pre-existing neurological predisposition or vulnerability, and the mental state is more accurately said to be triggered rather than caused by the intoxication. However, the verdict of "not criminally responsible by reason of mental disorder" that is normally available to those who

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21 I am speaking here more particularly of resultant luck. See e.g. Dana K Nelkin, "Moral Luck" (26 January 2004), online: *Stanford Encyclopedia of Philosophy Archive* <plato.stanford.edu/archives/sum2019/entries/moral-luck/> [perma.cc/9S7F-8XV6].

22 The misnomer may have arisen from the gradual collapse of the 'drunkenness defence' and 'insanity defence' (which applied even when the mental state was self-induced) under the umbrella of intoxication defences, which require different levels of intoxication depending on whether the intoxication is voluntary and if the crime is one of specific or general intent. Whereas the name may be fitting for the advanced intoxication defence, it is less fitting in cases of extreme intoxication.

23 The jurisprudence uses the derogative term 'insanity' to refer to this kind of severe psychosis.

24 Kalant, *supra* note 2; *Stone*, supra note 2 at para 156.

25 *Bouchard-Lebrun*, *supra* note 1 at para 57.

experience automatism or a severe psychosis due to a mental disorder will be unavailable in cases involving voluntary intoxication if a similarly situated person without the neurological predisposition or vulnerability could have fell into automatism or severe psychosis from taking the same dose of the substance(s).[26] The fact that someone without the predisposition or vulnerability could have been in a state of automatism or severe psychosis from the drug prevents a finding of 'not criminally responsible by reason of mental disorder', even the automatism or severe psychosis of the defendant may not have occurred but-for their neurological predisposition or vulnerability. In *Sullivan*, as is frequently the case, part of the debate at Thomas Chan's trial was whether his psychosis had been caused by the drugs or was attributable to his brain injury. Although he may have been more likely to experience a severe psychosis from taking psilocybin ("magic mushrooms"), the fact that someone without a brain injury could also have had a severe psychosis from the same dose (though it was unknown in this case) prevented him from successfully using a mental disorder defence and left him with only the voluntary intoxication defence. Where the line is being drawn seems unfair.

It is not easy to prove extreme intoxication, which must be done when using the voluntary intoxication defence. In the words of the Supreme Court in *Daviault*, "it will only be on rare occasions that evidence of such an extreme state of intoxication can be advanced and perhaps only on still rarer occasions is it likely to be successful."[27] The defendant, Henri Daviault, had seven or eight beers and a whole litre of brandy. His blood alcohol levels were around 0.4% to 0.6%, which is five to seven and a half times the legal driving limit of 0.08%.[28] Most people would be either in a coma or dead with that much alcohol. It's not altogether clear whether that was enough for an acquittal, since the new trial ordered by the Supreme Court was never held. However, the Ontario Court of Appeal in *Sullivan* suggested that he would likely have been convicted, because scientific evidence shows that alcohol probably cannot lead to extreme intoxication at all.[29]

Normally, the criminal law only asks for a reasonable doubt to acquit someone. However, you cannot be acquitted just by showing that extreme intoxication is possible enough to raise a reasonable doubt. The standard of

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26 *Ibid* at paras 71–72.
27 *Supra* note 6 at 100.
28 *Ibid* at 105.
29 *Supra* note 4 at para 137.

proof is elevated, and the defendant must show that they were extremely intoxicated "on a balance of probabilities." In other words, they must show that automatism or severe psychosis due to intoxication is the most plausible interpretation of the evidence.[30] And, unlike the usual approach in criminal law, it is not the prosecutor's job to prove that the defendant was not 'extremely' intoxicated. Instead, it is the defendant's job to prove that they were. How likely it is that the defendant was extremely intoxicated depends on how much of the substance was taken, and it will be very difficult to argue the voluntary intoxication defence without being able to prove how much alcohol or drug(s) they took. The law also requires expert testimony to prove that the intoxication was at the level of automatism or severe psychosis.[31] The defence does get thrown out when the defendant does not have an expert or when the expert is not convincing. In most circumstances, the expert will be a pharmacologist or toxicologist, and the government usually hires an expert to contradict the expert of the defendant.

With the current state of science, there is serious doubt as to whether alcohol by itself can lead to automatism or severe psychosis. According to Harold Kalant, a professor of pharmacology and expert on alcohol and drug tolerance, there is little evidence that it does. In his view, "[t]here is no scientific evidence whatsoever that automatism is directly caused by alcohol intoxication alone, no matter how severe the intoxication."[32] The problem with the idea that alcohol causes automatism, as opposed to the idea that alcohol can trigger automatism in someone who already has a neurological condition, is that alcohol impacts all nerve cells at the same time. Nerve cells responsible for consciousness and those responsible for coordinated movements both decrease their activity at the same time and speed.[33] This effect of alcohol on brain cells is called central nervous system depression, and alcohol is different from some other substances because it does not selectively depress the central nervous system; it does not select one part of the brain to affect more than others. As a result, being drunk enough to lose consciousness also means being drunk enough that you cannot do complex, coordinated movements.[34] If you are drunk to the point of losing consciousness, you might have simple, uncoordinated, purposeless, and

30 *Daviault*, *supra* note 6 at 101–02.
31 *Ibid* at 101, 103.
32 Kalant, *supra* note 2 at 638 [emphasis in original].
33 *R v McCaw*, 2019 ONSC 53 at paras 317–18 [*McCaw*].
34 *Ibid* at paras 289–92.

repetitive movements, but you cannot have the series of movements that happen in sexual assault. Complex movement can happen with automatism, but usually it is automatism from dissociative states that are different from the automatism caused by alcohol.[35] A review of studies on alcohol blackouts showed that there is a strong negative relationship between alcohol and the ability to form memories, but that there's little evidence that alcohol can have negative impacts on cognitive functioning.[36] On the contrary, studies showed that people in a blackout state had higher cognitive functions and could engage in social interactions. So, even though automatism comes with amnesia, alcohol-induced amnesia does not seem to come with automatism.[37]

Alcohol can trigger automatism and psychotic symptoms in other, more complicated ways, but the symptoms are quite different. First, there is 'alcohol idiosyncratic intoxication' where someone ingests a small amount of alcohol and undergoes a marked behaviour change (usually aggressive, violent, and/or self-harming).[38] It may also come with visual hallucinations.[39] Not everyone agrees that alcohol idiosyncratic intoxication exists, but what is most important to note is that it is triggered by an unusually small amount of alcohol and does not come with slurred speech or lack of coordination that is common when people are severely drunk.[40] Second, alcohol can trigger a "complex partial seizure" in the temporal lobe of the brain, which can cause violent and/or psychotic behaviours; it usually lasts only a few minutes and is followed by deep sleep, and the automatism behaviours themselves are "simple, stereotyped, unsustained, and never supported by a consecutive series of purposeful movements."[41] Third,

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35 Kalant, *supra* note 2 at 637.

36 Mark R Pressman & David S Caudill, "Alcohol-Induced Blackout as a Criminal Defense or Mitigating Factor: An Evidence-Based Review and Admissibility as Scientific Evidence" (2013) 58:4 J Forensic Sci 932 at 938–39.

37 See Kalant, *supra* note 2 at 640.

38 The diagnosis was recognised under the DSM-III-R and DSM-IV but collapsed into the general categories of alcohol intoxication and alcohol-related disorders. See American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-IV-TR* (Washington, DC: American Psychiatric Association, 2000) at 222.

39 For a recent case report, see Xiao-Ling Lin & Da-Li Lu, "Development of Psychotic Symptoms Following Ingestion of Small Quantities of Alcohol" (2016) 12 Neuropsychiatric Disease & Treatment 2449.

40 Kalant, *supra* note 2 at 638–39.

41 *Ibid* at 635.

people can have alcohol-induced psychotic disorder.[42] The disorder typically follows a period of prolonged, heavy drinking and lasts even after the person becomes sober again, typically clearing up within one to six months.[43] The most prevalent symptom is auditory hallucinations. And fourth, alcohol can also precipitate the development of mental health conditions that cause automatism or severe psychosis.[44] The person has an underlying, undeveloped mental health condition that is brought to the surface by alcohol. Depending on the condition, it may not be obvious outside of episodes, but there will typically be symptoms of some kind afterwards, such as other episodes of automatism or psychosis.

Blacking out while severely drunk tends to look quite different from these four conditions. The archetypical picture of someone who is severely intoxicated is slurred speech and poor coordination, with no symptoms indicating automatism or psychosis the next day. Meanwhile, sexual assault requires a series of complex actions. Each of those elements contradict one or multiple of the common features of alcohol idiosyncratic intoxication, complex partial seizure, alcohol-induced psychotic disorder, and precipitation of an underlying mental condition. In a way, evidence that someone is drunk makes the thesis of extreme intoxication less plausible.

It is precisely this kind of reasoning that led to the conviction of Cameron McCaw after the judge in his case declared section 33.1 constitutional. If he had been in a state of alcohol-induced extreme intoxication, reasoned Justice Nancy Spies, he would not have been able to sexually assault the victim as he did since it involved a complex series of steps.[45] According to the judge, he might have blacked out, but that did not mean that he was extremely intoxicated. Based on his actions, the scientific evidence suggested he was not. He went to prison. A similar reasoning was also adopted in *Dow c R.*[46]

To use the voluntary intoxication defence, the defendant must meet a higher-than-usual standard of proof, find and pay for an expert who will confirm that the circumstances are indicative of automatism or severe

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42 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (Washington, DC: American Psychiatric Association, 2013) at 5.

43 Melany L Hendricks et al, "Cognitive Changes in Alcohol-Induced Psychotic Disorder" (2017) 10:166 BMC Research Notes 1, DOI: 10.1186/s13104-017-2485/0.

44 Kalant, *supra* note 2 at 641.

45 *McCaw*, *supra* note 33 at para 380. He had also taken GHB but the expert evidence demonstrated that GHB had alcohol-like effects.

46 2010 QCCS 4276 at paras 81ff, 100 [*Dow*].

psychosis, and fight an uphill battle against the entrenched scientific view that alcohol cannot cause automatism by itself. By arguing the voluntary intoxication defence, the defendant has to admit material facts, like their presence during the crime, and they cannot readily contradict the victim's account of the events since automatism comes with amnesia. Admitting the facts and proving that it is more likely than not that they were that intoxicated will rarely be easier than denying the facts and hoping the judge is left with a reasonable doubt (unless there is damning evidence of these facts). This leaves little incentive to use voluntary intoxication as a defence against sexual assault charges.

3. Jurisprudential Statistics

Judges do not always apply the law correctly and law-in-action can look drastically different from law-on-paper. In the wake of *Daviault*, a major concern had been the impact the judgment would have on acquittals. Professor Elizabeth Sheehy revealed three successful uses and one unsuccessful use of the voluntary intoxication defence in the half a year following the decision.[47] All involved assaults or sexual assaults against women, and at least some of them suggested that the high threshold set by the Supreme Court was not being followed. In one of the cases, the fact that spousal violence was (allegedly) uncharacteristic of the defendant was used to support the conclusion of extreme intoxication — despite the fact that many men become violent when drunk without automatism or severe psychosis.[48] In the years since, however, successful or would-be successful uses of the voluntary intoxication defence have been much rarer.

I reviewed the cases referring to section 33.1 from 1995 to 2020, when *Sullivan* came out.[49] The entire period is of interest, since the first cases

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47 Elizabeth Sheehy, "The Intoxication Defense in Canada: Why Women Should Care" (1996) 23:4 Contemporary Drug Problems 595 at 603–04.

48 *Ibid* at 603; Heather MacMillan-Brown, "No Longer 'Leary' About Intoxication: In the Aftermath of *R. v. Daviault*" (1995) 59:2 Sask L Rev 311 at 330. Since the decision was handed down less than one month after *Daviault*, it is legitimate to wonder whether the same decision would have been rendered had the entire trial been conducted after the release of *Daviault*. Regardless, the reasoning is immensely worrisome.

49 I conducted my search exclusively on CanLII, which gave me 147 results. I also searched for cases citing section 33.1 on WestLaw, but only added the two cases declaring the section unconstitutional that were not on CanLII, bringing the total to 149. The WestLaw search returned a total of 154 results, close to the CanLII numbers.

declaring the law unconstitutional date back to 1999–2000,[50] and many cases that do not declare section 33.1 unconstitutional nevertheless make findings as to whether the defendant was in a state of extreme intoxication.

The constitutionality of section 33.1 was considered in 14 files.[51] It was ruled constitutional in five and unconstitutional in nine.[52] A total of four defendants were acquitted or would have been acquitted if not for the finding of constitutionality.[53] One of the would-be acquittals, dating back to 2000, involved sexual assault.[54] The other three involved neither sexual assault nor intimate partner violence. Among the cases that did not consider the constitutionality of section 33.1, two further acquittals would have resulted were it not for the law.[55] Neither of the two involved sexual assault or intimate partner violence.

Five were found guilty or would have been found guilty despite the

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50 *R v Dunn*, [1999] OJ No 5452, 28 CR (5th) 295 (ONCJ) [*Dunn*]; *R v Jensen*, [2000] OJ No 4870, 2000 CarswellOnt 6489 (ONSC).

51 With *Sullivan* counted twice, once for each defendant. Of note, I have included *R v Brenton* (1999), 180 DLR (4th) 314, [2000] 2 WWR 269 (NWTSC) [*Brenton*] even though it was overturned in *R v Brenton*, 2001 NWTCA 1 [*Brenton* 2001] since the Court of Appeal declined to address the constitutional argument. By contrast, the constitutional findings in *R v Chan*, 2018 ONSC 3849 [*Chan*], were directly overturned in *Sullivan*, *supra* note 4 and, therefore, they were not included among cases declaring the provision constitutional.

52 Constitutional: *R v Vickberg*, [1998] BCJ No 1034, 16 CR (5th) 164 (BCSC) [*Vickberg*]; *R v T (BJ)*, 2000 SKQB 572 [*T(BJ)*]; *Robb v R*, 2019 SKQB 295 [*Robb*] (stayed in *R v Robb*, 2020 SKQB 60); *R v SN*, 2012 NUCJ 2 [*SN*]; *Dow c R*, 2010 QCCS 4276 (new trial ordered on other grounds in *R c Dow*, 2014 QCCA 2086). Unconstitutional: *R v Sullivan*, 2020 ONCA 333 (for two defendants); *R v Brown*, 2020 ABQB 166 [*Brown*]; *R v Fleming*, 2010 ONSC 8022 [*Fleming*]; *R v Dunn*, [1999] OJ No 5452, 28 CR (5th) 295 (ONCJ); *R v Jensen*, [2005] OJ No 1052, 129 CRR (2d) 126 (ONCA) [*Jensen*]; *R v Cedeno*, 2005 ONCJ 91 [*Cedeno*]; *R v Brenton*, (1999) 180 DLR (4th) 314, 69 CRR (2d) 323 (NWTSC) [*Brenton*] (convicted in *R v Brenton*, 2001 NWTCA 1); *R v McCaw*, 2018 ONSC 3464 [*McCaw* 2018] (convicted in *R v McCaw*, 2019 ONSC 53).

53 *Sullivan*, *supra* note 4 (David Sullivan); *Brown*, *supra* note 52; *Vickberg*, *supra* note 52; *T(BJ)*, *supra* note 52.

54 *Ibid.*

55 *R c Lebrun*, 2011 SCC 58, aff'g 2008 QCCQ 5844; *R c Côté*, 2013 QCCQ 4485. An acquittal based on voluntary intoxication was also overturned in *R v Martin*, 1999 CanLII 1708 (ONCA) but the reasons are terse and do not specify whether the trial judge instructed the jury on advanced (negating specific intent) or extreme (negating general intent) intoxication, though the decision suggests that the trial judge mistakenly classified the offence as a specific intent one.

declaration of unconstitutionality.[56] They fell short of the level of extreme intoxication. *R v McCaw*, discussed in the last section, is an example. In another case, *R v Jensen*, the defendant was convicted of second-degree murder after he presented a voluntary intoxication defence to both murder and manslaughter, meaning that he far was from the level of extreme intoxication since the threshold for reducing murder to manslaughter due to intoxication is much lower.[57] Among cases that did not consider the constitutionality of section 33.1, findings that the degree of intoxication did not reach (or, sometimes, remotely suggest) 'extreme' levels were exceedingly common and I found around 50 such cases.

The other five cases merely allowed the defence to be argued, but I was unable to find whether they resulted in convictions or acquittals.[58] Some led to acquittals for unrelated reasons.[59] Various cases that did not consider the constitutionality of section 33.1 may have allowed the defence to be argued if not for section 33.1.[60]

A potential of six acquittals, only one of which involves sexual assault or intimate partner violence, over 25 years is a small number, especially considering the much larger number of cases clearly indicating that the person would have fallen below the level of extreme intoxication. But we must also consider the limits of the statistic. Some of the new trials were ordered recently and we do not know the outcome yet. Some judges and defendants did not consider applying the defence only because of section 33.1, notably because of the cost of challenging the constitutionality of the law, and we do not know if they would have led to an acquittal. There may be more acquittals that are not reported in the law databases. Additionally,

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56 *Jensen*, *supra* note 52; *Cedeno*, *supra* note 52; *McCaw* 2018, *supra* note 52 (found guilty in *R v McCaw*, 2019 ONSC 53); *Brenton*, *supra* note 51 (convicted in Brenton 2001, *supra* note 51, on the grounds that extreme intoxication was not proven regardless of the constitutionality of section 33.1); *Dow*, *supra* note 46 at para 154 (the judge stated that there was no evidence of extreme intoxicated and he was later convicted, but the conviction was overturned on other grounds and the file has gone through many levels of appeals and three trials in total thus far for the same charges).

57 *Supra* note 52. Since murder is a specific intent offence, he only needed to raise an advanced level of intoxication to defeat the charge.

58 *Sullivan*, *supra* note 4; *Fleming*, *supra* note 52; *Dunn*, *supra* note 50; *Robb*, *supra* note 51 (stayed in *R v Robb*, 2020 SKQB 60 [*Robb* 2020]); *SN*, *supra* note 51.

59 For instance, *Robb*, *supra* note 52 was stayed in *Robb* 2020, *supra* note 58 because his right to trial within a reasonable time was violated.

60 *R v JAW*, 2006 ABPC 178; *R c DD*, 2010 QCCQ 953; *R c Hébert-Ledoux*, 2020 QCCQ 976; *R v Pavlovszky*, 2005 NBQB 346.

not every charge leads to trial and not every crime is reported. The statistics do not account for the impact of the voluntary intoxication defence on peoples' willingness to report sexual assault or on police and prosecutors' willingness to investigate complaints of sexual assault, issues identified as major concerns after *Daviault* came out.[61] Under-reporting and under-investigation of sexual assault remain major problems in Canada.[62]

Even though it would be unreasonable to claim that the voluntary intoxication defence is only associated with a risk of six acquittals over 25 years, the small number gives a sense of scale for the problem that the defence poses in the context of sexual assault and intimate partner violence. In the same 25-year period, the legal database I used reported 5,459 decisions referring to the sexual assault provisions of the *Criminal Code*. What is clear from reviewing the courts' decisions is that judges are not very receptive to the claim of extreme intoxication, especially in cases involving alcohol and/or sexual assault and intimate partner violence. When courts consider the argument of voluntary intoxication, they are much more likely to consider that the intoxication was not extreme. These numbers are in line with the Supreme Court's suggestion in *Daviault*, based on the experiences of Australia and New Zealand, that allowing the voluntary intoxication defence would not lead to a significant increase in the number of acquittals since extreme intoxication is difficult to prove and extremely rare.[63]

Injustice cannot be encapsulated by numbers. Each wrongful acquittal is a blemish on the justice system, as is each wrongful conviction — perhaps even more so. Each sexual assault, each case of intimate partner violence that goes unrecognized is a harm to the principles of feminism. Nevertheless, feminist perspectives on the voluntary intoxication defence need to begin from a place of knowledge. Although the voluntary intoxication defence may be morally or politically undesirable, there is little

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61 Sheehy, *supra* note 47 at 611.

62 Robyn Doolittle, "Unfounded: Police Dismiss 1 in 5 Sexual Assault Claims as Baseless", *The Globe and Mail* (3 February 2017), online: <www.theglobeandmail.com/news/investigations/unfounded-sexual-assault-canada-main/article33891309/> [perm.cc/SP23-4EL9]; Alana Prochuk, *We Are Here: Women's Experiences of the Barriers to Reporting Sexual Assault* (Vancouver: West Coast LEAF, 2018).

63 *Supra* note 6 at 103–04. According to Patrick Healy, "Intoxication in the Codification of Canadian Criminal Law" (1994) 73 Can Bar Rev 515 at 543 [Healy, "Intoxication"], the approach in *Daviault* limits use the defence more than Australian and New Zealand law does.

evidence of a severe impact on the number of acquittals in sexual assault and intimate partner violence cases. The case law suggests that the defence is rarely used and even more rarely used successfully, even though the constitutionality of section 33.1 of the *Criminal Code*, the section prohibiting the defence, has been in doubt since 1995.[64] As the same time, these statistics cut both ways. Policy and political discussions of cases declaring section 33.1 unconstitutional like *Sullivan* should be had under the illuminating shine of the current state of the law, science, and jurisprudence.

II. Criminalizing Mental Illness

While Henri Daviault does not readily attract much sympathy, despite his alcohol addiction, the defendants of the most recent Ontarian case, Thomas Chan and David Sullivan, are a whole other matter.[65]

Thomas Chan, a high school student, took magic mushrooms while hanging out with friends at his mother's house. It was not his first time. After half an hour, he was the only one sober of the group and took some more. He suffered a psychotic break, characterised by erratic and violent behaviour. He went outside, shattered the window of a car, tried to fight one of his friends, and yelled "This is God's will" and "I am God." He then ran to his father's house nearby and, instead of getting in using the fingerprint recognition system, he broke into the house through a window. His father was in the kitchen, but he did not seem to recognize him and stabbed him repeatedly, causing his death. He then began attacking his stepmother, who said he did not seem to recognize her. She survived. At trial, the evidence showed that Thomas Chan suffered from a mild traumatic brain injury that had not healed by 2018, despite being first diagnosed in 2013. The injury was sustained due to repeated concussions during his rugby career, and it likely impacted his frontal and temporal lobes. However, the judge found that the link between brain injuries and toxic psychosis from magic mushrooms was insufficiently conclusive for his

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64 According to Professors Baker and Knopff, section 33.1 has stood so long without a Supreme Court challenge in large part due to strategic behaviour of the Court, as well as many cases that could have come to the Supreme Court being stalled in lower level courts. See Dennis Baker & Rainer Knopff, "*Daviault* Dialogue: The Strange Journey of Canada's Intoxication Defence" (2014) 19:1 Rev Const Stud 35.

65 The facts in the following paragraphs are drawn from *Sullivan*, *supra* note 4; *Chan*, *supra* note 51; *R v Chan*, 2019 ONSC 783.

severe psychosis to be considered caused by a mental disorder. He received a five-year sentence of imprisonment for manslaughter and aggravated assault.

David Sullivan, for his part, was living with his mother and was prescribed Wellbutrin to help him stop smoking. Psychosis is a known risk of the medication, especially among those susceptible to it. He sometimes took it recreationally and had experienced psychotic episodes before. On the fated day, he took an enormous quantity of tablets (between 30 and 80) while attempting suicide. He experienced what the judges called "a profound break with reality" and thought he had captured an evil alien. His mother tried to reassure him that there was no alien in the room, but the drugs made him believed that she was also an alien, and he stabbed her several times with kitchen knives. She called out "David, I'm your mother", which made him drop the knives and run away. She survived. He was convicted of aggravated assault and assault with a weapon.

Neurological vulnerability, prescription medication usage, and addiction are frequently in the background of voluntary intoxication cases. The role of mental health in both tragedies and the similarity of the facts to many cases leading to a verdict of not criminally responsible on account of mental disorder brings to the forefront the relation that section 33.1 entertains with the criminalization of mental health. I am not suggesting that section 33.1 criminalizes mental illness because mentally ill people are disproportionately violent or because a high percentage of mentally ill people are incarcerated as a result of section 33.1. People with mental illnesses, including psychotic disorders, are rarely violent and are much more prone to being victims of violence than perpetrators of it.[66] The paucity of cases invoking section 33.1 to prevent an intoxication defence that would otherwise have succeeded also means that section 33.1 plays only a small role in the overall pattern of overincarceration of people living with mental illnesses. Rather, I want to suggest three things: (1) the (former) unavailability of the voluntary intoxication defence for violent crimes leads to the incarceration of mentally ill people for acts that are inextricably linked to mental health issues, (2) disallowing the defence perpetuates a broader pattern of treating mental health problems as a criminal rather than healthcare issue, and (3) incarcerating mentally ill people, regardless of

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66 Jennifer Skeem et al, "Psychosis Uncommonly and Inconsistently Precedes Violence Among High-Risk Individuals" (2016) 4:1 Clinical Psychological Science 40.

reason, further entrenches social inequalities because of inadequate and discriminatory treatment of mentally ill people in carceral facilities.

Even though neither Thomas Chan, nor David Sullivan were found to have experienced a psychosis as a result of an underlying mental health condition, their stories may have looked wildly different had mental health aspects been taken out of the picture. Under the current state of the law, the defence of automatism or severe psychosis due to a mental disorder will often be unavailable even if the events would probably not have occurred without the pre-existing mental health or neurological issue (whether diagnosed or not). To use the defence when intoxication is involved, the defendant must convince the judge that the underlying condition did not just make them more likely to have an automatism or severe psychosis episode, but that someone without that condition could not have had automatism or severe psychosis.[67] That legal approach is incompatible with the reality that many conditions only make automatism or severe psychosis more likely and that the drugs involved have the potential to cause automatism or severe psychosis on their own.[68] Thomas Chan may not have had a severe psychotic episode if not for his brain injury, but the hard line set by the law between severe psychoses caused by neurological conditions and intoxication led to his conviction at trial regardless. I am also left to wonder why he did not have any further neurological testing between 2013 and 2018 — perhaps he would have refrained from taking hallucinogenic drugs if he had known that his brain injury was lingering.

David Sullivan's mental health was equally implicated by the combination of addiction and suicidality. He was taking Wellbutrin to deal with his smoking. The addiction was bad enough that he readily endured the occasional psychotic episodes that came as a side-effect. As he took the medication recreationally as well; I wonder whether he may have been addicted to it as well.[69] Most heartbreakingly, the fated psychotic break that

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67 *Bouchard-Lebrun*, *supra* note 1 at paras 71–72.

68 Michelle S Lawrence & Simon Verdun-Jones, "Blurred Lines of Intoxication and Insanity: An Examination of the Treatment at Law of Accused Persons Found to Have Committed Criminal Acts While in States of Substance-Associated Psychosis, Where Intoxication Was Voluntary" (2015) 93:3 Can Bar Rev 571.

69 Michelle Lawrence notes that, in *Bouchard-Lebrun*, *supra* note 1, the Court suggested that addiction to the psychosis-inducing drug may preclude voluntariness. See Michelle Lawrence, "Drug-Induced Psychosis: Overlooked Obiter Dicta in *Bouchard-Lebrun*" (2016) 32:1 CR (7th) 151. Whether the law will develop in that direction remains to be seen. Rulings in this direction would undermine the objective pursued by section 33.1,

led to him stabbing his mother arose out of a suicide attempt —hardly a trivial fact. Were it not for his addiction and suicidality, there is little doubt that he would not have attacked his mother. Was he adequately supported during his treatment and in relation to his suicidality? Why was he still on medication that gave him psychotic symptoms? What systemic failures led to him being suicidal and living with his mother while undergoing recurrent psychotic episodes?

Harm is harm, regardless of whether the perpetrator is living with a mental illness. However, approaching harm caused by people living with mental illness with a mind to punishment instead of adopting a public health outlook lies at the heart of the criminalization of mental illness. As a society, we too often deal with mentally ill people as criminals rather than people in need of support and services.[70] As a result, mentally ill people are grossly overrepresented in the carceral system, and their overrepresentation only worsens when considering subgroups that are also marginalized on other grounds like women, Black and Indigenous peoples, other people of colour, and members of LGBTQ+ communities. The criminalization of mental illness is deeply intertwined with racism and it is one of the ways in which the overincarceration of Black and Indigenous peoples is perpetuated.[71] Whereas white, middle-class individuals have greater access to mental health services, including addiction treatment, Black and Indigenous poor people overwhelmingly do not, and instead, they get targeted by police and funnelled towards prison.[72]

According to the Canadian Correctional Investigator, "Canadian penitentiaries are becoming the largest psychiatric facilities in the

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since those committing sexual assaults and intimate partner violence while drunk are often addicted to alcohol, further exposing the tension between the objectives of section 33.1 and the realities of those living with mental illness.

70 Gary Chaimowitz, "The Criminalization of People With Mental Illness: Position Paper" (2012) 57:2 Can J Psychiatry 1; Michael Rembis, "The New Asylums: Madness and Mass Incarceration in the Neoliberal Era" in Liat Ben-Moshe, Chris Chapman & Allison C Carey, eds, *Disability Incarcerated* (New York, NY: Palgrave Macmillan US, 2014) 139.

71 Syrus Ware, Joan Ruzsa & Giselle Dias, "It Can't Be Fixed Because It's Not Broken: Racism and Disability in the Prison Industrial Complex" in Liat Ben-Moshe, Chris Chapman & Allison C Carey, eds, *Disability Incarcerated* (New York, NY: Palgrave Macmillan US, 2014) 163.

72 Nirmala Erevelles, "Crippin' Jim Crow: Disability, Dis-Location, and the School-to-Prison Pipeline" in Liat Ben-Moshe, Chris Chapman & Allison C Carey, eds, *Disability Incarcerated* (New York: Palgrave Macmillan US, 2014) 81.

country."[73] Among federally incarcerated women, 4.6% had a current diagnosis of psychotic disorder and 6.5% of all incoming federal offenders from the Atlantic region had a psychotic disorder.[74] The global prevalence of psychotic disorders is 0.46%, meaning that inmates are 10 to 14 times more likely to have a psychotic disorder than the general population.[75] Female inmates also have extremely high rates of borderline personality disorder (33.3%), which can come with psychotic features,[76] and substance use disorders are exceedingly common across the carceral spectrum.[77] This pattern of overincarceration of the mentally ill disproportionately impacts people of colour, especially those who are Black and Indigenous, because of higher mental illness rates in those communities and of racially-correlated over-policing and overincarceration, both linked to systemic racism and colonialism.[78] Critical race and mad studies scholars point out that this is not a flaw of the system, but a feature built into it throughout history.[79] Racism and colonialism are causes of mental illness. Instead of focusing on meeting the needs of people living with mental illness, Canada incarcerates them.

Once incarcerated, the services offered are woefully inadequate. The demand for mental health services is far larger than the resources dedicated

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73 Cited in Ware, Ruzsa & Dias, *supra* note 71 at 168.

74 Correctional Service Canada, *Prevalence of Mental Health Disorders Among Incoming Federal Offenders: Atlantic, Ontario, & Pacific Regions*, by Janelle Beaudette, No ERR-13-3 (Ottawa: CSC, 2013) [CSC, *Prevalence of Mental Health*]; Correctional Service Canada, *National prevalence of mental disorders among federally sentenced women offenders: In custody sample*, by G Brown et al, No R-406 (Ottawa: CSC, 2018) [CSC, *National Prevalence*].

75 Berta Moreno-Küstner, Carlos Martín & Loly Pastor, "Prevalence of Psychotic Disorders and its Association with Methodological Issues: A Systematic Review and Meta-Analyses" (2018) 13:4 PLOS ONE 1.

76 Katrin Schroeder, Helen L Fisher & Ingo Schäfer, "Psychotic Symptoms in Patients with Borderline Personality Disorder: Prevalence and Clinical Management" (2013) 26:1 Curr Opinion Psychiatry 113.

77 CSC, *National Prevalence*, *supra* note 74; CSC, *Prevalence of Mental Health*, *supra* note 74; Fiona Kouyoumdjian et al, "Health Status of Prisoners in Canada: Narrative Review" (2016) 62:3 Can Family Physician 215.

78 Tarik Qassem et al, "Prevalence of Psychosis in Black Ethnic Minorities in Britain: Analysis Based on Three National Surveys" (2015) 50:7 Soc Psychiatry & Psychiatric Epidemiology 1057; Canada, Office of the Correctional Investigator, *A Case Study of Diversity in Corrections: The Black Inmate Experience in Federal Penitentiaries* (Final Report) (Ottawa: OCI, 2013); Ware, Ruzsa & Dias, *supra* note 71; Camille A Nelson, "Racializing Disability, Disabling Race: Policing Race and Mental Status" (2010) 15:1 Berkeley J Crim L 1.

79 Ware, Ruzsa & Dias, *supra* note 71; Erevelles, *supra* note 72.

to them, a reflection of misplaced funding priorities.[80] Despite the stated goal of rehabilitation, services are worse than those available outside of prison — which were already insufficient.[81] Those who have the greatest mental health needs often hide their conditions out of fear of it being used against them, including by impacting their access to release —fears that are understandable since anything discussed with therapists goes into their prison file and prisons are known to disproportionately place mentally ill people in solitary confinement.[82] Upon release, people living with serious mental health issues are offered little support and, as a result, they rarely stay in contact with mental health services and frequently become homeless.[83]

Although section 33.1 is perhaps a minor contributor to the criminalization of mental illness, it shares in it and mirrors the policy approach of criminalizing rather than supporting mentally ill people. The events having led to the charges against Thomas Chan and David Sullivan are unspeakably tragic, and the grave consequences of their actions will reverberate throughout the entire life of those who were implicated, as well as throughout the lives of their families and friends. A whole community suffered, is suffering, and will suffer as a result. But incarcerating two people having experienced grave psychosis against a background of neurological predisposition or suicidality does not serve any penological purpose. If the voluntary intoxication defence is a feminist issue because of its role in sexual and intimate partner violence, it is also one because of its relationship to

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80 Alexander I F Simpson, Jeffry J McMaster & Steven N Cohen, "Challenges for Canada in Meeting the Needs of Persons with Serious Mental Illness in Prison" (2013) 41:4 J Am Academy Psychiatry & L 501; Ware, Ruzsa & Dias, *supra* note 71 at 168.

81 Ware, Ruzsa & Dias, *supra* note 71 at 170.

82 *Ibid* at 168, 171; Simpson, McMaster & Cohen, *supra* note 80; Patrick White, "Complaint alleges Canada's prisons agency places mentally ill inmates in solitary confinement too often", *Globe and Mail* (20 June 2018), online: <www.theglobeandmail.com/canada/article-complaint-alleges-canadas-prisons-agency-places-mentally-ill-inmates/> [perma.cc/LV6E-N7C4].

83 Charlotte Lennox et al, "The Management of Released Prisoners with Severe and Enduring Mental Illness" (2012) 23:1 J Forensic Psychiatry & Psychology 67; Rembis, *supra* note 70 at 151; Élizabeth Fleury, "Santé mentale en prison: «Une fabrique d'itinérance»", *Le Soleil* (16 July 2019), online: <www.lesoleil.com/actualite/sante/sante-mentale-en-prison-une-fabrique-ditinerance-2a667650d73cac52c096acad48ada5a8> [perma.cc/4XP9-M47P]; Margot B Kushel et al, "Revolving Doors: Imprisonment Among the Homeless and Marginally Housed Population" (2005) 95:10 Am J Public Health 1747.

the criminalization of mental illness.

III. Weakening Criminal Law Standards

Two elements must be present to prove a crime: the *mens rea* and the *actus reus*. The *mens rea* ("guilty mind" in Latin) refers to the mental element of the crime: intent, knowledge, negligence, recklessness, etc.[84] The mental element must be linked to the *actus reus*.[85] The *actus reus* ("guilty act" in Latin) refers to the voluntary, physical action or inaction that constitutes the crime.[86] To prove a crime, no matter the crime, both *mens rea* and *actus reus* must be proven beyond a reasonable doubt. In the way these states are understood by courts, automatism and severe intoxication remove both *mens rea* and *actus reus* because a person cannot have the intent required for *mens rea* and, in fact, they do not even have the minimal psychological element to make a physical action 'voluntary' in the sense required to prove the *actus reus*.[87] Actions during automatism or severe psychosis are understood as unintentional and involuntary. For as long as it remains the law's understanding of the scientific fact of automatism and severe psychosis, laws that prohibit the voluntary intoxication defence pose a real risk of carceral expansion. Section 33.1 cannot be considered in isolation: we must also think about how decrying *Sullivan* for disallowing convictions in circumstances where there is no *mens rea* or *actus reus* will impact other areas of the law and lead to even more incarceration across Canada.

We can divide offences into five categories based on how they relate to *mens rea*. Each category is considered 'graver' morally than the following ones in the order: (1) subjective *mens rea*, (2) penal negligence, (3) regular negligence, (4) strict liability, and (5) absolute liability. Subjective *mens rea* is the gravest and most common type of offence in criminal law. Subjective *mens rea* requires the defendant to have some sort of subjective mental state like intention, recklessness, knowledge, or willful ignorance. The type of mental state required depends on the offence. Courts presume, as a rule,

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84 Bryan A Garner, ed, *Black's Law Dictionary*, 11th ed (St Paul, MN: Thomson Reuters, 2019) sub verbo "mens rea". See also *Legally Blonde* (United States: MGM, 2001).

85 *DeSousa*, *supra* note 19 at 964–65. There does not need to be a perfect symmetry between the *mens rea* and the *actus reus*, however. For instance, foreseeability of the risk of substantial bodily harm suffices to prove manslaughter and foreseeability of death need not be proven. See *R v Creighton*, [1993] 3 SCR 3, 105 DLR (4th) 632.

86 Garner, *supra* note 84, sub verbo "actus reus".

87 *Daviault*, *supra* note 6 at 102–03.

that offences require a subjective *mens rea*.[88] The second gravest category after the subjective one is penal negligence. Penal negligence is when someone's act(s) markedly depart from how careful a reasonable person would have been in the same circumstances.[89] The third gravest category is regular negligence, which includes any departure from how a reasonable person would have acted in the circumstances.[90] It is mostly used outside of the criminal law when people sue each other for negligence. The fourth level of offence, strict liability, is closely related to standard negligence.[91] With strict liability, the government only has to prove that the person has done the act (*actus reus*) and they do not have to prove any *mens rea*; the defendant can then get acquitted by showing that they made a factual mistake or acted reasonably in the circumstances.[92] In other words, you are presumed to have been negligent but can try proving that you were not. And then there is the lowest possible level of moral guilt: absolute liability. With absolute liability, the government must only prove the act (*actus reus*) and the defendant cannot even reply that they made a factual mistake or acted reasonably. So far, the law does not recognize offences that do not at least require proving the *actus reus*. If it did, it would be a sixth level and be even lower than absolute liability.

Section 7 of the *Canadian Charter of Rights and Freedoms* protects "the right to life, liberty, and security of the person."[93] As a result, the criminal law must follow a certain logic when it comes to *mens rea*. Imprisonment, the defining characteristic of criminal law, can only be ordered if it is "in accordance with the principles of fundamental justice."[94] Over the years, the Supreme Court of Canada has recognized many principles of fundamental justice directly bearing on *mens rea*. The type of *mens rea* required must be compatible with the stigma and punishment that attaches to the offence. Crimes that are particularly grave and stigmatized, like murder, require a subjective *mens rea*.[95] There are also limits for when different mental states

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88 *R v ADH*, 2013 SCC 28 at para 23.

89 *R v Hundal*, [1993] 1 SCR 867, 14 CRR (2d) 19.

90 *R v Beatty*, 2008 SCC 5 [*Beatty*].

91 Strict liability could be described as regular negligence coupled with a rebuttable presumption of negligence.

92 *R v Sault Ste Marie*, [1978] 2 SCR 1299, 85 DLR (3d) 161.

93 *Charter*, *supra* note 16, s 7.

94 *Ibid*.

95 *R v Vaillancourt*, [1987] 2 SCR 636, 47 DLR (4th) 399. The principle has yet to be applied to another offence.

can be substituted for another. For instance, the Supreme Court in *Daviault* said that proving intent to commit sexual assault could not be switched out for proving intent to drink because, depending on circumstances, the former was not always a predictable outcome of the latter.[96] However, proof of intent can generally be replaced by proof of recklessness and proof of knowledge can usually be replaced by proof of wilful ignorance.[97] They are sufficiently close, in moral terms, that replacing one for the other is authorized. Arguably, the most important principle, however, the one that provides perhaps the greatest protection against state oppression among all principles of fundamental justice, is the principle that whenever incarceration is a possible punishment for an offence, that offence must require some sort of *mens rea*.[98] It cannot be an absolute liability offence that only requires proof of the *actus reus*. According to the Supreme Court in *Daviault*, removing the voluntary intoxication defence goes even further, abrogating the need to prove *actus reus* since it only includes voluntary acts and not involuntary ones.[99]

Like other rights guaranteed by the *Charter*, section 7 is not absolute. Once it has been established that a right was interfered with, the government can show that it is the kind of limitation on civil liberties and human rights that is "demonstrably justified in a free and democratic society."[100] Justification is proven by showing that the law aims at a pressing and substantial objective, is rationally related to that objective, impairs the right(s) as little as possible, and there is proportionality between the positive and negative effects of the law.[101] If the infringement of the right is worse than not meeting the objective, then the law will be unconstitutional. Laws that restrict rights guaranteed by the *Charter* are frequently found to be justified and deemed constitutional as a result of this analysis.

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96 *Supra* note 6 at 92.

97 *R v Jorgensen*, [1995] 4 SCR 55, 129 DLR (4th) 510; *Sansregret v The Queen*, [1985] 1 SCR 570, 17 DLR (4th) 577.

98 *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 24 DLR (4th) 536 [*BC Motor Vehicle*]. Technically speaking, strict liability offences are not considered *mens rea* offences, but I would argue that there is still a substantial amount of *mens rea* involved insofar as errors of fact or having acted reasonably in the circumstances can be used as a defence.

99 *Supra* note 6 at 102–03.

100 *Charter*, *supra* note 16, s 1.

101 *R v Oakes*, [1986] 1 SCR 103, 26 DLR (4th) 200; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 889, 120 DLR (4th) 12.

Section 7 has been treated a bit differently from most other *Charter* rights when it comes to justifying infringements because you can only violate it by violating principles of fundamental justice — something so important to the justice system that they are considered part of its foundations. Furthermore, incarceration is, by definition, taking away someone's liberty. The very proposition that an infringement upon liberty that goes against principles of fundamental justice could be "demonstrably justified in a free... society" is peculiar on its face. Can a society ever be free that takes away liberty contrary to principles of fundamental justice?

Judges have shared this suspicion and since the *Canadian Charter* was promulgated in 1982, not a single violation of section 7 has been held justified under section 1 by the Supreme Court of Canada.[102] Although the Supreme Court is open to the possibility of a violation being justified and will still engage in the justificatory analysis, it has also long observed the difficulty of salvaging a breach of section 7.[103] In *Canada (Attorney General) v Bedford*, then-Chief Justice Beverley McLachlin explained:[104]

> It has been said that a law that violates s. 7 is unlikely to be justified under s. 1 of the Charter. The significance of the fundamental rights protected by s. 7 supports this observation.

Even though she expressly stated that it would be possible in some cases, she also affirmed the special status of section 7.[105] What would be required will depend on the context and on the law's objectives, but it has been suggested that where the law's objective is expediency, a justification would only be possible in circumstances such as natural disasters, war, epidemics,

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102 Peter W Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2007) (loose-leaf, 5th ed), §38.14(b). Leave to appeal to the Supreme Court of Canada was, however, dismissed in *R v Michaud*, 2015 ONCA 585 despite the Court of Appeal finding that a limitation on section 7 was justified under section 1 of the *Charter*. It is worth noting that the decision expressly states that safety regulations attract lower constitutional scrutiny than criminal laws, so its precedential value in relation to section 33.1 is very low. The decision of the Supreme Court to dismiss leave to appeal is, while interesting, does not have much legal significance.

103 Although, as Hogg, *supra* note 102 explains, the exercise is sometimes little more than repeating the points raised during the fundamental justice analysis.

104 *Canada (Attorney General) v Bedford*, 2013 SCC 72 at para 129 [*Bedford*] [footnotes omitted].

105 Some commentators have suggested that the decision nonetheless made justification easier to establish. See Hamish Stewart, "Bedford and the Structure of Section 7" (2015) 60:3 McGill LJ 575 at 593.

etc.[106] Where the objective is to combat the risk of perpetrators of sexual assault, intimate partner violence, and other violent crimes being acquitted, the threshold to meet is difficult to estimate but will undoubtedly be very high.

Declaring section 33.1 constitutional would allow for convictions without a *mens rea* reflecting the crime and indeed without a *mens rea* or *actus reus* at all,[107] posing two significant dangers for the ongoing development of the law: it weakens *mens rea* requirements and it weakens principles of fundamental justice unrelated to *mens rea*.

Weakening *mens rea* requirements by making greater room for lower levels of *mens rea* in proving offences or by removing the need for proving *mens rea* altogether has potentially serious consequences. Absolute liability is not enough whenever imprisonment is possible, and strict liability remains largely restricted to regulatory matters.[108] By allowing convictions without *mens rea* under section 33.1, the door is open to allowing convictions with lower levels of *mens rea* for other offences (for example, mere negligence where intent used to be required). The objective of fighting violence against women by ensuring that perpetrators are punished is a weighty and worthy one, but it is far from unique among criminal laws. The positive effects of section 33.1 are very significant but are not exceptional. If courts find these effects to be sufficiently important to outweigh the fundamental requirement of *mens rea*, which goes to the very heart of the criminal justice system, then many other laws running afoul of the principles of fundamental justice could be justified using similar reasoning. Finding a law constitutional creates a precedent. Judges must think about this and so must we when we comment on legal matters.

Lessening prosecutors' burden of proving a higher level of *mens rea* is a risk for people who are poor, homeless, and/or live with mental illness, and it will likely have an incidence on the overincarceration of Black and

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106 *BC Motor Vehicle*, *supra* note 98 at 518.

107 While section 33.1(1) requires marked departure from how a reasonable person would act — suggesting a penal negligence standard — subsection (2) expressly defines "marked departure" to include aggressive and violent behaviours occurring during automatism or severe psychosis. This is just a roundabout way of creating absolute liability for those who are in a state of automatism or severe psychosis.

108 Even in the pre-*Charter* landscape, strict liability was largely restricted to what was called "public welfare offences": see *Beatty*, *supra* note 90 at paras 22–23. These offences carry relatively light sentences: *R v Wholesale Travel Group Inc*, [1991] 3 SCR 154 at 205, 84 DLR (4th) 161.

Indigenous peoples. These groups are disproportionately targeted for offences seen as 'less grave' but which still carry the possibility of incarceration, and it would be tempting for the government (who wants to be 'hard on crime') to use strict or absolute liability. Women who live at the intersection of multiple vectors of marginalization are particularly at risk because of racial profiling, the feminisation of poverty, and the role played by sexism in the developing of mental illnesses.[109] Some penal negligence crimes relate to children and disproportionally apply to women. For instance, it is a crime to fail to provide one's children with the necessaries of life.[110] The recourse to the penal negligence standard of "marked departure from what a reasonable person would do" already indicates an impetus towards making the offence easier to prove for the government.

The impact of weakening *mens rea* requirements is difficult to predict and could bear on practically all aspects of criminal law. Since political will is the principal vector of change and is notoriously fickle, trying to predict what changes would follow may be a fruitless endeavour. I find comfort in the fact that in the last 25 years since section 33.1 was passed, no radical change to the criminal law has been seen, as far as *mens rea* is concerned. But the real risk does not arise unless the constitutionality of section 33.1 is confirmed by the Supreme Court or becomes firmly entrenched in the jurisprudence of appellate courts. Only then would the weakening of *mens rea* requirements be recognized by the law and prone to governmental abuse.

Besides principles of fundamental justice relating to *mens rea*, section 7 of the *Charter* (the right to life, liberty, and security of the person) guarantees an open-ended range of crucial protections. Laws cannot be arbitrary, irrational, vague, or overbroad.[111] People have a right to be tried and punished under the law that was in force at the time that the offence was committed and not be punished under a retroactive law or under the wrong

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109 It is important to recognize that intersecting vectors of marginalization create unique circumstances that are far more complex than merely "adding up" two forms of discrimination: see Kimberlé Crenshaw, "Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color" (1991) 43:6 Stan L Rev 1241; Trina Grillo, "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House" (1995) 10:1 Berkeley Women's LJ 16; Patricia Hill Collins, "Gender, Black Feminism, and Black Political Economy" (2000) 568:1 Annals Am Academy Political & Soc Science 41. I cannot recommend getting familiar with intersectionality and Black feminist thought enough.

110 *Criminal Code*, RSC 1985, c C-46, s 215.

111 *R v Malmo-Levine; R v Caine*, 2003 SCC 74; *R v Heywood*, [1994] 3 SCR 761, 120 DLR (4th) 348; *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606, 93 DLR (4th) 36.

legal provision.[112] Minors are presumed to be less morally guilty than adults for their actions.[113] People have a right to silence that goes beyond those granted by other sections of the *Charter*.[114] Police are obligated to take reasonable steps to preserve evidence, which may then be used at trial.[115] People cannot be convicted of crimes where they acted under severe duress, a situation tantamount to moral involuntariness. This principle was established after a woman was charged for importing heroin into Canada in a context of assaults, sexual harassments, and threats against her mother.[116] And last but not least, it goes against fundamental justice for the effect of a law to be grossly disproportional to the law's objective.[117] The principle of gross disproportionality was used to strike down laws criminalizing sex workers and prevent governments from disallowing safe injection sites.[118] Many of these principles are essential pillars of a just society and have been used to hamper harmful government action.

Governments routinely try to limit or infringe upon human rights and civil liberties for what they believe to be the greater good. The judicial system acts as a safeguard, however imperfect, of these rights and liberties, calling the government to account when it oversteps the proper boundaries of governmental action. Section 7 of the *Charter* and its relative imperviousness to justification under section 1 has been one of the most treasured bastions against government overreach. We live in an era marked by the rise of right-wing antidemocratic populisms rife with misogynistic elements and characterized by the institutionalisation of a neoliberal carceral, (pseudo) feminism, that collaborates in the marginalization of the most vulnerable members of society.[119] Opening the door by weakening some of the most

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112 *R v Gamble*, [1988] 2 SCR 595, 37 CRR 1. However, if the punishment changed from the time the offence was committed and the time of sentencing, the person has the right to pick the lesser punishment of the two. See *Charter*, *supra* note 16, s 11(i).

113 *R v DB*, 2008 SCC 25.

114 *R v Singh*, 2007 SCC 48; *Charter*, *supra* note 16, ss 11(c), 13.

115 *R v La*, [1997] 2 SCR 680, 148 DLR (4th) 608.

116 *R v Ruzic*, [2001] 1 SCR 687, 197 DLR (4th) 577.

117 *Bedford*, *supra* note 104.

118 *Ibid*; *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44.

119 Kenneth Roth, "The Dangerous Rise of Populism: Global Attacks on Human Rights Values" (2007) 70 J Int'l Aff 79; Rosalie Silberman Abella, "Judicial Independence, Democracy and Human Rights" (2019) 52:1 Isr LR 99; Rosalie Silberman Abella, "Freedom of Expression or Freedom from Hate: A Canadian Perspective" (2018) 40:2 Cardozo L Rev 503; Erik Voeten, "Populism and Backlashes against International Courts" (2019) Perspectives Policy 1; Mimi E Kim, "From Carceral Feminism to

important provisions of the *Charter*, even for very good reasons, is a decision that cannot be taken lightly.

IV. CONCLUSION

Far from my mind is the suggestion that the voluntary intoxication defence is without critique. Nor do I wish to take a definitive stance in favour of its existence. As Heather MacMillan-Brown, now a judge on the Saskatchewan Court of Queen's Bench, wrote when *Daviault* came out, it is "impossible to escape questions of policy and competing rights" that spring forward from the voluntary intoxication defence at "a time when Canada is struggling to cope with a plague of sexual violence."[120] Her comments, made 25 years ago, have sadly not lost any of their pertinency.

What I hope to have shown is that the defence is not so terrible of an idea that it can be dismissed offhandedly, without any deeper analysis. The question of whether voluntary intoxication should constitute a defence and under which conditions is a complex one that requires a nuanced balancing between competing moral and policy considerations. As we consider our response to violence against women, a problem of pandemic proportions,[121] we must adopt an intersectional outlook, fuelled by concern for the criminalization of mental illness and attuned to the disproportionate impact of the criminal justice system on Black, Indigenous, trans, queer, and homeless people — those who will bear the brunt of any relaxing of criminal law standards. For lack of a better place to make the remark, I would also like to point out that my earlier suggestion that the voluntary intoxication defence is less problematic than many think because it would have resulted in few acquittals over the last 25 years cuts both ways: the negative impact on sexual assault reporting by victims may outweigh the dangers of criminalizing mental health if very few mentally ill people could benefit from the defence anyway.

Transformative Justice: Women-of-color, Feminism and Alternatives to Incarceration" (2018) 27:3 J Ethnic & Cult Diversity Soc Work 219 at 220ff; Chloë Taylor, "Anti-Carceral Feminism and Sexual Assault — A Defense: A Critique of the Critique of the Critique of Carceral Feminism" (2018) 34 Soc Phil Today 29 at 31ff.

120 MacMillan-Brown, *supra* note 48 at 312.

121 I use the term consciously, the COVID-19 context having fuelled a disastrous rise in intimate partner violence: see Caroline Bradbury-Jones & Louise Isham, "The Pandemic Paradox: The Consequences of COVID-19 on Domestic Violence" (2020) 29:13/14 J Clinical Nursing 2047.

If good-versus-evil language fails to capture the feminist tensions surrounding the voluntary intoxication defence, the binary choice of maintaining it or abolishing it wholesale will likely also be misleading. These are serious options that must be considered, but they are far from the only ones (as the post-*Daviault* legal scholarship has shown).[122] The Court in *Daviault* itself gestured in that direction, pointing out that it was "always open to Parliament to fashion a remedy which would make it a crime to commit a prohibited act while drunk."[123]

Although exploring policy options and making recommendations is beyond the scope of this paper, I would be remiss if I did not point to three options that emerge from the foregoing analysis. First, concerns over the criminalization of mental illness could be partly alleviated by mending the difficult relationship between the voluntary intoxication defence, precluded by section 33.1, and the verdict of not criminally responsible by reason of mental disorder found in section 16 of the *Criminal Code*. The burden of proving that people who do not share your mental disorder or neurological vulnerability would not have fallen into automatism or severe psychosis is prohibitively high and flies in the face of scientific reality, which speaks the language of risk factors, predispositions, and percentages. The evidentiary threshold should be revised to better correspond to this reality. Second, alcohol could be targeted directly. Alcohol is frequently used by perpetrators of sexual assault, was the primary target of post-*Daviault* commentary, and was clearly on the mind of legislators when they adopted section 33.1.[124] Yet, as we have seen, alcohol is also one of the intoxicants for which there is the least evidence of being able to directly cause automatism or severe psychosis. Alcohol could be singled out by outright prohibition by creating a presumption that it does not lead to automatism or severe psychosis or by combining both a prohibition and a presumption — for instance by prohibiting the voluntary intoxication defence where alcohol is the only intoxicant and by creating a presumption that the combination of alcohol and small amounts of other drugs did not cause automatism or severe

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122 Healy, "Intoxication", *supra* note 63; Martha Shaffer, "*R. v. Daviault*: A Principled Approach to Drunkenness or a Lapse of Common Sense" (1996) 3:2 Rev Const Stud 311; Grant, *supra* note 8. As a prison abolitionist, I would favour approaches that address the problem without recourse to incarceration: see Angela Y Davis, *Are Prisons Obsolete?* (New York, NY: Seven Stories Press, 2003); Kim, *supra* note 119; Taylor, *supra* note 119. However, defending this view is beyond the scope of the paper.

123 *Daviault*, *supra* note 6 at 100.

124 Grant, *supra* note 8; Sheehy, *supra* note 47.

psychosis. Third, the government could initiate an expert consensus process to establish an evidentiary baseline regarding which drugs can cause automatism or psychosis under what conditions and leading to what symptoms. The report could then be integrated into the law as a mandatory consideration and serve as a shared language for expert witnesses in voluntary intoxication cases. The three options reflect the dual observations that (1) narrow, targeted limits on the defence are more readily justifiable than broad, categorical ones and (2) no harm is done to the principles of fundamental justice if the defence is only precluded when automatism or severe psychosis (i.e. lack of *mens rea*) are scientifically impossible.

The eagerness with which people have taxed the *Sullivan* decision of antifeminism for declaring section 33.1 unconstitutional and restoring the voluntary intoxication defence for violent crimes obscures the genuine complexity of the topic. We should switch out the narrow feminist lens applied by some in favour of an intersectional feminist lens that engages with the criminalization of mental illness and the importance of maintaining the integrity of principles of fundamental justice for marginalized communities. Doing this adds a layer of richness to our conversations and better equips us to choose from among the available policy options. Whichever one may be best, it is a choice that deserves as nuanced and complex of a reflection as the problem is.