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The Saturday Debate: Should extremely intoxicated people be legally responsible for their actions?

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The criminal law must respond to the extremely intoxicated offender. However, the recent Supreme Court of Canada decision in *R v Brown*, a ruling that the extreme intoxication defence must be available as a matter of constitutional rights, allows acquittal if the accused can prove on a balance of probabilities that he experienced a state akin to automatism, whereby he lost voluntary control of his actions.

Justice Canada's response, Bill C-28, will not resolve the problem. Yet it was rushed through Parliament in eight days, over the objections of women's groups across the country.

This defence promotes bad public-health policy. Individuals who lose voluntary control of their actions through alcohol and drug abuse and commit or threaten violence against another, can now be fully exonerated. The message — that their violent behaviour wasn't their fault — is the wrong message to send to people with substance abuse disorders. Those struggling with addictions often deflect responsibility. Now a pow-

erful institution — the law — shores up this wrong-headed belief and reinforces their claim to innocence.

The *Brown* decision also introduces a contradictory and confusing message about the relevance of intoxication to criminal responsibility. The law states that with the exception of a select few crimes, such as murder and theft, intoxication provides no defence. This holds true, although many intoxicated people experience a loosening of inhibitions and impaired judgment, and some become aggressive.

So while alcohol and drug intoxication play a role in criminal offending by facilitating behaviour that crosses the line from anti-social to criminal, the law provides no defence and judges need not mitigate sentences of intoxicated offenders.

However, if the individual becomes *extremely* intoxicated and reaches a state akin to automatism, they now can be acquitted of even the most violent crimes, leaving the law powerless to sanction the behaviour or to impose conditions or treatment. Ultimately, the confusing

message is that while impaired offenders can expect no leniency from the criminal law, those who can prove, with the right expert evidence, that they were extremely intoxicated, shed all criminal responsibility.

This defence shifts the burden of the consequences of risk-taking behaviour to the victims of extremely intoxicated violence. Those victimized, whether bereaved family members or those maimed or traumatized by violence, are left to shoulder these losses without response from the criminal justice system if the extreme intoxication defence succeeds.

Research shows this burden falls primarily on women. The extremely intoxicated violent offender is almost always a man and the majority of victims are women. Overwhelmingly these offences constitute classic male violence against women — sexual and intimate partner assault and wife killing. Women are also overrepresented among the random victims, for example older women living alone.

Already, men's sexual violence is often

committed with complete impunity because of the many obstacles to reporting and to successful prosecution. The extreme intoxication defence adds yet one more obstacle to holding perpetrators of violence against women accountable. This reality will almost certainly impact decisions about whether to report, lay and pursue charges.

Criminal law should respond to the extremely intoxicated violent offender because the Supreme Court *said* it should. In *Brown*, the court clearly indicated that it is a reasonable societal expectation that such individuals be held accountable and that deterrence is an appropriate goal.

The court also acknowledged the risk that the extreme intoxication defence will place disproportionate burdens on women as victims of violence. Significantly, *Brown* invited Parliament to respond with a new law governing extreme intoxication because of these concerns.

Sadly, Bill C-28 utterly fails. Even *Brown*'s defence lawyer called it "entirely ineffective" and predicted that future prosecutors will find it difficult to prove, beyond a reasonable doubt, that the intoxicants presented a foreseeable risk that the accused would harm another. There is simply no evidence available to suggest that particular drugs increase the risk of violent behaviour.

Instead, the law should place the burden on the accused to prove that their state of extreme intoxication was innocent — unforeseeable and blameless. The bill also does not preclude a defence based only on alcohol.

By failing to recognize women as full rights holders, entitled to criminal law's

protection and to be heard in the courts and the law-making process, both our highest court and our government have failed women, relegating them to the margins of the law.

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Every criminal law should be meticulously drafted to meet a genuine need — either to resolve an emerging problem or to fill a gap in existing sanctions.

Most laws are. A minority, however, are showpieces intended to attract potential voters, appease influential interest groups, or quiet a public clamour.

It would be hard to think of a more flagrant example of the latter than a Criminal Code provision created in 1995 — section 33.1. Intended to eliminate the so-called defence of extreme intoxication, the measure was a panicky response to a controversial court decision that had caused a widespread misperception that people could evade responsibility for violent crimes committed while they were intoxicated.

The provision was patently ill considered — a constitutional time bomb set to explode on the day it eventually arrived at the Supreme Court of Canada.

Cases that successfully invoke the excessive intoxication defence are exceedingly rare. Thus, it took almost 30 years for a case challenging the validity of section 33.1 to reach Canada's highest court. Last month, the Supreme Court shot the section down unanimously in a trio of test cases that should ring in the ears of legislators who find themselves tempted to play to the public gallery.

In the meantime, we find ourselves back

where we started with the government pushing through a new extreme intoxication law at breakneck speed without fulsome debate or analysis. Once again, the public is being misled into thinking that the recent Supreme Court decisions will be used as a get-out-of-jail-free card for irresponsible drinkers or drug-takers who maim or commit sexual violence.

They do no such thing.

To begin with, criminal law is founded on a bedrock principle that, to be found guilty of a crime, an individual must form the intent to break the law or at minimum act with gross negligence. For this reason, we do not convict individuals who, through mental illness, could not foresee the consequences of their conduct or understand that what they have done is morally wrong. Others who lose control over their actions, for whatever reason, are equally entitled to acquittals on the basis that they became, in effect, automatons.

The number of people who can fit within the defence of extreme intoxication because they experience an involuntary automatic state is infinitesimal. In one of the cases before the Supreme Court, for example, the defendant had overdosed on an antismoking drug during a suicide attempt. Plunged into an unintended psychotic state, he stabbed his mother. Another case involved a man who attacked his father and his father's partner while under the influence of a small quantity of magic mushrooms. The defendant had ingested the substance in the past with no ill effect.

Simply being drunk or high is nowhere near enough to anchor a defence of extreme intoxication. The effect of the intoxicant must be wholly unpredictable.

Presenting expert evidence on the effects and impact of the substance is also necessary to succeed at trial. In other words, cases such as those heard by the Supreme Court come around only slightly more often than Halley's comet.

Interestingly, the excessive intoxication defence comes into play most often in cases where someone was overwhelmed by the unexpected intensity of a substance. This attests to the desirability of governments deregulating and supervising the production of recreational drugs, wherever possible. Knowing what you are getting usually leads to people making more informed and responsible choices.

Police and prosecutors already have a perfectly effective range of laws to target drinking and driving or violent crimes committed while an individual is intoxicated. In particular, the offences of negligence causing death or serious bodily harm specifically target individuals who intentionally make reckless choices that endanger others. These laws provide strong protections to those who are vulnerable to sexual or domestic assault.

So, is any harm done when a law is unnecessary or has virtually no chance of surviving constitutional scrutiny?

First, there is the time wasted when government lawyers draft legislation that legislative committees must then debate. Court time is inevitably wasted when challenges to the law are litigated and appealed. There are also less visible consequences in the form of victims who feel misled and a public whose faith in the justice system may be eroded.

It is wrong for community leaders to stampede people into believing our laws

cannot protect them. It is wrong to enact laws that cannot withstand constitutional muster. But most of all, it is wrong to use legislation to combat a problem that doesn't exist.

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