"Having Regard" to Intoxication in the Sexual Offences Act 2003 – An Analysis of the Mens Rea in the Sexual Offences Act, and the Meaning of Circumstances.

Abstract: *This article challenges the prevailing view in relation to sexual offences, that the defendant's intoxication is not relevant when applying the "reasonable belief in consent" provision. It argues that, as a matter of statutory interpretation, intoxication may be considered a "circumstance" under Section 1(2) of the Sexual Offences Act 2003, utilising evidence from other common law jurisdictions. The role of the phrase "having regard to" is examined, concluding that this phrase prevents the undesirable consequences of holding intoxication to be a circumstance. Several fact patterns are given along with a normative justification which illustrates the requirement for the law to develop in this area.*

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Introduction

Sexual offences are notorious for the depth of feeling that they elicit across a broad spectrum of opinion. In many ways, the Sexual Offences Act 2003 was a radical change to the way that sexual acts were criminalised in England and Wales. Its most notable change was in the mens rea standard, reversing *Morgan* and instead requiring the Crown to prove that the defendant did not reasonably believe that the complainant was consenting. [1] This article examines the meaning of "reasonable belief in consent" as qualified by Section 1(2) of the Act, which specifies that "whether a belief is reasonable is to be determined having regard to all the circumstances".[2] Specifically, this article argues that a defendant's intoxication (whether voluntary or involuntary) can constitute a "circumstance". Although the Court of Appeal has made comments in dicta suggesting that intoxication will not be considered (in *AG's Reference No.79 of 2006(Whitta)*[3] and *Grewal*[4]), this article argues that the court did not satisfactorily address its mind to the question of "circumstances", and that there are factual situations in which intoxication will (and should) be considered a circumstance. This article first engages in an exercise of statutory interpretation showing that the statute does include intoxication as a circumstance, and then provides a normative justification for such an inclusion.

In making this argument, this article first sets out the relevant history of the sexual offences in England and Wales, before considering the proposals for their reform. The text of the Act is then considered alongside the wording of legislation from other jurisdictions to aid interpretation. This includes an examination of the difference between "circumstances" and "characteristics", and also the meaning of "having regard". Finally, there is an analysis of the mens rea of the sexual offences, showing

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[1] *DPP v Morgan* [1976] AC 182 (HL) & Sexual Offences Act 2003, s1(1)(c)

[2] Sexual Offences Act 2003, s.1(2)

[3] *Attorney General's Reference No.79 of 2006 (Adam George Whitta)* [2006] EWCA Crim 2626; [2007] 1 Cr App R (S) 122

[4] *R v Grewal* [2010] EWCA Crim 2448

that reasonable belief does not subsume the test of recklessness. An examination of several factual matrices is given alongside a normative justification for why intoxication should be taken to be one of the circumstances for the purposes of section 1(2).

The Sexual Offences Act 2003 has the opportunity to provide a middle path between the two competing schools of thought on the relevance of a defendant's intoxication for criminal liability. It does not have to be entirely excluded, nor entirely included in a calculation of whether a belief in consent was "reasonable". It is possible for the inquiry not to descend into "reasonable glue sniffer" madness whilst remaining fair to defendants.[5] This is due to the phrase "having regard". There exists an exciting opportunity for a fresh development in the law of intoxication albeit in a sobering context, and this article will show how this may be achieved.

History of Belief in Consent in England and Wales

The question of the mens rea of rape was assessed by the House of Lords in *Morgan,*[6] where the House decided by a 3-2 majority that a person who honestly believed that his partner was consenting – however unreasonable that belief was – was entitled to an acquittal due to his lack of mens rea.

Public outcry at the judgment in *Morgan*[7] led to the Sexual Offences (Amendment) Act 1976 which implemented the recommendations of the Heilbron Report.[8] The 1976 Act provided that when assessing a person's claimed belief in consent, the jury should take into account the presence or absence of reasonable grounds for the belief that was claimed. However, this amounted only to a rule of evidence rather than one of substantive law.[9]

Further limitations were placed on *Morgan*[10] by *Woods*[11] (in which there was an intoxicated mistake as to consent) and *Fotheringham*[12] (in which there was an intoxicated consent as to identity) where the Court of Appeal held that a mistake induced by intoxication could not be relied upon as a defence to rape. This article argues that this is no longer good law, as (1) the use of older case law when interpreting a new statutory scheme is extremely limited, and (2) these decisions were based on a mens rea standard of recklessness, rather than the standard found in the 2003 Act, which is different and not simply lesser.

The most recent chapter of the history of the defence of belief in consent is the Sexual Offences Act 2003, which provides that any belief as to consent has to be reasonable, and that whether a belief is reasonable is to be determined having regard to all the circumstances.[13]

Proposals for Reform – How did we get Here?

Once the mens rea principle had been applied to the sexual offences in *Morgan*,[14] there was public outcry at the possibility that a man who forced himself onto a woman could be acquitted on the basis that he (perhaps very unreasonably) believed that she was consenting. The Heilbron committee was convened to examine the law of the sexual offences.[15] Many expected the report to recommend

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[5] *R v Morhall* [1993] 4 All ER 888 (CA)
[6] [1976] AC 182 (HL)
[7] [1976] AC 182 (HL)
[8] Home Office, *Report of the Advisory Group on the Law of Rape* (HMSO, 1976), Cmnd 6352. For evidence of outcry see the introduction to that report.
[9] Sexual Offences (Amendment) Act 1976, s.1
[10] [1976] AC 182 (HL)
[11] *R v Woods* (1982) 74 Cr App R 312 (CA)
[12] *R v Fotheringham* (1989) 88 Cr App R 206 (CA)
[13] Sexual Offences Act 2003, s.1(1)(c) & s.1(2)
[14] [1976] AC 182 (HL)
[15] Home Office, *Report of the Advisory Group on the Law of Rape*

abandoning the judgment in *Morgan*.[16] This it did not do, however. The recommendations stated that the "reasonable grounds" requirement should be one of evidence rather than one of substantive law.[17] This was duly added to the statute books in the Sexual Offences (Amendment) Act 1976.[18]

Following the Heilbron report, the Criminal Law Review Committee's 1984 report sought merely to codify the existing law[19], as did the Draft Criminal Code of 1989.[20] It was not until 2000 when the Home Office asked the Law Commission to consider the role of consent in the sexual offences that another body examined the defence of a belief in consent.[21] The Law Commission recommended the retention of *Morgan,*[22] but proposed requiring a jury direction to the effect that juries should have regard to whether the defendant sought to establish consent when assessing whether the defendant's belief in consent was honest.[23] However, the independent Government report "Setting the Boundaries"[24] went further, and approved the Canadian Criminal Code's solution, which included a reasonableness provision, discussed below.[25]

Following the Government's white paper, the Sexual Offences Bill 2003 was introduced into the House of Lords. The provision that dealt with belief in consent read:[26]

"Section 1 (3) This section applies if:

(a) A reasonable person would in all the circumstances doubt whether B consents; and
(b) A does not act in a way that a reasonable person would consider sufficient in all the circumstances to resolve such doubts."

The wording of the test was later altered to the familiar wording of the Act. This was done after significant discussion in the Home Affairs Committee, the conclusion of which was that the Act should take into account some of the characteristics of the defendant in assessing whether the belief was reasonable.[27] Hilary Benn, the supporting minister in the Commons, told the Committee that the two tests were the same in substance and would lead to the same result.[28]

The series of proposals for reform show that (1) the question of wording in this provision was fought over, and (2) that many committees – often having direct input into the wording of the Act – had concluded different things, sometimes radically so.

As has been shown above, the pre-2003 law did not allow intoxicated mistakes to remove liability for rape.[29] However, this is not instructive in the interpretation of the 2003 statute because "the law does not develop in an accessible and coherent manner if reliance continues to be placed on cases that arise under a repealed or superseded law, unless there is a good reason to do so".[30] Even if the cases

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[16] [1976] AC 182 (HL)
[17] Home Office, *Report of the Advisory Group on the Law of Rape* at para 67
[18] Sexual Offences (Amendment) Act 1976, s.1
[19] Criminal Law Revision Committee, *Fifteenth Report: Sexual Offences* (HMSO, 1984), Cmnd 9213, at para 2.41
[20] Law Commission, *A Criminal Code for England and Wales* (HMSO,1989), Law Com. No 177, HC 299, pp.75-76
[21] Law Commission, *Consent in the Sex Offences* (HMSO, 2000), Appendix C of Vol 2 *Setting the Boundaries*
[22] [1976] AC 182 (HL)
[23] Law Commission, *Consent in the Sex Offences* at para 7.44
[24] Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences*, (HMSO, 2000), Cmd 5668
[25] Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* at para 2.13.10
[26] Sexual Offences HL Bill (2002-03) 1, HL Bill 26
[27] Home Affairs Committee, *Sexual Offences Bill* (HMSO, 2003), HC 639 at para 23
[28] Home Affairs Committee, *Sexual Offences Bill,* pp. Ev-16. The evidence before this specific committee is not available online. The author is happy to be contacted to provide a scanned PDF.
[29] *Woods* (1982) 74 Cr App R 312 (CA) & *Fotheringham* (1989) 88 Cr App R 206 (CA)
[30] *R v Gurpinar* [2015] EWCA Crim 178; [2015] 1 WLR 3442 at [4]. There are competing approaches to this question. See *R v Asmelash* [2013] EWCA Crim 157; [2014] QB 103 for an example of utilising old case law when interpreting new legislation. See also *R v Clinton* [2012] EWCA Crim 2; [2013] QB 1 at [2] where "common law heritage is irrelevant". *Gurpinar* should be preferred as it is the most recent authority on the point.

of *Woods*[31] and *Fotheringham*[32] were deemed to be authoritative over the new statutory scheme, they do not cover the full spectrum of sexual offending.

The Statute

It will be useful to copy in the whole of Section 1 of the Sexual Offences Act 2003:[33]

"Section 1 Rape:

(1) A person (A) commits an offence if –
  (a) He intentionally penetrates the vagina, anus, or mouth of another person (B) with his penis,
  (b) B does not consent to the penetration, and
  (c) A does not reasonably believe that B consents
(2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents.
(3) Sections 75 and 76 apply to an offence under this section.
(4) A person guilty of an offence under this section is liable, on conviction on indictment, to imprisonment for life."

For sections 1-4, the only changes made are to subparagraphs 1(a) and 1(b) and subsection (4).

Circumstances vs Characteristics

The provision says "circumstances" and not "characteristics". It is submitted that the Home Affairs Committee would have wished for the provision to read "characteristics", and therefore apply to those with mental disabilities, as discussed in the dicta of *B*.[34] However, the word "circumstances" does not necessarily mean or include "characteristics". Circumstances may be transient or external, whereas a "characteristic" is necessarily intransient, as in the example of a person with a learning disability being unable to understand when someone is or is not consenting. As Viscount Bledisloe observed, "'Circumstances' means surrounding facts; that is, the party they had been to; what the lady was wearing; what the lady had said, and so forth. The circumstances are not the peculiar characteristics of the individual: his extreme youth, his sexual inexperience, his mental health, and so forth."[35] This is important, as intoxication is much more of a "circumstance" than it is a characteristic. His Lordship made these remarks during the House of Lords debates on the wording of the Bill, and made these comments as a warning to the chamber that the Bill did not, as they wished for it to do, allow for the mental disability of a defendant to be taken into account. The fact that the chamber and department had such warnings – and still retained the language of "circumstances" rather than characteristics – is instructive in its interpretation. Further, the Court of Appeal in *B* quite properly placed weight on the word used in the legislation rather than the discussions in Parliament, not interpreting "circumstances" as "characteristics" in the context of mental illness.[36]

Intoxication as a Circumstance

The fact that drink was taken and that one (or both) of the people engaging in a sexual encounter were intoxicated, is a "surrounding fact" in Viscount Bledisloe's words, and therefore a circumstance. Whether intoxication may be a circumstance has been examined by the criminal law before.

The most notable use of the word "circumstance" in the criminal law is in the reformed partial defence to murder of Loss of Self Control, under the Coroners and Justice Act 2009. It provides in Section 54(1)(c) that "a person of D's sex and age, with a normal degree of tolerance and self-restraint

[31] (1982) 74 Cr App R 312 (CA)
[32] (1989) 88 Cr App R 206 (CA)
[33] Sexual Offences Act 2003, s1
[34] *R v B* [2013] EWCA Crim 3; [2013] 1 Cr App R 481 at [41]
[35] HL Deb 31 March 2003, vol 646, col 1107
[36] *R v B* [2013] EWCA Crim 3; [2013] 1 Cr App R 481 at [32]. See *R v Jacobs* [2023] EWCA Crim 1503; [2024] 4 W.L.R. 8; [2024] 1 Cr. App. R. 13 for further discussion.

and in the circumstances of D, might have reacted in the same or a similar way to D."[37] It provides further at Section 54(3) that "in subsection (1)(c) the reference to "all the circumstances of D" is a reference to of all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint".[38]

Asmelash is of clear relevance.[39] Judge LJ placed reliance[40] on *Dowds*[41] in holding that intoxication was not a circumstance that could be considered for the purposes of Section 54(1)(c). It is my submission that *Dowds* was decided on the basis of acute intoxication not being a "recognised medical condition" for the purposes of the new partial defence of diminished responsibility, and that the main purpose of the new partial defence was to bring it more in line with current medical knowledge, rather than to change the law substantively.[42] *Dowds* is therefore not authority on the question of "circumstances", and was not a sound reason for Judge LJ to base his decision in *Asmelash* on.

Furthermore, in *Asmelash* his Lordship stated that the consumption of alcohol was something which "has of course been long understood…may diminish the ability of an individual to control or restrain himself", and therefore fell within the exception in Section 54(3).[43] This implies that the intoxication was a "circumstance", but that it was excluded due to the statutory exclusion, and the common law rules. The fact that it is a circumstance is relevant to the interpretation of the Sexual Offences Act, as no such exclusion is found within the Act.

There are instances in other common law jurisdictions in which it is implied that intoxication is a circumstance. Indeed, the New South Wales Criminal Code's section relating to rape reads:[44]

"S.61HK (1) A person (the accused person) is taken to know that another person does not consent to a sexual activity if—

(a) the accused person actually knows the other person does not consent to the sexual activity, or
(b) the accused person is reckless as to whether the other person consents to the sexual activity, or
(c) any belief that the accused person has, or may have, that the other person consents to the sexual activity is not reasonable in the circumstances.

S.61HK (5) For the purposes of making any finding under this section, the trier of fact –

(a) must consider all of the circumstances of the case, including what, if anything, the accused person said or did, and

(b) must not consider any self-induced intoxication of the accused person."

Intoxication is specifically excluded from consideration, implying that it is in fact a "circumstance". The New South Wales Law Reform Commission recommended retaining the provision relating to self-induced intoxication despite specific provisions in the Crimes Act 1900 preventing the consideration of self-induced intoxication when assessing a defendant's mental state.[45] This was because, as the Attorney General said "It also clarifies what is meant by "all the circumstances of the case".[46] This is strong evidence for suggesting that intoxication is a "circumstance", otherwise the NSW Law Reform

[37] Coroners and Justice Act 2009 s.54(1)(c)
[38] Coroners and Justice Act 2009 s.54(3)
[39] *Asmelash* [2013] EWCA Crim 157; [2014] QB 103
[40] *Asmelash* [2013] EWCA Crim 157; [2014] QB 103 at [20] and [22]
[41] *R v Dowds* [2012] EWCA Crim 281; [2012] 1 WLR 2576
[42] *Dowds* [2012] EWCA Crim 281; [2012] 1 WLR 2576 at [28] and [35]
[43] *Asmelash* [2013] EWCA Crim 157; [2014] QB 103 at [22]
[44] New South Wales, Crimes Act 1900, s.61HK (5)
[45] New South Wales Law Reform Commission, *Consent in Relation to Sexual Offences* (No. 148, 2020) at para 7.178
[46] NSW, Parliamentary Debates, Legislative Council, 7 November 2007, 3584, 3586 (J Hatzistergos, Attorney General and Minister for Justice).

Commission most likely would have recommended that it was no longer required, and the Attorney would not have considered that it was important to clarify the meaning of "all the circumstances of the case".

The Canadian Criminal Code dealing with all of the sexual offences, which was recommended by the Setting the Boundaries report, reads:[47]

"Section 273.2 It is not a defence to a charge under Section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where;

(a) The accused's belief arose from
    i. The accused's self-induced intoxication,
    ii. The accused's recklessness or wilful blindness, or
    iii. Any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
(b) The accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
(c) There is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct."

The fact that the Canadians did not rely upon S.273.2(b) as excluding self-induced intoxication may indicate that the reasonableness test in the English statute does include said intoxication, notwithstanding the difference in the two reasonableness provisions. The Canadian Statute was given in evidence to the Home Affairs Committee in Justice's memo, meaning that the Canadian Statute is valuable to the interpretation of the English one.[48] In addition to adding to the evidence that intoxication is a "circumstance", the fact that this statute was provided twice to the scrutinisers of the legislation (once in Setting the Boundaries and once in Justice's memo) shows that the drafters and scrutinisers of the legislation knew of the specific provision dealing with intoxication. Further, "Consent in the Sex Offences" recommended specific provisions dealing with intoxication.[49] "Setting the Boundaries" at Recommendation 9 also specified that self-induced intoxication should not be taken into account.[50] Parliament therefore had specific draft provisions and provisions from other jurisdictions dealing with intoxication before them in several forms, and on several occasions. Yet it did not include the provision as recommended.

Taken altogether, there is compelling evidence that intoxication is a circumstance according to the law, unless explicitly excluded. As it was not excluded in the Sexual Offences Act, despite Parliament's attention being brought to the problem on several occasions, there is strong evidence for interpreting "all the circumstances" in the Sexual Offences Act as including intoxication. This could, however, produce many undesirable results. The more intoxicated a person was, the less likely he would be convicted of a sexual offence. However, the Act's use of the phrase "having regard to" allows the law an opportunity to prevent these negative outcomes.

"Having Regard To"

The phrase "having regard to" does not require the jury to put any specific weight on any circumstance.[51] This phrase guards against the "reasonable glue sniffer" and the "reasonable alcoholic".[52] It does not require the reasonable man assessing the belief to be given the attributes or circumstances of the defendant. It requires that the jury have regard to the fact that he was in those circumstances when assessing whether the belief was reasonable. A jury direction may go along the

[47] Canada, Criminal Code 1985, s.273.2
[48] Home Affairs Committee, *Sexual Offences Bill*, pp.Ev-67, at [27]. The evidence before this specific committee is not available online. The author is happy to be contacted to provide a scanned PDF.
[49] Law Commission, *Consent in the Sex Offences* at para 7.44 (2)
[50] Home Office, *Setting the Boundaries: Reforming the Law on Sex Offences* at para 2.13.14
[51] See *Devine and Laverty v Welsh Ministers* [2011] EWHC 358 (Admin) at [54] for discussion in an administrative context.
[52] *Morhall* [1993] 4 All ER 888 (CA)

lines of "members of the jury, as reasonable people, it is for you to decide the weight that you give to any circumstance that you find to be relevant to the question of reasonable belief in consent". This direction would be subject to the approach taken in *Jacobs* which is discussed below.[53] Indeed, Lord Falconer of Thoroton accepted this in the House of Lords, saying "It is for the judge and the jury together to work out the extent to which they should take into account the particular attributes of the defendant".[54] It is for the jury to decide what relevance and weight they attach to each circumstance. Clearly, this is not good for the law in terms of certainty, however, it seems to be what Parliament intended.

This point is particularly relevant when considering the decisions of *Whitta* and *Grewal.* The court in *Whitta* (a sentencing case) said "in passing" that the reasonable man is sober.[55] This is of course trite law. However, *Whitta* failed to take into account whether the intoxication may be a circumstance that the jury must have regard to. In *Grewal*, the point was not fully argued by counsel, however, the court again did not consider whether the intoxication may be relevant to the circumstances question, but not to the reasonable man, simply stating that the reasonable man is sober.[56] Further, both comments were strictly obiter.

The recent decision of the Court of Appeal in *Jacobs* also lends weight to this argument, and the utility of the approach proposed in this article.[57] Lady Carr CJ noted that Hughes LJ in *B* "did not suggest that autism is relevant to reasonable belief in consent as a matter of principle. Rather, that depends upon the facts of the case and the issues which arise", specifically whether the defendant's inability to discern subtle social cues had an influence on his belief in consent.[58] Applying this broad approach to intoxication, it follows that only in situations where a defendant would have difficulty in assessing subtle cues (or perhaps a complainant's level of intoxication) and this was the source of his mistake would his intoxication be relevant. This further safeguards complainants by preventing juries from placing weight on a defendant's intoxication in cases where it is not relevant to the task that the defendant had to do. A jury would only be directed that they may place weight on the defendant's intoxication in cases where the defendant had to make fine distinctions.

"All" of the Circumstances

The statute does not do as the Scots do, limiting what is to be considered to any steps taken by the defendant to ascertain whether the complainant is consenting.[59] This approach was of course open to the English, however, the English statute requires regard to be had to "all" the circumstances, and merely emphasises that steps taken by D are highly relevant to this inquiry. In the House of Lords Bill, the relevance of the circumstances was limited firstly to whether a reasonable person would have doubted whether B was consenting (instead of belief, indicating a gap whereby a person may have doubts about consent, but still believe that there was consent), and secondly in assessing the way that the defendant acted in resolving these doubts. The defendant had to "act in a way that a reasonable person would consider sufficient in all the circumstances to resolve such doubts".[60] This limited the consideration of circumstances to the assessment of how the defendant acted, and not to his belief (there being a distinction between belief and doubt). This is much closer to the Scottish statute, and would have severely limited the extent that intoxication may be taken into account by the jury. However, the English approach changed to include "all" of the circumstances. This is of course important, as it was done intentionally with the aim of broadening the situations in which a person's circumstances may be taken into account.

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[53] *R v Jacobs* [2023] EWCA Crim 1503; [2024] 4 W.L.R. 8; [2024] 1 Cr. App. R. 13
[54] HL Deb 31 March 2003, vol 646, col 1095
[55] [2006] EWCA Crim 2626; [2007] 1 Cr App R (S) 122 at [15]
[56] [2010] EWCA Crim 2448 at [30]
[57] *Jacobs* [2023] EWCA Crim 1503; [2024] 4 W.L.R. 8; [2024] 1 Cr. App. R. 13
[58] *Jacobs* [2023] EWCA Crim 1503; [2024] 4 W.L.R. 8 at [80] & *B* [2013] EWCA Crim 3; [2013] 1 Cr App R 481 at [41]
[59] Sexual Offences (Scotland) Act 2009 (asp 9), s.16
[60] Sexual Offences HL Bill (2002-03) 1, HL Bill 26, Section 1(3)

There is also a distinction to be made between the Sexual Offences Act and the Criminal Damage Act 1971. The relevant provision in the Criminal Damage Act reads:[61]

"Section 5(2) A person charged with an offence to which this section applies, shall, whether or not he would be treated for the purposes of this Act as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse—

(a) If at the time of the act or acts alleged to constitute the offence he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances"

The Court of Appeal recently considered the meaning of "its circumstances" in relation to protestors throwing paint and smashing windows.[62] Lady Carr CJ placed substantial reliance on the pronoun "its", finding that it limited the relevant "circumstances" to those which relate to the damage or destruction of property.[63] This is in contrast to the Sexual Offences Act's specifying that "all" of the circumstances should be considered. Further, Lady Carr CJ implied that "political or philosophical beliefs" were "circumstances" but their consideration was prevented by the construction of the Act as allowing only those with a direct connection to the damage done.[64] The Lady Chief Justice therefore interpreted "circumstances" widely, but did not allow consideration of them under the specific language of the Criminal Damage Act. Such a restriction does not apply to the Sexual Offences Act as there is a requirement that the jury have regard to "all" of the circumstances. It should be noted that a philosophical belief relating to when a person "should" consent (for example, attitudes towards skirt length) would not be relevant under the approach taken in *Jacobs*.[65]

Therefore, on the bare language of the Act, there is nothing prohibiting the jury from placing some weight on the circumstance that the defendant was intoxicated when assessing whether he believed that another person was consenting – or even able to consent. There are also grounds rooted in public policy and theory for holding that intoxication is a circumstance that can properly be taken into account.

Intoxication in the Law Generally

The criminal law has had difficulty with self-induced intoxication, as Williams recognises.[66] This is largely because of the tension between the mens rea principle, and the fact that intoxicated defendants are both more likely to commit offences and adduce little judicial or public sympathy. The approach of the House of Lords in *Majewski* was to regard an intoxicated defendant as having the mens rea for crimes of basic intent, when he did not have that mens rea.[67] This approach is somewhat unsatisfactory, as it undermines the principle of mens rea, although it does so on grounds of public policy. Allowing an intoxicated defendant to escape criminal liability for causing physical harm to a person, causing damage to property, or raping a person simply by virtue of his intoxication is unacceptable. However, this construction of the Sexual Offences Act provides an opportunity for a middle path to be taken. The present middle path is to distinguish between offences of basic and specific intent done largely on the basis of public policy. The approach proposed in this article is able to move this distinction inside the offence by virtue of the flexibility inherent in the phrase "having regard". The Act does not ask whether a reasonable person, intoxicated to the extent of the defendant, would have believed in the consent of the victim. The Act instead asks that the jury puts some (or no) weight on the fact that the defendant was intoxicated when making a distinction between consent and non-consent, which can often be difficult. How much weight is put on that circumstance is a matter for the jury,

[61] Criminal Damage Act 1971, s.5(2)(a)
[62] *Attorney General's Refence (No.1 of 2023)* [2024] EWCA Crim 243
[63] *Attorney General's Refence (No.1 of 2023)* [2024] EWCA Crim 243 at [44]
[64] *Attorney General's Refence (No.1 of 2023)* [2024] EWCA Crim 243 at [44] and [46]
[65] [2023] EWCA Crim 1503; [2024] 4 W.L.R. 8
[66] Rebecca Williams, 'Voluntary Intoxication – a lost cause?' (2013) 129 LQR 264
[67] Andrew Simester, 'Intoxication is never a defence' [2009] Crim LR 3 & *Majewski* [1977] 1 AC 443 (HL)

taking into account the facts of the case. A violent stranger rapist whose lust was inflamed by drink would not benefit from this interpretation. A tipsy man who did not realise that his partner was so intoxicated that she could not consent (especially if she had taken drink or drugs before he arrived) might benefit from this interpretation.

Intention, Recklessness, Negligence – the Mens Rea Ladder?

It is a widely held conception of the Sexual Offences Act that the mens rea requirement of not having a reasonable belief in consent is simply lower than the pre-2003 requirement of recklessness. It could be argued therefore that because intoxication was not taken into account in the pre-2003 law, intoxication should not be taken into account under the Act.[68] However, the standard of "reasonable belief in consent" does not necessarily subsume the standard of "recklessness".

When teaching criminal law, it is often useful and accurate to express the mens rea requirements of offences as a "ladder" with intention as the most culpable, recklessness as a middle ground, and negligence/reasonable belief as the least culpable. However, when considering "reasonable belief" in the context of intoxication, this ladder falls apart; the mens rea of negligence or reasonable belief does not necessarily subsume the rung of recklessness.

Intoxication's relationship with recklessness (specifically in relation to a belief in consent) is somewhat murky. If the person would have foreseen the risk of harm had they been sober, liability will be found. However, if they would not have foreseen the risk even if they had been sober, liability will not be found.[69] It is clear therefore that in some cases of intoxication, these standards do not necessarily overlap.

An example may help to illustrate. D is a very cautious and intelligent person. D becomes intoxicated, misreads the signs at a Christmas party, and touches a colleague sexually and without her consent. Under the old law of *Woods*[70] and *Richardson*[71], the question is whether D himself would have foreseen the risk that C was not consenting had he been sober. Because D is a cautious man, he would have done so, and therefore he would be liable for indecent assault. However, under the new law, simply because D was intoxicated does not mean that any belief that he had as to consent was unreasonable. It still may be the case that the reasonable person would have believed in consent.[72] Therefore, in some limited circumstances, the old law is a higher standard where a person is more cautious than the reasonable man, until he becomes intoxicated. The above example works with either understanding of "circumstances" - including or excluding intoxication. It is illustrative of the difference in mens rea requirements.

The fact that this is a different standard is not only relevant to the distinction between the approach taken in *Clinton*[73] and *Asmelash*[74] in relation to the use of old case law when interpreting new statutes, but also has an impact on the transferability of reasoning in the case that they are authoritative or advisory. In *Woods*, Griffiths LJ cited Lord Elwyn-Jones: "reducing oneself by drink or drugs to a condition in which the restraints of reason and conscience are cast off was held to be a reckless course of conduct and an integral part of the crime".[75] This decision being based on recklessness (and conflating the recklessness in getting intoxicated with the recklessness of the particular offence) shows that it has limited authority over the present statutory system of sexual offences. His Lordship goes on to say that he would have expected Parliament to have been clear had they intended that self-induced intoxication was relevant under the Sexual Offences Act 1976. This does not address the question of

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[68] See Rebecca Williams, 'Voluntary Intoxication – a lost cause?' (2013) 129 LQR 264 at fn 150
[69] *R v Richardson & Irwin* [1999] 1 Cr App R 392 (CA)
[70] (1982) 74 Cr App R 312 (CA)
[71] [1999] 1 Cr App R 392 (CA)
[72] See *Grewal* [2010] EWCA Crim 2448 at [30]
[73] [2012] EWCA Crim 2; [2013] QB 1
[74] [2013] EWCA Crim 157; [2014] QB 103
[75] *Woods* (1982) 74 Cr App R 312 (CA) at pp.314 & *DPP v Majewski* [1977] AC 443 (HL)

circumstances, merely the question of reasonableness. His Lordship uses the example of a "man whose lust was so inflamed by drink that he ravished a woman"[76] – however, this would not be a reasonable belief as the present statute does not ask what the reasonable man would have foreseen in this state, but asks that the fact that he was in this state be given some regard by the jury when assessing the reasonableness of the belief. Additionally, the example given by Griffiths LJ is more akin to intoxication loosening inhibitions rather than removing mens rea.

Furthermore, this example is not the one that I would wish to rely on. The approach taken in *Jacobs*[77] would prevent the defendant's intoxication from being taken into account, and in any case, little weight would be attached to the intoxication by a jury. The law should not only cater to the extreme cases – it often does this extremely well. It must also be discerning in its application to borderline cases, and it is these cases, along with the normative justification, that explain why the law should accept intoxication as a circumstance for the purposes of Section 1(2).

Fact Patterns and Normative Assessment

There are several illustrative and realistic fact patterns that would stretch the comments in *Woods*[78] under the current law. The comments were of course proper under the law of recklessness, however, because these are different standards, it is proper to examine factual situations other than the "ravished a woman" scenario given in *Woods*.[79]

The first and most applicable example is that of joint intoxication. Under *Bree*, if a person is so intoxicated as to be unable to consent, then consent will be vitiated under Section 74 of the Sexual Offences Act.[80] However, Sir Igor Judge P had some difficulty in expressing a test that was clear and applicable, instead commenting that "capacity to consent may evaporate well before a complainant becomes unconscious" and that whether this is so is "fact specific", and dependant on the "state of mind of the individuals involved".[81] This test may be relatively easy to formulate a jury direction on. However, when a court cannot provide a grid of levels of intoxication which would lead to an incapacity to consent, it is my submission that to place a burden on the defendant to do that is unfair. Sjölin rightly observed that "the cost of D checking that C is consenting is very slight whereas the cost to C is very high".[82] This is of course true, and provides a normative basis for holding the defendant to a high standard when it comes to assessing consent. However, this reasoning begins to fall apart in the case of joint intoxication. The cost to D of having to check on C's level of intoxication, and weighing up whether C is too intoxicated to consent using the vague guidelines in *Bree* is much higher.[83] The claimant has, by her own voluntary actions, made the defendant's job (assessing capacity to consent) much more difficult. This is especially so if C had started to take drink or drugs before D arrived. To require a defendant to do this weighing exercise (to the standard of a sober man) whilst intoxicated himself creates an asymmetry of responsibilities which is unfair. This could be remedied by allowing the jury to take into account the fact that the defendant was intoxicated when making such a judgement.

Further to this example, in the case that both parties to a sexual encounter were sufficiently intoxicated to be unable to consent under *Bree*[84] and Section 74, it would seem that both were liable for a sexual offence. This may be a satisfactory way for the law to operate, however, it is submitted that it reduces the mens rea of a sexual offence to a vanishing point. The moral blameworthiness is lacking, and the asymmetry between males and females in the sexual offences (which the Act aims to reduce by its inclusion of buggery in the rape provision, and the introduction of the Section 4 offence) is

[76] *Woods* (1982) 74 Cr App R 312 (CA) at pp.314-315
[77] [2023] EWCA Crim 1503; [2024] 4 W.L.R. 8; [2024] 1 Cr. App. R. 13
[78] (1982) 74 Cr App R 312 (CA)
[79] (1982) 74 Cr App R 312 (CA)
[80] *R v Bree* [2007] EWCA Crim 804; [2007] 2 All ER 676 at [34]
[81] *Bree* [2007] EWCA Crim 804; [2007] 2 All ER 676 at [34]
[82] Catarina Sjölin 'Ten years on: Consent under the Sexual Offences Act 2003' (2015) 79 JCL 20
[83] [2007] EWCA Crim 804; [2007] 2 All ER 676
[84] [2007] EWCA Crim 804; [2007] 2 All ER 676

exacerbated. As Michael Scott observes of the Canadian law, "the drunken man is morally equivalent to the drunken woman. If he is entirely responsible for the consequences of his drunken actions (the rape), why should she not be responsible for the consequences of her actions (giving consent)".[85] Recognising intoxication as a circumstance that the jury may have regard to would remedy both of these situations by recognising the difficulty in assessing capacity to consent (or actual consent), especially when intoxicated, and allowing the jury to find fault where it lies. The fact that a man was intoxicated would not automatically exculpate him, as it is for the jury to consider the reasonableness of a belief "having regard" to the circumstances, and not ascribe the circumstances to the reasonable man, as explained above.

Another example of limited culpability is where a person has been spiked, a similar fact pattern to *Kingston*.[86] Had a husband been with his friends, and one had spiked his drink either with drugs (*Kingston* as involuntary) or with alcohol (*Allen*[87] as voluntary intoxication), and he then returned to his wife and had intercourse believing that she consented when she did not, his only defence would be that he had a reasonable belief in consent. This is the case because the sexual offences are offences of general intent,[88] and nevertheless, an intoxicated intent is an intent.[89] If the defendant's intoxication was not taken into account when considering the reasonableness of the husband's belief in his wife's consent, this essentially morally innocent man (there being limited prior fault of the intoxication) would be stripped of his only viable defence. It is submitted that a much more satisfactory way for the law to operate is to allow juries to have regard to the fact that the husband was intoxicated.

The fact that the defendant's intoxication was involuntary is also a circumstance (it being a surrounding fact of the situation). However, the involuntary nature of the intoxication and the intoxication itself have to be separated in order for the analysis of "circumstances" to make sense. A defendant not wanting to become intoxicated does not affect the reasonableness of any belief that he held regarding the consent of the complainant; it is the actual intoxication itself which is relevant to his mistaken belief in consent. Therefore, involuntary intoxication may be given more weight by the jury than voluntary intoxication, but it is impossible to include involuntary intoxication without including voluntary intoxication.

It is of course open to reasonable readers to disagree over the outcomes of the fact patterns given above, however it remains the case that it should be open to the jury to conclude that no conviction should result on both the proper construction of the Act and for the normative reasons given above. When an offence carries as much stigma as rape and a sentence of up to a life in prison,[90] we should be reticent to give a defendant that label when (1) his moral blameworthiness is lacking as in the examples above, and (2) the statute which criminalises it could be reasonably interpreted as providing him a line of defence, as this article has argued the Sexual Offences Act can be.

Conclusion

This article has sought to show that the construction of the Sexual Offences Act is not as simplistic as might have been thought of at first glance. It has shown that other uses of the phrase "all the circumstances" have been interpreted as including intoxication, although it has been excluded by various provisions. Furthermore, the relevance of *Woods*[91] and *Fotheringham*[92] is limited due to the different mens rea standards, and the use of recklessness in the decision in *Woods*.[93] The phrase "having

[85] Michael Scott, 'Jake and Josie Get Drunk and Hook Up: An Exploration of Mutual Intoxication and Sexual Assault' (2017) 54 Alta L Rev 1039
[86] *R v Kingston* [1995] 2 AC 355 (HL)
[87] *R v Allen* [1988] Crim LR 698 (CA)
[88] *R v Heard* [2007] EWCA Crim 12; [2008] QB 43
[89] [1995] 2 AC 355 (HL)
[90] Sexual Offences Act, s.1(4). See the Sentencing Act 2020, s. 274, 285, & sch 19
[91] (1982) 74 Cr App R 312 (CA)
[92] (1989) 88 Cr App R 206 (CA)
[93] (1982) 74 Cr App R 312 (CA)

regard to" prevents the perverse outcome of the very intoxicated man being able to get away with rape. The reasonable man does not become intoxicated to the same extent as the defendant. Merely, in some of the more borderline cases given above, it should be open to the jury to consider that the defendant's intoxication was there when they are assessing the reasonableness of a belief. This represents a new opportunity in the criminal law for an approach to be taken that can simultaneously retain the mens rea principle, and prevent drunken defendants from escaping liability when public policy demands that they ought not to. The approach advocated in this article does not upend the law of intoxication in England and Wales. It is merely an evolution of the doctrine which is well recognised to be defective.