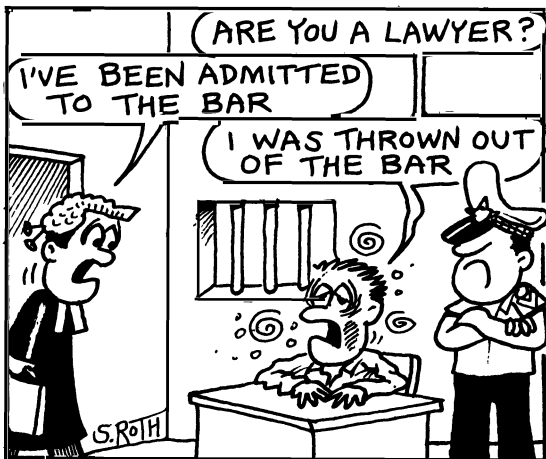


Dealing with the 'drunk's defence'

Megan Bowman

Law reform in Victoria: criminal liability for actions performed while in a state of self-induced intoxication.



In February 1997, Noa Nadruku, a professional rugby player, was charged with assault for punching two women in the face outside a Canberra nightclub. At trial, the magistrate stated that 'the two young ladies were unsuspecting victims of drunken thuggery'.¹ However, evidence was led that Nadruku was so drunk at the time of committing the offences that he was barely conscious and, even though the magistrate described the accused's behaviour as 'deplorable, intolerable and unacceptable', Nadruku was acquitted on the basis that he was so intoxicated he did not know nor intend what he did.

The decision in Nadruku's case received disparaging media coverage² that sparked a public outcry about the effectiveness of the current law. In March 1998, federal parliament enacted legislation to remove 'the so-called "drunk's defence" from commonwealth criminal law'.³ The Australian common law jurisdictions, Victoria, South Australia and the Australian Capital Territory were urged by the federal government to review their current law and enact similar legislation.⁴ Accordingly, in May 1998, the Governor-in-Council requested the Victorian Law Reform Committee (LRCV) to examine how Victorian criminal law should deal with people who commit criminal acts and who seek to rely on evidence of self-induced intoxication to show that they acted involuntarily or did not intend to commit the act.

In so doing, the LRCV undertook an extensive study of intoxication and criminal liability so that it could reach its own conclusions 'independent from extraneous pressure'.⁵ Accordingly, the LRCV received submissions and consulted with a number of individuals and bodies, including the Victorian Director of Public Prosecutions, Victoria Legal Aid, Victoria Police, legal professional bodies, legal and medical academics, the judiciary and community interest groups (at 1.3).

The ultimate objective of the LRCV in making its recommendations was to address community concern about the acquittal of intoxicated offenders while preserving the fundamental principles that constitute the basis of the Victorian criminal justice system. This article reviews the recommendations of the LRCV and analyses whether such an objective has been achieved.

Current law in Victoria

The High Court decision of *R v O'Connor* (1980) 146 CLR 64 (*O'Connor*) states the current law in Victoria regarding criminal liability and self-induced intoxication. In *O'Connor*, a very narrow majority of the High Court (4:3) upheld the fundamental common law principle that the prosecution bears the burden of proving beyond reasonable doubt that the accused committed an offence voluntarily and intentionally. Accordingly, the questions for the jury are whether or not at the time of committing the offence the acts of the accused were willed and conscious and that the accused possessed the requisite mental element. Thus, where self-induced intoxication is relevant, it is open to

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defence counsel to cast doubt on the existence of either of these essential elements.⁶ Where reasonable doubt exists, the prosecution has obviously failed to discharge its burden and the accused must be acquitted.

The majority declined to follow the English decision of *DPP v Majewski* [1977] AC 443 in which the House of Lords held that evidence of self-induced intoxication is only to be considered where the accused is charged with an offence of specific intent but not one of basic intent. The LRCV summarises the distinction as follows (at 1.7):

An offence of basic intent is ... where the defendant intends to commit the criminal act, for example, common assault, where the defendant has an intention to strike the victim. An offence of specific intent is ... where some further intention is required, for example, causing serious injury, where the defendant intends not only to strike the victim but also to cause injury when doing so.

The majority held that fundamental common law principles could not be overturned in favour of the artificial distinction between crimes of specific and basic intent.

The minority of the High Court, however, decided that intoxication constituted an exception to the general rule of criminal responsibility due to public policy considerations. In particular, Mason J encapsulated the concerns of the minority by stating that two strands of thought justify the inculcation of a self-induced intoxicated offender, namely, a moral judgment and a social judgment (at 110). The moral judgment embodies the notion that if a person commits a crime while intoxicated they should be held responsible for that crime simply because they voluntarily embarked upon their own drunkenness. That is, morally speaking, people should not get so drunk that they cannot control their actions. The social justification for convicting intoxicated offenders is that society should be protected from the sometimes violent conduct of intoxicated individuals by punishing such individuals for their behaviour and, in so doing, deterring others from behaving likewise.

In summary, the LRCV concluded that the *O'Connor* principles should continue to state the law in Victoria in conjunction with the introduction of procedural changes in order to safeguard the integrity of the Victorian criminal justice system. The LRCV also recommended that the Drugs and Crime Prevention Committee investigate the relationship between the use of intoxicants and the occurrence of crime in our community.

Retaining the *O'Connor* principles

(Recommendation 3)

The LRCV's recommendation to retain *O'Connor* as the current law in Victoria was due to the finding that *O'Connor* embodies fundamental common law principles, that those principles are currently operating fairly and simply, and that evidence shows the *O'Connor* argument is rarely raised and very rarely accepted in court (at 6.80).

The overarching argument against the retention of *O'Connor* was that the community should be protected from violence and that in pursuing this protection, the criminal law should punish and deter offenders. Proponents of change submitted that offenders who choose freely to become intoxicated must be held accountable and face appropriate punishment for any criminal conduct committed while in that state. It was also submitted that the law must reflect community values by not tolerating criminal conduct from

self-intoxicated offenders, that is, that the law should not condone morally unacceptable behaviour.

Such arguments have been enunciated throughout modern legal history. During his Maccabean lecture in 1958, Lord Devlin stated that the aim of the criminal law, among other things, was to preserve morality, as determined by the right-minded person, in order to prevent societal disintegration.⁷ While aspects of that lecture were refuted by Professor Hart⁸, it is arguable that one aim of the criminal law is to protect society. Indeed, the thrust of Mason J's dissenting judgment in *O'Connor* was the need to preserve morality and society through criminal sanction. However, the crucial flaw in the submissions to the LRCV above is that they focus on the result itself, that is, the fact that injury or damage has been caused rather than the capacity of the offender. Such a focus narrows the role of the criminal law to that of punishment only and ignores fundamental principles of individual responsibility.

Accordingly, the LRCV concluded that it is a fundamental principle of the common law that a person is not guilty of a criminal offence unless that person acted voluntarily and intentionally. This principle, which goes to the heart of our criminal legal system, is paramount in any criminal trial. The LRCV stated that the prosecution of an offender involves the competing interests of punishing those who are guilty and ensuring that those who are innocent are not convicted of a criminal offence (at 6.76). While some may argue that a self-intoxicated person who commits a crime is not 'innocent' because they actually did the act, that person is not liable *at law* if they did the act involuntarily or without intention. This distinction is crucial to maintain. It embodies the 'golden thread' of our criminal legal system whereby an accused is innocent until proven guilty, as held in *Woolmington v DPP* [1935] AC 462. That is, an accused is innocent until all elements of a crime are proven beyond reasonable doubt by the prosecution.

This protection of an innocent person is essential to a fair legal system but may yield some anomalous, even outrageous results. The LRCV acknowledged that the Nadruku decision fell into such a category (at 6.64). However, the LRCV stated clearly that change should only occur when current legal principles are intrinsically flawed and create injustice. Further, reform must be based on sound ethical legal principles, not simply because there exists the possibility that a magistrate or jury may return a perverse decision (at 6.81). The LRCV noted that the media might contribute to community mistrust and misunderstanding of legal principles by using inflammatory language and provocative headlines (at 6.82). Further, labelling of the *O'Connor* principle as 'the drunks' defence' is apt to incite community hostility and distrust, even though, as stated above, it is not a defence to a crime the elements of which have already been established beyond reasonable doubt. In light of these findings, the LRCV concluded that community anger and dismay at a decision does not justify departure from fundamental principles. To do so would amount to 'unjust attribution of criminal responsibility' (at 6.85 and 6.86).

This recommendation is commendable and harks back to the reasoning of the majority judges in *O'Connor* whereby Barwick CJ stated that while an offender is blameworthy for becoming intoxicated, that does not provide ground for presuming her or his acts to be voluntary or intentional (at 87). That is, *moral* blameworthiness cannot be superimposed onto a separate *legal* crime. The LRCV has remained faithful to this fundamental distinction.

Introducing procedural changes

Offender to be tried before a jury

(Recommendation 6)

The LRCV recommended that where an offender has been charged with an indictable offence and seeks to bring evidence of self-induced intoxication as grounds for acquittal, that offender must be tried before a jury. As such, the offender cannot be dealt with summarily before a magistrate but must be exposed to scrutiny by a jury 'as the conscience of the community' (at 6.105).

The reason for this procedural change is twofold. First, as indicated above, evidence presented to the LRCV established that, in the rare cases when the *O'Connor* principles are pleaded, juries are reluctant to excuse an accused on the basis of self-induced intoxication (at 6.103).⁹ Second, while the LRCV commended the ability of magistrates to perform their roles, it was accepted that in the context of self-induced intoxication the community needs to 'gain solace from a decision of their peers' in determining voluntariness and intention (at 6.103).

The initiative to bring such offenders before a jury is an excellent compromise between retaining fundamental legal principles and addressing community concern about the acquittal of intoxicated offenders. No reform measure can prevent anomalous decisions in our legal system, indeed, such decisions are bound to occur due to the nature of human imprecision. However, safeguards can be implemented to mitigate such occurrences. Arguably, this initiative operates to safeguard against perverse decisions while simultaneously upholding community confidence in the judicial system. This is due to the fact that a jury requires considerable persuasion before acquitting a self-induced intoxicated offender of an indictable offence and, if a jury is so persuaded, the decision to acquit would be more acceptable to the community than the same decision of a magistrate.

The only concern with this initiative is that an offender may receive a more severe sentence due to being heard in a higher court. Under s.53 and schedule 4 of the *Magistrates' Court Act 1989* (Vic) certain indictable offences may be tried summarily before a magistrate only. Pursuant to ss.113 and 113B of the *Sentencing Act 1991* (Vic), the maximum sentence available in the Magistrates Court is much lower than that of the County Court. It is submitted that, in order to ensure equity, a convicted offender should not be penalised at sentencing simply because they were forced to be tried in a higher court.

Moreover, it is important to remember that this recommendation only applies when an offender has been charged with an indictable offence. If an offender is charged with a summary offence, for example, common assault, they will still be tried in the Magistrates' Court without a jury. In such a case, the chance of a 'Nadruku outcome' still exists.

Jury directions at trial and limitations to appeal rights

(Recommendations 4 and 5)

The LRCV recommended that a trial judge needs to direct a jury as to the issue of intoxication *only when* the offender specifically requests the trial judge to do so. Further, if the jury asks about intoxication, the trial judge is to withdraw it from their consideration unless the offender expressly requests otherwise.¹⁰ The LRCV stated that this recommendation is to be used in conjunction with the new

criminal trial rules to be introduced through the *Crimes (Criminal Trials) Bill 1999* (Vic). This Bill provides that, among other things, any evidence or argument which the prosecution or defence intend to rely on must be raised as an issue prior to the commencement of the trial. Moreover, the LRCV recommended that if the offender fails to request the judge to direct the jury on intoxication and the offender is convicted of the offence, they cannot use the issue of intoxication as a ground for appeal.

The aim of these recommendations is to prevent the situation where the defence has either not raised the intoxication argument at all or has made only passing reference to such evidence but then attempts to appeal against a conviction on grounds of inadequate or incorrect jury directions (at 6.101). While this initiative may improve the efficiency of the conduct of criminal trials and prevent unnecessary and costly appeals, it may do so to the detriment of justice. It is submitted that such procedural changes will ensure inequity before the law for an unrepresented accused who does not have knowledge of such procedures or lacks the skills to invoke them.¹¹ This issue should be contemplated further before this LRCV recommendation is adopted.

Evidence of prior conduct to be admissible

(Recommendation 9)

The LRCV concluded that where the issue of intoxication is raised by the offender, the rules of evidence be varied such that the prosecution will adduce evidence automatically to show the offender 'has previously been intoxicated and been involved in misconduct or committed criminal offences' (at 6.129). Such evidence is called propensity evidence as it shows the character of an accused and/or that the accused has a tendency to do certain acts, commit (particular) crimes or is the sort of person who would do so. Propensity evidence is often highly prejudicial and is subject to special rules of admissibility. In Victoria, s.398A of the *Crimes Act 1958* stipulates that such evidence is admissible if it is relevant to any facts in issue, regardless of its prejudicial effect, if to do so is just in all the circumstances. Whether it is 'just' requires an assessment of the probative force of the evidence balanced against its likely prejudicial effect.

The recommendation to admit evidence of an accused's prior conduct removes these safeguards and widens the category of evidence that the prosecution may adduce in order to prove voluntariness and intention. The effect of this recommendation will be to let the jury hear highly prejudicial evidence against the accused regardless of whether it is just to do so. Further, it is unclear from the LRCV report what *type* of evidence is to be admitted. It is not expressly stated whether evidence of previous intoxication is admissible per se, or whether it must be linked to misconduct. Moreover, 'misconduct' may include prior acts that stop short of criminal offences. Again, it appears that this initiative is intended to reduce significantly the chances of acquittal. However, it may actually increase the chances of wrongful conviction.

Rehabilitation as an option at sentencing and further investigation of rehabilitative programs

(Recommendations 7 and 8)

The LRCV recommended that drug and alcohol rehabilitation programs be considered as options at sentencing. Further, such rehabilitation programs should

include anger management courses for offenders convicted of alcohol-related offences. The LRCV also recommended that the nature, extent and demand for drug and alcohol rehabilitation services should be investigated with a view to providing further facilities and that early-intervention programs be developed in order to identify and rehabilitate potential offenders. The possibility of placing a surcharge on alcohol in order to fund these programs was raised for further exploration.

The LRCV found that the threat of imprisonment and harsher penalties do not necessarily reduce the crime rate and that particularly, in the context of intoxication-related offences, treatment of the cause of the crime is more beneficial for both the community and the offender than punishment (at 6.108). Rehabilitation goes to the root of the problem thereby encouraging a past offender to return to community life and not re-offend. The prime aim of imprisonment, however, is to punish an offender and may actually feed recidivism. It is laudable that the LRCV has recommended not only the use of rehabilitative options at sentencing but also the broadening of existing programs and facilities as a practical step towards that end. Punishment is one aim of the criminal justice system. Prevention of harm and mitigation of crime through reformation is another. Alcohol and drug-related crime is as much a social issue as a legal one and it needs to be addressed as such. A society that permits the promotion of drugs and alcohol to the point of glamour cannot, without hypocrisy, simultaneously desire to punish a person for becoming grossly intoxicated.¹² The source of the problem needs to be addressed in preference to its outcome.

Investigation of the relationship between intoxicants and crime

(Recommendation 1)

In conjunction with the recommendations to retain *O'Connor* and introduce procedural changes, the LRCV also recommended that the Drugs and Crime Prevention Committee (the Committee) be given terms of reference to examine the relationship between alcohol and/or drug use and crimes of violence in our community. The LRCV received overwhelming evidence that a strong link exists between intoxicant consumption and violent crime. However, past Australian (and overseas) studies had demonstrated deficiencies and yielded inconsistent results (at 5.21 and 5.18). Due to the finding that Australians consume large amounts of alcohol and that all types of intoxicant affect human behaviour, the LRCV concluded that further investigation of the issue is necessary.

The LRCV did not specify how the results of such an investigation should be used. It is submitted, however, that the Committee's findings may assist with the development of rehabilitation programs and may also form the basis of public awareness campaigns.

Suggestions which the LRCV rejected

Adoption of the Majewski approach

The LRCV considered whether legislation should be enacted in Victoria that codifies the *Majewski* principle by distinguishing between offences of specific and basic intent.¹³ It concluded that such a classification is arbitrary and confusing and would erode fundamental legal principles. It would 'require Victorian juries to grapple with

unnecessarily complex issues and subtle distinctions thereby increasing the possibility of unjust decisions' (at 6.22).

As stated previously, the impetus to evaluate the need for such legislation had come from the Federal Government. However, the LRCV responded that Victoria should only follow the course of other jurisdictions if it could be shown that adoption of such measures would benefit the administration of justice in the Victorian community (at 6.23). For the reasons stated previously, the LRCV concluded that the *O'Connor* principles function efficiently and fairly in Victoria and should continue to do so.

Enacting a special offence of Committing a Dangerous Act While Grossly Intoxicated

The LRCV rejected the suggestion of enacting a special statutory offence to deal with self-induced intoxicated offenders who commit crimes involuntarily or unintentionally (Recommendation 2). Proponents submitted that the objective of a separate statutory offence would be to protect the community from criminal acts of grossly intoxicated persons by ensuring that such persons are punished for any harm done while in that state (at 6.25). The LRCV concluded that to do so is 'simply legislating against stupidity' and would make moral irresponsibility, being the voluntary consumption of alcohol or drugs, an offence (at 6.63). In so doing, such an offence would also undermine fundamental legal principles whereby an accused could be held accountable even though they acted involuntarily and unintentionally.

Moreover, the LRCV was concerned by consequential procedural issues, including the potential increase of plea-bargaining for the lesser statutory offence and that a trial may be longer because a jury would need to consider more issues (at 6.58 and 6.59). Further, there may be an escalation of compromised jury verdicts whereby a jury may convict an offender of the lesser crime as a default option simply because members are unable to agree about whether the principle offence has been made out. Finally, the LRCV expressed concern that a statutory penalty fails to distinguish between the seriousness of offences and the degree of intoxication of the offender (at 6.60). Again, the LRCV concluded that the current law on self-induced intoxication, coupled with juries' reticence to acquit offenders, ensures fairness and efficiency.

Intoxication as mental impairment

It was also submitted that a self-induced intoxicated offender may be acquitted by reason of mental impairment under s.20 of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (the Act). Section 20 of the Act does not define 'mental impairment' and could therefore include gross intoxication. The outcome is a conditional acquittal due to mental impairment whereby the court may impose a treatment order on the offender. Once an offender is found to be mentally impaired under the Act, various sentencing options exist, including custody in an approved mental health service or release under supervisory conditions. The LRCV stated that the advantage of such initiatives is that even if an accused is acquitted, they will be forced to undergo rehabilitation or surveillance or perhaps to pay compensation for serious damage done to property (at 6.66 and 6.67).

Admittedly, broadening mental impairment to include gross intoxication ensures that an offender, even though acquitted, is not entirely exculpated and also allows for

treatment of a person with intoxicant addiction. However, it is submitted that confining an offender to a mental health service after they have sobered up, and therefore after the reason for mental impairment has ceased to exist, may be a misapplication of the Act. Rehabilitation of an offender appears to be adequately dealt with under the recommendations of the LRCV. Accordingly, the LRCV rejected the option of intoxication as mental impairment due to their ultimate conclusions and recommendations (at 6.68).

Conclusion

The recommendations of the LRCV aim to balance community faith in our legal system without eroding fundamental legal principles. It is submitted that the recommendations do achieve that balance. Fundamental principles are preserved by the retention of the approach in *O'Connor* but community confidence is also maintained by the introduction of procedural changes, the cumulative effect of which will ensure that the accused's chances of acquittal on the basis of self-induced intoxication are reduced significantly. The LRCV then softens that outcome by stipulating that rehabilitation and treatment for convicted offenders should be given at sentencing and, further, that existing resources be investigated and extended to make such options a reality. Consequently, even though offenders are more likely to be convicted under the new regime, they will receive a more appropriate sanction than imprisonment. However, the potential for unfair outcomes due to certain of the recommended procedural changes, particularly the effect on an unrepresented accused and the initiative to admit evidence of prior conduct, needs to be contemplated prior to their adoption. Overall, it is commendable that the LRCV remained independent and thorough regardless of external pressures.

Self-induced intoxication should be perceived as a social issue as much as a legal one. As such, the relationship between intoxication and people who commit crime should be understood and treated, not just punished, so that the chances of re-offending are reduced. The criminal justice system can assist that aim. As the New South Wales Director of Public Prosecutions commented (at 6.108): 'We try to use the criminal law to regulate behaviour and to keep behaviour within socially acceptable limits. The criminal law cannot make people be good or moral but it can set boundaries for behaviour.'

References

1. per Magistrate Madden, *S C Small v Noa Kurimalawai*, Australian Capital Territory Magistrates' Court, Matter No. CC97/01904, 22 October 1997, transcript of proceedings at 11.
2. For example, 'How Nadruku tackled the law — and made it an ass', *Canberra Times*, 25 October 1997.
3. Senator Amanda Vanstone, Minister for Justice, media release, 2 December 1997. Subsequently, the *Criminal Code Amendment Act 1998* (Cth) was enacted which provided that the self-induced intoxication provisions of the *Criminal Code Act (Cth) 1995* (ss.4.2(6), 8.2(1) and (2)) were to commence on 13 April 1998. Those provisions in the Code stipulate that self-induced intoxication is not to be considered in determining an accused's voluntariness or intention to commit an offence of basic intent.
4. The South Australian parliament recently enacted the *Criminal Law Consolidation (Intoxication) Amendment Act 1999* (SA) which codifies the retention of the *O'Connor* principles and also introduces procedural changes to the rules of evidence (see ref. 10 below). In contrast, the *Crimes Amendment Bill (No 4) 1998* (ACT) was reintroduced into the Australian Capital Territory Legislative Assembly on 28 May 1998 which, pursuant to the proposed s.428XC, mirrors the relevant provisions in the *Criminal Code Act 1995* (Cth). The Bill has been referred to the Justice and Community Safety

Committee which will return its report in October/November 1999 after considering the Bill in light of initiatives in other jurisdictions, including Victoria.

5. Law Reform Commission of Victoria, 'Criminal Liability for Self-Induced Intoxication', Government Printer Victoria, May 1999. References in brackets throughout this article refer to this Report.
6. However, the High Court unanimously upheld the 'Dutch Courage' principle enunciated in *Attorney-General for Northern Ireland v Gallagher* [1963] AC 349 whereby the deliberate consumption of alcohol in order to gain the 'courage' to commit a crime will not excuse an offender.
7. Lord Devlin's collection of lectures were published in *The Enforcement of Morals*, Oxford University Press, 1965.
8. Hart, H.L.A. *Law, Liberty and Morality*, Oxford University Press, 1963.
9. The 1986 LRCV report 'Criminal Responsibility: Intentional and Gross Intoxication' stated that only 30 accused had been acquitted at that time, most of which had occurred in the Magistrates Court, at 19 and 22.
10. This recommendation mirrors the recent South Australian initiative in the *Criminal Law Consolidation (Intoxication) Amendment Act 1999* (SA), s.269.
11. Konstantopoulos, V., 'Review of Criminal Liability for Self-induced Intoxication', (1999) *LJ*, August 60, at 63.
12. A similar point is made in relation to developing strategies for dealing with the growing problem of illegal drugs in our society in Brett, P., Waller L. and Williams, C.R., *Criminal Law Text and Cases*, 8th edn, Butterworths, 1997 at [16.58].
13. The *Crimes Act 1900* (NSW), s.428B, embodies this principle and expressly stipulates which crimes are to be treated as specific or basic intent. However the LRCV concluded (at 6.11) that such a list still creates uncertainty when a jury must consider a crime which is either not listed or which has been committed recklessly.

EDITORS' NOTE: As this issue is being edited in the Northern Territory, which has its own unique provisions in relation to intoxication and criminal responsibility, we thought we would tell you about the equivalent legislation in the top end.

Intoxication in the NT

Under the Criminal Code NT there is an evidentiary presumption that: (i) intoxication is voluntary; and (ii) unless intoxication is involuntary, that the accused foresaw the natural and probable consequences of his or her conduct (s.7(1)).

Implicit in this is that an accused may still be able to overcome this presumption, and raise a defence under s.31 of the Code, which excuses responsibility where intention or foresight is lacking (or where, given foresight, an ordinary, which means sober, person would still have done the act).

Where involuntary intoxication causes an abnormality of mind, this raises a defence of insanity (s.36).

There may also be a defence along common law lines in relation to offences against the person, by virtue of a statutory gap created by s.318 of the Code. Note, however, that in such cases, an alternative verdict of dangerous act under s.154 of the Code may be returned.

See John Devereux, *Intoxication in the Northern Territory Criminal Code*, AULSA, 1987, p.475.