

Just Say No to the Charges Against You: Alcohol Intoxication, Mental Capacity, and Criminal Responsibility

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There have been many studies showing a high correlation between crime and alcohol use. Even the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (DSM-III-R) cites that one significant complication of "alcohol intoxication" is its "frequent association with the commission of criminal acts."¹ Specifically, the DSM-III-R points out that "more than one-half of all murderers are believed to have been intoxicated at the time of the act."²

Yet because of the multiplicity of factors involved in analyzing alcohol's relation to crime, no study has conclusively proven any direct causal link.³ From the high correlation alone, many people may simply assume and expect that violence results from alcohol use. Some studies suggest that the lowering of inhibitions caused by alcohol may encourage the commission of violent

crime.⁴ Other studies show that violent criminals often come from socioeconomic backgrounds with a particularly high incidence of intoxication and alcoholism. Finally, it has even been suggested that alcohol may be more causally related to a criminal's being caught than to the actual commission of crimes.⁵

Whatever the explanation, the high correlation between alcohol and crime might suggest that the law would more severely penalize a person found to be intoxicated at the time of a criminal act. And indeed in some jurisdictions, evidence of alcohol consumption may increase the severity of a crime such as vehicular homicide.⁶ Defendants found to be under the influence of alcohol at the time of their crime may also lose the privilege to raise certain specific affirmative defenses based on insufficient mental capacity, if the alcohol could have induced the condition.⁷ Also, there are "alcohol-specific" crimes in which intoxication is a defined requirement of the offense, such as "public drunkenness" and "driving while intoxicated."

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However, even with these anti-alcohol stances taken by the law, some courts leave open the possibility of actually reducing charges against or even totally acquitting a defendant whose mental state has been affected by alcohol. In limited circumstances, evidence of voluntary intoxication, involuntary intoxication, chronic alcoholism, or delirium tremens may cast doubt upon one's capacity for criminal responsibility. This paper will examine each of the four above alcohol-induced states of mind along with the circumstances in which each can be used to challenge criminal charges. As it becomes apparent just how limited these defenses are in light of current views on alcohol and mental capacity, perhaps one can determine whether alcohol defenses should still exist as part of the criminal law.

Alcohol Intoxication

"Alcohol intoxication" as a mental disorder under the DSM-III-R is defined as "maladaptive behavioral changes due to recent ingestion of alcohol," such as aggressiveness, impaired judgment, impaired attention, irritability, depression, or emotional lability.⁸

The law also recognizes the "medical fact" that "alcohol intoxication diminishes perception and judgment."⁹ The Model Penal Code has acknowledged that a high level of intoxication can prevent subjective awareness of external reality:

Alcohol acts as a depressant and, in large amounts, can seriously interfere with the drinker's perceptive capacity and mental powers. With .30 percent or more of alcohol in the blood (the equivalent of a pint of whiskey in

the body) a drinker's sensory perception is quite dulled, and he has little comprehension of what he sees, hears, or feels.¹⁰

Yet, the law does not treat a defense based on alcohol intoxication in the same way it does defenses based on other mental disorders. Much of this special treatment of intoxication is based on the fact that a defendant is usually viewed as having caused his or her mental impairment voluntarily. In fact, whether the intoxication is considered voluntary or involuntary is the essential legal distinction with respect to how the law treats an intoxication defense.¹¹

Voluntary Intoxication

"Voluntary intoxication" is not recognized as an excuse for crime in any American jurisdiction.¹² This rule is grounded upon the assumption that "a person is free to choose whether or not to drink."¹³ If one voluntarily chooses to become intoxicated, one willfully increases the risk of harm to others by reducing one's mental capacity for evaluating danger and controlling one's actions.¹⁴ Thus, a person voluntarily intoxicated by alcohol at the time of a criminal act is held responsible for his or her crime.

Negation of Mens Rea Nevertheless, the law does leave open one exception in which a voluntary intoxication excuse can be relevant. In many jurisdictions either by statute or by common law, evidence of voluntary intoxication can be used to reduce the severity or degree of the crime charged.¹⁵ Where it is allowed, this exception applies only to "specific intent crimes, not "general intent" crimes.¹⁶

“Specific intent” crimes are crimes such as murder, burglary, or assault with intent to commit rape. By statutory definition, these crimes require a preconceived, planned, and deliberate criminal purpose beyond the general carrying out of the act.¹⁷ The prosecution must prove these specific intent requirements beyond a reasonable doubt.¹⁸ If evidence of intoxication casts doubt upon a “specific intent” element of a crime, then the crime charged is normally reduced to its general intent equivalent which carries a lesser sentence.¹⁹ Thus, a defendant will be unlikely to escape responsibility for the act of crime committed while voluntarily intoxicated by alcohol, but the defendant may attempt to use evidence of intoxication to lessen any extra punishment added to the crime by an additional intent requirement.

The reasoning behind the voluntary intoxication exception is that it is unfair to “adopt a subjective criterion for culpability,” and then not allow the defendant to produce evidence to show that he or she “did not, in fact, have the required state of mind.”²⁰ Also, it is unfair to punish someone for a crime beyond the foreseeable risk one took when one chose to drink, particularly when the subsequent criminal act was totally out of character for the person.²¹

Thus, the defendant’s culpability for voluntarily “getting drunk” does not in itself establish the *mens rea* for the ensuing offense, but the law still refuses to allow one to fully escape responsibility for one’s drunken acts.²² For example, an excessively drunk person who shoots a friend because he mistakes the friend

for an attacker may be allowed to use evidence of voluntary intoxication to reduce a murder charge to manslaughter. Yet the above person would probably not be fully excused by reason of mistake or self-defense if his intoxication contributed to his error.²³

Restrictions on Evidence of Voluntary Intoxication Of the jurisdictions that allow the voluntary intoxication exception, some have rules that limit this evidence beyond the usual constraints. For example, some courts only allow evidence of intoxication to negate premeditation and deliberation for first degree murder charges and exclude such evidence for all other crimes.²⁴ Some jurisdictions only consider such evidence at sentencing.²⁵ In many jurisdictions, a defendant may not show that voluntary intoxication prevented his having the culpable mental state of recklessness.²⁶ And some courts may require the defendant “to bear the burden of persuasion despite the fact that an element of crime is at issue.”²⁷

These restrictions can be based on the evidence being unreliable, confusing to the factfinder, or potentially inviting fraud, perjury, or easy simulation.²⁸ Yet in most jurisdictions that allow the exception, evidence sufficient to warrant a voluntary intoxication instruction can be of any kind normally admissible, as long as it is relevant to the defendant’s capability of entertaining the intent charged.²⁹

Substantive Limitations on the Voluntary Intoxication Excuse Even in the jurisdictions where evidence of voluntary intoxication is allowed, it is not

easy to present or to convince a jury to accept. To insure that the intoxication did, in fact, preclude the defendant from having the necessary intent for the crime, courts make a very restrictive inquiry into the defendant's mental state.

The boundaries of this inquiry were set as early as 1870 in the often-cited Michigan case of *Roberts v. People*,³⁰ where the defendant, in a drunken rage, attempted to shoot a store clerk against whom he held a grudge. When the defendant later claimed that his level of drunkenness prevented him from having the necessary intent for the crime of "assault with intent to kill," the court stated:

... it was the right and duty of the jury to take into consideration the nature and circumstances of the assault, the actions, conduct, and demeanor of the defendant, and his declaration before, at the time, and after the assault; and especially to consider the nature of the intent, and what degree of mental capacity was necessary to enable him to entertain the simple intent to kill, under the circumstances of this case—or, which is the same thing, how far the mental faculties must be obscured by intoxication to render him incapable of entertaining that particular intent.³⁰

These parameters set long ago are still the basic ones used by most courts. The emphasis on the time frame, the extent of intoxication, and execution of the act, together with the reconstruction of the situation as a whole remain as important to a court's inquiry today as in the days of *Roberts*.

Time Frame Unlike a defense of insanity or diminished capacity, which focuses on the defendant's mental state primarily at the time of the act, most

courts use a broader time frame to examine the mental state for voluntary intoxication. In *Roberts*, the jury was instructed to take into consideration "the nature and circumstances" of the act and the "actions, conduct, and demeanor" of the defendant, "before, at the time [of], and after" the act.³¹ Thus the focus is not just on the moment of harm but upon the whole course of conduct that may be relevant to the determination of requisite intent.

For example, if the accused forms the intent to commit the crime prior to becoming intoxicated and then later claims intoxication to negate that intent, such a claim is no defense because the intent was "formed while sober, and the intoxication only served as a catalyst to the act."³²

Thus, the initial focus is on whether the defendant is intoxicated enough to preclude formation of requisite intent.³³ If the defendant was so intoxicated that he or she could not have formed knowledge, purpose, or understanding of the act to begin with, then the defendant has a chance to negate the specific intent charge.³⁴ In many cases, this focus on the time prior to the act ends the court's inquiry.

But the accused should also have lacked the requisite specific intent at the time of the offense as well as beforehand. Furthermore, the defendant's condition after the act is relevant. Someone too intoxicated to have intended a crime is unlikely to become fully coherent immediately afterwards. Statements to a policeman after the crime could reveal the defendant was not drunk, as well as

attempts to cover up the act in a calculated manner such as the disposing of a body or the hiding of a weapon.³⁵

Extent of Intoxication It has been held that the accused need not be intoxicated to the extent of incapacity, since the evidence need only create a reasonable doubt whether the defendant was sober enough to be capable of forming the intent required.³⁶

On the other hand, a person does not have to be cold sober to have the sort of intent that justifies holding one criminally responsible.³⁷ Alcohol dampens inhibitions, but it does not generally impair the ability to act purposefully.³⁸

To negate specific intent, one must be drunk to an extreme degree, sufficient to blot out the capacity to know or to entertain a purpose. "The formulations suggest a standard almost impossible to prove without proving physical immobility as well."³⁹

Some states use an insanity test in determining the level of intoxication necessary to negate a specific intent element. Thus, a defendant may have to show that he was so intoxicated that he was unable to understand the nature of his act or understand that it was wrong.⁴⁰ Other tests require the intoxication to "entirely suspend the power of reason,"⁴¹ or to "paralyze mental faculties,"⁴² or to cause the defendant to be in a "state of unconsciousness."⁴³ Thus, the burden of production on degree of intoxication during the act is so restrictive that a person committing a crime could rarely meet it.

Execution of the Act Finally, when the execution of an act indicates that the

defendant possessed sufficient mental capacity to be well aware of what he was doing, the degree of intoxication will not matter.⁴⁴

In one case, a defendant was charged with stealing a car. The defendant contended that he had a blackout from drinking and did not have the requisite intent. Yet the court observed that the alleged blackout did not prevent the defendant from starting the car by substituting a beer-can opener for an ignition key, nor from driving the automobile in city traffic with normal ability, nor from fabricating a story in an attempt to protect himself from questioning by a police officer.⁴⁵

In a less obvious example, evidence showed that a defendant was not too intoxicated to form the necessary intent for robbery, where a rock was used to break into a building, and the defendant was seen looking through a cash register.⁴⁶

Reconstruction of the Situation Whether or not a defendant's intoxication did preclude the formation of a required mental state is a factual question probably only answerable with the aid of an expert on intoxicated states. As both the knowledge and the number of experts in this area are limited, convincing evidence based on intoxication is rarely developed.⁴⁷

"Reconstructive inquiries regarding the degree of a person's intoxication due to alcohol, and the nature of any associated functional or behavioral impairment, are notoriously speculative and imprecise—no less so than those per-

taining to impairments allegedly attributable to intrapsychic forces."⁴⁸

The problems lie in determining what the defendant consumed, the amount, the span of time during which the alcohol was consumed, the reconstruction of the situation including the drinker's expectations and the setting, individual variability, and the translation of neuropsychological assumptions about alcohol into cognitive-behavioral terms relevant to the law. "Determinations regarding degree of impairment of perceptual and judgmental functions are at best gross probability estimates even when they are based on accurate assumptions."⁴⁹

But experts in intoxicated states are rarely used and rarely sought after. This may be because intoxication evidence is susceptible to "some degree of quantification or objective demonstration" by non-experts. Also because many people drink, lay people have an illusion of being able to understand subtle differences in degrees of intoxication on their own. In the courts, it is generally thought to be a part of human experience that factfinders can understand and apply.⁵⁰ Testimony of experts could go far in clearing up lay misunderstandings about intoxication.⁵¹ Yet, it is doubtful that such expert testimony would greatly enhance a defendant's chances of success under the voluntary intoxication defense.

With the multitude of restrictions on the defense described above, the chances of a defendant being afflicted with intoxication sufficient to negate intent would be minuscule.⁵² One would have to com-

mit a specific intent crime, get so drunk beforehand that no intent could be formed, remain at a level of drunkenness approaching that of a coma throughout the act, carry out the act in a severely drunken manner, show signs of drunkenness after the act. have good evidence of all this, be allowed by the court to put on this evidence, and get the jury to believe it. In actual practice, lower courts often err in not allowing voluntary intoxication evidence; but on remand, claims of voluntary intoxication due to alcohol are almost always rejected in favor of the original verdict.⁵³

Involuntary Intoxication

Unlike voluntary intoxication, "involuntary intoxication" is a complete defense to any criminal act in most jurisdictions. This rule is based on the presumption that one who consumes an intoxicant against one's will, or without full awareness of the implications of one's conduct, is not blameworthy.⁵⁴ Thus, in involuntary intoxication, the offender does not freely choose to become intoxicated and does not willingly assume the risks of one's intoxicated conduct.⁵⁵

Involuntary intoxication can be intoxication "due to the fault of another, accident, inadvertence or mistake of the consumer, or by some physical or psychological dependence."⁵⁶ "Intoxication due to the fault of another can take the form of inducement by force, fraud, duress, or contrivance."⁵⁷

However, at present, the involuntary intoxication excuse with respect to alcohol alone is even less likely to succeed

in court than the voluntary intoxication excuse.⁵⁸

Involuntariness Requirement First, one has to prove that the intoxication was in fact involuntary. This is made extremely difficult with respect to alcohol. "The only safe test of involuntary intoxication is the absence of an exercise of independent judgment and volition on the part of the accused in taking the intoxicant."⁵⁹

For "intoxication due to the fault of another" to succeed as involuntary, one must be literally tricked or forced to drink by a third party, not just encouraged or facilitated.⁶⁰ This occurs most often in the case of a drugged drink. However, many courts hold that if the accused was willingly drinking alcohol, the drugging of a drink is not grounds for considering the ensuing intoxication involuntary.⁶¹

In cases of "accident," "inadvertence," or "mistake of the consumer," involuntariness has been inferred where a violent reaction results from a defendant's drinking alcohol while he or she is on prescribed medication. However, the individual must have had no reason to anticipate such a reaction from drinking, which again would be extremely rare with warnings of such reactions usually accessible.⁶²

The other situation in which alcohol consumption might be considered involuntary is where a defendant has some physiological or psychological condition that renders him or her unusually sensitive to the effects of alcohol. Again, this is only considered involuntary if the

defendant does not know about this disability before drinking.⁶³

One such condition recognized in the DSM-III-R is "Pathological Intoxication" or "Alcohol Idiosyncratic Intoxication." The DSM-III-R describes the essential feature of this disorder to be a marked behavioral change—usually to aggressiveness—that is due to the recent ingestion of an amount of alcohol insufficient to induce intoxication in most people. There is usually subsequent amnesia for the period of intoxication. The behavior is atypical of the person when not drinking—for example a shy, retiring, mild-mannered person may, after one weak alcoholic drink, become belligerent and assaultive. And the change in behavior begins within minutes of drinking and ceases within a few hours.⁶⁴ However, many courts refuse to recognize this as involuntary regardless of the disorder categorization if one voluntarily took the drink that brought it on.

Insanity Threshold Requirement

But even if the court accepts the intoxication as involuntary due to one of the rare situations above, the defendant must also prove that the intoxication made him or her temporarily insane during the time the act was committed. In the few cases in which a defendant has successfully established the involuntariness of his or her intoxication, the defendant has failed to show that the intoxication deprived him or her of the mental capacity to know or understand what he or she was doing.⁶⁵

To determine whether an accused was legally insane at the time of the offense,

courts commonly apply one of three tests—the M’Naghten rule, the irresistible impulse addition to the M’Naghten rule, or the American Law Institute test.

For a defendant to lack responsibility, the M’Naghten rule requires a finding that a person suffers from a disease that renders cognition clearly defective. Thus, the defendant either must not have known the nature and quality of the act committed or must not have known that it was wrong. The irresistible impulse addition allows the defendant to know what he or she was doing and that it was wrong, but allows the defendant to prove that his or her actions were beyond his or her control (a further volitional test). The ALI definition inquires whether the accused understood or appreciated the criminal nature of the act and whether he was able to conform his or her conduct to legal requirements. (Federal districts now utilize a test proposed by the American Psychiatric Association similar to the ALI test, minus the volitional prong.⁶⁶)

Unlike the expansive time frame for voluntary intoxication, each of these insanity tests only looks at the impairment at the time of the act. But for many of the same reasons previously discussed with respect to voluntary intoxication, the degree of impairment caused by alcohol alone is as unlikely to meet the given insanity threshold as it is the *mens rea* threshold, where the two are different. Alcohol, even in large amounts, would rarely bring about the lack of mental capacity sufficient for the successful affirmative defense of insanity.

Chronic Alcoholism

A controversy exists over what intoxication rule should apply when a crime is committed by an intoxicated chronic alcoholic. With alcoholism considered to be a disease by some, the argument has been made that the involuntary intoxication defense is appropriate for chronic alcoholics.⁶⁷ Thus, as discussed above, a successful defendant would have to prove the elements of (1) involuntariness and (2) intoxication to the point of insanity at the time of the act.

Involuntary Intoxication and the “Disease Model” With respect to the involuntariness, one would have to convince a court that, due to the disease of chronic alcoholism, the compulsion to get drunk caused the defendant to become so physiologically or psychologically disabled that he or she was deprived of the ability to avoid the risk-creating intoxication that led to the crime.⁶⁸ In other words, one would have to prove that chronic alcoholism destroys the ability to choose to drink.⁶⁹

Unlike an episode of “intoxication,” which is relatively limited in duration, advocates of the “disease model” of alcoholism view it as an enduring, irreversible condition that progresses through a distinct series of phases.⁷⁰ A significant mental component is the alcoholic’s “denial” that he or she is an alcoholic, thus preventing the recognition that he or she lacks control over drinking or the behavior that follows it.⁷¹ Under this model, an alcoholic may lack responsibility for the voluntary drinking because he or she is not consciously aware of the risks peculiar to him or her.

“Alcoholism, almost by definition, robs its victims of the capacity to foresee the consequences of their drinking.” thus, “an alcoholic’s drinking may be accompanied by a mental condition not sufficient to ground moral culpability or deserved punishment for that drinking.”⁷²

This argument has even been carried further to suggest that a chronic alcoholic’s compulsion utterly overwhelms behavioral controls to the degree that the compulsion is the equivalent of coercion or duress.⁷³

Just as the defendant may be excused if he or she commits a crime under the imminent threat of bodily injury by another, so should the alcoholic be excused if he commits a crime in order to avoid the complications of alcohol withdrawal.⁷⁴

Alcoholism as Voluntary Intoxication Under the Criminal Law However, the theory of chronic alcoholism as a mental disease sufficient to render alcohol consumption involuntary has never commanded significant legal support.⁷⁵ Under the criminal law, the intoxicated alcoholic is generally treated as voluntarily intoxicated.⁷⁶

The traditional argument used by the courts is the moralistic view that an alcoholic’s drinking was not involuntary to begin with. To say that the defendant suffered from both a physical compulsion and mental obsession to consume alcohol is not to say that the obsession and compulsion were so completely overpowering that the defendant was incapable of not taking the first drink, which in turn led to successive drinks, and an eventual state of inebriation.⁷⁷

Thus, according to this theory, a person probably cannot without fault become a victim of alcoholism.⁷⁸ The chronic alcoholic must have voluntarily consumed alcohol over a period of time before becoming an alcoholic. However powerful the pressures once the person becomes an alcoholic, they were not present in all the steps along the way.⁷⁹ The condition was foreseeable, but was voluntarily contracted or nurtured, and a reasonable person would have resisted at some point.⁸⁰

Opponents of the Disease Model

Recently, many experts have begun to reinforce the criminal law’s treatment of alcoholism as voluntary with studies that challenge the view that an alcoholic is enslaved to his habit.⁸¹ For example, no neurological or physiological mechanisms or processes have been identified that validate the disease model of alcoholism.⁸² Some of the experts also believe that an alcoholic does in fact have control over whether he or she drinks each day, regardless of whether there is “control” over the behavior following alcohol consumption.⁸³ On any given occasion an alcoholic may be able freely to choose whether he or she starts drinking and continues drinking.⁸⁴ Thus, intoxication would not be involuntary in light of the full reconstruction of the situation. Furthermore, there are enough conscious, purposive actions in the characteristic behavior of alcoholics (including abstinence when the motivation is great enough) that involuntariness is not a valid ground for excuse.⁸⁵

Also social and psychological inducements to begin and to continue using

alcohol appear to have a large role in accounting for alcoholism.⁸⁶ Other alcohol studies reveal that one's expectations about what alcohol does affects one as much or more than the alcohol itself.⁸⁷ If the criminal behavior is due to "expectancies," the perpetrator may have more control over his or her behavior than he or she wants to admit.⁸⁸ Thus, the involuntary disease argument has recently been brought into question as a medical model and has yet to be accepted from a legal standpoint.

Failure to Meet the Insanity Threshold But even if a court were to recognize the involuntary disease argument, the chronic alcoholic probably could not show that intoxication amounted to insanity at the time of the offense under the given jurisdiction's insanity test. "The concept of disease of the mind as it functions in the insanity defense does not simply represent a medical treatment category."⁸⁹ Being sick does not imply that a person is irresponsible and not morally culpable. "Just as a psychiatric diagnosis of mental illness does not in itself establish a defense of legal insanity," neither does a diagnosis of alcohol addiction establish that the alcoholic is not responsible for his or her actions.⁹⁰ Thus, the state is not holding a defendant responsible for being a chronic alcoholic, but for the crime he or she committed.⁹¹

With respect to the degree of intoxication amounting to insanity, most chronic alcoholics' cases would be extremely weak. Even if at the time of the offense the blood alcohol level is .30, a level under which a moderate social

drinker might lack substantial capacity to engage in any conduct at all, the alcoholic probably has built up tolerance or resistance to chemical effects of alcohol, and "has developed skill in handling liquor, so that the ability to cope is better maintained," and "the deficiencies better hidden from notice and corrected for."⁹² Even an alcoholic can get drunk to the point of being comatose, but, like any other highly intoxicated person, he or she will not be likely to commit some purposeful criminal act beyond public drunkenness.⁹³

Thus, chronic alcoholism provides little practical ground for excusing crime. Only when the alcoholism produces a permanent and settled insanity distinct from the alcoholic compulsion itself will the criminal law accept it as an excuse.⁹⁴

Delirium Tremens (Alcohol Withdrawal Delirium)

The DSM-III-R describes the essential feature of this disorder as a delirium that develops after recent cessation of or reduction in alcohol consumption, usually within one week. The associated features are marked autonomic hyperactivity, often indicated by tachycardia and sweating, vivid visual, auditory, or tactile hallucinations, delusions, agitated behavior, irregular tremor, and fever. It usually only occurs after 5 to 15 years of heavy drinking.⁹⁵

"Delirium tremens is the after-effect of excessive drinking."⁹⁶ It produces a mental and physiological state that can result in both cognitive and volitional impairment. Since the disorder results from long-term drinking, the victim

could be viewed as having brought the condition on through his or her past conduct. However, the law recognizes that the condition is distinct from alcohol intoxication or alcoholism in that the victim has no control over it once it has begun. Thus, one suffering from delirium tremens at the time of a criminal act will be permitted to use an affirmative defense based on insanity rather than an intoxication defense.⁹⁷

However, the accused must not have been drinking when the criminal act was committed to successfully use this defense. "Because one who becomes voluntarily intoxicated is presumed to intend the consequences of his actions, evidence of intoxication is fatal to a delirium tremens defense," and the accused can only prove lack of capacity to lower the degree of the crime as with voluntary intoxication.⁹⁸

Conclusion

The frequency of alcohol-related crime undoubtedly presents society with a dilemma. One legal solution might be to make alcohol intoxication an aggravating factor for crimes, increasing the severity of a crime when the perpetrator is found to have been intoxicated at the time of the act. The deterrent effect of such a change in the law might prove valuable. However, since there is little evidence that alcohol use *directly* causes crime, and some evidence that alcoholics do not freely choose to drink, such a change in the law might bring about the undesired result of additional punishment without sufficient justification.

An alternative solution might be to

make alcohol treatment a required or potentially mitigating part of sentencing for offenders found to have been intoxicated.⁹⁹ The implementation and administration of this rehabilitative approach might engender its own set of practical difficulties for courts and the criminal justice system. On the other hand, such a change might help those whose alcohol problems may have been a major factor in their violation of the law.

Perhaps even the ongoing public denunciation campaign against alcohol and drugs will help some people turn away from using alcohol as a solution to their problems long before they resort to the commission of criminal acts, although more advertising exists encouraging alcohol use than discouraging it.

Yet, one solution to alcohol-related crime would definitely not be to abolish the existing intoxication defenses. Any defense based on alcohol use, particularly voluntary alcohol use, has little chance of success as it is. As has been shown, the law has layers of restrictions to keep alcohol from providing the defendant with a means of escaping responsibility for his or her criminal acts. Thus, getting drunk to avoid later being held responsible for a crime is not a good strategy for the would-be criminal. If ever the rare fact situation arises where a person meets all the criteria for an alcohol intoxication defense, the legal framework is there for that defendant. But under the present law, a person who gets caught committing a crime does not realistically have the choice to "just say

no” to a conviction merely because he or she was drunk at the time.

References

1. American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders (ed 3 rev) 128 (1987). [hereinafter DSM-III-R]. In spite of the fact that the manual was produced for the use of the mental health field rather than the law, the DSM-III-R is the most widely relied upon source of information for legal determinations about issues of mental incapacity. Reisner R, Slobogin C: Law and the Mental Health System 331 (ed 2) (1990).
2. DSM-III-R, *supra*.
3. Lang A, Sibrel P: Psychological perspectives on alcohol consumption and interpersonal aggression. *Crim Just Behavior* 16:299-324, 1989.
4. See Grad F, Goldberg A, Shapiro B: Alcoholism and the Law Dobbs Ferry, NY Oceana, 1971 at 2 [hereinafter Grad].
5. *Id.*
6. Intoxicated drivers causing accidents resulting in death are being convicted for second degree murder rather than manslaughter in some states. See Pears v. State, 672 P. 2d 903 (Alaska Ct. App. 1983); People v. Watson, 30 Cal.3d 290, 179 Cal. Rptr. 43 (1981).
7. Evidence of voluntary intoxication at the time of the crime can be fatal to an insanity defense based on delirium tremens. Boettcher M: Voluntary intoxication: a defense to specific intent crimes, 65 U Det L Rev 65:33-71, 1987 at 36. The same may be true for an insanity defense based upon post-traumatic stress disorder. See Norris v. State, 490 So. 2d 839 (Miss. 1986).
8. DSM-III-R, *supra* note 1, at 127. “Alcohol intoxication” is not to be confused with “alcoholism,” to be discussed later. Alcohol intoxication is usually a state of relatively brief duration, which can result from a single episode of drinking by either a non-alcoholic or an alcoholic. “Alcoholism” involves a long-term pattern of drinking that continues through many episodes of alcohol intoxication.
9. Grad, *supra* note 4, at 129.
10. Model Penal Code § 2.08, comment at 3 n.4 (Tent. Draft No. 9, 1959), quoting Greenberg, Intoxication and alcoholism: physiological factors. *Annals* 315:22, 1958 at 27; Mandiberg SF: Protecting society and defendants too: the constitutional dilemma of mental abnormality and intoxication defenses. *Fordham L Rev* 53:221-77, 1984 at 227.
11. The following discussion only applies to crimes that indeed were committed by the accused while intoxicated. Evidence that the defendant was so drunk that he could not have committed the physical acts constituting the offense is relevant for any crime, whether the intoxication was voluntary or involuntary. If an accused is charged with breaking into a house, he will be permitted to prove that he was too drunk to perform such a physical movement. Paulsen, Intoxication as a defense to crime. U Ill L F Annotation, Modern Status of the Rules as to Voluntary Intoxication as Defense to Criminal Charge. 8 A.L.R. 3d 1236, 1264 (1966).
12. Boettcher, *supra* note 7, at 33.
13. Grad, *supra* note 4, at 129.
14. *Id.*
15. *Id.*
16. In cases out of Georgia, Mississippi, Missouri, Texas, Virginia, and Vermont, the general rule that voluntary intoxication is not a defense to crime has been applied as an absolute. These courts have not allowed the jury to consider voluntary intoxication even on the issues of specific intent. Annotation, 8 A. L. R. 3d 1236, 1241 (1966); Nemerson S: Alcoholism, intoxication, and the criminal law. *Cardozo L Rev* 10:393-473, 1988 at 423.
17. Each crime requires *mens rea* or culpable intent. Yet some crimes are classified as “specific intent” crimes and others as “general intent” crimes. The distinction between the two is often more a question of judicial interpretation than statutory definition. To distinguish one from the other, some courts focus on the presence or absence of statutory language such as “willfully,” “intentionally,” or “with intent to,” which may be taken to require a particular state of mind. Other courts have interpreted specific intent to require “purpose” or “knowledge” rather than mere “recklessness.” The most common scheme however is to define general intent as the intent to carry out the act actually committed, while specific intent requires an intent to achieve additional consequences. Note, Alcohol abuse and the law. *Harv L Rev* 94:1660-1712, 1981 at 1683. The distinction is based upon the idea that specific intent crimes pose a greater threat to society than general intent crimes. Grad, *supra* note 4, at 130.

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18. Boettcher, *supra* note 7, at 33; Mandiberg, *supra* note 9, at 228.
19. Grad, *supra* note 4, at 130. There are a few specific intent crimes that have no lesser included general offense, such as tax evasion; thus, a defendant who could prove that he or she lacked the specific mental element could be completely acquitted, even though he or she committed the act: however, voluntary intoxication excuses may be barred for such crimes to avoid the possibility of this result. See Sendor B: Mistakes of fact: a study in the structure of criminal conduct. Wake Forest L Rev 25:707-82, 1990 at 746.
20. Bonnie R. Slobogin C: The role of mental health professionals in the criminal process. Va L Rev 66:427-522, 1980 at 437.
21. Paulsen, *supra* note 11, at 15.
22. Bonnie and Slobogin, *supra* note 20, at 438.
23. Robinson P: Causing the conditions of one's own defense. Va L Rev 71:1-63, 1985.
24. See Chittum v. Commonwealth, 174 S. E. 2d 779 (Va. 1970).
25. See Tex. Penal Code Ann. § 8.04 (Vernon 1974).
26. Mandiberg, *supra* note 10, at 222.
27. *Id.*
28. Annotation, 8 A. L. R. 3d 1236, 1245 (1966). In reality, it seems unlikely that many defendants could convincingly fake such a high degree of intoxication. "Such pretense would require two qualities that are rare among criminals: superior acting ability and forethought." See Mandiberg, *supra* note 10, at 236-9.
29. Boettcher, *supra* note 7, at 54-6.
30. Roberts v. People, 19 Mich. 401, 417 (1870).
31. *Id.*
32. Boettcher, *supra* note 7, at 61.
33. To be entitled to a jury instruction for voluntary intoxication in North Carolina, a defendant must meet the relatively high burden of production of introducing evidence that intoxication rendered the defendant "utterly incapable" of forming the alleged *mens rea*. Comment, Mental impairment and *mens rea*: North Carolina recognizes the diminished capacity defense in *State v. Shank* and *State v. Rose*, 67 N C L Rev 67:1293-1315, 1989 at 130.
34. Paulsen, *supra* note 11, at 7.
35. Mandiberg, *supra* note 10, at 227.
36. Annotation, 8 A.L.R. 3d 1236, 1257 (1966).
37. Note, *supra* note 17, at 1685.
38. *Id.* at 1686.
39. Paulsen, *supra* note 11, at 8.
40. Some states that have applied an insanity test to the degree of intoxication required to negate *mens rea* are Minnesota, South Carolina, and Florida. Case Comment, Criminal law: chronic alcoholism as a defense to crime. Minn L Rev 61:901-20, 1977 at 902; Mandiberg, *supra* note 9, at 222; Massey. Intoxication as a defense against criminal charges in Florida, Crim Just Behavior 16:325-44, 1989.
41. People v. Nichols, 420 N.E. 2d 1166 (Ill. App. Ct. 1981).
42. Jones v. State, 362 So. 2d 1303 (Ala. Crim. App. 1978).
43. People v. Otis, 33 Cal. App. 3d 893, 109 Cal. Rptr. 444 (1973); People v. Flowers, 38 Cal. App. 3d 813, 113 Cal. Rptr. 701 (1974).
44. Massey, *supra* note 40, at 337.
45. People v. Hansen, 178 N.E. 2d 206 (Ill. App. Ct. 1961).
46. Coble v. State, 476 N.E. 2d 102 (Ind. 1985).
47. Mandiberg, *supra* note 10, at 227.
48. Bonnie and Slobogin, *supra* note 20, at 436.
49. *Id.*
50. Mandiberg, *supra* note 10, at 243.
51. *Id.* at 244.
52. *Id.* at 246.
53. Annotation, 8 A.L.R. 1236, 1240 (1966).
54. Comment, *supra* note 40, at 905.
55. *Id.* at 906.
56. Boettcher, *supra* note 7, at 35.
57. *Id.*
58. Comment, *supra* note 40, at 907; Grad, *supra* note 4, at 129.
59. Annotation. When Intoxication Deemed Involuntary so as to Constitute a Defense to Criminal Charge, 73 A.L.R. 3d 195 (1976) at 203.
60. *Id.* at 200.
61. *Id.* This caveat only applies to a resulting condition that could have been brought on by alcohol. If an alcoholic drink were drugged with a substance that produced effects beyond those attributable to alcohol, then the intoxication with respect to that substance could be involuntary.
62. *Id.* at 201.
63. *Id.* at 203.
64. DSM-III-R, *supra* note 1, at 128.
65. Annotation, 73 A.L.R. 3d 195, 204 (1976).
66. Reisner and Slobogin, *supra* note 1, at 497-501.
67. Massey, *supra* note 40, at 331.
68. Comment, *supra* note 40, at 917; Annotation, 73 A.L.R. 3d 195, 205 (1976).
69. Comment, *supra* note 40, at 910.
70. Nemerson, *supra* note 16, at 399.
71. *Id.* at 407.

72. *Id.* at 416.
73. Comment, *supra* note 40, at 912; Kadish S: Excusing crime. Calif L Rev 75:257-89, 1987 at 26.
74. Kadish, *supra* at 287.
75. Annotation, 73 A.L.R. 3d 195, 202 (1976).
76. Grad, *supra* note 4, at 130.
77. Annotation, 73 A.L.R. 3d 195, 224 (1976).
78. Kadish, *supra* note 73, at 287.
79. *Id.*
80. Annotation, 73 A.L.R. 3d 195, 202 (1976).
81. Kadish, *supra* note 73, at 288.
82. Massey, *supra* note 40, at 332.
83. *Id.* at 331.
84. *Id.* at 332.
85. Kadish, *supra* note 73, at 287.
86. *Id.* at 288.
87. Massey, *supra* note 40, at 333.
88. *Id.*
89. Kadish, *supra* note 73, at 286.
90. *Id.*
91. By holding the alcoholic responsible for his or her crimes, the state is not punishing an alcoholic defendant for the "mere status" of being an alcoholic, but for a separate act he or she committed against society. Otherwise, the punishment might be an unconstitutional violation for cruel and unusual punishment under the Eighth and Fourteenth Amendments. See Robinson v. California, 370 U.S. 660 (1962); Powell v. Texas, 392 U.S. 514 (1968).
92. Fingarette H: How an alcoholism defense works under the ALI insanity test, Int'l JL Psychiatry 2:299-322, 1979.
93. *Id.*
94. Annotation, 8 A.L.R. 3d 1236, 1239 (1966); Massey *supra* note 40 at 338.
95. DSM-III-R, *supra* note 1, at 331.
96. Boettcher, *supra* note 7, at 35.
97. *Id.*
98. *Id.*
99. See Mandiberg, *supra* note 10, at 269.