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## The Drunk, the Insane, and the Criminal Courts: Deciding What to Make of Self-Induced Insanity

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# THE DRUNK, THE INSANE, AND THE CRIMINAL COURTS: DECIDING WHAT TO MAKE OF SELF-INDUCED INSANITY\*

LAWRENCE P. TIFFANY\*\*

If a madman commit a felony he shall not lose his life for it, because his infirmity came by the Act of God; but if a drunken man commit a felony, he shall not be excused, because his imperfection came by his own default.

—Lord Bacon, 1630<sup>1</sup>

## I. INTRODUCTION

There are genuine cases of involuntary intoxication, temporary insanity, and automatism that are actuated by the combined influence of an ingested substance and a preexisting condition of the body or the mind.<sup>2</sup> Many of these cases have been categorized historically as a pathological reaction to alcohol or, what is the same thing, pathological intoxication. We now know that frequently these episodes are phenomena in which an underlying brain abnormality is aggravated by alcohol consumption causing temporary insanity and sometimes violence directed at others nearby.<sup>3</sup>

Some courts fail to realize that what contributes significantly to the distinctions between the legal categories of drunkenness and insanity (or automatism), and voluntary and involuntary intoxication is the fault of the actor—the actor's awareness of probable consequences—in bringing

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\* This article is based on work undertaken for the book, L. TIFFANY & M. TIFFANY, *THE LEGAL DEFENSE OF PATHOLOGICAL INTOXICATION—WITH RELATED ISSUES OF TEMPORARY AND SELF-INFLICTED INSANITY* (1990).

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1. F. BACON, *ELEMENTS OF THE COMMON LAWS OF ENGLAND* 29 (1630). The meaning of the archaic term "default" is fault, not omission or neglect.

2. Automatism is differentiated from insanity by the concept of "mental disease" and the differing perceptions of the need to confine those acquitted. For purposes of this Article, the two defenses of insanity and automatism are undifferentiated because the concept of fault as discussed here would work to force them both, along with involuntary intoxication cases, into the category of voluntary intoxication.

3. See generally L. TIFFANY & M. TIFFANY, *PATHOLOGICAL INTOXICATION—WITH RELATED ISSUES OF TEMPORARY AND SELF-INFLICTED INSANITY* (1990).

about the physical or mental condition. In what amounts to an extension of the same oversight, those courts treat involuntary intoxication, temporary insanity, or automatism resulting from knowing consumption of alcohol as inculpatory fault on the part of the drinker, regardless of whether any reason existed for that person to recognize the possibility of an atypical reaction to the alcohol. Other courts—most of them, fortunately—permit the jury to treat the actor's ensuing mental impairment as a factual basis for a possible defense, unless they additionally find that the actor was culpable in bringing about his or her own mental incapacity.

## II. A BRIEF CONSIDERATION OF THE CONCEPT OF FAULT IN THE EARLY DEVELOPMENT OF THE LAW OF INSANITY AND INTOXICATION

Were it not for the requirement of mental disease, intoxication, when severe enough, is tantamount to insanity. "[I]nsanity and gross intoxication are alike in being conditions of irrationality at the time of the offending act; . . . the two cases differ significantly as to ultimate culpability because of the differences in the *origin* of that irrationality."<sup>4</sup> What distinguishes the insanity defense from both voluntary and involuntary intoxication is the notion of "mental disease or defect," which must be the reason for the actor's inability to reason, his "irrationality." Early literature provides minimal support for an explicit link between the development of insanity law and intoxication law.<sup>5</sup> It is speculative, of course,

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4. H. FINGARETTE & A. HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 10 (1979) (emphasis in original).

5. The starting point from an historical point of view is the ancient position which did not regard mental disorder, or insanity, as having any bearing upon the matter of criminal guilt. Principles of criminal liability dating prior to the Norman Conquest persisted into the thirteenth century and "a man who has killed another by misadventure, though he may deserve a pardon, is guilty of a crime; and the same rule applies . . . to a lunatic . . . ." R. PERKINS & R. BOYCE, *CRIMINAL LAW* 950 (3d ed. 1982) (citing 3 W. HOLDSWORTH, *HISTORY OF ENGLISH LAW* 371 (5th ed. 1942)). Thus, as one might expect, insanity law did not antedate development of the concept of *mens rea*. Still,

[b]y the time of Henry III (1216-1272) it was not uncommon for the king to grant a pardon as a special act of grace for one who had committed homicide while of unsound mind [citing F. POLLOCK & F. MATTLAND, *HISTORY OF ENGLISH LAW* 480 (2d ed. 1899)] and in the reign of Edward I (1272-1307) although there was no change in the theory of guilt as a strict matter of law, such a homicide was regarded as pardonable to the extent that it entitled the defendant to a special verdict saying he committed the crime while mad and this practically insured the issuance of a pardon, which in time came to be granted as a matter of course. [citing 2 J. STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 151 (1883); 1 F. WHARTON & M. STILLE, *MEDICAL JURISPRUDENCE* ch. 26 (5th ed.

but it would seem that a definition of insanity which contained a no-fault limitation (other than "mental disease"), would force recognition that intoxication was an exception to insanity law and that involuntary intoxication was an exception to normal intoxication. The fault rationale appears at the very outset of intoxication law because it is so obvious, as the initial quotation betokens.

Hawkins referred to insanity law in terms of a limitation expressed as a "natural disability."<sup>6</sup> This would seem to exclude self-induced insanity, unless, of course, an underlying "natural disability" exacerbated by self-administered alcohol would serve. While there is little explicit discussion in the available writings of the early authorities, it is, nevertheless, clear that what they envisioned was a condition of a more-or-less permanent character such as "fixed" or "settled" insanity (brain damage) from alcohol abuse, not a merely temporary derangement. But they almost certainly recognized no other kind of condition, and if that is true, one hardly would expect them to discuss the subject of temporary insanity triggered by alcohol. It would be another century or two before it was

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1905)]. During the reign of Edward II (1307-1327) insanity was beginning to be recognized as a defense to crime, and life was spared although chattels were still forfeited, while in the time of Edward III (1327-1377) absolute "madness" became a complete defense to a criminal charge.

R. PERKINS & R. BOYCE, *supra*, at 950 (citing, *inter alia*, S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW 125 (1925) (some references omitted)). There is language in documents surviving from 1278 that may refer to the release to sureties of a defendant when "the King learns by inquisition taken by the justices to deliver Noting gaol [Nottingham jail] that Hugh hanged his daughter whilst suffering from madness, and not by felony or of malice aforethought." Calendar of Close Rolls, Edward I, 7 Edw. I 518 (1278). More extensive and critical material may be found in S. GLUECK, MENTAL DISORDER AND THE CRIMINAL LAW (1925) and F. WHARTON & M. STILLE, MEDICAL JURISPRUDENCE (5th ed. 1905). H. WEIHOFEN, MENTAL DISORDER AS A CRIMINAL DEFENSE 53 (1954) (footnote omitted) provides:

Insanity did not become a defense to crime in England until the beginning of the fourteenth century, and the authorities on the subject prior to the seventeenth century are so general in their terms that they can be regarded as little more than "antiquarian curiosities." The early institutional writers, Bracton, Littleton, and Fitzherbert, did not treat insanity as a defense to crime at all, and their discussion of it as an excuse to civil liability is fragmentary. Coke, writing in the seventeenth century, discussed the criminal liability of persons *non compos mentis*, but only in a casual manner.

*Id.*

What we now commonly refer to in describing the history of the insanity defense as the "wild beast" test was evidently developed in Arnold's Case, 16 How. St. Tr. 695, 765 (1724), in which reference is made to a defendant who "doth not know what he is doing, no more than an infant, than a brute, or a wild beast . . ." See generally Platt & Diamond, *The Origins and Development of the "Wild Beast" Concept of Mental Illness and Its Relation to Theories of Criminal Responsibility*, 1 J. HIST. BEHAV. SCI. 355 (1965).

6. 1 W. HAWKINS, PLEAS OF THE CROWN (1824).

known that alcohol could also trigger a temporary mental derangement equivalent to a psychotic state, a link that could not earlier be made to cases of temporary, self-induced insanity. Such cases could not arise without knowledge of potentiation or other interactive effect.

In the leading reported case involving intoxication in early English law, the court stressed the fault of the actor in becoming inebriated. Singh reports on the case of *Reniger v. Fogossa*:<sup>7</sup>

*Reniger v. Fogossa* argued in the Exchequer Chamber in the time of Edward VI in 1551, is the first reported case containing an early statement of the law. There it was said:

'If a person that is drunk kills another this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, he shall not be privileged thereby.'<sup>8</sup>

Singh continues: "Lord Bacon, writing in the seventeenth century, said substantially the same thing when he declared that if a drunken man commit a felony he shall not be excused because his imperfection came by his own default."<sup>9</sup> Hale also summarized these opinions in his statement that a drunken person "shall have no privilege by his voluntarily contracted madness, but shall have the same judgment as if he were in his right senses."<sup>10</sup> Thus, the very early conception was that a severely intoxicated person is mad but guilty nevertheless. Hale also added two qualifications to his generally accepted statement of the rules regarding intoxication as a defense:

1. That if a person by the unskillfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrenzy, as *aconitum* or *nux vomica*, this puts him into the same condition in reference to crimes as any other phrenzy and equally excuseth him.

2. That although the *simple* phrenzy occasioned *immediately* by drunkenness excuse not in criminals, yet if by one or more such practices an *habitual or fixed* phrenzy be caused though this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caused puts the man into the same condition in relation to crimes, as if the

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7. *Reniger v. Fogossa*, P.B., 1 Plowd. 1, 75 Eng. Rep. 1 (1551).

8. Singh, *History of the Defence of Drunkenness in English Criminal Law*, 49 LAW Q. REV. 528, 530 (1933) (footnote omitted).

9. *Id.* (citing F. BACON, ELEMENTS OF THE COMMON LAWS OF ENGLAND 29 (1630)).

10. 1 M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 32 (1778).

same were contracted involuntarily at first.<sup>11</sup>

While Singh viewed the first of these qualifying rules as reflecting previously existing law, he thought the latter might have been in advance of its time, though it is now universally recognized as substantially accurate.<sup>12</sup> As Blackstone expressed it, intoxication was an instance of "deficiency of will,"<sup>13</sup> and he refers to drunkenness as "artificial, voluntarily contracted [madness] or intoxication, which, depriving men of their [reason], puts them in a temporary phrenzy . . ."<sup>14</sup> Involuntary intoxication and insanity share the ancient characterization that neither is a "voluntarily contracted madness,"<sup>15</sup> but voluntary intoxication is. No corollary observation that includes the possibility of a category of voluntary insanity appears to exist; insanity is assumed to be an "involuntarily contracted madness," either because insanity is limited to mental disease (God-given) or because insanity law is made to serve the function of designating the mental state in question as one not voluntarily assumed. Thus, involuntary intoxication is allowed as a complete *mens rea* defense or excuse, but if the mental impairment is "voluntarily contracted madness," it is not given its full logical relevance. The term involuntary in this context includes both coercion and lack of awareness, at least as long as neither involves the culpability of the defendant. For reasons less clear, the courts will recognize even a "voluntarily contracted madness" as insanity if it has become permanent as in the case of "fixed" or "settled" insanity, even though it has its origins in alcohol or other drug abuse.<sup>16</sup> Perkins and Boyce have expressed the opinion that:

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11. *Id.* (emphasis added).

12. *See, e.g.,* *People v. Guillett*, 342 Mich. 1, 6, 69 N.W.2d 140, 142-43 (1955); *Myers v. State*, 174 P.2d 395, 400 (Okla. Crim. App. 1946).

13. 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 26 (1769).

14. *Id.* at 25.

15. *Reniger v. Fogossa*, P.B., 1 Plowd. 1, 75 Eng. Rep. 1 (1551).

16. Perhaps this recognition results not so much from fault-finding in the definition of crimes and defenses as from the futility of punishment, since the defective mental state is permanent.

There is another factor that is irrelevant to the meaning of fault. It is remarkable that, with rare exception, neither the common law cases nor the modern statutes make any distinction between whether the intoxicant was legal or illegal to possess or use. Thus, LSD is accorded the same significance as alcohol, and illegal drinking by a minor is treated the same as legal drinking by an adult. While the Model Penal Code does not make it explicit that "legal" drugs are to be equated with "illegal" drugs, it does make clear the equation of alcohol and other drugs: "The definition [of intoxication] . . . does not confine the term to alcoholic intoxication. The use of drugs is to be treated in the same way as the use of alcohol if the drugs similarly excite the passions or impede mental powers in connection with allegedly criminal acts." MODEL PENAL CODE § 2.08 comment 8 at 12 (Tent. Draft No. 9, 1959). "The great majority of states with revised codes addressing the issue have

[s]ince the refusal to place intoxication and insanity on the same basis (insofar as criminal incapacity is concerned) is due to the fact that the former is usually a "voluntarily contracted madness," it follows that they should be dealt with alike when the intoxication is involuntary, and such is the law . . . .<sup>17</sup>

The law of voluntary intoxication places limitations on the defense of lack of *mens rea*, and it results from a generalized conclusion that the actor was at fault in creating a high-risk situation of temporary insanity by gross intoxication which caused the lack of *mens rea*. As the courts have long said of voluntary intoxication, as distinct from pathological intoxication, "A man who voluntarily puts himself in condition to have no control of his actions, must be held to intend the consequences."<sup>18</sup> Thus the ancient common law rule was that "voluntary drunkenness is no excuse for crime."<sup>19</sup> It is thought that the very early common law refused to take any account of voluntary intoxication in determining criminal liability.<sup>20</sup> Factors underlying this no-defense rule may have included moralistic judgments regarding drunkenness,<sup>21</sup> although this is disputed,<sup>22</sup> and concern that drunkenness, if allowed to reduce criminal responsibility, either would be feigned<sup>23</sup> or would be resorted to as a shield by one planning the commission of a crime.<sup>24</sup> Concern that drunkenness could be feigned or simulated for the purpose of the commission of a particular offense appears repeatedly in American case law.<sup>25</sup> Even this broad statement of the intoxication rule would soon be

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included drugs within the intoxication provision." 1 MODEL PENAL CODE AND COMMENTARIES § 2.08 comment 4 at 366 (1985). See *id.* at 366 n.51, which lists seven states that do not mention drugs other than alcohol in their intoxication statutes. The contemporary courts are of the same opinion. 1 W. LAFAVE & A. SCOTT, SUBSTANTIVE CRIMINAL LAW § 4.10 n.2 (1986).

17. R. PERKINS & R. BOYCE, *supra* note 5, at 1001 (citing, *inter alia*, *Burrows v. State*, 38 Ariz. 99, 297 P. 1029 (1931); *Strickland v. State*, 137 Ga. 115, 72 S.E. 922 (1911); *People v. Robinson*, 2 Park. Crim. R. 235, 304 (N.Y. 1855); *Hanks v. State*, 542 S.W.2d 413 (Tex. Crim. App. 1976); *State v. Gilchrist*, 25 Wash. App. 327, 606 P.2d 716, 717 (1980)); *Pearson's Case*, 2 Lew. C.C. 144, 168 Eng. Rep. 1108 (1835).

18. *People v. Garbutt*, 17 Mich. 9, 19 (1868).

19. *Pearson's Case*, 2 Lew. C.C. 144, 168 Eng. Rep. 1108 (1835).

20. *Singh*, *supra* note 8, at 530.

21. *United States v. Drew*, 25 F. Cas. 913, 913 (C.C.D. Mass. 1828) (No. 14,993) ("the law not permitting a man to avail himself of the excuse of his own gross vice and misconduct . . .").

22. *Singh*, *supra* note 8, at 536-37.

23. M. HALE, *supra* note 10, at 32.

24. For a discussion of the development of common law principles regarding intoxication, see J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 529-38 (2d ed. 1960).

25. See, e.g., *State v. Kavanaugh*, 20 Del. (4 Penne.) 131, 53 A. 335 (1902).

modified to exclude its application to so-called specific intent crimes.<sup>26</sup>

Addressing the risk-creation justification, the drafters of the Model Penal Code stated the position that underlies their treatment of the intoxication defense and probably captures the common law position as well:

[T]here is the fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk.<sup>27</sup>

This rationale does not apply to a case of pathological intoxication unless the risk actually assumed by or fairly assignable to the actor bears some relation to the outcome:

Common experience teaches that consumption of too much alcohol causes the consumer to do foolish things, but it does not teach that the consumption of any alcohol, in however small a quantity, will have this effect. If, therefore, a man becomes wildly aggressive after consuming half a glass of beer . . . we cannot rely on the factor of common experience to fasten the blame upon him.<sup>28</sup>

The difference between voluntary intoxication and involuntary intoxication arises from the actor's mental state: it is the existence of fault in bringing on the intoxication, not the nature of the resulting incapacity. In the case of voluntary intoxication, the actor was at fault in bringing about his own claim of lack of *mens rea*, and in the case of involuntary intoxication, the actor was not at fault in doing so.

The defense of involuntary intoxication in the sense of force or fraud by other persons has infrequent but unanimous recognition in the cases, and it receives the same acceptance in the writings. At least since the dictum of Baron Parke in *Pearson's Case*, reflecting Hale's view that "[i]f a party be made drunk by stratagem, or the fraud of another, he is not responsible,"<sup>29</sup> the idea has existed that involuntary intoxication in the sense of inadvertent intoxication could be a complete defense. Development of insanity law seems to have always been motivated by recognition that the actor was not at fault for either his condition or his acts in that condition.<sup>30</sup> The development of the law of voluntary intoxication was

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26. *Roberts v. People*, 19 Mich. 401 (1870).

27. MODEL PENAL CODE § 2.08 comment 3 at 9 (Tent. Draft No. 9, 1959).

28. P. BRETT, AN INQUIRY INTO CRIMINAL GUILT 202 (1963).

29. *Pearson's Case*, 2 Lew. C.C. 144, 145, 168 Eng. Rep. 1108, 1108 (1835).

30. See, e.g., Brandt, *The Insanity Defense and the Theory of Motivation*, 7 LAW & PHIL. 123,



based on the contrary assumption that the actor was at fault. Some courts espouse that merely drinking is fault enough. Most, fortunately, will couch the limitation in terms of fault, that is, some level of recklessness or negligence on the part of the actor that a violent reaction or other criminal behavior is likely to follow ingestion of alcohol.

### III. EXPLORING SOME ILLUSTRATIVE CASES

Though the cases discussed here are not often currently acknowledged as the progenitors, modern cases that confront the question of the effect on criminal responsibility of self-induced, temporary insanity—most of which are pathological intoxication cases<sup>31</sup>—tilt in one of two directions, and they largely find their origins in two cases, *Choice*<sup>32</sup> and *Roberts*,<sup>33</sup> originally decided in the late 1800s. Moreover, both cases illuminate the issues generated by this phenomenon better than many of the more contemporary opinions and thus are more effective illustrations. The first line of cases eventually came to represent a judge-created outlaw view of alcohol and criminal liability, while the second champions a more traditional and personal principle of criminal responsibility, a responsibility resting on *mens rea*.

#### A. *The Fault (Culpability) Lies in Knowingly Drinking Alcohol: Strict Liability as to the Consequent Mental Incapacity (the Evilsizer Legacy)*<sup>34</sup>

In the 1860 Georgia case of *Choice v. State*,<sup>35</sup> the defendant was convicted of murdering a constable who had previously tried to serve papers on him. Testimony suggested the possibility of a pathological reaction to alcohol, although that term was not yet in use. Medical diagnoses differed at trial.<sup>36</sup> There was, however, no disagreement regarding the fact that friends had repeatedly observed the defendant engage in violent behavior when he drank—all subsequent to sustaining a head injury.

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136 (1988) (“The thesis I suggest about the insanity defense is that it is essentially the claim that the state of mind of the agent at the time of his unlawful act prevents conclusive inference from his act to a defective level of moral/legal motivation (as being its necessary condition), hence it provides a release from culpability.”).

31. L. TIFFANY & M. TIFFANY, *supra* note 3.

32. *Choice v. State*, 31 Ga. 424 (1860).

33. *Roberts v. People*, 19 Mich. 401 (1870).

34. *Evilsizer v. State*, 487 S.W.2d 113 (Tex. Crim. App. 1972).

35. 31 Ga. 424 (1860).

36. See, e.g., the discussion of inomania and mania-a-potu in *Choice*, 31 Ga. at 428.

The defendant's appeal rested on a number of grounds, but most centered on the trial court's instructions regarding the insanity defense,<sup>37</sup> and whether his conviction was against the weight of medical evidence. There was, indeed, considerable medical testimony offered to prove that a brain lesion combined with the use of alcohol could result in temporary insanity.

The critical instruction objected to by defense counsel but upheld by the court was the following:

But, though it is the general rule, that insanity is an excuse, yet, there is an exception to this rule, and that is, when the crime is committed by a party in a fit of intoxication, though the party may be as effectually bereft of his reason by drunkenness as by insanity produced by any other cause. For drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness was occasioned by the fraud, artifice or contrivance of another. *Nor does it make any difference, that a man by constitutional infirmity, or by accidental injury to the head or brain, is more liable to be maddened by liquor than another man. If he has legal memory and discretion when sober, and voluntarily deprives himself of reason, he is responsible for his acts in that condition.*<sup>38</sup>

*Choice* is an important case, and it appears that a subsequent line of cases has badly misunderstood *Choice*. The misunderstanding focuses on the use of the phrase "voluntarily deprives himself of reason." While the court does not dwell on the matter, it is a fair reading of the opinion to suppose that by "voluntarily" the court meant to include "knowingly." Viewed in this light, the court merely held that if the defendant was aware of the underlying condition and the likely effects on him of drinking alcohol, then his resulting temporary insanity was not a defense.<sup>39</sup>

What evidence supports this view of *Choice*? First, the court refers to the rule that "drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness was occasioned by the fraud, artifice or contrivance of another." Although a rule of ancient origin, even it encompasses the notion that intoxication can be considered involuntary in-

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37. *Id.* at 471.

38. *Id.* at 472 (emphasis added). See also *id.* at 455 (substantially the same form); *Thomas v. State*, 105 Ga. App. 754, 125 S.E.2d 679 (1962) (citing and applying the same language).

39. While juries are no longer instructed in terms of presumptions based on "natural and probable consequences" as they once were, *Sandstrom v. Montana*, 442 U.S. 510 (1979), the idea of requiring notice before fault is assigned is captured in the statement: "Massachusetts has never recognized voluntary intoxication as a complete defense to any crime because a person is presumed to intend the natural, probable, and usual consequences of his voluntary acts." 32 J. NOLAN, MASSACHUSETTS PRACTICE: CRIMINAL LAW § 645, at 465 (1976).

toxication if it is unknowingly, as distinct from coercively, induced. Second, the court quotes Justice Story on this point: “‘There are men,’ says Mr. Justice Story, ‘soldiers who have been severely wounded in the head especially, who well know that excess makes them mad; but if such persons willfully deprive themselves of reason, they ought not to be excused for one crime, by the voluntary perpetration of another.’”<sup>40</sup> “Willfully” and “who well knows” are terms of subjective fault and not of strict liability.

Third, ample evidence was presented in this case that the defendant’s reaction to alcohol after his head injury was consistently and extremely abnormal and that the defendant was aware of this behavior. One assignment of error on behalf of the defendant was that the court had not allowed evidence that the family of the defendant had long refused to allow him to possess deadly weapons.<sup>41</sup> The appellate court essentially treated the evidence exclusion as harmless in the sense of unnecessary or redundant evidence based upon the other testimony of the dangerousness of the defendant when he was drinking: “For what prudent family would not have dreaded to see deadly weapons in the hands, or about the person, of William A. Choice—one who, while in his cups, as all the proof demonstrates, was so dangerous, both to friend and foe?”<sup>42</sup> It is quite clear that the defendant knew that he reacted abnormally and violently when drinking, and the court stressed the evidence of actual realization.

The term “voluntary intoxication” even today carries too many meanings, and it ought not be surprising to find that it carried a broad range of meaning in 1860. But even Justice Story’s quoted language regarding actors “who well know that excess makes them mad” underscores the fact that it is the defendant’s awareness of the likely outcome that renders his drunkenness to be voluntary intoxication or, more accurately in pathological intoxication cases, renders the insanity or automatism defense unavailable and calls for the application, at most, of the law of voluntary intoxication.

In *Choice*, the court soundly rejected, on grounds entirely apart from lack of knowledge,<sup>43</sup> the defendant’s additional claim that his drinking,

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40. *Choice*, 31 Ga. at 481 (quoting *United States v. Drew*, 5 Mason’s U.S. Rep. 28. [25 F. Cas. 28 (C.C.D. Mass. 1828) (No. 14,993)]). This quote, attributed to Justice Story, is not in the available opinion version of *Drew*.

41. *Id.* at 464.

42. *Id.*

43. While the defense never directly requested a charge to the jury, counsel did suggest that the defendant was involuntarily intoxicated in the sense that we would say today that an alcoholic can-

not his reaction to drinking, was involuntary; the court did not at all discuss this issue in the sense of involuntary consumption of alcohol. The opinion deals with neither the question of the defendant's ability to abstain from drinking, which was rejected, nor with the "contrivance" of third parties issue.<sup>44</sup> Thus, the court's rejection of his defense comes to rest on the fault involved in his awareness of his condition based on repeated prior episodes.

It would seem at this point that the type of opinion authored in *Choice* could be dismissed as no more than a familiar example of an appellate court allowing a careless trial court's instruction to pass muster on review on the unarticulated ground that the error committed by omission of a specification to find facts, not underscored or seemingly even required at all by that charge, might equitably be ignored because those facts, relating to the actor's condition and the possible effects of drinking, were well known to him and to everyone else who knew him, and all this was obvious to judge and jury and eventual readers of the opinion. The doctrine of "harmless error" and the rule that all of the instructions taken together govern review of the adequacy of jury instructions, while neither fits tidily here, provide the best explanation of the outcome of the appeal.

To this day, some writers do not appear to understand that what the court held in *Choice*, as virtually every subsequent authority has construed it, was that the insanity defense was lost if the defendant not only voluntarily brought it on himself, but triggered it culpably or caused the condition to be manifested through his own fault, that is, while aware of his susceptibility. But some writers, as well as some courts, continue to misstate the rule by omitting any reference to fault:

Nor, it seems, is there any exemption from responsibility merely because a man, by reason of previous injury to his head or brain, or other constitutional infirmity, is more liable to be maddened by liquor than another man.<sup>45</sup>

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not refrain from drinking. To this, the court was quite clear: "Upon this proposition, however, I plant myself immovably; and from it, nothing can dislodge me but an Act of the Legislature, namely: that neither moral nor legal responsibility can be avoided in this way." *Id.* at 473.

44. Professor Hall seems to have read the case as holding that the defendant was liable even though the prior head injury led to a lack of control over drinking. Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1057-58 (1944). I view it not as a matter of voluntariness of the act, but as a matter of awareness of the consequences.

45. W. CLARK & W. MARSHALL, A TREATISE ON THE LAW OF CRIMES § 6.10, at 440 (M. Barnes ed. 7th ed. 1967).

*Choice* was the origin of that unfortunate statement of the law. The statement is wrong because it fails to limit its application to situations in which the actor is or has reason to be aware of his condition and the likely result of drinking.

Further research on the *Choice* decision unearthed something interesting. In *State v. Kavanaugh*,<sup>46</sup> a 1902 Delaware decision on a prosecution for larceny, the court held:

It is also settled that it makes no difference in the degree of responsibility for crime that a man, by a constitutional infirmity or by accidental injury to the head or brain, is more liable to be maddened by liquor than another man. If he has legal memory and discretion when sober, and voluntarily deprives himself of reason, *knowing of his infirmity*, he is responsible for his acts whilst in that condition.<sup>47</sup>

It is not clear whether this language, virtually identical to that in *Choice*, except for the italicized portion, was taken without citation from *Choice*, or whether both *Choice* and *Kavanaugh* took it from some earlier, common source. But the italicized portion of the *Kavanaugh* statement does not appear in the earlier statement quoted above from *Choice*. Was it added to *Choice* by *Kavanaugh* or deleted by *Choice* from a common source? We have been unable to find the language in any case or writing prior to *Choice*, and it would appear that *Choice* itself was the source and that later decisions such as *Wilson*,<sup>48</sup> discussed below, and *Kavanaugh*, which added a notice requirement, were direct modifications of the language of *Choice*. Two subsequent Georgia cases repeated the unmodified *Choice* language. In *Massey v. State*,<sup>49</sup> the defendant testified rather vaguely that he suffered losses of memory sometimes because of a prior blow to the head and his chief contention was that he had taken too much “dope” the day of the rape. In *Thomas v. State*,<sup>50</sup> it is not apparent from the opinion exactly how the issue was submitted to the jury. Neither case provides clarification of *Choice*.

While *Kavanaugh* may be the correct statement, it nevertheless appears to have both adopted the language of *Choice* and modified it significantly—modified it to what the *Choice* court should have said on those facts in the first place, as explained earlier. Part of the difficulty is that

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46. *State v. Kavanaugh*, 20 Del. (4 Penne.) 131, 53 A. 335 (1902).

47. *Id.* at 131, 53 A. at 336 (emphasis added).

48. *State v. Wilson*, 104 N.C. 868, 10 S.E. 315 (1889).

49. *Massey v. State*, 222 Ga. 143, 149 S.E.2d 118 (1966).

50. *Thomas v. State*, 105 Ga. App. 754, 125 S.E.2d 679 (1962).

the trial court used its instruction in *Choice* as a headnote that lends itself readily to repetition without a sufficient view of the facts actually involved in the case.<sup>51</sup> Repetition without reference to those facts is exactly what the Georgia Supreme Court did in one of the later Georgia cases<sup>52</sup> and as the Georgia Court of Appeals had done earlier.<sup>53</sup>

To reiterate, *Kavanaugh* did not even cite *Choice*. *Kavanaugh* is difficult to categorize because it refers both to actors who are ignorant of their infirmity and those who know of their infirmity. The *Kavanaugh* opinion did, however, cite the *American & English Encyclopedia of Law*,<sup>54</sup> which had appeared two years earlier in 1900. The *Encyclopedia* used language almost identical (with the knowledge requirement) to that used by both *Choice* (without the knowledge requirement) and *Kavanaugh*.<sup>55</sup>

In *State v. Wilson*,<sup>56</sup> an 1889 North Carolina case, the court approved an instruction that said in substance:

[I]f the prisoner was so mentally or physically constituted by nature, or because so constituted by a blow received on the head several years before, that when he drank liquor he lost his reason, and became furious, and unable to control himself, and the prisoner, *knowing this*, voluntarily drank liquor at the time of the homicide, and by the immediate effects of the liquor became frantic even to the extent that for the time being he did not know right from wrong, and in this condition slew the deceased without justification or excuse, he would be guilty of murder.<sup>57</sup>

The passage in the *Encyclopedia* was obviously taken from *Choice*, and just as obviously, the *Encyclopedia* added the modification “knowing of his infirmity” just as the North Carolina court had done in *Wilson* the year before publication of the *Encyclopedia*; it was that version of the law that the *Kavanaugh* court used. The editors of the *Encyclopedia* cited both *Choice* and *Wilson* for the proposition that knowledge is required (“knowing of his infirmity”) to defeat the defense, although *Choice* had omitted it. The contradiction of citing both *Choice* and *Wilson* for the

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51. *Massey*, 222 Ga. at 148-49, 149 S.E.2d at 123.

52. *Id.* at 143, 149 S.E. 2d 118.

53. *Thomas v. State*, 105 Ga. App. 754, 125 S.E.2d 679 (1962).

54. 17 THE AMERICAN & ENGLISH ENCYCLOPEDIA OF LAW (D. Garland & L. McGehee eds. 2d ed. 1900) [hereinafter ENCYCLOPEDIA].

55. ENCYCLOPEDIA, *supra* note 54, at 405.

56. 104 N.C. 868, 10 S.E. 315 (1889).

57. *Id.* at 872, 10 S.E. at 316 (emphasis added).

knowledge requirement was further compounded in the *Encyclopedia* by this passage:

*Rule Not Applicable Where Party Ignorant of Infirmity.*—If a person be subject to a tendency to insanity which is liable to be excited by intoxication, of which he is ignorant, having no reason from his past experience or from information derived from others to believe that extraordinary effects are likely to result from his intoxication, he ought not to be held responsible for such extraordinary effects; and so far as the jury believes that his actions resulted from these, and not from the natural effects of drunkenness or from previously formed intentions, the same degree of competency should be required to render him capable of entertaining the intent, or responsible for it, as when the question is one of insanity alone.<sup>58</sup>

It would seem that two cases, often taken as representing opposing views, *Choice* and *Roberts*, discussed in the next section, are cited for the same proposition. Indeed, most courts, such as *Wilson* and *Kavanaugh*, took that to be the law despite the careless instruction that the court approved in *Choice*.

The Texas courts, nevertheless, may have taken *Choice* further than it was ever intended. Arguably, they have adopted a line of cases consistent with their extraordinarily negative view of alcohol use in any context<sup>59</sup>—cases that seem to have gained some unacknowledged adherents. The defendant in *Evilsizer*<sup>60</sup> complained of the trial court's refusal to instruct the jury that it could find insanity based on a combination of pre-existing Korsakoff's syndrome<sup>61</sup> and alcohol consumption. The court seems to have held that pathological intoxication cannot be a defense even when the actor is not aware of the condition, a position that goes well beyond *Choice*.

[I]f the pre-existing condition of mind of the accused is not such as would

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58. ENCYCLOPEDIA, *supra* note 54, at 405 n.2 (citing *Roberts v. People*, 19 Mich. 401 (1870)).

59. See Tiffany & Anderson, *Legislating the Necessity Defense in Criminal Law*, 52 DEN. L.J. 839, 866-67 (1975), for a discussion of the Texas courts' view of alcohol consumption as a contributing factor giving rise to a situation in which the defendant claimed the necessity or choice-of-evils defense. In one case, the defendant injured himself after drinking and was denied the defense on a charge of driving under the influence of alcohol when, because he did not have access to a telephone, he tried to get himself to the hospital for treatment of the wound. *Butterfield v. State*, 167 Tex. Crim. 64, 317 S.W.2d 943 (1958).

60. *Evilsizer v. State*, 487 S.W.2d 113 (Tex. Crim. App. 1972).

61. Korsakoff's syndrome, named after a Russian neurologist, has been defined as "[p]ersonality characterized by a psychosis with polyneuritis, disorientation, muttering delirium, insomnia, illusions, and hallucinations . . . . Occurs as a sequel to chronic alcoholism but may be due to other intracranial pathology." TABER'S CYCLOPEDIA MEDICAL DICTIONARY 780 (C. Thomas ed. 14th ed. 1981).

render him legally insane in and of itself, then the recent use of intoxicants causing stimulation or aggravation of the pre-existing condition to the point of insanity cannot be relied upon as a defense to the commission of the crime itself.<sup>62</sup>

A Texas statute then provided:

Neither intoxication nor temporary insanity of mind produced by the voluntary recent use of ardent spirits, intoxicating liquor, narcotics, or a combination thereof, shall constitute any excuse for the commission of crime. Evidence of temporary insanity produced, however, by such use of ardent spirits, intoxicating liquor or narcotics, or a combination thereof, may be introduced by the defendant in mitigation of the penalty attached to the offense for which he is being tried.<sup>63</sup>

This statute merely states the usual rule of intoxication: voluntary (knowing) intoxication is not a defense even if it reaches the level of (temporary) legal insanity. This provides no support for *Evilsizer*. "The question presented by appellant is whether temporary insanity, produced by the combined effect of a pre-existing, weakened condition of the mind and the recent consumption of intoxicants, constitutes a defense to murder with malice,"<sup>64</sup> and the court held that it did not, without discussion of any fault limitation, either in general or on the facts of this case. The fault under *Evilsizer* would seem to lie in drinking.

How, in 1972, did such a view suddenly emerge? Part of the answer may lie in *Chapman v. State*,<sup>65</sup> cited as precedence in *Evilsizer*. In *Chapman* the defendant tried to rely on alcohol in combination with a pre-existing condition, syphilis, which it was argued had caused brain damage. The court stated, in an opinion by Judge Krueger upholding the defendant's murder conviction:

Appellant complains because the court declined to instruct the jury that if they believed from the evidence that appellant was affected with syphilis and that said disease, together with the recent use of ardent spirits, produced a state of temporary insanity to acquit him. We are of the opinion that appellant was not entitled to such an instruction. Although it may be conceded that he had syphilis, if this alone did not produce temporary insanity, but the voluntary recent use of ardent spirits in addition thereto caused him to become temporarily insane, then the recent use of ardent

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62. *Evilsizer*, 487 S.W. 2d at 116.

63. TEX. PENAL CODE ANN., § 36 (Vernon 1974) (repealed).

64. *Evilsizer*, 487 S.W. 2d at 115.

65. *Chapman v. State*, 136 Tex. Crim. 285, 124 S.W.2d 112 (1938).



spirits would be the direct and immediate cause of the claimed insanity, but for which he would not have been temporarily insane.

Consequently it follows that although he may have had syphilis or may have been in a weakened physical condition due to some other cause, yet if the recent use of ardent spirits was the primary cause which produced the temporary insanity, he would be in the same condition, in the eyes of the law, as a healthy, robust man who indulged in the use of ardent spirits and as a result became temporarily insane. It may be true that a person affected with syphilis is more susceptible to intoxication. This, however, would not constitute any defense, but under the law might be considered by the jury in mitigation of the punishment to be assessed.<sup>66</sup>

This opinion, upon which *Evilsizer* relied, makes no mention of any facts well known to the defendant, as in *Choice*, regarding known, dangerous susceptibility to alcohol by the defendant, which could be understood to temper the language used. In the subsequent *Chapman* opinion by Judge Graves, on a motion for rehearing, the court additionally observed germane to the facts of that case:

The State's theory was that appellant was drunk from the use of ardent spirits, and that *his usual habit and custom when drunk was to pull his pistol and attempt to kill some one against whom he had a real or fancied grudge . . . .* [T]estimony was persuasive in showing that appellant was not insane but only drunk, and *doing the same thing that he usually did when he was drunk.*<sup>67</sup>

While it would be better procedure to have submitted these questions to the jury more plainly, it is apparent that the court did not lay down a general rule regarding temporary insanity. The court held that the proposed instruction was properly denied in a case in which the defendant was well aware that his violent conduct was highly predictable, based on what appears to have been numerous previous occurrences. *Chapman*, just as *Choice*, was clearly a case of fault on the part of the defendant in bringing about his mental state.

The courts remain divided over the meaning of "involuntary" intoxication. In general terms, does "involuntary" in the law of involuntary intoxication mean only unwilling consumption, or does it also include lack of awareness as to what or how much is being consumed and the probable level of intoxication? As late as 1982, the Superior Court of Pennsylvania, without reliance on a statute, held that the defendant's

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66. *Id.* at 290-91, 124 S.W.2d at 115-16.

67. *Id.* at 295, 124 S.W.2d at 118 (emphasis added).

awareness of the effects of a combination of prescribed medicine and alcohol was not relevant on a charge of involuntary manslaughter because “[a]ppellant does not contend that he was coerced into taking either medication . . . or alcohol. If he was mistaken in his belief that he could withstand the effects of the combination, that hardly makes his having consumed them involuntary. An instruction on involuntary intoxication was not called for in this case.”<sup>68</sup>

In *Commonwealth v. Hicks*,<sup>69</sup> the defendant, following a bench trial, was convicted of murder in the third degree. He had been drinking heavily after taking an amphetamine-based diet pill prescribed by his physician. He chased his mother out of the residence, rampaged down the street, finally killing someone. Essentially the court seemed to affirm the conviction on the basis that the trial court found, as the trier of fact, that the alcohol alone was sufficient to account for his mental state.

While it is a statement uncalled for by the facts of the case, the Pennsylvania Supreme Court deliberately went out of its way to underscore the outlaw, strict liability view of alcohol and crime. In *Commonwealth v. Henry*, the court left no room to argue that it only intended for the rule to apply to actors who knew or should have known of the possible reaction:

Thus, the law has developed in Pennsylvania that a defendant cannot, as a matter of law, be insulated from criminal liability for his actions by claiming a mental state resulting from alcohol which was voluntarily ingested. Whether or not appellant was aware that he would suffer from the mental state is irrelevant, the fact that he voluntarily ingested the alcohol being determinative in depriving him of an insanity defense.<sup>70</sup>

It has proven surprisingly difficult to achieve uniformity in application of the principle enunciated by Bacon. Most courts have little trouble telling the difference between voluntary intoxication, involuntary intoxication, and insanity or automatism, but a few, as evidenced here by the language used in *Henry*, have obvious difficulty drawing the line. In the quest for finding fault on the part of the defendant, some courts do not distinguish between the act of drinking, awareness of the intoxicating nature of what is being ingested, awareness of the incapacitating results of

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68. *Commonwealth v. Todaro*, 301 Pa. Super. 1, 6, 446 A.2d 1305, 1308 (1982) (citation omitted).

69. 483 Pa. 305, 396 A.2d 1183 (1979). See also *Commonwealth v. Stewart*, 377 Pa. Super. 530, 547 A.2d 1189 (1988); *Commonwealth v. Sirbaugh*, 347 Pa. Super. 154, 500 A.2d 453 (1985) (the court took the same approach, citing *Hicks*).

70. *Commonwealth v. Henry*, 569 A.2d 929, 935 (1990).

that conduct, and the question of the probability of engaging in harmful conduct as a result of self-incapacitation. What varies is the courts' view of fault on the part of the actor in bringing about his mental condition at the time of the offense charged. Pennsylvania has joined those jurisdictions that seem to say it is not insanity if it is brought about by the hand of the actor, rather than by the fault of the actor. When will they say this? One could substitute the term "inadvertent overdose of insulin" for "alcohol" in the quoted passage and ask whether the Pennsylvania Supreme Court would hold to the same view.

*B. The Fault (Culpability) Consists of Negligence or Recklessness as to the Consequent Mental Incapacity: The Roberts Line of Cases*

In *Roberts v. People*<sup>71</sup> in 1870, the Michigan Supreme Court reversed an assault conviction because the trial court did not draw the now familiar distinction between intoxication as a defense to a general intent crime as opposed to a defense to a specific intent crime. Following a quarrel earlier in the day, the defendant inexplicably shot a man with whom he previously had been on friendly terms. Testimony was offered to prove that on one previous occasion, the defendant, after two ordinary doses of whiskey administered for neuralgia, had been "deprived of the use of his mental faculties."<sup>72</sup> The defendant's mother and grandmother were insane.

After determining that a new trial was required, the court went on to consider the second major issue raised by the defense. Counsel argued that the trial court erred in refusing to grant an insanity instruction which told the jury that the offense was excusable if caused by insanity "aroused and called into action by the stimulus he drank."<sup>73</sup> On what first seems like similar grounds to those who misconceive the *Choice* decision, the court opined that the defendant may have proved no more than alcohol sensitivity.

The court said that insanity thus caused by intoxication would be no defense.<sup>74</sup> "If, therefore, the intoxication was voluntary . . . any degree of insanity thus produced would be a part of the consequences of such

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71. *Roberts v. People*, 19 Mich. 401 (1870).

72. *Id.* at 405-06.

73. *Id.* at 407.

74. *Id.* at 422.

voluntary intoxication”<sup>75</sup> and would be treated as voluntary intoxication and its defensive effects limited as explained in the first holding.

*Roberts* is sometimes cited for the above proposition. However, the court took up an important point overlooked or ignored in *Evilsizer* and a few other later cases.

And if, from his past experience or information, he had, while sane and before drinking, on that day, *good reason to believe* that, owing to a dormant tendency to insanity, *intoxication would be likely to produce an extraordinary degree of mental derangement* beyond the effects likely to be produced upon persons clear of any such tendency, he must be held to have intended this extraordinary derangement as well as the intoxication and the other results produced by it.<sup>76</sup>

The court indicated that in such an event, the matter would be treated as voluntary intoxication with the effects already noted; this could defeat a showing of specific intent, but not general intent. The converse, and most important, proposition was put as follows:

*But if he was ignorant that he had any such tendency to insanity, and had no reason from his past experience, or from information derived from others, to believe that such extraordinary effects were likely to result from the intoxication; then he ought not to be held responsible for such extraordinary effects . . . . [T]he same degree of competency should be required to render him capable of entertaining, or responsible for, the intent, as when the question is one of insanity alone . . . .*<sup>77</sup>

The *Roberts* rule is that the actor must not be culpable with respect to the possible or probable abnormal reaction from ingesting alcohol. It is not enough to defeat the defense of pathological intoxication to “cause the condition of one’s own defense”;<sup>78</sup> to lose the exculpatory effects of insanity, the self-inflicted insanity must be unleashed with some level of culpability on the part of the actor.

Thus, a conventional recounting of the law that “voluntary intoxication is not a defense even if it results in insanity at the time of the act,” can have diverse meanings, depending upon the facts to which it is applied. Voluntary drinking in the sense of knowingly consuming what is known to be an alcoholic beverage can be confused with awareness of the result of drinking, whether that result is normal intoxication or a patho-

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75. *Id.*

76. *Id.* (emphasis added).

77. *Id.* at 422-23 (emphasis added).

78. Robinson, *Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985).

logical reaction to alcohol. If a person has an underlying, pre-existing condition which may trigger an atypical reaction, then this is a different situation. Most courts realize that fault is required, but a few do not or may not, depending upon how one reads the cases.

*Commonwealth v. Brennan*<sup>79</sup> is a modern case that deals with the combination of an underlying mental disease and alcohol consumption. The defendant was convicted of first degree murder for killing his wife. He was an alcoholic who had abstained from alcohol for eleven years, but the victim's affair with another person left him depressed. The defendant drank heavily and took both Valium and marijuana the day of the killing. On the issue of criminal responsibility, the defense expert testified that "when Brennan drank he displayed aberrant, unpredictable behavior, emotional reactions, and violence, none of which occurred when Brennan was not drinking."<sup>80</sup> The trial court ruled inadmissible the expert's opinion regarding the defendant's criminal responsibility. The court on appeal reversed on this point:

The expert's testimony would have warranted a finding that the defendant's mental disease or defect, organic brain syndrome, was the cause of his lack of criminal responsibility. Although Dr. Weisman was of the opinion that the defendant had the capacity to understand the nature of his conduct when he did not consume alcohol, and that his conduct when alcohol-free is unaffected by the mental condition or defect, he was nevertheless of the opinion that the defendant suffered from an underlying disease or defect, apart from the alcoholism, which was the cause of his lack of criminal responsibility. The jury should have been permitted to hear this testimony . . . . [L]ack of criminal responsibility is established even if voluntary consumption of alcohol activated the illness, unless he knew or had reason to know that the alcohol would activate the illness.<sup>81</sup>

The court also noted that the same issue had previously arisen. "In *Commonwealth v. Shelley*,<sup>82</sup> . . . the court observed that the instruction given 'did not treat adequately the situation in which voluntary alcohol consumption unforeseeably activates a latent mental disease or defect unrelated to alcohol use.'<sup>83</sup> Of course, the jury, on the defendant's own evidence, would be warranted in finding the defendant guilty despite his temporary mental condition because of his awareness of his reaction to

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79. *Commonwealth v. Brennan*, 399 Mass. 358, 504 N.E.2d 612 (1987).

80. *Id.* at 360, 504 N.E.2d at 614.

81. *Id.* at 362-63, 504 N.E.2d at 615-16.

82. *Commonwealth v. Shelley*, 381 Mass. 340, 350, 409 N.E.2d 732, 738 (1980).

83. *Brennan*, 399 Mass. at 363, 504 N.E.2d at 615-16.

alcohol. It is, nevertheless, the jury's function to do so under proper instructions which the trial court did not give in this case.

A century after the *Roberts* decision was handed down, it is its dictum that stands out as important. In *People v. Kelley*,<sup>84</sup> the court reversed a robbery conviction due to a failure to instruct correctly on voluntary intoxication in relation to a specific intent crime. "The Supreme Court ruled [in *Roberts*] that if the jury found that Roberts knew that intoxication would trigger a dormant tendency to insanity, then insanity would be a defense only if the defendant was insane without regard to his intoxication."<sup>85</sup> The court in *Kelley* quotes much of the same language set out earlier in *Roberts*:<sup>86</sup>

The *Roberts* opinion states only that intoxication may not be relied upon to establish a defense *other* than intoxication when the actor knows before he begins to drink that drinking may cause a condition which would create a factual basis for that defense. This did not create an exception to the intoxication defense itself.<sup>87</sup>

#### IV. CONCLUSION

Absent culpability on the part of the actor in bringing about the condition of temporary insanity, why do some courts appear to reject the concept of blameless, albeit self-induced, temporary insanity as a legally useful category when its phenomenological existence is not seriously in dispute?<sup>88</sup> One can only speculate why some courts do. To expand, or to be perceived as expanding, defenses today, especially those involving alcohol and insanity, is politically dangerous. The sentiment in this country is clearly turning ever more zealously against alcohol and other drugs. Thus, some jurisdictions may cast aside for political reasons a defense which ought to be recognized. Those courts will convict and imprison people who manifest not "immorality," or even recklessness, but a pernicious medical malady, a susceptibility, sufficiently singular as to be almost certainly unfamiliar to many judges. Because alcohol is often implicated as a precipitating factor, the reluctance of courts to give the defense any credence or status is even greater lest it appear that one

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84. *People v. Kelley*, 21 Mich. App. 612, 176 N.W.2d 435 (1970).

85. *Id.* at 625, 176 N.W.2d at 441.

86. *Roberts v. People*, 19 Mich. 401, 422 (1870); *Kelley*, 21 Mich. App. at 625 n.19, 176 N.W.2d at 441 n.19.

87. *Kelley*, 21 Mich. App. at 625, 176 N.W.2d at 441.

88. Tiffany & Tiffany, *Nosologic Objections to the Criminal Defense of Pathological Intoxication: What Do the Doubters Doubt?*, 13 INT'L J. LAW & PSYCHIATRY 49 (1990).

favors “letting drunks get away with murder,” figuratively or literally, with predictable adverse political consequences for those judges. Ad hoc explanations exist for other cases as the discussion has shown, but ne-prohibitionist attitudes may be part of the problem.

A second explanation lies in the relative ignorance, and hence mistrust, of courts regarding claims that alcohol consumption could inadvertently lead to insanity without fault. Both the *Choice/Evilsizer* and *Roberts* line of decisions have their contemporary counterparts.<sup>89</sup> It seems impossible to formulate an “objective” means to critique these approaches. The legal situation is reminiscent of the disparate contemporary views of the old notion at common law,<sup>90</sup> still discernable in the cases,<sup>91</sup> known as the moral wrong theory of mistake law. This theory holds liable, despite a mistake and a concomitant failure to possess a necessary mental state, those who were up to no good to begin with, though doing nothing illegal or even particularly dangerous. Perhaps in the future the law will more clearly develop in line with traditional notions of fault. This will require the courts to gain a better understanding that self-induced mental incapacity—whether through alcohol or other external means—does not equate with fault, though fault may be involved in some cases. Just as surely, in other cases, though there may be self-inducement, there is no fault at all on the part of the actor other than drinking, and it is difficult to understand why the actor would not be entitled to defensive instructions reflecting that view.

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89. L. TIFFANY & M. TIFFANY, *supra* note 3.

90. *Regina v. Prince*, 2 L. R.-Cr. Cases Res. 154 (1875).

91. *United States v. Feola*, 420 U.S. 671 (1975).