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SPECIAL PROJECT
DRUGS AND CRIMINAL RESPONSIBILITY

I. INTRODUCTION

With the use of alcohol and other drugs becoming ever more prevalent in today's society, the law must adjust to a variety of problems. One response has been the imposition of severe criminal penalties against those who use drugs or commit crimes to support their increasingly expensive use of various drugs. An often overlooked problem, however, and one that undoubtedly deserves greater critical analysis and legal response, is that of the person who commits crimes *while under the influence* of alcohol or other drugs.

This Special Project deals with the interaction between drugs and criminal responsibility and addresses the question of when may a person who commits a crime under the influence of a drug plead that influence as a defense to criminal responsibility. The Special Project initially explores the effects of the more commonly encountered drugs upon the human body. The Special Project then undertakes to examine intoxication as a defense, the insanity defense, and various constitutional issues that may be raised by criminal defendants. Within each area, the Special Project sets forth the traditional analytical framework and attempts to apply it to the problems of persons under the influence of drugs. The Special Project then concludes that analysis is seriously lacking in many of the areas involved and contends that either the courts or the legislatures must increase their expertise in these areas and respond to these potentially serious flaws in the criminal legal system.

II. DRUGS AND THEIR EFFECTS

A. Cocaine

Cocaine is the active alkaloid found in coca leaves *(Erythroxylon coca)*, which contain 0.5% to 1.5% of the drug by weight.[1]

1. NATIONAL CLEARINGHOUSE FOR DRUG ABUSE, INFORMATION REPORT SERIES No. 11, COCAINE 3 (1972) [hereinafter cited as REPORT SERIES].

Cocaine was first isolated in the mid-nineteenth century and used as a local anesthetic. Although the Indians of South America chew coca leaves to ingest cocaine, the drug is usually not consumed in this fashion. Instead, it appears as a white crystalline powder that may be sniffed or dissolved in water and injected.

Cocaine stimulates the central and sympathetic nervous systems,[2] producing increased breathing and basal metabolic rates. When initially administered, the drug causes vasoconstriction that results in a rise in blood pressure.[3] In larger doses, cocaine may produce headache, pallor, cold sweat, rapid and weak pulse, tremors, fast and irregular shallow breathing, nausea, convulsions, and unconsciousness.[4] In high doses, the drug may be lethal. "Cocaine is toxic because the central stimulation that is the immediate effect of the drug is followed by depression of the higher nervous centers."[5] Death results from respiratory failure when the medullary centers of the brain are depressed. Acute cocaine poisoning may be treated with an intravenous, short-acting barbiturate.[6]

Although no tolerance is developed to cocaine a user may initially need several doses to become sensitized to the drug's effects. Because cocaine is psychologically, not physically, addicting, abstinence produces no traumatic physical symptoms comparable to narcotics withdrawal.[7] Abstinence, however, may result in psychological symptoms such as depression and craving for the drug.

The psychophysiological effects of cocaine are similar to those of the amphetamines[8]—excitation, restlessness, euphoria, and feelings of heightened physical, sexual, and mental power.[9] Chronic inhalation in moderate doses results in nervousness, insomnia that induces physical exhaustion and mental confusion, weight loss, de-

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2. C. KORNETSKY, PHARMACOLOGY 216 (1976).

3. REPORT SERIES, *supra* note 1, at 7.

4. L. GRINSPOON & J. BAKALAR, COCAINE 111 (1976).

5. DeLong, *The Drugs and Their Effects*, in DEALING WITH DRUG ABUSE 105 (1972). A combination of heroin or morphine and cocaine, called a "speedball," is sometimes taken to counteract the abrupt emotional shift from euphoria to depression. REPORT SERIES, *supra* note 1, at 10.

6. REPORT SERIES, *supra* note 1, at 276.

7. E. BRECHER & EDITORS OF CONSUMER REPORTS, LICIT AND ILLICIT DRUGS 276 (1972) [hereinafter cited as E. BRECHER].

8. O. RAY, DRUGS, SOCIETY, AND HUMAN BEHAVIOR 275-76 (2d ed. 1978). Both cocaine and amphetamines act as stimulants. Cocaine, however, has a shorter duration of action. When the drugs are inhaled, as opposed to being administered intravenously, their psychological effects may differ. *Id.*

9. L. GRINSPOON & J. BAKALAR, *supra* note 4, at 95-96; REPORT SERIES, *supra* note 1, at 7.

terioration of the nasal mucous membranes and cartilage,[10] and sometimes mild paranoia.[11] In addition, frequent and heavy cocaine use results in anxiety, noise hypersensitivity, graphobia (compulsive scribbling), memory disturbances, fast pulse, and impotence.[12] Chronic administration of large doses produces a characteristic paranoid psychosis[13] that may cause acts of violence.[14] "In this state hallucinations are not uncommon and abnormal sensations induced by cocaine in the peripheral nerves may convince the hyperexcited user that animals are burrowing under his skin."[15] In the later stages of chronic cocaine intoxication, there may be twitching, cold in the extremities, spontaneous abortion, and even paralysis.[16]

B. Depressants

1. Barbiturates

The barbiturates[17] are a large class of central nervous system depressants[18] that are derived from barbituric acid.[19] The central

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10. Because cocaine causes coustriction of nasal blood vessels, steady moderate use of the drug commonly leads to rhinitis. Initially, cocaine stimulates respiration and dries the nasal mucosa; this effect then rebounds into congestion. Perforation of the septum may occur in extreme cases. L. GRINSPOON & J. BAKALAR, *supra* note 4, at 134. "The most common symptoms are runny, clogged, inflamed, swollen, or ulcerated noses which may be painfully sensitive and frequently bleed." *Id.*

11. *Id.* at 130.

12. *Id.* at 137.

13. E. BRECHER, *supra* note 7, at 275.

14. M. GERALD, PHARMACOLOGY 291 (1974). "The behavior of individuals in a hyperexcited, toxic cocaine state is often irrational and violent, much more so than in the case of the heroin addict." REPORT SERIES, *supra* note 1, at 8.

15. *Id.* These sensations, known as formication, are commonly called "cocaine bugs."

16. L. GRINSPOON & J. BAKALAR, *supra* note 4, at 137.

17. Slang terms for barbiturates include "Barbs," "Blockbusters," "Bluebirds," "Blue Devils," "Blues," "Christmas Trees," "Downers," "Green Dragons," "Mexican Reds," "Nebbies," "Nimbies," "Pajaro Rojo," "Pink Ladies," "Pinks," "Rainbows," "Red and Blues," "Redbirds," "Red Devils," "Reds," "Sleeping Pills," "Stumbles," "Yellow Jackets," and "Yellows." DRUG ENFORCEMENT, July 1979, at 39.

18. More than 2,500 depressants have heen synthesized, but only about a dozen are widely used today. Harvey, *Hypnotics and Sedatives,* in THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 102 (5th ed. L. Goodman & A. Gilman 1975). The barbiturates are usually grouped according to duration and activity. Barbital and phenobarbital (Veronal and Luminal) are long-acting (six to ten hours), amobarbital (Amytal) is intermediate (five to six hours) in duration, and pentobarbital and secobarbital (Nembutal and Seconal) are short-acting (two to three hours). O. RAY, *supra* note 8, at 291.

19. In 1864, Adolph von Baeyer first prepared barbituric acid (malonylurea), which is not a central nervous system depressant. The barbiturates are formed through substitutions at position five of the malonylurea molecule. In 1903, Fischer and von Mering introduced the first medically useful barbiturate, diethylbarhituric acid or barbital (Veronal). In 1912,

nervous system depression caused by barbiturates produces symptoms that range from mild sedation to coma and death.[20] The drugs' effect is directly influenced by the user's expectations and the physical or social setting in which the drug is ingested.[21] For instance, a dose of 220 mg. of secobarbital may induce either sleep or a state of disinhibition euphoria depending upon the individual's mental state and his environment.[22] Short duration barbiturates produce a barbiturate "high" that is very similar to alcohol intoxication;[23] higher doses produce coma and death.[24] All barbiturates produce an effect known as a barbiturate "hangover" that is characterized by depressed mood and slowed muscular performance lasting up to eighteen hours after the drug is ingested.[25] If the drug is taken in conjunction with alcohol, there is an additive effect[26] that may precipitate death by respiratory failure. The effects of chronic barbiturate use closely resemble those of chronic alcohol use and include disorientation, mental confusion, and depression.[27] Abrupt withdrawal of barbiturates from dependent users results in a psychosis that clinically resembles alcoholic delirium tremens.[28] The psychosis, characterized by confusion, disorientation to time and place, delusions, and visual and auditory hallucinations, is followed by a deep sleep.[29]

Loewe, Juliusberger, and Impens independently and simultaneously introduced phenobarbital (Luminal) into medicine. Although many other barbiturates have been synthesized, barbital and phenobarbital still are used in medical practice. Harvey, *supra* note 18.

20. E. BASSUK & S. SCHOONOVER, THE PRACTIONER'S GUIDE TO PSYCHO-ACTIVE DRUGS 147 (1977).

21. R. JULIEN, A PRIMER OF DRUG ACTION 52 (1975).

22. D. WESSON & D. SMITH, BARBITURATES: THEIR USE, MISUSE, AND ABUSE 28 (1977). In one study, researchers reported that a group of violent youthful offenders attributed their aggressive activities to an attempt to counter the depressive effects of barbiturates. They literally fought to stay awake. O. RAY, *supra* note 8, at 293.

23. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 148. As with alcohol intoxication, there is a reduction in the ability to make accurate judgments and motor control is decreased. O. RAY, *supra* note 8, at 65.

24. E. BASSUK & S. SCHOONOVER, *supra* note 20.

25. W. EVANS & J. COLE, YOUR MEDICINE CHEST 53 (1978). The barbiturate "hangover," however, does not include the nausea and headache of the alcohol hangover. *Id.*

26. PHYSICIANS' DESK REFERENCE 1083 (34th ed. 1980). When the combined effect of two drugs is the simple algebraic sum of their individual actions, there is an "additive" effect. C. KORNETSKY, *supra* note 2, at 16.

27. MARTINDALE: THE EXTRA PHARMACOPOEIA 770 (27th ed. A. Wade 1977) [hereinafter cited as MARTINDALE].

28. O. RAY, *supra* note 8, at 293.

29. *Id.*

2. Chloral Hydrate

Chloral hydrate was first synthesized in 1832 and is the oldest member of the hypnotic group of drugs.[30] Its effects are similar to those of barbiturates, and in therapeutic doses it produces a sound sleep.[31] Adverse effects include nightmares, disorientation, and paranoid bebavior.[32] As with chronic use of barbiturates or alcohol, addiction may develop, and sudden withdrawal may result in delirium.[33] Simultaneous administration of alcohol or barbiturates enhances the sedative effects of the drug.[34]

3. Glutethimide

Glutetbimide (Doriden) was introduced in 1954 as a "safe" barbiturate substitute without the potential of addiction.[35] Within ten years, however, this characterization proved to be incorrect—the potential of addiction and severity of withdrawal symptoms were shown to be equal to those of barbiturates.[36] Furthermore, long-acting effects of glutethimide, which make it exceptionally difficult to reverse an overdose, negated the drug's potential as a barbiturate substitute.[37]

4. Ethyl Alcohol

Because alcohol is a chemical that alters normal biological processes, it is properly classified as a drug.[38] Alcohol depresses the central nervous system (CNS), and its effect is in direct proportion to the level of alcohol in the blood.[39] The drug first affects those

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30. Harvey, *supra* note 18, at 126-27.
31. MARTINDALE, *supra* note 27, at 753.
32. Harvey, *supra* note 18, at 128.
33. *Id.*
34. MARTINDALE, *supra* note 27, at 753.
35. DRUG ENFORCEMENT, July 1979, at 22.
36. Harvey, *supra* note 18, at 133.
37. *Id.*; DRUG ENFORCEMENT, July 1979, at 22.
38. R. FORNEY & F. HUGHES, COMBINED EFFECTS OF ALCOHOL AND OTHER DRUGS 6 (1968).
39. O. RAY, *supra* note 8, at 144. Ray summarizes the behavioral effects expected in moderate drinkers at particular blood alcohol percentages: 0.05—lowered alertness, usually good feeling, release of inhibitions, impaired judgment; 0.10—slowed reaction times and impaired moter function, less caution; 0.15—large, consistent increases in reaction time; 0.20—marked depression in sensory and motor capability, decidely intoxicated; 0.25—severe moter disturbance, staggering, sensory perceptions greatly impaired, smashed; 0.30—stuporous but conscious—no comprehension of the world around them; 0.35—surgical anesthesia, about LD-1, minimal level causing death; 0.40—about LD-50. *Id.* at 146. Blood levels, however, do not explain all behavioral effects. Other factors, including the ethnic origin of the

parts of the brain involved in the most highly integrated functions.[40] Release of the cortex from its integrating and inhibitory control results in disorganized thought processes and disruption of motor control.[41] Recent memory, ability to concentrate, and discrimination are diminished.[42] Depending on the history of the particular individual, behaviors that were previously suppressed may be released.[43] In this initial period, users often become more loquacious, extroverted, confident, and aggressive, but mood swings are uncontrolled and emotional outbursts are frequent.[44] The user feels that his performance in both verbal and manual tasks is enhanced, but tests show that efficiency in such tasks is decreased.[45] Consequently, the capacity for prudent judgment is diminished.[46] At higher blood-alcohol levels increased CNS depression may produce incoordination, confusion, disorientation, stupor, anesthesia, coma, or death.[47]

Small doses of alcohol may induce a sudden, brief, and profound intoxication in some individuals who have poor impulse control and chronic anxiety.[48] This pathological intoxication is characterized by confusion, disorientation, delusions, visual hallucinations, increased activity, impulsivity, aggressiveness, and rage reactions.[49] The episode ends with a deep sleep, and usually the person does not remember the event when he awakens.[50]

A few chronic alcoholics experience a disintegration of personality structure, and in such cases episodic loss of control is frequent.[51] A syndrome closely resembling schizophrenia, with paranoid delusions and hallucinations, is evident in some alcoholics.[52] An acute alcoholic hallucinosis, consisting of illusions, auditory and olfactory hallucinations, and paranoia, may follow an alcoholic's

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drinker, his social environment, and his expectations, contribute to the degree of intoxication. R. FORNEY & F. HUGHES, *supra* note 38, at 31.

40. Ritchie, *The Aliphatic Alcohols*, in THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 137-38 (5th ed. L. Goodman & A. Gilman 1975).

41. *Id.*

42. *Id.*

43. W. CLARK & J. DEL GIUDICE, PRINCIPLES OF PSYCHOPHARMACOLOGY 510 (1970).

44. *Id.*; Ritchie, *supra* note 40, at 137-38.

45. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 267.

46. R. FORNEY & F. HUGHES, *supra* note 38, at 33.

47. W. CLARK & J. DEL GIUDICE, *supra* note 43, at 510.

48. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 268.

49. *Id.*

50. *Id.* at 269.

51. *Id.*

52. *Id.*

prolonged period of drinking. In contrast with the experience of delirium tremens, however, there is excellent memory of the psychotic episode.[53] Nevertheless, memory may be impaired through the phenomenon of alcohol-induced "blackouts."[54] In one laboratory experiment, sober alcoholics were unable to recall conversations they had engaged in while intoxicated.[55]

Alcohol is an addictive drug with chronic ingestion producing a state of physical dependence.[56] Degree and duration of intoxication determine the intensity of a withdrawal syndrome,[57] which may range from a mild hangover to delirium tremens.[58] The latter syndrome occurs in only five percent of alcoholics developing withdrawal symptoms.[59] The initial state of withdrawal is characterized by restlessness, irritability, and tremor followed by a fitful sleep. The next stage includes illusions, visual and tactile hallucinations, and disorientation as to time and place.[60] By the third day of withdrawal, the alcoholic may become terrified of his hallucinations and experience severe delirium.[61]

Mixing alcohol and other drugs may result in additive depressant effects.[62] This group of drugs includes barbiturates, CNS depressants, narcotics, phenothiazines, sedatives and hypnotics, and tricyclic antidepressants.[63]

5. Methaqualone

Methaqualone, an addictive, nonbarbiturate sedative-hypnotic, was introduced in the United States in 1965 under the brand names Quaalude and Sopor.[64] Except for a greater loss of motor coordination, the effects of the drug are similar to those of other sedative-hypnotics.[65] A "high" or "down" may result from mild overdosage.[66] With severe overdosage, delirium and convulsions

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53. *Id.* at 268.
54. H. WALLGREN & H. BARRY, 1 ACTIONS OF ALCOHOL 342 (1970).
55. *Id.*
56. C. KORNETSKY, *supra* note 2, at 155-56.
57. *Id.*
58. *Id.*
59. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 271-72.
60. *Id.*
61. C. KORNETSKY, *supra* note 2.
62. J. JAMES, M. BRAUNSTEIN, A. KARIG, E. HARTSHORN, A GUIDE TO DRUG INTERACTIONS 11 (1978).
63. *Id.*
64. O. RAY, *supra* note 18, at 289.
65. *Id.* at 290.
66. Harvey, *supra* note 18, at 131.

may occur,[67] and in one reported case a dose of 400 mg. produced amnesia.[68] A popular view among abusers of the drug is that it is an aphrodisiac. Members of the drug culture also liken the effects of the drug to those of heroin.[69]

C. *Hallucinogens*

From a clinical perspective there is no clear dividing line between hallucinogens and other drugs. In toxic doses or under certain conditions, many drugs can induce hallucinations, illusions, delusions, and paranoid ideation.[70] Legal terminology arbitrarily defines as hallucinogenic lysergic acid diethylamide (LSD) and related drugs that produce states of altered perception.[71] Although the pharmacological and physiological bases of hallucinogenic potency remain a scientific puzzle,[72] the actual effects upon man have been explored.[73]

1. LSD

LSD was first synthesized from ergot fungus in 1938;[74] its hallucinogenic properties were discovered in 1943.[75] Prior to 1962, LSD was little known and available only on a small scale. In 1962, however, new restrictive Federal Drug Administration regulations led to a substantial increase in illegal private manufacture of LSD. The widespread public controversy over the drug served to publicize and launch its greater use.[76]

LSD is a potent compound[77] without odor, color or taste.[78]

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67. *Id.*

68. *Id.*

69. *Id.*

70. Jaffe, *Drug Addiction and Drug Abuse,* in THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 309 (5th ed. L. Goodman & A. Gilman 1975).

71. *Id.*

72. Brawley & Duffield, *The Pharmacology of Hallucinogens,* in 24 PHARMACOL. REVS. 31 (1972).

73. R. DEBOLD & R. LEAF, LSD, MAN AND SOCIETY (1958).

74. Known for centuries in Europe, Ergot fungus *(Claviceps purpurea)* grows on grain. The fungus is easily detectable, and the grain is usually destroyed, since the ergot remains active in bread made from contaminated grain. LSD was synthesized from ergot by A. Hofmann at Sandoz Laboratories, Switzerland. For further ergot information, see E. BRECHER, *supra* note 7, at 346.

75. Hoffmann, *Psychotomimetic Drugs: Chemical & Pharmacological Aspects,* 8 ACTA PHYSIOLOGICA ET PHARMACOLOGICA NEERLANDICA 240 (1959).

76. E. BRECHER, *supra* note 7, at 366.

77. Doses as low as .03 milligram have been found effective, while the usual dose is .05 milligram. O. RAY, *supra* noto 8, at 350.

78. *Id.* at 356.

Readily absorbed when taken orally, the drug produces initial sensations in twenty to eighty minutes depending upon dosage and individual sensitivity.[79] The physiological effects of LSD usually consist of pupillary dilation, piloerection (gooseflesh), tachycardia (accelerated heart rate), muscular weakness, tremor, nausea, numbness, and hyperthermia.[80] Other possible reactions include hallucinatory effects and distortions in sensory perception[81] and hypersensitivity to stimuli.[82] In addition, synesthesias, the overflow from one sense to another, may occur,[83] along with space and time disorders and abnormal body sensations.[84] Amphetamines and stimulants prolong and intensify the effects of LSD, while parenteral barbiturates abort the action.[85]

Continued use of LSD rapidly produces tolerance and requires a greater dose to achieve equivalent prior effects.[86] If LSD usage is interrupted, however, tolerance vanishes quickly,[87] allowing resumption of drug intake at smaller doses within a few days. No physical withdrawal symptoms result when drug use is discontinued.[88] LSD is cross-tolerant with mescaline and psilocybin. A tolerance developed to one drug also produces a tolerance to the others.[89] Although accurate data on long-term use of LSD are difficult to obtain, studies appear to rule out major brain damage even after hundreds of "trips."[90] It is also asserted that "[d]eath directly

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79. W. CLARK & J. DEL GIUDICE, *supra* note 43, at 490.

80. *Id.* at 493; C. KORNETSKY, *supra* note 2, at 207.

81. D. SANKAR, LSD—A TOTAL STUDY 287 (1975). Sankar adopts a four-stage view of the effects of LSD: (1) Initial—lasting for an hour, in which the somatic effects occur, *see* note 80 *supra*, and accompanying text; (2) Experience—lasting one to eight hours, in which the psychedelic effects occur; (3) Recovery—lasting from hours to several days, when normal condition alternates with abnormal; (4) Aftermath—either immediate, resulting in tension, anxiety, depression or fatigue, or long-term. Sankar cites flashbacks as a long-term effect, but it has never been proven that flashbacks differ from any recurrent memory of an intense emotional experience. *Id.* at 287-88. For a discussion of flashbacks, see E. BRECHER, *supra* note 7, at 378-79.

82. O. RAY, *supra* note 8, at 357.

83. Jaffe, *supra* note 70, at 310. Colors are heard and sounds may be seen.

84. O. RAY, *supra* note 8, at 359.

85. W. CLARK & J. DEL GIUDICE, *supra* note 43, at 491. Chlorpromazine is usually the drug of choice to block LSD. O. RAY, *supra* note 8, at 356-57.

86. Continued use of LSD over a period of three (3) days may produce tolerance. C. KORNETSKY, *supra* note 2, at 207.

87. *Id.*

88. Jaffe, *supra* note 70, at 311.

89. The hallucinogens are similar to the narcotics in the development of cross-tolerances. *See* notes 149-50 *infra* and accompanying text.

90. E. BRECHER, *supra* note 7, at 389. The rumors of chromosome damage by LSD have also proved unfounded. O. RAY, *supra* note 8, at 366.

caused by the toxicity of LSD is unknown."[91]

The psychological effects of LSD are numerous and vary widely among individuals. "It is not possible to say, 'This is *the* description of the experience.' "[92] Studies indicate that individual reaction depends upon the complex interaction of several variables. The most important are setting, personality, dose, and expectation.[93] LSD can increase self-awareness and release inhibition. Depending upon the variables, this release may be "ecstatic, frightening, rapturous or homicidal."[94] In the second hour after ingestion, fear of fragmentation of the self may cause ego disruptions including depersonalization, loss of self-awareness, and loss of control over behavior.[95] Tension and anxiety may produce panic or overt psychosis.

Although no method exists to insure a "good" experience, the environment is a useful predictive indicator.[96] Supportive companions and a structured physical setting usually act to prevent a panic reaction. The pre-existing personality of an individual can indicate whether the use of LSD will lead to overt psychosis,[97] for the individual with an already precarious hold on reality will be unable to integrate the LSD experience. Dose level contributes to the severity of effects—low doses give rise to mild to severe distortions, larger doses result in pseudo-hallucinations, and very large doses lead to true hallucinations.[98] Although an individual may have the ability to cope with distortion, true hallucinations may cause him to panic. Expectation is a further component in the LSD experience. Statistics indicate that the incidence of "bad trips" expanded at a greater rate after LSD received large amounts of adverse publicity,[99] because of increased *expectation* of adverse ef-

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91. W. CLARK & J. DEL GIUDICE, *supra* note 43, at 497.

92. O. RAY, *supra* note 8, at 359.

93. W. CLARK & J. DEL GIUDICE, *supra* note 43, at 495.

94. D. SANKAR, *supra* note 81, at 340.

95. O. RAY, *supra* note 8, at 359.

96. W. CLARK & J. DEL GIUDICE, *supra* note 43, at 377, find that subjective reactions alter with the environment. "[B]oth social and physical aspects of the environment may interact with drug effects . . . to produce unanticipated, yet predictable results." *Id.*

97. Although there is difference of opinion over whether novices have more serious reactions than habitual users, "it is probably true that the more disturbed one is in the absence of the drug, the more likely it is that one will have a bad trip or other adverse reaction." O. RAY, *supra* note 8, at 362.

98. Gorodetsky, *Marihuana, LSD, and Amphetamines,* 5 DRUG DEPENDENCE 20 (1970). Often LSD is bought in an unknown amount and can trigger a panic reaction through an unexpectedly large dosage. E. BRECHER, *supra* note 7, at 375.

99. *Id.*

fects. Thus, initial apprehension may lead to a self-fulfilling prophecy and increase the hazards of LSD use.

2. Psilocybin

The drug psilocybin is found naturally in *Psilocybe mexicana* and related mushrooms,[100] commonly called "magic mushrooms." When manufactured synthetically, the drug is known as psilocin. Also an alkaloid, psilocybin's physiological and psychological effects are similar to those of LSD.[101]

Two primary differences distinguish psilocybin from LSD. First, it is estimated that LSD is at least 100 times more potent than psilocybin.[102] In addition, psilocybin, which produces effects for only two to six hours, has a shorter period of activity than LSD.[103]

3. DMT

Another alkaloid with psychedelic effect similar to LSD is dimethyltryptamine (DMT), which is closely related to the less common diethyltryptamine (DET). Unlike LSD, DMT is not effective when taken orally and therefore must be injected or inhaled by sniffing or smoking.[104] DMT produces an LSD-like syndrome of very short duration accompanied by more severe sympathomimetic actions.[105] An injected dose of one milligram per kilogram of body weight produces LSD-like effects for approximately one hour.[106]

4. DOM-STP

The drug 2,5-dimethoxy-4-methylamphetamine (DOM), is commonly known as STP. On the "street" these initials are said to stand for "Serendipity, Tranquility and Peace."[107] There have been few experiments with DOM in controlled laboratory situations. The data gathered thus far indicate that the actions and effects of DOM are similar to LSD and mescaline.[108] DOM has a rep-

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100. C. KORNETSKY, *supra* note 2, at 208.
101. Jaffe, *supra* note 70, at 310.
102. *Id.*
103. W. CLARK & J. DEL GIUDICE, *supra* note 43, at 499.
104. O. RAY, *supra* note 8, at 374.
105. C. KORNETSKY, *supra* note 2, at 209.
106. O. RAY, *supra* note 8, at 374. The experience is short enough to fit into a lunch hour; thus the DMT characterization as the "businessman's trip."
107. C. KORNETSKY, *supra* note 2, at 209.
108. DOM is one hundred times as potent as mescaline, but only 1/13 as potent as

utation of producing extraordinarily long effects, lasting from 24 to 48 hours. This reputation may result from street exaggeration, or the effects may actually be caused by the use of large amounts.[109] Low doses of DOM produce euphoria without causing psychedelic effects or perceptual distortions.[110] Higher doses produce typical LSD-like psychedelic effects.[111]

D. Marijuana, Hashish, and THC

Marijuana[112] is a preparation for smoking that consists of the chopped leaves, flowers, and stems of the *Cannabis* plant.[113] The psychoactive substance believed responsible for most of the characteristic psychological effects of marijuana is Delta-9 tetrahydrocannabinol (THC).[114] The actual amount of THC found in marijuana depends upon the conditions of harvesting and curing and the genetic variation of the plant.[115] The resin of the plant is secreted in the highest quantity by the unfertilized flowers of the female and contains five to ten times as much THC as is found in the leaves.[116] In the United States, "hashish"[117] refers to the highly resinous concentrate from the flowering tops of the female plant.[118] Hash oil, containing still higher concentrations of THC, is made by boiling hash in a solvent and filtering out the solid material.[119]

Behavioral responses to THC vary according to strength of the preparation, route of administration, setting, and individual variables such as metabolic rate and experience and expectations of

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LSD. O. RAY, *supra* note 8, at 381.

109. *Id.*

110. Snyder, Faillace & Weingartner, *DOM (STP), a New Hallucinogenic Drug, and DOET: Effects in Normal Subjects*, 125 AM. J. PSYCH. 358 (1968).

111. One to three milligrams produce only euphoria, while three to five milligrams produce a six- to eight-hour hallucinogenic period. O. RAY, *supra*, note 8, at 381.

112. Slang terms for marijuana include "Acapulco Gold," "Cannabis," "Colombian," "Ganga," "Grass," "Griffa," "Hemp," "Herb," "J," "Jay," "Joint," "Mary Jane," "Mota," "Mutah," "Panama Red," "Pot," "Reefer," "Sativa," "Smoke," "Stick," "Tea," "Weed," and "Yerba." DRUG ENFORCEMENT, July 1979, at 39.

113. O. RAY, *supra* note 8, at 401. The evidence is strong that there are three species of *Cannabis: Cannabis sativa*, from which hemp rope is made, *Cannabis indica*, which is grown for its psychoactive resins, and *Cannabis ruderalis*, which grows primarily in Russia and not at all in the United States. *Id.* at 391.

114. Jaffe, *supra* note 70, at 306.

115. O. RAY, *supra* note 8, at 401.

116. *Id.*

117. Slang terms for hashish include "Goma de Mota," "Hash," and "Soles." DRUG ENFORCEMENT, July 1979, at 39.

118. O. RAY, *supra* note 8, at 401.

119. *Id.* at 391-92.

subjects.[120] While the THC "high" varies greatly with individuals,[121] the most common effects can be described. In low doses,[122] equivalent to one marijuana cigarette, THC usually produces an increased sense of well-being or euphoria[123] that relieves pre-existing tension, anxiety, and hostility.[124] The euphoric feeling is accompanied by psychosedative effects, which include sleepiness,[125] sluggishness, lethargy, fuzzy thinking,[126] an altered time sense,[127] and a dreamy state in which the user is less able to communicate.[128] At slightly higher doses, equivalent to several marijuana cigarettes, short-term memory is often impaired, but long-term memory remains intact.[129] As a consequence, there may be a deterioration in the capacity to carry out tasks requiring multiple mental steps.[130] Users also report a keener sense of hearing, more vivid visual imagery,[131] and an enhancement of the nondominant senses of touch, taste, and smell.[132] Although the user's senses appear heightened, there is a dose-related impairment of intellectual and psychomotor performance at the level of social intoxication.[133]

Adverse reactions to THC are uncommon, but may occur at high dosage levels.[134] The most common reaction is panic resulting from the fear of loss of control.[135] Acute intoxication may produce

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120. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 296.

121. C. KORNETSKY, *supra* note 2, at 215.

122. In the United States, an average marijuana cigarette delivers the equivalent of 2.5 to 5 mg of Delta-9 THC. Jaffe, *supra* note 70.

123. *Id.*

124. E. BASSUK & S. SCHOONOVER, *supra* note 20.

125. Sleepiness is more pronounced when users are alone than when they interact with others. Jaffe, *supra* note 70.

126. Thought processes are slowed, and concentration is impaired. E. BASSUK & S. SCHOONOVER, *supra* note 20.

127. Time appears to pass more slowly. "Minutes may seem like hours." Jaffe, *supra* note 70, at 307.

128. "Speech may be disconnected and tangential." E. BASSUK & S. SCHOONOVER, *supra* note 20.

129. *Id.*

130. "This effect on memory-dependent, goal-directed behavior has been called 'temporal disintegration,' and is correlated with a tendency to confuse past, present, and future, and with depersonalization—a sense of strangeness and unreality about the self." Jaffe, *supra* note 20, at 306.

131. Visual and auditory stimuli previously ignored may take on a novel quality. *Id.* at 307.

132. *Id.*

133. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 297. Experienced users, however, are able to compensate for the acute intoxicating effects, even when given large doses of THC. *Id.*

134. *Id.*

135. O. RAY, *supra* note 8, at 408. Panic reactions tend to occur in older and inexperi-

a THC-precipitated psychosis[136] that is clinically indistinguishable from a schizophrenic reaction[137] and is characterized by confusion, paranoia, and visual and auditory hallucinations.[138] Furthermore, investigators have reported the occurrence of "flashbacks"[139] that resemble an LSD intoxication of shorter duration and less intensity.[140]

E. Narcotics

Narcotic agents are either extracted from the opium poppy[141] or are derived synthetically from morphine-like alkaloids.[142] Opium is produced by incising the seed capsule of the poppy and collecting, drying, and powdering the oxidized sap from the wound.[143] Opium contains over twenty alkaloids; the two producing narcotic effects are morphine (10%) and codeine (0.5%).[144] There are four classes of narcotic agents: the natural opium alkaloids; the semisynthetic derivatives; the synthetic agents (opioids); and the narcotic antagonists.[145]

1. Effects of Narcotics

In considering the effects of narcotics, it is important to note that all opiate agonists are generally fungible.[146] Continual use of a narcotic rapidly produces tolerance,[147] and requires an increase in dosage to produce prior effects. Narcotic use induces drug dependence (addiction), which is characterized by tolerance, physical de-

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enced users. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 297.

136. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 298.

137. O. RAY, *supra* note 8, at 408.

138. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 299.

139. Keeler, Reifler & Liptzin, *Spontaneous Recurrence of Marihuana Effect*, 125 AM. J. PSYCH. 384 (1968).

140. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 298.

141. The opium poppy, *Papaver somniferum*, is indigenous to Asia Minor. Jaffe & Martin, *Narcotic Analgesics and Antagonists*, in THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 245 (5th ed. L. Goodman & A. Gilman, 1975).

142. The perspective here is medical; the legal definition of narcotics is based upon the addictive nature of the drugs. Legally, cocaine is also classified as a narcotic. R. FORNEY & F. HUGHES, *supra* note 38, at 73.

143. C. KORNETSKY, *supra* note 2, at 117.

144. M. GERALD, *supra* note 14, at 241.

145. *Id.* at 237-38.

146. The opiate agonists are the natural opium alkaloids, the semisynthetic derivatives, and the synthetic agents. Since all narcotics are based on morphine and codeine alkaloids, the differences in effect are generally of degree, not of kind, and are considered at Subsection 2 *infra*.

147. C. KORNETSKY, *supra* note 2, at 130.

pendence, and compulsive abuse (psychic craving).[148] The use of one narcotic induces cross-tolerance[149] and cross-dependence[150] among all opiate agonists. Once drug dependence is established, cessation of drug use produces withdrawal; the severity of that varies according to the degree of physical dependence, which is determined by the dosage at the time of abstinence.[151]

Narcotic use produces a variety of physiological effects. The pupils constrict, decreasing the ability to see in the dark.[152] A decrease in motility of the gastrointestinal tract leads to constipation.[153] In addition, interaction with the CNS results in vasodialation (elevated body heat), decrease in salivation, and histamine release causing itching in the extremities.[154] Sexual function is depressed. Narcotics stimulate the brain area controlling nausea and vomiting,[155] but depress the respiratory centers in the brain, which results in slow, shallow respiration.[156]

The primary psychophysiological effect of narcotics is an analgesic action that provides relief from severe pain. These drugs, however, inhibit only the subjective, anxiety-provoking aspect of pain and not the perception of pain itself.[157] Initial use of narcotics in the absence of pain produces dysphoria,[158] but persistent admin-

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148. A. GOLDSTEIN, L. ARONOW & S. KALMAN, PRINCIPLES OF DRUG ACTION 586 (2d ed. 1974).

149. E. BRECHER, *supra* note 7, at 2.

150. "The ability of one drug to suppress the manifestations of physical dependence produced by another and to maintain the physically dependent state is referred to as cross-dependence." Jaffe, *supra* note 70, at 289-90.

151. Administering a narcotic at any time will immediately stop withdrawal symptoms. The symptoms initially resemble those of influenza and usually appear eight to twelve hours after the last dose:

> The addict experiences tearing, a runny nose, sweating, yawning, and difficulty in sleeping. This restless sleep is commonly referred to as the "yen." At about 20 hours, goose flesh (hence the name "cold turkey"), widened pupils, and tremors appear. At the peak intensity of withdrawal (about 48 to 72 hours), the addict suffers from insomnia, weakness, muscle spasms in the legs, chills, intestinal cramps, nausea, vomiting, diarrhea, fever, and an elevated blood pressure; in very severe cases, he may suffer from hallucinations and become delirious.

M. GERALD, *supra* note 14, at 251. There is no medical evidence that withdrawal alone is fatal. *Id.*

152. E. BRECHER, *supra* note 7, at 31. Miosis reduces the pupil to a "pinpoint." Tolerance never develops to this narcotic effect. C. KORNETSKY, *supra* note 2, at 127-28.

153. *Id.* at 129.

154. Jaffe & Martin, *supra* note 141, at 247.

155. O. RAY, *supra* note 8, at 311.

156. *Id.*

157. C. KORNETSKY, *supra* note 2, at 121-22.

158. DeLong, *supra* note 5, at 78. Dysphoria is the experience of mild anxiety and fear.

istration results in a euphoric experience. When taken intravenously, a narcotic such as heroin has two discernable stages of effects—the "rush" or initial impact, often likened to sexual orgasm and the "high," a state when the drug acts as an emotional analgesic.[159] If a narcotic is not administered intravenously, only the second stage euphoria is experienced. During the euphoric state the opiates cause a mental clouding characterized by drowsiness, lethargy, and an inability to concentrate.[160] "Opioids reduce pain, aggression, and sexual drives, and their use, therefore, is unlikely to induce crime."[161] Violent action is unlikely because the euphoric user is "often totally disinterested in the outside world and its activities."[162]

If the social, economic, and legal consequences of illicit narcotic use were not punitive, research indicates that little harm would result.[163] Evidence suggests that the drugs temporarily depress rather than permanently damage sexual function,[164] and controlled tests show no intellectual deterioration due to drug use.[165] Narcotics do not cause either chronic psychosis or an organic type of mental deterioration.[166] One study found no "physical deterioration or impairment of physical fitness aside from addiction per se [and] no evidence of change in the circulatory, hepatic, renal or endocrine functions."[167]

An inherent danger of illicit narcotic use is the potential for overdose because of the uncertainty of the drug's strength. A user who has temporarily ceased drug intake to lower drug tolerance, and thus cost of habit, may be unable to gauge the new level of tolerance. As dosage is increased, the subjective effects of the drug are more pronounced; there is greater drowsiness, euphoria, nausea, vomiting, and respiratory depression.[168] Excessive doses induce convulsions and respiratory arrest. Overdose is a slow death, often taking up to twelve hours and characterized by lethargy and

159. *Id.* at 79.
160. *Id.* at 78-79.
161. Jaffe, *supra* note 70, at 295.
162. M. GERALD, *supra* note 14, at 250.
163. E. BRECHER, *supra* note 7, at 27. "There is thus general agreement throughout the medical and psychiatric literature that the overall effects of opium, morphine, and heroin on the addict's mind and body under conditions of low price and ready availability are on the whole amazingly bland." *Id.*
164. *Id.* at 29.
165. *Id.* at 25.
166. *Id.*
167. *Id.* at 23.
168. Jaffe & Martin, *supra* note 141, at 248.

stupor followed by coma and then respiratory arrest.[169] The narcotic antagonists, acting as an antidote for respiratory depression, are used to counteract an overdose.[170]

2. Representative Narcotic Antagonists

(a) Opium

Opium has been used for its pleasurable and analgesic effects since the Sumerians in 4000 B.C.[171] The drug is primarily prescribed in capsule form to treat diarrhea. To obtain euphoric effects, opium vapor containing morphine must be inhaled.[172] Opium differs from other narcotic drugs in dosage: to equal one grain of injected heroin, 300-400 grains of opium must be smoked. In addition, inhalation spreads the dose over time, as opposed to instantaneous introduction through injection.[173]

(b) Morphine

Morphine is often the standard of comparison for other narcotics. First isolated from opium in 1803,[174] morphine is highly effective for the relief of severe pain and as an antitussive.[175] When taken subcutaneously, the peak effect of the drug occurs within 30 minutes to an hour and lasts four to six hours.[176] The decline from peak effect is rapid and necessitates readministration to avoid an abrupt mood change from euphoria to depression. When taken orally, the peak effect is lower and delayed, but the effects last from twelve to twenty-four hours.[177]

(c) Codeine

Codeine, or methylmorphine, is less effective than morphine as an analgesic or antitussive.[178] The drug is often taken orally with tolerance developing less rapidly than with morphine. The drug

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169. E. BRECHER, *supra* note 7, at 102.

170. M. GERALD, *supra* note 14, at 237. The most common narcotic antagonists are nalorphine, naloxone and levallorphan.

171. *Id.* at 239.

172. E. BRECHER, *supra* note 7, at 46.

173. *Id.*

174. A German pharmacist named Sertürner isolated morphine. The name was derived from Morpheus, Greek god of dreams. C. KORNETSKY, *supra* note 2, at 118.

175. M. GERALD, *supra* note 14, at 237. An antitussive is a cough suppressant.

176. C. KORNETSKY, *supra* note 2, at 121.

177. DeLong, *supra* note 5, at 77.

178. M. GERALD, *supra* note 14, at 237. Codeine is still extensively used as an antitussive and for relief of mild pain.

produces less respiratory and behavioral depression, and codeine use is characterized by a lower incidence of nausea and constipation.[179]

(d) Heroin

Heroin (diacetylmorphine) is a semisynthetic derivative of morphine.[180] First discovered in 1898, it has become the most popularly abused narcotic. Although heroin is three times as active as morphine, it produces no greater dependence, no different euphoria, and no fewer side effects.[181] Heroin's potency stems from its ability to pass through the blood-brain barrier, where it is hydrolyzed to morphine.[182]

(e) Dilaudid

Hydromorphone, or dihydromorphinone, is another semisynthetic derivative and is commonly known by its trade name Dilaudid. This drug is ten times as active as morphine and produces proportionately greater respiratory depression. Dilaudid has a faster onset and a shorter duration of action than morphine.[183]

(f) Meperidine

Meperidine, a synthetic agent, is known under the trade names Demerol and Dolantin and is one of the most commonly used narcotic analgesics. Unlike morphine, meperidine has no antitussive action, does not produce contraction of the pupils, and has slight constipating effects.[184] Meperidine is one-tenth as potent as morphine[185] and has a shorter duration of action—two to four hours.[186] With oral administration, the meperidine peak effect is fifty percent higher than with intravenous administration.[187]

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179. *Id.* at 256.

180. C. KORNETSKY, *supra* note 2, at 119.

181. If heroin is administered subcutaneously, users cannot reliably distinguish heroin from morphine. Jaffe, *supra* note 70, at 294.

182. M. GERALD, *supra* note 14, at 247.

183. *Id.* at 237.

184. C. KORNETSKY, *supra* note 2, at 132.

185. M. GERALD, *supra* note 14, at 248.

186. Jaffe & Martin, *supra* note 141, at 264.

187. DeLong, *supra* note 5, at 78. The study found that "addicted medical personnel, who have ready access to meperidine, tend to prefer that drug to the other opiates, possibly because of its fast action and relatively high potency when taken orally." *Id.*

(g) Methadone

Methadone is an addictive synthetic analgesic agent. Equally potent as morphine, methadone has a longer duration of action.[188] Several effects distinguish methadone from morphine. First, it produces no euphoria when taken orally. Second, it prevents an emotional bounce from euphoria to depression because of its long activity. Third, it eliminates tolerance problems because of its stabilized dosage. Fourth, it blocks the euphoric effects of morphine. Fifth, it ends compulsive drug-seeking behavior. Last, it results in less severe withdrawal symptoms.[189] Because of these factors, methadone has become the drug of choice for treatment of narcotic dependence.

F. PCP

Marketed as Sernylan, phencyclidine (PCP) is classified as an anesthetic agent and is used only in veterinary medicine.[190] PCP is a white crystalline powder soluble in water and alcohol[191] and is commonly manufactured in capsule or tablet form. The drug may be smoked, inhaled, swallowed, or injected.

PCP is a difficult drug to classify because it produces different effects at different doses. The drug's action on the brain is not well understood by the medical profession.[192] At different dose levels PCP acts as a minor tranquilizer, sedative, analgesic, anesthetic or stimulant; when injected intravenously, it produces hallucinations.[193] The drug slightly increases pulse and breathing rates, but produces a more noticeable increase in blood pressure.[194] In addition, there may be loss of muscular coordination, unsteady gait, nausea, vomiting, and dizziness.[195] Medical literature, however, indicates that use of the drug does not result in permanent damage.[196]

Although PCP produces some hallucinogenic effects similar to LSD, the "disorganizaton of thought and derealization are greater

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188. E. BRECHER, *supra* note 9, at 161-62.
189. *Id.* at 161-62.
190. M. GERALD, *supra* note 14, at 330.
191. Marshman & Adair, *Phencyclidine,* 18 ADDICTIONS 31-35 (1971).
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.* at 384.

than with LSD."[197] Research indicates that PCP mimics the symptoms of early schizophrenia better than the other hallucinogens.[198] PCP's disorganizing potential may result in anti-social actions and may produce "inappropriate or dangerous behavior (e.g., reckless driving or assault) while a person is in a disoriented and possibly hostile state."[199]

G. *Peyote and Mescaline*

Peyote (peyotl),[200] a cactus common throughout the Southwest and Mexico,[201] contains more than thirty psychoactive alkaloids.[202] "Mescal buttons," which are dried slices of the upper portion of the cactus, contain mescaline, the primary agent responsible for the visual effects associated with the ingestion of peyote.[203]

Doses of 300 to 500 mg of mescaline are sufficient to produce hallucinations.[204] Although the mescaline experience begins about one hour after oral administration,[205] the peak effects are not attained until about two to four hours after ingestion and may not be completely absent until twelve hours later.[206] Effects of the drug include perceptual distortion, heightened sense of color, enhanced self-awareness, some depersonalization, and a state of heightened mood.[207] The most prominent effect of the drug consists of visual hallucinations in rich colors, but there may also be auditory and tactile hallucinations.[208] The mescaline experience differs from that of LSD in that it lasts longer, produces more vivid colors and perceptual phenomena,[209] and is less likely to induce flagrant psychotic reactions.[210]

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197. W. CLARK & J. DEL GIUDICE, *supra* note 43, at 490.

198. *Id.*

199. Marshman & Adair, *supra* note 191, at 384.

200. Slang terms for peyote include "Buttons," "Cactus," "Mesc," "Mescal," and "Mescal Buttons." DRUG ENFORCEMENT, July 1979, at 39 (1979).

201. Peyote is the cactus *Lophophora williamsii.* O. RAY, *supra* note 8, at 376.

202. *Id.* at 379.

203. *Id.*

204. MARTINDALE, *supra* note 27, at 883.

205. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 291.

206. W. EVANS & J. COLE, *supra* note 25, at 292.

207. *Id.*

208. Schultes, *Hallucinogens of Plant Origin,* 163 SCIENCE 245, 250 (1969).

209. W. EVANS & J. COLE, *supra* note 25, at 292.

210. A. GOTH, MEDICAL PHARMACOLOGY 317 (8th ed. 1976).

H. Psychotherapeutics

1. Tricyclic Antidepressants

Imipramine is representative of the class of psychotherapeutic drugs known as tricyclic antidepressants.[211] When administered over a period of time, the tricyclics produce an elevation of mood in depressed patients.[212] Normal subjects, however, feel "unhappy" and are more anxious after being given a therapeutic dose of the drug.[213] In certain predisposed patients, tricyclics may induce manic excitement.[214] Acute overdose produces an adverse reaction that consists of "confusion, delirium, poor recall, disorientation, agitation, visual and auditory hallucinations, anxiety, motor restlessness, purposeless movement, and a thought disorder."[215] Concomitant use of alcohol may exaggerate these effects.[216]

2. Anti-psychotic Drugs: Phenothiazines

Derivatives of phenothiazine, a compound first synthesized in 1883, have been used since the early 1950s in the treatment of schizophrenia.[217] The synthesis in 1950 of the phenothiazine derivative, chlorpromazine, marked the beginning of a completely new approach to mental illness.[218] Chlorpromazine and the other antipsychotic phenothiazines[219] consistently improve the core symptoms of schizophrenia, including emotional withdrawal, hallucina-

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211. Imipramine (Tofranil) was the first of the tricyclic series of compounds to he synthesized (1948). In 1958, Kuhn found that imipramine was effective in the treatment of mental depression. Byck, *Drugs and the Treatment of Psychiatric Disorders*, in THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 153, 174 (5th ed. L. Goodman & A. Gilman 1975). Other tricyclic drugs in current use are desmethylimipramine (Norpramin), amitriptyline (Elavil), nortriptyline (Aventyl), and protriptyline (Vivactil). W. EVANS & J. COLE, *supra* note 25, at 201.

212. Byck, *supra* note 211, at 175.

213. *Id.*

214. *Id.* at 178.

215. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 31.

216. PHYSICIANS' DESK REFERENCE, *supra* note 26, at 910.

217. Byck, *supra* note 211, at 157.

218. W. CLARK & J. DEL GIUDICE, *supra* note 43, at 255. Approximately half the patients in mental hospitals are diagnosed as schizophrenics. O. RAY, *supra* note 8, at 251. According to a 1976 report hy the Veterans Administration, seventy-four percent of their then hospitalized psychotic patients received antipsychotic medications. Seventy-eight percent of these patients were receiving a phenothiazine and sixteen percent a butyrophenone. *Id.* at 252.

219. Other phenothiazines are triflupromazine (Vespirin), prochlorperazine (Compazine), trifluoperazine (Stelazine), perphenazine (Trilafon), thiopropazate (Dartal), and Thioridazine (Mellaril). O. RAY, *supra* note 8, at 252.

tions, delusions, paranoia, belligerence, and hostility.[220] Unlike the hypnotic drugs, such as barbiturates and alcohol, the phenothiazines do not induce any physical dependence or cause any intoxication or heightening of mood.[221] If a single oral dose of 100 mg is given to a normal subject, he will respond minimally to external stimuli, including those that might arouse emotion during his normal state.[222] Achievement of the same calming effect in a mentally ill person might require 1000 mg a day.[223] While the phenothiazines do not cause intoxication or central nervous system depression, they prolong and intensify the action of CNS depressants such as anesthetics, barbiturates, and narcotics.[224]

3. Anti-psychotic Drugs: Butyrophenones

Haloperidol (Haldol),[225] a butyrophenone first marketed in the United States in 1967, is an effective alternative to the anti-psychotic phenothiazine drugs.[226] Although the butyrophenones differ chemically from the phenothiazines, their effects are quite similar.[227] Additive effects result from the use of haloperidol in combination with alcohol.[228] Adverse reactions include insomnia, restlessness, anxiety, euphoria, agitation, drowsiness, depression, lethargy, headache, confusion, grand mal seizures, and exacerbation of psychotic symptoms, including hallucinations.[229]

4. Anti-anxiety Drugs: Meprobamate

Meprobamate (Miltown, Equanil) is a carbamate[230] developed by Berger in 1954.[231] Its pharmacological effects are very similar to those of the barbiturates.[232] At the usual dosage of 400 mg taken four times a day, the drug causes a mild reduction in anxiety gen-

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220. *Id.* at 254.
221. W. EVANS & J. COLE, *supra* note 25, at 156.
222. Byck, *supra* note 211, at 158.
223. W. EVANS & J. COLE, *supra* note 25, at 154.
224. R. FORNEY & F. HUGHES, COMBINED EFFECTS OF ALCOHOL AND OTHER DRUGS 65 (1968).
225. W. EVANS & J. COLE, *supra* note 25, at 157.
226. Byck, *supra* note 211, at 166.
227. W. EVANS & J. COLE, *supra* note 25, at 157.
228. PHYSICIANS' DESK REFERENCE, *supra* note 26, at 1102.
229. *Id.*
230. Other carbamates in therapeutic use are tybamate (Tybatran), carisoprodol (Rela, Soma), mebutamate (Capla), hydroxyphenamate (Listica), and ethinamate (Valmid). W. EVANS & J. COLE, *supra* note 25, at 161.
231. *Id.* at 158-59.
232. Byck, *supra* note 211, at 188.

erated by highly emotional situations.[233] A single dose of between 800 and 1600 mg produces an intoxication similar to that associated with barbiturates.[234] Chronic use of meprobamate in high doses results in tolerance, habituation, and addiction that equals the severity of barbiturate use.[235] Withdrawal symptoms depend on the dose and include insomnia, tremors, hallucinations, anxiety, and grand mal seizures.[236] Meprobamate in combination with either alcohol or barbiturates has an additive effect.[237] Adverse reactions to the drug include drowsiness, ataxia, dizziness, slurred speech, headache, impairment of visual accomodation, euphoria, overstimulation, and paradoxical excitement.[238]

5. Anti-anxiety Drugs: Benzodiazepines

The benzodiazepines, of which chloradiazepoxide (Librium) is representative,[239] were first synthesized in 1933. At appropriate doses, these drugs produce calming effects without inducing sleep.[240] Their action is of long duration, lasting approximately twelve to twenty-four hours.[241]

Reported adverse reactions to high doses of these drugs include an increase in hostility, excitement, psychoses, and rage.[242] Benzodiazepines have an additive effect when taken in combination with ethyl alcohol, barbiturates, and other hypnotic agents.[243]

6. Lithium

Lithium is an element that is used in its salt form to treat mania.[244] Its specific effect on mania was first reported in 1949,[245]

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233. W. EVANS & J. COLE, *supra* note 25, at 158-59.
234. *Id.*
235. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 150.
236. *Id.*
237. W. EVANS & J. COLE, *supra* note 25, at 160.
238. PHYSICIANS' DESK REFERENCE, *supra* note 26, at 1804.
239. Derivatives of chloradiazepoxide used as anti-anxiety agents include diazepam (Valium), clorazepate dipotassium (Tranxene), and oxazepam (Serax). W. EVANS & J. COLE, *supra* note 25, at 161.
240. *Id.*
241. *Id.* at 162.
242. Byck, *supra* note 211, at 191. These effects have not been reported with regard to oxazepam. *Id.*
243. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 141.
244. Byck, *supra* note 211, at 184. "The core symptoms of mania are an elated mood and hyperactivity. The manic person feels absolutely marvelous mentally and physically, but his normal judgments about the world and his own capabilities have disappeared. . . ." O. RAY, *supra* note 8, at 261.
245. Byck, *supra* note 211, at 184.

but the Food and Drug Administration did not approve its medical use until 1970.[246] In a normal subject, lithium in therapeutic doses has almost no discernible psychotropic effect.[247] Instead, the major problem with lithium therapy is that the dose sufficient to control the hyper-excitement of mania is very close to the dose that causes a toxic reaction.[248] Consequently, the physician must closely monitor the blood levels of patients at all times during lithium treatment.[249] Symptoms of lithium overdose include fatigue, muscular weakness, tremor of the hands, slurred speech, blurred vision, dizziness, incoordination, disorientation, apathy, and impaired memory.[250]

I. Solvents

A large number of household products are comprised of volatile organic substances: rubber cements and glues contain toluene; fingernail polish consists of acetone and acetates; lighter and cleaning fluids have naphtha and carbon tetrachloride as major constituents; and gasoline contains a variety of hydrocarbons.[251] The increased abuse of these products by adolescents[252] has focused attention on the effects of solvents when consumed as a drug.

Solvents are inhaled and gain rapid access to the brain through the lungs.[253] "The volatile solvents are properly classified as anesthetics along with ether and alcohol. Like the latter, they may produce a temporary period of stimulation before depression of the central nervous system occurs."[254] The early symptoms after inhalation consist of dizziness, drowsiness, slurred speech, and psychomotor clumsiness.[255] The user frequently complains of headache.[256] Continued inhalation, once intoxication has occurred, leads to increased drowsiness, eventual unconsciousness, and death.[257]

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246. O. RAY, *supra* note 8, at 261-62.
247. Byck, *supra* note 211, at 184.
248. W. EVANS & J. COLE, *supra* note 25, at 208-09.
249. *Id.*
250. *Id.*; E. BASSUK & S. SCHOONOVER, *supra* note 20, at 60.
251. *See* M. GERALD, *supra* note 14, at 195; D. LOURIA, THE DRUG SCENE 46 (1968).
252. For an exposition on how increased publicity created increased solvent abuse, see E. BRECHER, *supra* note 7, at 321-34.
253. The solvent is placed in a bag or on a rag, which is then held over the nose and mouth.
254. Cohen, *Glue Sniffing*, 231 J.A.M.A. 653, 653 (1975).
255. *Id.*
256. D. LOURIA, *supra* note 251, at 47.
257. Malcolm, *On Solvent Sniffing*, in DRUG ABUSE: PSYCHOLOGY, SOCIOLOGY, PHARMACOLOGY 455, 456 (B. Hafen ed. 1973).

Chronic use is characterized by a loss of appetite, anorexia, muscular weakness, nausea, vomiting, fatigue, and irritation of the nose and eyes.[258] Tolerance occurs when solvent use is habitual, but there is disagreement as to the degree of physical injury directly caused by solvent inhalation.[259] Although it is uncertain whether solvents create a state of physical dependence, abrupt withdrawal may produce anxiety, depression, dizziness, aggressive behavior, restlessness, insomnia, nausea, and compulsive drug craving.[260] These symptoms, however, may be psychological rather than physiological in origin.[261]

Solvent inhalation produces a euphoria accompanied by mental confusion and followed by hallucinations, illusions, or delusions.[262] The effects of these drugs are unpredictable;[263] those who encounter pleasant effects on some occasions may suffer terrifying hallucinations during other experiences.[264] A user may feel great power and strength. "Fighting is a common occurrence, and a sniffer may believe that he is immune to injury."[265] While the bulk of authority reports impulsive, aggressive, and dangerous behaviors,[266] some commentators perceive these activities as characteristic of immature adolescents who do "all sorts of silly and potentially dangerous things when high on glue—much the same things they would have done if drunk on alcohol."[267]

J. Stimulants

1. Amphetamines

The amphetamines,[268] consisting of three basic chemical struc-

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258. E. BRECHER, *supra* note 7, at 318.

259. Whether solvent inhalation causes liver damage is an especially controversial issue. Reported blood abnormalities may indicate bone marrow damage. Malcolm, *supra* note 257, at 456.

260. D. LOURIA, *supra* note 251, at 50.

261. Malcolm, *supra* note 257, at 456.

262. Cohen, *supra* note 254, at 653.

263. *See* Malcolm, *supra* note 257, at 456.

264. D. LOURIA, *supra* note 251, at 48.

265. Malcolm, *supra* note 257, at 456.

266. *See* D. LOURIA, *supra* note 251, at 52; Cohen, *supra* note 254, at 653; Malcolm, *supra* note 257, at 456.

267. E. BRECHER, *supra* note 7, at 331.

268. Slang equivalents for the major types of amphetamines include for dextroamphetamine (Dexadrine)—"Dexies," "Co-pilots," and "oranges"; for amphetamine (Benzedrine)—"Bennies," "Splash," and "Peaches"; for methamphetamine (Methadrine, Desoxyn)—"Meth," "Speed," "Crystal," "Crank," and "White Cross" (tablets); for dextroamphetamine and amphetamine (Diphetamine, Biphetamine)—"Footballs." A. GOTH,

tures,[269] are direct nervous system stimulants.[270] Therapeutic doses[271] produce wakefulness, increased mental alertness, improvement in ability to concentrate on simple tasks,[272] and euphoria.[273] The drug also improves motor coordination and performance in activities that require sustained physical exertion.[274]

High doses of amphetamine produce effects that "usually consist of a greater magnitude of its usual pharmacologic actions."[275] Methamphetamine[276] is the drug of choice for euphoric effects.[277] Intravenous injection of "speed" in sufficient quantity may produce effects similar to whole-body orgasm.[278] Acute intoxication is also characterized by restlessness, irritability, confusion, talkativeness, anxiety, insomnia, impotence, changes in libido, profound lability of mood, disorientation, a generalized deterioration in psychomotor performance, and delirium.[279] The intoxication syndrome may progress to a pattern of psychosis that is often clinically indistinguishable from paranoid schizophrenia[280] and includes visual and auditory hallucinations[281] and paranoid delusions.[282] The individual may become aggressive and antisocial.[283] Compulsive, stere-

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supra note 210, at 310. Other slang terms for amphetamines are "Beans," "Black Beauties," "Black Mollies," "Cross-roads," "Double Cross," "Minibennies," "Pep Pills," "Rosas," "Roses," "Thrusters," "Truck Drivers," "Uppers," "Wake-ups," and "Whites." DRUG ENFORCEMENT, July 1979, at 39.

269. Two are optical isomers of each other. The third is a methalated form of either or both of these isomers. O. RAY, *supra* note 8, at 282-83.

270. A. GOTH, *supra* note 210, at 310.

271. Ten mg is the usual oral dose. Five mg of *dl*-amphetamine is approximately equivalent to 150 mg of caffeine (one cup of coffee). O. RAY, *supra* note 8, at 284.

272. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 280.

273. A. GOTH, *supra* note 210, at 268.

274. O. RAY, *supra* note 8, at 284.

275. C. KORNETSKY, *supra* note 2, at 170.

276. "Speed" is methamphetamine put into liquid for injection intravenously. O. RAY, *supra* note 8, at 285.

277. *Id.* at 283.

278. R. JULIEN, A PRIMER OF DRUG ACTION 87 (1975).

279. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 282-83; C. KORNETSKY, *supra* note 275, at 170; MARTINDALE, *supra* note 27, at 306; PHYSICIANS' DESK REFERENCE, *supra* note 26, at 1612.

280. R. JULIEN, *supra* note 278, at 87. In contrast to the disorientation with regard to time and place that is characteristic of "amphetamine psychosis", *i.e.*, the user is able to retrospectively describe his condition in detail. E. BASSUK & S. SCHOONOVER, *supra* note 20, at 284-85.

281. "As is generally true in paranoid schizophrenia, the hallucinations occurring during the amphetamine-induced state are predominately auditory." C. KORNETSKY, *supra* note 2, at 170.

282. A. GOTH, *supra* note 210, at 311.

283. R. JULIEN, *supra* note 278, at 87. There is considerable evidence indicating that amphetamine abuse makes users more prone to violent behavior. In a study of amphetamine

otyped behavior often precedes the onset of the psychotic episode.[284] When prolonged high dosages of the drug are discontinued, the user experiences extreme fatigue and a profound mental depression.[285]

2. Methylphenidate and Phenmetrazine

The chemical structure of methylphenidate (Ritalin) is similar to that of amphetamine. It is a mild central nervous system stimulant, and its pharmacological properties are essentially the same as those of amphetamine.[286] It is used primarily for treatment of hyperkinetic behavioral disorders in children. Most abuse associated with methylphenidate involves intravenous use of tablets dissolved in water.[287]

Phenmetrazine is medically used as an appetite suppressant, and it produces effects comparable to those of other CNS stimulants. Its abuse involves both oral and intravenous use.[288]

III. The Intoxication Defense

A. Introduction

On the night of August 20, 1976, John Foster, with the aid of friends, blockaded a road with a tractor and started a bonfire by the roadside. Richard and Patricia Young, who happened to be driving along the road, stopped at the barricade. Foster, who had known Young for thirteen years, approached the car with a .44 magnum revolver and remarked: "Dickie, you think I'm freaked out, but if you don't turn off the motor and everybody get out of the car I'm going to blow your f—ing head off." Young then sped

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abusers who committed murder, one researcher concluded that in the cases he studied, "homocide was clearly related to an amphetamine-induced delusional process and/or state of emotional lability." Ellinwood, *Assault and Homocide Associated with Amphetamine Abuse*, 127 Am. J. Psych. 1170, 1175 (1971).

284. C. Kornetsky, *supra* note 2, at 170-71. "The apparently purposeless behavior may consist of, for example, repetitive examination of contents of a handbag, continual counting and rearrangement of objects, and so on. Accompanying the stereotyped behavior may be grinding of the teeth (bruxism), licking of the lips, and shifting of the eyes from side to side. Also characteristic of chronic stimulant overdose is a delusion of formication (ants crawling over one's body)." *Id.* at 171.

285. Physicians' Desk Reference, *supra* note 26, at 1612.

286. Franz, *Central Nervous System Stimulants*, in The Pharmacological Basis of Therapeutics 359, 365 (5th ed. L. Goodman & A. Gilman 1975).

287. Drug Enforcement, July 1979, at 27.

288. *Id.* at 26-27.

away while Foster fired several shots at the car.[289] The evidence at trial showed that Foster, at the time of the shooting, had been under the influence of beer and possibly LSD.[290]

This factual situation exemplifies the effects of intoxication on human behavior. Alcohol, along with other drugs, impairs a user's judgment, releases his inhibitions, and causes him to behave abnormally.[291] The common excuse offered by such persons for their actions while intoxicated is that they did not intend to commit the act and that the drug made them go crazy.

Although sufficient to explain petty quarrels among friends, this excuse historically has been rejected by the criminal law. Common law adheres to the rule that voluntary intoxication is no defense to a criminal act. At one time, it was even suggested that voluntary drunkenness was an aggravating circumstance that increased the actor's culpability.[292] The more commonly accepted view, however, provides that "such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses."[293] This strict rule arose partly from the belief that intoxication could be easily feigned[294] and partly from the belief that a man should be unable to avail himself of the excuse of his own vice.[295]

Even under the common law, however, there were circumstances in which intoxication could be a defense. For example, intoxication was a valid excuse to criminal behavior when induced by fraud, duress, or mistake.[296] Also, in the late nineteenth century courts developed the "exculpatory doctrine," which allowed evidence of intoxication to negate intent whenever it was an essential

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289. State v. Foster, 405 A.2d 726, 728 (Me. 1979).

290. *Id.* at 730-31.

291. Paulsen, *Intoxication as a Defense to Crime*, 1961 U. ILL. L.F. 1, 1.

292. Blackstone states: "[O]ur law looks upon this as an aggravation of the offence, rather than as an excuse for any criminal misbehaviour." 4 W. BLACKSTONE, COMMENTARIES * 25-26.

293. 1 M. HALE, PLEAS OF THE CROWN * 32.

294. "Now touching the trial of this incapacity . . . this is a matter of great difficulty, partly from the easiness of counterfeiting this disability . . . and partly from the variety of the degrees of this infirmity . . . ." *Id.*

295. *See* United States v. Drew, 25 F. Cas. 913 (C.C.D. Mass. 1828) (No. 14,993).

296. Hale states:

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

1 M. HALE, PLEAS OF THE CROWN * 32.

element of the crime.[297]

Today, the effect of intoxication on criminal responsibility is well settled. A clear majority[298] of American jurisdictions adhere to the view that voluntary intoxication does not excuse a criminal act unless the actor, because of his intoxication, could not form the intent required in the definition of the crime. Moreover, some jurisdictions have recognized that *involuntary* intoxication is a complete defense to criminal behavior in appropriate circumstances.[299] While the rules applied to the intoxication defense have undergone little change since the adoption of the strict common law approach, it is the purpose of this section of the Special Project not only to relate existing law but also to point out the difficulties in its justification. Furthermore, this Special Project investigates the problems that arise when the majority rule is applied to intoxication caused by ingestion of narcotic drugs.

B. Voluntary Intoxication

In *Commonwealth v. Graves*,[300] the Pennsylvania Supreme Court recently reiterated the majority rule in a case in which defendant robbed and murdered an elderly man while under the influence of wine and LSD. The court held that evidence of intoxication could not serve as a defense to criminal conduct but could still show that no crime was committed, by negating a particular element of the crime.[301] On this basis, the Pennsylvania court granted defendant a new trial because robbery required a specific intent, which defendant could possibly negate.[302]

Even today, the policy arguments that support this rule rest

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297. "[A]lthough you cannot take drunkenness as any excuse for crime, yet when such crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime." Regina v. Doherty, 16 Cox. Cr. C. 306, 308 (N.P. 1887).

298. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 45, at 342-43 (1972).

299. *See* Burrows v. State, 38 Ariz. 99, 297 P. 1029 (1931); People v. Penman, 271 Ill. 82, 110 N.E. 894 (1915). It is clear, however, that courts are hesitant in finding such appropriate circumstances. As one commentator has stated, "[T]he amazing thing about the factual situations met in the decisions on intoxication, which, because of the usual judicial stress on fraud and coercion as exculpatory, becomes apparent only after close study of the cases, is that *involuntary intoxication is simply and completely nonexistent.*" Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1056 (1944).

300. 461 Pa. 118, 334 A.2d 661 (1975).

301. *Id.* at 122-23, 334 A.2d at 663.

302. Because the rohbery charge, under the felony-murder doctrine, led to the homicide conviction, the latter was also overturned. *Id.* at 127, 334 A.2d at 665-66.

primarily upon the notion that intoxication is sufficiently bad in itself and that liability should be imposed for criminal acts committed while in such a state.[303] The countervailing policy, which accounts for the exculpatory doctrine, is that the inebriate's reduced mental capacity should prevent his being held to the same standard of liability as his sober counterpart.[304] Focusing on these competing concerns, the California court in *People v. Hood*[305] noted that, while the moral capability of a drunken criminal is frequently less than that of a sober person, it is a common belief that a person who voluntarily gets drunk and commits a crime should not escape the consequences.[306] The combined effect of these policies has been that evidence of intoxication has been held admissible to negate the specific intent required for robbery,[307] larceny,[308] burglary,[309] attempted rape,[310] assault with intent to kill,[311] and other crimes.[312] First degree murder has also been reduced to second degree murder with intoxication negating the element of deliberation or premeditation.[313] Some courts, however, have refused to go further and reduce first or second degree murder to manslaugh-

303. As one court has noted, the general rule that voluntary intoxication will not excuse criminal responsibility "rests upon puhlic policy, demanding that he who seeks the influence of liquor or narcotics should not be insulated from criminal liability because that influence impaired his judgment or his control. The required element of badness can be found in the intentional use of the stimulant or depressant." State v. Maik, 60 N.J. 203, 214, 287 A.2d 715, 720-21 (1972).

304. In actuality, most courts explain the exculpatory doctrine in terms of an objective, logical legal analysis—absent intent, a material element of the crime, the particular crime cannot be committed. *See* Commonwealth v. Graves, 461 Pa. 118, 334 A.2d 661 (1975). Thus,

> [t]he judges insist straight-facedly that the doctrine is quite consistent with the traditional rule that voluntary drunkenness never excuses; it is simply that an objective material element, "intention," is lacking in harms committed in gross intoxication. Logic and law, but not sentiment for drunkards, effect the mitigation—so runs the rationalization.

Hall, *supra* note 299, at 1049.

305. 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969).

306. *Id.* at 455, 462 P.2d at 377, 82 Cal. Rptr. at 625.

307. *See* Terhune v. Commonwealth, 144 Ky. 370, 138 S.W. 274 (1911); State v. Reagin, 64 Mont. 481, 210 P. 86 (1922).

308. *See* Edwards v. State, 178 Miss. 696, 174 So. 57 (1937); Daugherty v. State, 154 Neb. 376, 48 N.W.2d 76 (1951); Calvert v. State, 55 Okla. Crim. 346, 30 P.2d 717 (1934).

309. *See* Vickery v. State, 62 Tex. Crim. 311, 137 S.W. 687 (1911); State v. Phillips, 80 W. Va. 748, 93 S.E. 828 (1917).

310. *See* Whitten v. State, 115 Ala. 72, 22 So. 483 (1896); State v. Vanasse, 42 R.I. 278, 107 A. 85 (1919).

311. *See* Booher v. State, 156 Ind. 435, 60 N.E. 156 (1901); State v. Pasnau, 118 Iowa 501, 92 N.W. 682 (1902).

312. *See* Stenzel v. United States, 261 F. 161 (8th Cir. 1919) (espionage).

313. State v. Hall, 214 N.W.2d 205 (Iowa 1974).

ter,[314] holding that voluntary intoxication is sufficient to show malice aforethought. In addition, even those courts that allow intoxication to negate specific intent will still convict a defendant of a lesser included general intent crime.

The attempt, based upon "types" of intent, to define an area in which intoxication reduces or eliminates criminal responsibility has caused confusion in its application.[315] With regard to understanding criminal intent, one commentator has stated that "the mental element is probably the most complex area of criminal law."[316] Analytical problems arise when courts do not allow intoxication to negate general intent,[317] but do allow the defense in specific intent crimes.[318]

Logically, intoxication should negate any intent that is a necessary element of a crime. Thus, as LaFave and Scott suggest, a two-step inquiry is necessary. First, courts must determine what intent the crime in question requires. Second, if there is an intent requirement, courts must determine if the defendant in fact entertained such an intent or knowledge of the crime.[319] Under the second prong, courts should allow evidence of intoxication to negate the intent element and possibly reduce or eliminate the penalty regardless of the nature of the intent.

Professor Hall clearly identifies the problem by noting that "no immediate external situation, however criminal it appears to be, can of itself preclude the possibility that the relevant *mens rea* was lacking; and evidence *aliunde* is always admissible in that re-

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314. *See* Commonwealth v. Graves, 461 Pa. 118, 124-25, 334 A.2d 661, 664 (1975). *Contra*, Kane v. United States, 399 F.2d 730 (9th Cir. 1968), *cert. denied*, 393 U.S. 1057 (1969) (first degree murder reduced to voluntary manslaughter); United States v. King, 34 F. 302 (1888); Ray v. State, 257 Ala. 418, 59 So. 2d 582 (1952); State v. Gomez, 94 Idaho 323, 325, 487 P.2d 686, 688 (1971) (intoxication may be considered to negate malice aforethought); State v. Sprouse, 63 Idaho 166, 118 P.2d 378 (1941). In Alabama and Idaho, however, both first and second degree murder require an intent to take life.

315. *See* W. LAFAVE & A. SCOTT, *supra* note 298, at 344.

316. M. BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 169 (1978).

317. "General intent" is used in the sense that a person intends the physical acts which he commits. *See* W. LAFAVE & A. SCOTT, *supra* note 298, at 344.

318. Specific intent "is the intent to commit a particular act with a specific objective in mind which constitutes the harm defined by law." M. BASSIOUNI, *supra* note 316, at 178.

319. W. LAFAVE & A. SCOTT, *supra* note 298, at 344. Professor Hall points out that

> [e]ach crime . . . has its distinctive *mens rea* . . . . It is evident that there must be as many *mentes reae* as there are crimes. And whatever else may be said about an intention, an essential characteristic of it is that it is directed toward a definite end. To assert therefore that an intention is "specific" is to employ a superfluous term. . . .

J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 142 (2d ed. 1960).

gard."[320] Thus, a person charged with burglary, which requires a specific intent to commit a felony, can establish, by external evidence, that he lacked the required intent. Under the prevailing rule, however, a person charged with rape, most often defined as requiring only general intent, cannot prove lack of intent. His intent is implied from the act of forced intercourse itself. This bifurcation, however, is clearly erroneous because "[w]hat . . . looks like an obvious case of rape may turn out to be a mere assault and battery because the perpetrator is the long-lost unrecognized husband of the woman, or the parties may have consummated a legal marriage which the woman later decided was illegal."[321] Thus, the better and more logical view is to admit evidence of intoxication in all cases in which intent, whether general or specific, is an element of the crime.[322]

Despite these arguments, many courts continue to adhere to the antiquated distinction between specific and general intent. For example, in *United States v. Hartfield,*[323] a recent Ninth Circuit case involving attempted robbery, the court held that in a specific intent crime voluntary intoxication that precludes the formation of the necessary intent may be established as a defense.[324] Similarly, in *United States v. Scott*[325] the District of Columbia Circuit upheld this distinction in a robbery case. The court cited with ap-

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320. *Id.* at 144.

321. *Id.*

322. Professor Bassiouni, however, argues for the validity of the distinction between specific and general intent on the basis of foreseeability:

> [F]orseeability of the actor extends to potential general misconduct in which a "general intent" suffices, while "specific intent" requires a positive knowledge either of the particular act that constitutes a part of the material element of the crime or of a specific result. This mental state cannot be formulated by the intoxicated person, because the foreseeability of such specific purpose cannot be imputed to that person at the time of his or her sobriety.

M. BASSIOUNI, *supra* note 316, at 475.

Professor Bassiouni himself realizes, however, tbat this argument is based more on convenience than on logic:

> An intoxicated person who acts "under the influence of intoxication" may be unable to formulate a "general intent" and, *a fortiori,* a "specific intent." However, to unravel the mysteries and functioning of the mind or to evaluate the shades of external influence exerted by foreign substances affecting a person's state of mind is not a task intended by the law of crimes.

Id. at 474-75 (footnote omitted). With the aid of medical experts and modern technical advancements, however, this task should be easier to undertake.

323. 513 F.2d 254 (9th Cir. 1975).

324. *Id.* at 259.

325. 529 F.2d 338 (D.C. Cir. 1975).

proval its earlier decision in *Edwards v. United States*,[326] which held that when "a specific intent is essential to the crime charged, and evidence is introduced that might create a reasonable doubt whether the defendant was sober enough to be capable of forming this intent, the jury must be instructed to acquit if they have such a doubt."[327]

Recently, however, the Supreme Judicial Court of Maine took an approach similar to that espoused by LaFave and Scott.[328] In *State v. Foster*[329] the court indicated that intoxication would be a defense to an attempted homicide charge "if it raised a reasonable doubt as to whether [appellant] intentionally or knowingly discharged the revolver *(i.e.,* intended the act) or as to whether he intended to kill or knew to a substantial certainty that death would result *(i.e.,* intended the result)."[330] Instead of focusing on the distinction between general and specific intent, the court first identified the crime to determine whether any intent was required and then allowed evidence of intoxication to negate the existence of such intent.

Despite the sound analysis in *Foster,* the majority of courts nevertheless continue to distinguish between general and specific intent in applying the intoxication defense. Adherence to the doctrine by these courts in the face of the logical paradox, however, is unwarranted. Perhaps scholars, practitioners, and defendants alike are faced with a situation in which "logic . . . must defer to history and experience"[331] because of judicial willingness to give up a doctrine that is supported by the weight of one hundred and fifty years of English and American decisions. This doctrine, however, was not the necessary development of English law. The earliest reported cases[332] make no mention of a distinction between specific

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326. 172 F.2d 884 (D.C. Cir. 1949).

327. *Id.* at 884.

328. *See* note 25 *supra* and accompanying text.

329. 405 A.2d 726 (Me. 1979). For a statement of the facts of the case, see text accompanying notes 289-90 *supra.* It should be noted that there was evidence that defendant had ingested LSD as well as beer before the shooting occurred. The court's failure to make a distinction between these types of intoxication suggests it will apply its test to both situations. For a further discussion of the distinction between alcoholic and narcotic intoxication, see Section D(1) *infra.*

330. 405 A.2d at 729.

331. United States v. Watson, 423 U.S. 411, 429 (1975) (Powell, J., concurring). Indeed, it is possible that this distinction could be attacked under equal protection grounds. *See* Part V, Section A *infra.*

332. Regina v. Doherty, 16 Cox C.C. 306 (N.P. 1887); Regina v. Monkhouse, 4 Cox C.C. 55 (N.P. 1849); Regina v. Cruse, 173 Eng. Rep. 610 (1838).

and general intent. Instead, these decisions present the question in terms of whether evidence of intoxication is sufficient to negate the intent charged.[333] Taken literally, this early application of the rule applies equally to general and specific intent. Such an interpretation and application avoids the necessity for the hazy distinctions between specific and general intent while enabling courts to apply a more logically defensible rule.

C. *Involuntary Intoxication*

Although it has been argued that there is no realistic defense of involuntary intoxication,[334] courts have recognized the defense in certain circumstances. Thus, at common law "if a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrenzy . . . this puts him into the same condition, in reference to crimes, as any other phrenzy, and equally excuseth him."[335] Today, the defense is stated as including "[c]oerced intoxication, pathological intoxication, intoxication by innocent mistake, and unexpected intoxication resulting from the ingestion of a medically prescribed drug."[336] In *City of Minneapolis v. Altimos*[337] the Supreme Court of Minnesota examined the history and present state of the involuntary intoxication defense, noting that in all four situations an actor must meet the insanity requirement of his jurisdiction.[338] Thus, while voluntary intoxication must be of such a degree as to render the actor incapable of acting knowingly and intentionally, involuntary intoxication need only render the individual incapable of appreciating the criminality of his conduct at the time of the commission of the crime.[339]

1. Coerced Intoxication

In *Burrows v. State*,[340] the classic case involving coercion, the Arizona Supreme Court held that coerced intoxication would not

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333. "[Y]ou may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime." Regina v. Doherty, 16 Cox C.C. 306, 308 (N.P. 1887).

334. *See* note 299 *supra*.

335. 1 M. HALE, PLEAS OF THE CROWN * 32.

336. City of Minneapolis v. Altimus, 306 Minn. 462, 468, 238 N.W.2d 851, 856 (1976).

337. 306 Minn. 462, 238 N.W.2d 851 (1976).

338. For a discussion of the insanity defense, see Part IV *infra*.

339. *See* People v. Walker, 33 Ill. App. 3d 681, 687, 338 N.E.2d 449, 453 (1975).

340. 38 Ariz. 99, 297 P. 1029 (1931).

excuse criminal behavior unless the influence exercised on a defendant's mental state amounted to duress or fraud.[341] Consequently, the court upheld the jury's determination that the coercion involved[342] did not amount to a legal defense. Many courts following *Burrows* have strictly construed this coercion requirement.[343] A comparison of the coercion requirement in other areas of the law, however, indicates that such a rigid rule is unjustified. For example, Professor Williston states that in contracts cases "the correct rule, is that any unlawful threats which do in fact overcome the will of the person threatened, and induce him to do an act which he would not otherwise have done, and which he was not bound to do, constitute duress."[344] Application of this subjective approach in criminal law would allow juries to consider the particular susceptibility of a defendant and would thereby result in a more equitable treatment of criminal defendants on a case-by-case basis. Nevertheless, criminal courts continue to apply a harsh rule. One explanation for continued use of this strict rule is societal distaste for drunkenness. Also, there is a fear that a less stringent standard will allow defendants to go free merely by stating "he made me do it." This argument has little support, however, since the more subjective approach espoused by Professor Williston has worked well in other areas of the law.

2. Pathological Intoxication

Pathological intoxication has been defined as "intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible."[345] Although case law on this topic is extremely scarce,[346] it seems that a defendant

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341. *Id.* at 116, 297 P. at 1035.

342. Defendant, an eighteen-year-old, hitched a ride with the deceased, who had been drinking and had liquor in the car. During the ride, deceased became abusive and threatened to leave defendant in the middle of the desert if he did not drink. Defendant had never tasted liquor before and refused at first. But, being penniless and in fear of being left in the desert, defendant drank several bottles of beer. Later, when they reached a small town, deceased bought some whiskey and again urged defendant to drink. Fearing what deceased might do if he refused, defendant drank some whiskey. The effect of the alcohol made defendant dazed and unaware of what was happening until after he killed the deceased. *Id.* at 103-04, 297 P. at 1031.

343. *See, e.g.*, State v. Bunn, 283 N.C. 444, 196 S.E.2d 777 (1973); Perryman v. State, 12 Okla. Crim. 500, 159 P. 937 (1916).

344. 13 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1605, at 669 (3d ed. 1970).

345. MODEL PENAL CODE § 2.08(5)(c) (proposed Official Draft, 1962).

346. One case that discusses the pathological intoxication defense is Kane v. United

raising this defense must show that despite his knowledge of intake he was unaware of his susceptibility to an atypical reaction to the substance.[347]

3. Innocent Mistake

In *People v. Penman*,[348] defendant committed murder after having consumed several pink tablets that apparently contained cocaine. At trial, he contended that the person who gave him the tablets represented them to be breath purifiers. The court held that if, as a finding of fact, defendant was insane at the time of the murder, his defense of innocent mistake would lie.[349] This area is similarly lacking in case law,[350] but it is generally recognized that the defense is valid when a person is deceived into taking the intoxicant.[351]

4. Medical Prescription

In *City of Minneapolis v. Altimus*[352] the Minnesota Supreme Court held that three requirements must be met before a defendant can offer as a defense his unexpected intoxication from the ingestion of a medically prescribed drug. First, "defendant must not know, or have reason to know, that the prescribed drug is likely to have an intoxicating effect."[353] Second, "the prescribed drug, and not some other intoxicant, [must] . . . in fact [be] the cause of defendant's intoxication at the time of his alleged criminal conduct."[354] Third, defendant, "due to involuntary intoxication, [must be] . . . temporarily insane."[355] Some courts have imposed

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States, 399 F.2d 730 (9th Cir. 1968). Defendant Kane based his appeal of his conviction for the shooting and killing of his wife on the defense of pathological intoxication. Kane had previously suffered head injuries resulting in a reduced tolerance of alcohol. Aware of this fact, he nevertheless became intoxicated on the day in question and suffered periods of unconsciousness due to his consumption of beer. The court, while recognizing the Model Penal Code's provision on pathological intoxication, refused to recognize it as an affirmative defense. The court sidestepped the issue by stating that Kane's failure to raise the defense in the trial court precluded his asserting the defense on appeal. The court noted, however, that even if it allowed the defense Kane could not claim its protection because he was aware of his peculiar susceptibility to alcohol. *Id.* at 736-37.

347. *See* W. LAFAVE & A. SCOTT, *supra* note 298, at 348.

348. 271 Ill. 82, 110 N.E. 894 (1915).

349. *Id.* at 97-98, 110 N.E. at 900-01.

350. The author has found no cases in which innocent mistake has been argued.

351. W. LAFAVE & A. SCOTT, *supra* note 298, at 348.

352. 306 Minn. 462, 238 N.W.2d 851 (1976).

353. *Id.* at 470, 238 N.W.2d at 857.

354. *Id.*

355. *Id.*

an additional requirement that the prescribed drug be taken in accordance with medical advice or pursuant to a prescription.[356] Decisional law is again scarce,[357] but judicial authority indicates that courts will rarely permit as a defense this form of involuntary intoxication.[358]

A review of the four situations in which involuntary intoxication may be a defense to criminal behavior indicates that judicial recognition of the defense has been tacit at best. Thus, although the doctrine is accepted by the majority of jurisdictions, involuntary intoxication rarely appears as a viable criminal defense.

D. Areas of Inquiry

1. Drugs and the Intoxication Defense

Courts confronted with the issue of intoxication caused by ingestion of narcotic drugs have uniformly applied the same rules developed with regard to alcoholic intoxication.[359] Similarly, commentators have refused to distinguish between alcoholic intoxication and narcotic intoxication.[360] These courts and commentators, however, fail or refuse to realize that there is a fundamental difference between the effects of alcohol and of narcotics upon human behavior. While alcohol has the effect of releasing inhibitions and setting free inner character traits of the individual,[361] some drugs

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356. *See* Perkins v. United States, 228 F. 408 (4th Cir. 1915); People v. Koch, 250 A.D. 623, 294 N.Y.S. 987 (1937).

357. In Prather v. Commonwealth, 215 Ky. 714, 287 S.W. 559 (1926), the court held that defendant, a morphine addict as a result of a painful operation, could not control his actions and was therefore not guilty. *See also* Annot., 30 A.L.R. 761 (1924). *Cf.* Johnson v. Commonwealth, 135 Va. 524, 115 S.E. 673 (1923) (Defendant, in pain from a toothache, became intoxicated without a doctor's order and committed murder. His intoxication was held voluntary.).

358. *See* City of Minneapolis v. Altimus, 306 Minn. 462, 472, 238 N.W.2d 851, 858 (1976).

359. *See* People v. Aguirre, 30 Ill. App. 3d 854, 334 N.E.2d 123 (1976); City of Minneapolis v. Altimus, 306 Minn. 462, 238 N.W.2d 851 (1976); State v. Roisland, 1 Or. App. 68, 459 P.2d 555 (1969); State v. Mriglot, 15 Wash. App. 446, 550 P.2d 17 (1976); State v. Zamora, 6 Wash. App. 130, 491 P.2d 1342 (1971).

360. *See* M. BASSIOUNI, *supra* note 316, at 472; W. LAFAVE & A. SCOTT, *supra* note 298, § 45.

361. "Alcohol is an anesthetic or depressant, and its action is approximately the same on all human central nervous systems: It is usually described as reducing the speed and accuracy of perception, slowing down reaction time, and diminishing tensions, anxieties and inhibitions." Bacon, *Social Settings Conducial to Alcoholism*, 164 J.A.M.A. 177, 178 (1957).

It has also been stated that a person's behavior pattern while under the influence of alcohol remains consistent each time he is in a similar condition. *See* Note, *Intoxication as a Criminal Defense*, 55 COLUM. L. REV. 1210, 1211 (1955).

often have effects totally unrelated to the user's personality.[362]

An argument can be made, therefore, that the traditionally strict rule concerning voluntary intoxication as it relates to criminal responsibility should not apply to narcotic drugs. A defendant should be able to argue that he was totally unaware that the drug would have a particular effect on him. A similar approach is found in the innocent mistake strain of the involuntary intoxication doctrine. Although a defendant is not tricked into taking the drug, the fact remains that at the time of ingestion he is unaware of the actual effect of the drug. In a sense, he is tricked by the drug itself. Thus, the defense of voluntary narcotic intoxication, like that of innocent mistake, should be based on the concept of foreseeability. Indeed, one commentator has espoused utilization of the concept with regard to the liability of inexperienced inebriates, stating that "the inexperienced inebriate . . . cannot be held criminally liable for a harm committed under gross intoxication."[363] Thus, in effect, no liability would be imposed because the inexperienced inebriate did not know the effect that the increased amount of alcohol would have upon him. Similarly, although a person who drinks liquor can reasonably foresee the possibility of a certain type of behavior modification, one who uses narcotic drugs cannot foresee with any certainty the possible behavioral changes that the drug may effect.

An alternative solution to the drug intoxication issue may be found in *State v. Foster*,[364] which involved both alcohol and drug intoxication. The Maine court, rather than making an arbitrary distinction between specific and general intent, held that intoxication will be a defense if a defendant shows that he did not intend either the act or the result that occurred.[365] Applying equally to alcohol and drug intoxication, this test discards the specious distinction made between specific and general intent and instead allows the intoxicated defendant to prove an absence of intent in either situation.

A related problem that has not received judicial attention concerns "flashbacks" that may occur with the use of drugs such as LSD. In this situation, a person may experience hallucinations several days or weeks after initial ingestion of the drug. Should a person be held criminally responsible for acts committed during such episodes? In other words, is the episode itself voluntary or involun-

362. *See generally* Part I *supra*.
363. J. HALL, *supra* note 319, at 554.
364. 405 A.2d 726 (Me. 1979).
365. *Id.* at 729.

tary? Since medical testimony indicates that the occurrence of flashbacks is rare and unpredictable,[366] it cannot logically be assumed that the person intended the drug to have this effect. Thus, the traditional approach to intoxication is inadequate in dealing with this problem. The flashback is a complete surprise to its victim, and its results are not intended from the initial use of the drug. Logically, therefore, any criminal acts committed during a flashback lack the requisite element of intent and must be excused because the intoxication is "involuntary." It seems likely, however, that courts, through their strict application of what constitutes "involuntariness," will infer the requisite intent from the initial "bad act" of ingesting the drug.

In *State v. Roisland*[367] the Court of Appeals of Oregon refused to accept the argument that the traditional rules for intoxication should not apply to drug use. The court reasoned that voluntary use of nonalcoholic intoxicants is comparable to alcoholic intake due to the similarities between the requisite intent and the resulting action. Thus, it concluded that because of these similarities the culpability should not differ.[368] The court's reasoning, however, seems based more upon notions of expedience than of logic. In order to avoid a flood of cases based upon the subjective effects of various drugs, courts are willing to impose a general rule that is not directly applicable in all cases. Furthermore, because the ingestion of many drugs is an illegal act in itself, courts do not hesitate to deviate from the course of pure logic and infer the requisite intent for the act that follows despite differences in foreseeable effects.

2. Actus Reus and Intoxication

The essence of criminal liability is that the actor must commit a voluntary act *(actus reus)* and intend to commit the act *(mens rea)*.[369] As has been shown, courts are reluctant to completely excuse intoxicated offenders on the ground that *mens rea* has been negated.[370] An argument may nevertheless be made that the intoxi-

366. *See* E. BRECHER, *supra* note 7, at 387.

367. 1 Or. App. 68, 459 P.2d 555 (1969).

368. *Id.* at 77, 459 P.2d at 559.

369. *See* W. LAFAVE & A. SCOTT, *supra* note 298, § 24, at 175-76.

370. *See* notes 300-68 *supra* and accompanying text. While courts will not convict intoxicated offenders for certain specific intent crimes, they usually convict for a lesser included offense that only requires general intent.

cated person has not performed a *voluntary* act.[371]

The Model Penal Code provides that involuntary acts include those which are "not a product of the effort or determination of the actor, either conscious or habitual."[372] Therefore, a defendant could argue that, although intoxicated, his acts were not the product of his will, particularly when he had no control over his actions. Thus, the element of voluntariness *of the act* is lacking when the crime is committed. This situation is comparable to that of committing a crime while sleepwalking, which some courts[373] have held fails to satisfy the voluntary act requirement. The argument is essentially that the defendant was unconscious when he committed the act.

It is unclear, however, whether a court would recognize this argument in a defense based upon voluntary intoxication. The Model Penal Code, for example, requires that liability be "based on conduct which *includes* a voluntary act . . . ."[374] Thus, while a defendant may have been unconscious when the act was committed, voluntariness is found in the ingestion of alcohol or drugs. If a defendant is further held to have knowledge of the possible consequences of taking the intoxicating substance, he is guilty of the crime.[375]

Judicial unwillingness to find an involuntary act in such situations results in a body of law that, although lacking in logical application, reflects the impact of societal mores on the decisionmaking process of the courts. As long as society condemns either the use or excessive use of alcohol and drugs, the existing rules on intoxication may be justified. Whether society's attitudes, and with it the law's approach, toward alcohol and drugs will change is pure speculation. At present, however, because these rules provide a quick, efficient means to establish criminal responsibility "logic . . . must defer to history and experience."[376]

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371. "Voluntary act" will be used in the sense of an "external manifestation of the will." *See* W. LAFAVE & A. SCOTT, *supra* note 298, § 25, at 180.

372. MODEL PENAL CODE § 2.01(2) (Proposed Official Draft, 1962).

373. In Bradley v. State, 102 Tex. Crim. 41, 277 S.W. 147 (1925), defendant awoke from his sleep in a frightened state and started shooting, killing the woman with whom he was sleeping. The court held that the jury could acquit if they found defendant was asleep when he shot the deceased. *See also* Fain v. Commonwealth, 78 Ky. 183, 39 Am. Rep. 213 (1879).

374. MODEL PENAL CODE § 2.01(1) (Proposed Official Draft 1962) (emphasis supplied).

375. Still unanswered, however, is the problem of the "flashback." *See* text accompanying note 366 *supra*.

376. United States v. Watson, 423 U.S. 411, 429 (1975) (Powell, J., concurring).

E. Conclusion

Although formulated many years ago, the intoxication defense has remained essentially intact. Some courts have expanded the doctrine by varying their interpretation of general and specific intent,[377] while others have refused to adopt the exculpatory doctrine at all.[378] The vast majority of jurisdictions, however, adhere to the rule that voluntary intoxication can only negate the intent that constitutes an essential element of the crime.

Should courts continue to adhere to the view that voluntary intoxication will not totally exonerate a defendant, the bias against intoxication must be admitted and the use of a purely arbitrary legal rationale discontinued. This realization is the first step toward any significant change in the treatment of intoxicated offenders. Courts must then realize that in the vast majority of cases criminal intent cannot be implied from the initial innocent consumption of alcohol. In those few cases where a person drinks to help him "get his nerve up" to commit a crime, he should be dealt with as if he were not intoxicated because he has formed the requisite criminal intent. When such intent cannot be found, however, another approach becomes necessary.

Refusing to infer intent from the initial consumption of alcohol and drugs will not leave criminals free to steal, rape, or kill without fear of punishment. If a person thinks "I can go ahead and get drunk and not worry about whether I injure or kill someone," he has evidenced a recklessness sufficient to impose criminal responsibility. When this initial intent is lacking, however, courts should alter their traditional approach. In a system that bases criminal responsibility on the voluntary, intentional acts of an individual, a person must have the opportunity to prove the absence of such volition or intent. As societal attitudes toward those intoxicated by alcohol or other drugs change, the ultimate outcome may be the imposition of alternative forms of treatment instead of harsh criminal sanctions. At present, however, courts should at least be willing to reduce the criminal sanctions when a defendant can show that he formed no criminal intent at the time of consumption.

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377. *See* notes 329-30 *supra* and accompanying text.

378. *See* note 298 *supra*.

IV. The Insanity Defense

A. Introduction

The principle that insanity may reduce criminal responsibility has been invoked regularly by drug dependent defendants seeking to avoid or reduce punishment for criminal offenses.[379] Because virtually all courts are familiar and comfortable with the insanity analysis it is not surprising that the insanity defense has become the workhorse of counsel representing the drug dependent defendant. This section of the Special Project first summarizes the requirements of the defense and the various tests employed by the courts. Second, it discusses the relationship between drug dependence and insanity and analyzes the drug dependence theory. Third, the leading cases under each of the insanity tests are summarized and the recurring legal issues distilled. Fourth, several related defenses, including compulsion and diminished capacity, are discussed. Finally, the drug dependent insanity plea is analyzed with major emphasis on the role of the expert witness and the factfinder and on several proposed solutions. It should be noted, however, that no comprehensive doctrine concerning the drug dependent defendant's criminal responsibility has been developed. Consequently, the resolution of any particular case rests upon the prevalent theory of the given jurisdiction and the particular fact pattern of a given case.

B. The Insanity Plea

At common law, in order for a person to be held accountable for his conduct and therefore criminally responsible, he must reach a certain age and be mentally sound. Because the presence of the requisite *mens rea* is an element of each offense, a defendant must be able to formulate the requisite intent in order to be convicted of the offense charged. Therefore, a defendant who is insane or otherwise mentally incompetent may not be convicted or punished for criminal acts committed while mentally disabled.[380] Typically, whether one is insane and thereby relieved of criminal responsibil-

379. For a discussion of the development of the principle that insanity reduces or negates criminal responsibility, see R. Perkins, Criminal Law 850-52 (2d ed. 1969); Bennett, *Drug Addiction and Its Effect on Criminal Responsibility,* 9 Wake Forest L. Rev. 179, 180-82 (1973).

380. M. Bassiouni, *supra* note 316, at 487. Numerous reasons have been advanced for the proposition that insanity should diminish criminal responsibility. *See* D. Tompkins, Insanity and the Criminal Law: A Bibliography (1960).

ity is a determination for the trier of fact, in accordance with the particular test utilized.[381]

1. The Insanity Tests

(a) M'Naghten

The oldest of the commonly used insanity tests was formulated in *M'Naghten's Case*.[382] M'Naghten, intending to kill Sir Robert Peel, shot and killed another person. Medical testimony showed that at the time of the shooting he was acting under an insane delusion and was in a disordered mental condition. The jury returned a verdict of not guilty based upon an instruction that the defendant had to be of sound mind in order to be convicted. The modern *M'Naghten* insanity test, based upon the answers given by the House of Lords, requires the defendant to prove one of two assertions: either that he acted under a defect of reason occasioned by mental disease that prevented him from comprehending the nature and quality of his act or that if he did so comprehend he did not know that his actions were wrong.[383]

The *M'Naghten* test has proven to be somewhat inflexible. Thus, several states have combined *M'Naghten* with the "irresistible impulse" test.[384] Under this version of the test, a defendant may be relieved of criminal responsibility even when he can distinguish between right and wrong. He must show, however, that the duress of the mental disease caused him to lose the power to decide between right and wrong at the time of the criminal act.[385]

(b) Durham

In *Durham v. United States*[386] the District of Columbia Circuit expressed dissatisfaction with the *M'Naghten* test and concluded that the better view is "simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."[387] Thus, under the *Durham* rule the jury first determines whether the defendant was sane or insane at the

381. Although expert testimony is admissible on the question of a defendant's mental capacity and state, the determination of insanity is a pure legal issue. R. PERKINS, *supra* note 379, at 858.

382. 8 Eng. Rep. 718 (1843).

383. *Id.* at 722.

384. *E.g.*, Parsons v. State, 81 Ala. 577, 2 So. 854 (1887).

385. *See* R. PERKINS, *supra* note 379, at 868-75.

386. 214 F.2d 862 (D.C. Cir. 1954).

387. *Id.* at 874-75.

time of the offense. If the defendant was insane, the jury must then determine whether the act was the "product" of his insanity. The *Durham* rule, however, has not enjoyed wide acceptance among the courts.[388]

(c) *Model Penal Code*

The drafters of the American Law Institute's Model Penal Code rejected the *M'Naghten*-irresistible impulse test because they perceived the need to include impairment of the capacity to control behavior as well as the impairment of cognition in the insanity definition. Furthermore, they wanted the legal definition to include sudden or spontaneous acts over which the individual had no control. The drafters also rejected the *Durham* rule because of the confusing word "product."[389] The model test provides:

> (1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks the substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.
> (2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.[390]

All the federal circuits, as well as a number of state jurisdictions, have now adopted the Model Penal Code test in some form.[391]

2. Presumptions and Burden of Proof

In most jurisdictions a criminal defendant is presumed to be both sane and of sound mind. When some evidence of insanity or mental disease is introduced, however, the presumption of sanity disappears and the burden shifts to the prosecution to prove the defendant's sanity beyond a reasonable doubt.[392] The defendant, of

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388. In fact, the same court that formulated the rule later modified it in McDonald v. United States, 312 F.2d 847 (D.C. Cir. 1962). The Second Circuit, typical of other courts' reaction, noted that "[t]he most significant criticism of *Durham*, however, is that it fails to give the fact-finder any standard by which to measure the competency of the accused." United States v. Freeman, 357 F.2d 606, 621 (2d Cir. 1966). The D.C. Circuit ultimately rejected *Durham* in favor of the Model Penal Code test. *See* United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972); notes 389-90 *infra* and accompanying text.

389. MODEL PENAL CODE §§ 158-159 (Tent. Draft No. 4 1955).

390. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

391. *See* Comment, *Criminal Responsibility and the Drug Dependence Defense—A Need for Judicial Clarification*, 42 FORDHAM L. REV. 361, 373 n.69 (1973). For a listing of other jurisdictions adopting the Model Penal Code test, see United States v. Brawner, 471 F.2d 969, 979 (D.C. Cir. 1972).

392. United States v. Hartfield, 513 F.2d 254, 259 (9th Cir. 1975) (only slight evidence

course, must withstand the government's countervailing evidence that shows him to be sane.[393] Thus, to successfully attack a finding of sanity on appeal, the defendant must demonstrate that reasonable men would possess a reasonable doubt as to his sanity.[394]

3. Admissibility of Evidence on the Insanity Issue

Because only slight evidence of insanity is sufficient to rebut the presumption of sanity,[395] it is axiomatic that admissibility standards for evidence on the issue of insanity should be liberal. Consequently, most jurisdictions allow the introduction of any relevant testimony related to the defendant's mental state. For example, in *Faught v. State*,[396] defendant offered as evidence expert testimony that he was insane because of a compulsion caused by drug addiction. The trial court, however, excluded the entire testimony, admonishing the jury not to consider the expert testimony concerning defendant's condition.[397] The Indiana Court of Appeals reversed, holding that defendant was entitled to have the jury consider all expert testimony concerning his state of mind at the time of the robbery.[398]

Most courts also are fairly liberal concerning the expertise required of the defendant's witnesses. For example, in *United States v. Kienlen*[399] the court held that testimony by a general practitioner to show defendant's mental capacity at the time of the crime was properly admitted. Similarly, in *United States v. Milne*[400] the Fifth Circuit allowed defendant to support an insanity defense with the testimony of three lay witnesses who testified to his heavy drug use and bizarre behavior. The court reasoned that

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of insanity is sufficient to shift the burden onto the government); United States v. Milne, 487 F.2d 1232, 1234-35 (5th Cir. 1973); People v. Jackson, 116 Ill. App. 2d 304, 314, 253 N.E.2d 527, 532 (1969).

393. *See* United States v. Strutton, 494 F.2d 686 (2d Cir. 1974).

394. United States v. Greene, 497 F.2d 1068, 1073 (7th Cir. 1974). *See also* United States v. Kissane, 478 F.2d 1098 (7th Cir. 1973). The jury, of course, may find from conflicting testimony that the government has carried its burden of proving the defendant sane beyond reasonable doubt. Webber v. United States, 395 F.2d 397, 399 (10th Cir. 1968).

395. *See* note 392 *supra* and accompanying text.

396. 155 Ind. App. 520, 293 N.E.2d 506 (1973).

397. *Id.* at 522, 293 N.E.2d at 507.

398. *Id.* at 524, 293 N.E.2d at 509. On a subsequent appeal the same court reiterated its holding, stating that evidence of the effects of drug addiction and/or withdrawal symptoms was also admissible. Fraught v. State, 162 Ind. App. 436, 438, 319 N.E.2d 843, 845 (1974).

399. 415 F.2d 557 (10th Cir. 1969).

400. 487 F.2d 1232 (5th Cir. 1973).

both lay and expert evidence should be admitted to give a defendant an adequate opportunity to develop the insanity defense.[401] In *Brown v. United States*[402] the court went a step further by ruling that a defendant has the right to judicial assistance in developing the basis for his insanity defense.[403]

4. Result of the Insanity Plea

A defendant is accorded varying treatment when his insanity plea is successful. In some jurisdictions mandatory civil commitment follows a verdict of not guilty by reason of insanity. In other jurisdictions the jury, after rendering its verdict, makes a separate determination concerning the defendant's present state of mind. If the jury finds that the defendant is presently sane, he is immediately released. If the defendant is deemed insane, however, he is confined to a mental institution until he is considered fit for release.[404] Thus, in those jurisdictions that adhere to the latter approach, it is in the best interest of the defendant to secure a finding of insanity at the time of the alleged offense, followed by a finding of sanity at the close of the trial.[405]

C. The Insanity Plea and the Drug Dependent Defendant

1. Drug Dependence and Criminal Responsibility

The effect of drug use and drug addition on *mens rea* has led a number of courts and commentators to raise the issue of their relation to criminal responsibility. One commentator has offered two basic arguments against punishing addicts when their behavior is caused by drug use and drug addiction.[406] First, the punishment

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401. *Id.* at 1235. The Ninth Circuit similarly has held that evidence of intoxication is admissible on the issue of insanity. This reflects the general rule that virtually all evidence relevant to mental competency should be admitted. *See* United States v. Hartfield, 513 F.2d 254 (9th Cir. 1975).

402. 331 F.2d 822 (D.C. Cir. 1964).

403. *Id.* at 823.

404. *See* M. BASSIOUNI, *supra* note 316, at 495, and authorities collected therein. The time of release is determined solely by local law.

405. The Seventh Circuit has held that a defendant is entitled to introduce evidence of his mental condition as it existed both at the time of the crime and at time of trial. *See* United States v. Kissane, 478 F.2d 1098, 1101 (7th Cir. 1973). Furthermore, most jurisdictions require an examination of the defendant to determine his competency to stand trial. Although different standards are used to determine competency and insanity, the results of the competency test might be dispositive of a defendant's sanity at time of trial. *See generally* Annot., 73 A.L.R.3d 16 (1976).

406. Bennett, *supra* note 379, at 182-83. This section of the Special Project focuses solely on insanity based arguments for diminished criminal responsibility. Other theories of

does not serve the deterrent function of the criminal law because the dominant addiction is the incapacity of the addict to abstain from using drugs despite a desire to quit. Thus, the addict lacks the power to stop using drugs. Second, punishment of addicts does not succeed due to the addict's continued psychological and physiological dependence on drugs. Thus, punishment of addicts would not accomplish two of the functions of the criminal law —deterrence and rehabilitation. The only purpose arguably served would be that of retribution.[407]

The argument that drug addiction negates criminal responsibility was judicially recognized as early as 1926 in *Prather v. Commonwealth.*[408] In *Prather* defendant had been convicted of conversion of trust funds after testifying to a hazy recollection of using the proceeds to buy morphine. His physicians testified at trial that he had been an addict and insane at the time of the offense, but was of sound mind at the time of trial. The Kentucky Court of Appeals held that it was immaterial whether defendant's habit was voluntary or the result of medical treatment. The court further noted that, because expert testimony indicated defendant's insanity, the responsibility for the commission of the crime should not be distinguished from that of other insane persons.[409]

Several alternative requirements are implicit in all the insanity tests. Specifically, the defendant must show that at the time of the crime an underlying medical disease or defect either prevented him from distinguishing right from wrong, deprived him of the substantial capacity to appreciate the criminality of his conduct, made him unable to conform his behavior to the requirements of the law, or produced the allegedly criminal conduct. Due to these requirements, the defendant first must establish a nexus between his drug use or drug addiction and a mental disease or defect in order to successfully assert insanity as a bar to criminal

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the effect of drugs and drug dependence on criminal responsibility are treated in Parts III and V of this Special Project.

407. "Thus, society has recognized over the years that *none* of the three asserted purposes of the criminal law—rehabilitation, deterrence and retribution—is satisfied when the truly irresponsible, those who lack substantial capacity to control their actions, are punished." United States v. Freeman, 357 F.2d 606, 615 (2d Cir. 1966) (emphasis supplied).

408. 215 Ky. 714, 287 S.W. 559 (1926).

409. *Id.* at 716-17, 287 S.W. at 560. While *Prather* may be read for the proposition that compulsion due to drug addiction is exculpatory, a more exact interpretation is that the court was primarily persuaded by the insanity theory. The case, however, leaves open the question whether defendant's drug addiction alone was sufficient to constitute insanity, or whether the addiction precipitated a mental disease or defect that would legally constituto insanity.

responsibility. Additionally, the defendant must meet the requirements of the applicable insanity test.[410]

Proof of addiction alone is generally insufficient to relieve a defendant from criminal responsibility under a jurisdiction's insanity test.[411] Thus, the District of Columbia Circuit has held that, while narcotic addiction is an illness, the jury must still find a causal relationship between the defendant's disease or defect and the offense charged.[412] Similarly, Missouri courts have held that drug abuse, absent a psychosis, is not a defense under that state's insanity test.[413] The most forceful recent statement that drug addiction alone will not relieve a defendant from criminal responsibility, even if he was incapable of conforming his conduct to the requirements of the law, was enunciated by the Massachusetts Supreme Judicial Court in *Commonwealth v. Sheehan.*[414] The court explained that drug addiction did not meet the state's version of the Model Penal Code test unless there was a causal connection between the drug addiction and a mental disease or defect of the defendant.[415] Thus, it is evident that in addition to proof of drug addiction the defendant must also offer some evidence of a mental disorder to trigger the insanity defense. Specifically, the insanity issue "may arise if, but only if, the evidence shows that a particular addiction is such as to 'substantially affect mental and emotional processes and substantially impair behavior controls.' "[416]

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410. *See* notes 383-94 *supra* and accompanying text.

411. Bennett argues that proof of addiction alone is not enough even to present the issue of insanity to the trier of fact. Bennett further points out that a personality disorder alone is insufficient to raise the insanity issue. He argues, however, that since addiction and personality disorder nearly always coexist, the combination of the two might he sufficient to diminish or negate criminal responsibility. Bennett, *supra* note 379, at 184.

412. *See* Castle v. United States, 347 F.2d 492 (D.C. Cir. 1964). The same court later explained that while narcotic addiction alone, without more, is not a mental disease or defect and thus does not constitute some evidence of insanity, it may be of probative value *along with other* evidence on the issue of responsibility. Green v. United States, 383 F.2d 199, 201 (D.C. Cir. 1967). In the same year the circuit court elaborated on the nature of probative value:

> Evidence of [drug addiction], however, has probative value in conjunction with evidence of mental illness, and the effect of a deprivation of narcotics on behavioral controls is a relevant circumstance. We have recognized, too, that extensive and protracted addiction may so deteriorate such controls as to produce irresponsibility within our insanity test.

Gaskins v. United States, 410 F.2d 987, 989 (D.C. Cir. 1967) (footnotes omitted).

413. *See* Dorsey v. State, 586 S.W.2d 810 (Mo. App. 1979).

414. 383 N.E.2d 1115, 1118 (Mass. 1978).

415. *Id.* at 1119. For a further analysis of the court's decision, see text accompanying notes 430-40 *infra.*

416. Watson v. United States, 439 F.2d 442, 465 (D.C. Cir. 1970) (Bazelon, J., concur-

In *United States v. Moore*[417] defendant attempted to avoid this nexus requirement through a novel theory of exculpation based on a self-control analysis. He argued that an addict's self-control is composed of two factors that determine whether he will perform certain acts to obtain drugs—his physical craving for the drug and his character or moral standard. Defendant then proposed a balancing test with regard to these factors and argued that the addict should be relieved of criminal responsibility whenever the first factor outweighs the second.[418] The court, rejecting this argument because of its seemingly broad implications, emphasized that the logic of defendant's argument would extend to any illegal act by a defendant for the purpose of obtaining narcotics for personal use.[419] Implicit in the court's reasoning is its adherence to the notion that only a demonstrable mental disease or defect will diminish criminal responsibility and that mere compulsion caused by drug addiction will not.

2. Drug Related Insanity Plea Under the Various Tests[420]

Jurisdictions using the *M'Naghten* standard apply the same test to defenses of insanity from drug addiction as to insanity resulting from any other cause. Thus, the drug dependent defendant must be prepared to show that his addiction caused a mental disease sufficient to produce a defect of reason that would render him unable to distinguish right from wrong.[421] In *People v. Kelly*[422] defendant pleaded not guilty by reason of insanity to a charge of assault with intent to commit murder. The testimony tended to show that she was suffering from an underlying schizophrenia, but was normally a sane person. The evidence, however, also established that her voluntary ingestion of drugs over a two month period had triggered a legitimate psychosis and had rendered her unable to distinguish right from wrong on the day of the crime. The trial court, after finding defendant incapable of understanding that her act was wrong, ruled that insanity was no defense because it arose

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ring in part, dissenting in part) (footnotes omitted).

417. 486 F.2d 1139 (D.C. Cir.), *cert. denied*, 414 U.S. 980 (1973).

418. *Id.* at 1145.

419. *Id.* The court further observed that under defendant's theory a bank robber, who stole because he needed to support his drug habit, would have a patently greater lack of free will than the mere possessor. *Id.* at 1146.

420. For a comprehensive collection of cases and detailed discussion of the drug depedence insanity defense, see Annot., 73 A.L.R.3d 16 (1976).

421. *See id.* at 71-75.

422. 10 Cal. 3d 565, 516 P.2d 875, 111 Cal. Rptr. 171 (1973).

from voluntary ingestion of drugs rather than because of a settled and permanent nature. The California Supreme Court reversed, however, holding that under the *M'Naghten* test the cause of the insanity was immaterial. The court observed that insanity induced by drug dependence affects responsibility in the same manner as insanity produced by any other cause.[423] Responding to the trial court's reasoning, the California Supreme Court held that insanity must be settled but not necessarily permanent in order to negate criminal responsibility.[424]

In *State v. Maik*[425] defendant, on trial for killing a friend by stabbing him sixty-six times, claimed that a voluntary ingestion of LSD triggered a psychotic episode and rendered him legally insane at the time of the crime. The New Jersey Supreme Court, identifying the issue as whether the voluntary use of drugs would support a defense of insanity under the *M'Naghten* standard,[426] held that the *M'Naghten* test did not require an inquiry into the etiology of the underlying mental disease. Thus, the court concluded that the insanity defense was available. In support of its reasoning, the court noted that the state's civil commitment statute afforded ample protection to society by mandating confinement of insane defendants to mental institutions until they recover from their insanity. Both *Kelly* and *Maik,* however, fail to clarify or define the parameters of diseases or defects sufficient to invoke the insanity plea and instead leave that role to the trier of fact.

Several decisions from the District of Columbia Circuit have indicated that the *Durham* test might be available to drug dependent defendants if they can demonstrate that their addiction caused a mental disease or defect. The defendant, however, would then have to show that his criminal act was the "product" of the addiction. For example, in *Castle v. United States,*[427] the court, after noting that testimony before the jury explained the defen-

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423. *Id.* at 576, 516 P.2d at 882-83, 111 Cal. Rptr. at 178-79.

424. *Id.* at 576-77, 516 P.2d at 883, 111 Cal. Rptr. at 179. *But see* Brand v. State, 123 Ga. App. 273, 180 S.E.2d 579 (1971), in which the court held that only insanity of a *permanent fixed character,* even though caused by a drug, will raise the lack of criminal responsibility.

425. 60 N.J. 203, 287 A.2d 715 (1972).

426. *Id.* at 212, 287 A.2d at 720. The court noted at the outset of its analysis that all the insanity tests of criminal responsibility "have the common characteristic of attempting to distinguish between the sick and the bad." *Id.* at 213, 287 A.2d at 720.

427. 347 F.2d 492 (D.C. Cir. 1964), *cert. denied,* 381 U.S. 929 (1965). Subsequently, the same court attempted to define mental disease or defect caused by drug addiction as an abnormal condition of the mind substantially impairing capacity to control behavior. *See* Heard v. United States, 348 F.2d 43 (D.C. Cir. 1964).

dant's degree of dependence on drugs and his withdrawal symptoms, determined that a jury could have found a causal relationship between the drug dependent abnormality and the criminal act. In all these cases the District of Columbia Circuit stressed that drug addiction alone does not constitute a mental disease or defect. Instead, the court required evidence of a serious mental disease that produced the criminal act before a verdict of acquittal by reason of insanity under the *Durham* test could be returned.[428]

Of the established tests, the Model Penal Code test is perhaps most receptive and readily adaptable to a plea of drug related insanity.[429] In *United States v. Freeman*[430] defendant asserted insufficient capacity caused by drug addiction as a defense to a charge of selling narcotics. Experts testified that defendant was a narcotics addict and confirmed alcoholic who had experienced toxic psychosis and whose addiction had caused a destruction of brain tissue. They also testified that although he was cognizant of his actions he could not distinguish right from wrong. The government's expert contended that although the defendant had some difficulty in distinguishing right from wrong it was not sufficient to satisfy *M'Naghten*. He also testified that there was no indication of brain disease. The trial court found that defendant failed to satisfy the requirements of the *M'Naghten* test. On appeal, the Second Circuit reversed, holding that the trial court should have used a less rigid test of insanity. After reviewing the other available tests the court adopted the Model Penal Code standard. In support of its selection, the court noted that only that test permitted sufficient introduction of evidence to allow the trier of fact to decide the full mental state of the accused—his characteristics, potentialities and capabilities.[431] Thus, it is clear that the court perceived the Model Penal Code test as allowing the broadest possible exposure of a defendant's mental condition to the judge or jury.

Even under the Model Penal Code test, however, the defendant must still establish a causal link between drug addiction and a mental disease or defect. Thus, in *Faught v. State*[432] a jury in-

428. *See, e.g.*, Gaskins v. United States, 410 F.2d 987 (D.C. Cir. 1967); Green v. United States, 383 F.2d 199 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 961 (1968); Hightower v. United States, 325 F.2d 616 (D.C. Cir. 1963), *cert. denied*, 384 U.S. 994 (1966). For a detailed discussion of the relation of the *Durham* test to drug dependent insanity, see Annot., 73 A.L.R.3d 16, 64-71 (1976).

429. *See* Annot., 73 A.L.R.3d 16, 16, 25 (1976).

430. 357 F.2d 606 (2d Cir. 1966).

431. *Id.* at 619-23.

432. 162 Ind. App. 436, 319 N.E.2d 843 (1974).

struction that mere evidence of drug addiction is not a defense to a crime was held proper in a jurisdiction that adopted the Model Penal Code standard. Moreover, *Commonwealth v. Sheehan*[433] is a recent indication that the Model Penal Code actually may impose a very strict standard on the drug dependent defendant. In *Sheehan* defendant appealed a pharmacy robbery conviction by arguing that his drug addiction qualified as a mental disease or defect that, along with the other necessary elements, warranted a finding of not guilty by reason of insanity under the state's version of the Model Penal Code test.[434] The court rejected this argument,[435] stating that if "the normal consequences of drug addiction are to be accepted as a ground for avoidance of responsibility for criminal conduct, the Legislature is the appropriate body to make that determination."[436] The court, however, held that if the defendant, as a result of a mental disease or defect, lacks substantial capacity to conform his conduct to the requirements of the law apart from drug addiction, his drug addiction should not bar him from asserting lack of criminal responsibility.[437]

Sheehan also rejected the notion that drug addiction would justify conduct on the theory that drug consumption is involuntary.[438] The court then indicated a preference for treating claims of lack of criminal responsibility according to the particular facts of each case.[439] Although the court's strong language is perhaps unwarranted, it indicates that the Model Penal Code test does not necessarily signify a liberalization of the criminal responsibility standards for the drug dependent defendant. While the court's analysis appears sound, it presents some danger to the purpose of the test—to allow the trier of fact to consider the broadest evidence of the accused's mental health. A better approach might have been to limit the holding by stating that an expert's conclu-

433. 383 N.E.2d 1115 (Mass. 1978).

434. Massachusetts had earlier adopted the Model Penal Code insanity test in Commonwealth v. McHoul, 352 Mass. 544, 226 N.E.2d 556 (1967).

435. *See* note 432 *supra* and accompanying text.

436. 383 N.E.2d at 1118.

437. *Id.* at 1118-19. The court added that the defendant may avail himself of the insanity plea if his consumption of drugs, apart from drug addiction itself, causes a mental disease or defect. It nevertheless stressed that if such disease is solely the product of voluntary consumption of drugs the insanity defense is not available. *Id.* at 1119.

438. *Id.* at 1119 (citing Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413 (1975)).

439. 383 N.E.2d at 1119. The court was particularly bothered by the testimony of defendant's expert, who argued that drug addiction is a mental disease or defect that in this case prevented defendant from conforming his conduct to the requirements of the law.

sions concerning the defendant's ability, as a result of his drug dependence, to conform his conduct to the requirements of the law are not necessarily binding on the trier of fact.[440]

3. Temporary Insanity

A sharp division exists among jurisdictions concerning whether a state of temporary insanity, caused by voluntary intoxication and ingestion of drugs, might relieve a defendant of criminal responsibility. In *State v. Bower*[441] the court expressly held that temporary insanity does not relieve the accused of culpability. In *People v. King*[442] the court reversed a directed verdict of not guilty by reason of insanity, holding that the question of insanity is a determination for the jury and not the court. The court nevertheless held that the jury reasonably could have concluded that defendant's voluntary use of LSD, marijuana, barbiturates and alcohol on the day he killed his wife negated his accountability for the act, since experts testified that the LSD rendered him incapable of controlling his actions. In *State v. Maik*[443] the court similarly concluded that a temporary psychotic episode qualified as a state of insanity under the *M'Naghten* test. Thus, the current status of this defense is unsettled and should therefore be explored in defending a criminal defendant who commits an offense while under the effects of drugs, particularly those with unknown or unexpected effects. Certainly the defense should be raised when intoxication triggers an underlying psychotic disorder of a settled nature.

4. Distinctions in Offenses

Although some commentators have raised the possibility that the finding of lack of criminal responsibility might be related to the nature of the drug offense committed, there is no direct au-

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440. *See* discussion of the appropriate scope of expert testimony in notes 454-57 *infra* and accompanying text.

441. 73 Wash. 2d 634, 440 P.2d 167 (1968). The court relied primarily on a statute that provided in part:

> Any person who shall have committed a crime while insane, or in a condition of mental irresponsibility, and in whom such insanity or mental irresponsibility continues to exist, shall be deemed criminally insane within the meaning of this chapter. *No condition of mind induced by the voluntary act of a person charged with a crime shall be deemed mental irresponsibility within the meaning of this chapter.*

Id. at 646, 440 P.2d at 175 (citing WASH. REV. CODE § 10.76.010) (emphasis in original).

442. 181 Colo. 439, 510 P.2d 333 (1973).

443. 60 N.J. 203, 287 A.2d 715 (1972). *See* notes 382-85 *supra* and accompanying text.

thority to support this suggestion.[444] In *United States v. Moore*[445] the court discussed whether defendant was a trafficking or a non-trafficking addict, but ultimately concluded that the distinction was not relevant to the outcome.[446] Accordingly, the availability of an insanity based defense for a drug dependent defendant should not depend upon any distinctions rooted in the nature of the offense committed.

D. Related Defenses

1. Insanity Induced by Intoxication

A number of jurisdictions adhere to the view that insanity may be offered as a valid defense even when induced by voluntary drug intoxication. Thus, in *Webber v. United States*[447] defendant supported his plea of not guilty by offering evidence of temporary insanity induced by drugs. The court accepted defendant's argument, reasoning that the government failed to carry its burden to prove beyond a reasonable doubt that the defendant had the requisite mental capacity at the time that he committed the crime.[448] This analysis appears to be the correct one. The insanity defense should not depend on the cause of the insanity; when the plea is offered the court should instruct the jury on insanity and charge the jury that it must find the defendant competent at the time of the crime in order to return a conviction.

2. Compulsion

There is limited authority to support the proposition that the drug addict, when out of drugs, is incapable of refraining from any

444. *See generally* Annot., 73 A.L.R.3d 16 (1976).

445. 486 F.2d 1139 (D.C. Cir.), *cert. denied*, 414 U.S. 980 (1973).

446. *Id.* at 1144. It is possible that the debate over the propriety of the distinctions stems from the provisions of the Narcotic Addict Rehabilitation Act of 1966 [NARA], 28 U.S.C. §§ 2901-2906 (1976). A person eligible under the Act who is charged with a crime may be advised that the charges will be held in abeyance if he elects to submit to an examination to determine whether he is an addict and whether he is likely to be rehabilitated through treatment. The accused electing this alternative must consent to civil commitment if he is found suitable for treatment. If the treatment is successful the charge is dismissed; if after three years it is not successful, prosecution is resumed. The principal shortcoming of NARA, however, is that a large number of addicts are excluded from treatment. For a discussion of the possibility of expanding the Act's scope, see text accompanying notes 461-64 *infra*.

447. 395 F.2d 397 (10th Cir. 1968).

448. The court, however, found that the government carried its burden. *Id.* The validity of this defense was implied by the same court three years later in United States v. Stewart, 443 F.2d 1129 (10th Cir. 1971). *See also* note 422 *supra* and accompanying text.

act that might replenish his supply and that his actions are therefore the same as the criminal actions of an insane person.[449] *State v. Flores*[450] is the strongest authority for the proposition that proof of compulsion due to drug addiction may exculpate a defendant from criminal responsibility. In *Flores* defendant sought to avoid criminal liability for a burglary charge by asserting that he was a longtime addict and therefore had to steal to supply his habit. He introduced testimony of two psychiatrists to support his claim. The first expert testified that defendant was under an extremely strong compulsion to obtain funds to satisfy his habit and that he experienced extreme anxiety and a very urgent need. The second expert asserted that defendant was mentally ill because his criminal acts were the product of a mental illness that made it impossible for him to distinguish right from wrong. Therefore, this expert concluded that defendant's heroin addiction subjected him to an irresistible impulse to steal to supply his habit. The court ruled that this undisputed testimony was adequate to support a defense of insanity and held that the trial court's refusal to give an instruction on insanity constituted reversible error.[451]

E. Analysis

From the previous discussion it is clear that the final determination of whether the drug dependent defendant will be relieved of responsibility for his criminal act hinges on a determination of the trier of fact. In particular, the leeway granted the fact finder in its evaluation of expert testimony is extremely crucial. In *United States v. Milne*[452] the court delineated the functions of the expert and the fact finder and concluded that the expert may voice opinion as to insanity but not as to criminal capacity. The court reasoned that no witness could speak on the ultimate issue of criminal responsibility without reaching legal conclusions. Similarly, in *United States v. Freeman*[453] the court stressed that, although relevant expert testimony will always be admissible, the testimony

449. *See* Annot., 73 A.L.R.3d 16, 50-51 (1976). For example, in Prather v. Commonwealth, 215 Ky. 714, 287 S.W. 559 (1926), the court held that drug-induced insanity was indistinguishable from insanity based on other causes.

450. 82 N.M. 480, 483 P.2d 1320 (Ct. App. 1971).

451. *Id.* at 481, 483 P.2d at 1321. The court did not express the concern of earlier courts that the expert testimony may have usurped the function of the jury. *Cf.* Commonwealth v. Sheehan, 383 N.E.2d 1115 (Mass. 1978), discussed in notes 33-40 *supra* and accompanying text.

452. 487 F.2d 1232 (5th Cir. 1973), *cert. denied*, 419 U.S. 1123 (1974).

453. 357 F.2d 606 (2d Cir. 1966). *See* notes 430-31 *supra* and accompanying text.

must be in the form of furnishing data, and not a legal conclusion or moral pronouncement.[454] The court emphasized that once the expert witness furnishes information as to the mental state of the accused, society—represented by the trier of fact—must then decide whether a man with the characteristics described should be held accountable for his acts.[455]

The distinction drawn by these courts between the functions of expert witnesses and the trier of fact is best preserved by the Model Penal Code test. In fact, the desire to preserve this traditional distinction motivated the District of Columbia Circuit's abolition of the *Durham* test in *United States v. Brawner*.[456] The court feared that the *Durham* rule placed undue reliance on expert testimony and thus usurped the jury's proper role.[457] The court then adopted the Model Penal Code test, reasoning that this test encouraged a broad presentation of the mental capacity issue to the jury.

Thus, of the three established tests for determining the validity of a defendant's insanity defense, the Model Penal Code test best serves the interests of both the individual defendant and the penal system. This test allows the jury to consider a defendant's incapacity to control his behavior and provides a more flexible approach to differing factual situations than the *M'Naghten* and *Durham* rules.[458] In addition, by insisting on a determination of culpability by the trier of fact, the Model Penal Code test prevents the insanity issue from being reduced to a battle between prosecution and defense expert witnesses.

Because of the complex nature and increasing use of drugs, however, even the Model Penal Code test may be insufficient to deal with the drug dependent defendant under all circumstances. Many addicts who are not legally insane may still need treatment that a prison sentence cannot afford them. Nevertheless, the lack of recent decisions in this area indicates that courts are not yet willing to confront this issue in an adequate fashion. Thus, pre-

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454. 357 F.2d at 623.

455. *Id.* at 619-20. Similarly, in Hill v. State, 252 Ind. 601, 251 N.E.2d 429 (1969), the court observed that the psychiatrist will best serve the ends of justice if he limits his testimony simply to the description of the defendant's mental state.

456. 471 F.2d 969, 981 (D.C. Cir. 1972).

457. "But the difficulty . . . is that the medical expert comes, by testimony given in terms of a non-medical construct ("product") to express conclusions that in essence embody ethical and legal conclusions." *Id.* at 982-83. The *Brawner* case provides an excellent discussion of the merits of the ACI test, and of the proper roles for the expert and the jury.

458. *See* note 390 *supra* and accompanying text.

dicted expansion of insanity defense theories, to cover more situations has not yet occurred.[459] Instead, reliance continues to be placed on the imposition of legal sanctions because of the widespread belief that the addict is an autonomous person responsible for his conduct.[460]

This increasing complexity posed by the effects of drugs upon the human mind may nevertheless force society—and consequently the courts—to adopt new and more equitable approaches with regard to treatment of the drug dependent defendant. A promising interim solution when dealing with drug dependent defendants who are not found insane under traditional analysis is a reexamination of the Narcotic Addict Rehabilitation Act of 1966.[461] Under the Act, eligible individuals may consent to civil commitment and rehabilitation as opposed to criminal punishment. The narrow definition of an "eligible individual,"[462] however, has not allowed for full development of the Act's ideals.[463] Basically, the purpose of the Act is to provide alternative forms of treatment to individuals with drug dependence problems.[464] Consequently, a broad applica-

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459. *E.g.*, Bennett, *supra* note 379, at 191. Bennett suggested that there is an additional "viable approach" to the issue of criminal responsibility as related to drug addiction other than insanity—pharmacological duress. To date no court has embraced this approach.

460. *See* Fingarette, *Addiction and Criminal Responsibility*, 84 YALE L.J. 413, 444 (1975). The author argues forcefully that "there is no medical foundation for adopting the general proposition at the crux of the exculpatory legal arguments, the proposition that addictive conduct is involuntary." *Id.* at 443.

461. 28 U.S.C. §§ 2901-2906 (1976). *See* note 449 *supra*. 28 U.S.C. § 2901 defines an eligible individual as follows:

> (g) "Eligible individual" means any individual who is charged with an offense against the United States, but does not include—
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> (1) an individual charged with a crime of violence.
>
> (2) an individual charged with unlawfully importing, selling, or conspiring to import or sell, a narcotic drug.
>
> (3) an individual against whom there is pending a prior charge of a felony which has not been finally determined or who is on probation or whose sentence following conviction on such a charge, including any time on parole or mandatory release, has not been fully served: *Provided*, That an individual on probation, parole, or mandatory release sball be included if the authority authorized to require his return to custody consents to his commitment.
>
> (4) an individual who has been convicted of a felony on two or more occasions.
>
> (5) an individual who has been civilly committed under this Act, under the District of Columbia Code, or any State preceeding *[sic]* because of narcotic addiction on three or more occasions.

462. *See* Kadish, *Narcotic Addict Rehabilitation Act: A Shot in the Arm to Criminal Sentencing?* 12 AM. CRIM. L. REV. 753, 771 (1975). Professor Kadish criticizes the narrow definition of eligible addicts after a thorough analysis of the eligibility criteria under the Act.

463. *See id.* at 753-54.

464. *Id.* at 2.

tion of the Act may do more to protect the drug addict and members of society than would the imposition of criminal penalties for limited time periods with little hope for rehabilitation.

Therefore, the current exclusions of the Act should be modified in order to make the election between prosecution and treatment available to a greater percentage of addicts. By affording the individual this choice between meaningful treatment and prosecution under fairly rigid standards, the Act would effect the goal of rehabilitation of the addicted offender while still protecting society from his criminal behavior. Because the Act's present structure represents merely an unfulfilled ideal, reevaluation is needed to render the Act truly effective.

V. CONSTITUTIONAL DEFENSES

A. Equal Protection

The common-law doctrine that bars voluntarily intoxicated defendants from introducing evidence of intoxication to negate the existence of general *mens rea* while permitting involuntarily intoxicated defendants to negate its existence may be subject to an equal protection challenge. Similarly, the related common-law distinction that allows defendants to introduce evidence of voluntary intoxication to negate the requisite *mens rea* in specific intent crimes but not in general intent crimes also may be open to an equal protection attack.[465] While an equal protection challenge may not invalidate the current voluntary intoxication doctrine on constitutional grounds, it does expose the serious analytical flaws in the doctrine and suggests that a reevaluation of the legal treatment of voluntarily intoxicated defendants is needed.

The fourteenth amendment mandates that no state shall deny to persons within its jurisdiction the equal protection of the laws.[466] In *Bolling v. Sharp*[467] the Supreme Court held that the equal protection requirements of the fourteenth amendment also apply to the federal government through the fifth amendment. An equal protection problem thus arises whenever the government utilizes classifications to treat similarly situated persons unequally. Under current equal protection analysis the purpose and effect of the governmental classifications are scrutinized to determine the

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465. For a complete discussion of intoxication and criminal defendants *see* Part III *supra*.

466. U.S. CONST. amend. XIV, § 1.

467. 347 U.S. 497 (1954).

applicable standard of review. Initially, the court inquires whether the governmental classification disadvantages persons within a "suspect class"[468] or whether it affects a "fundamental interest."[469] If a suspect class or a fundamental interest is involved, then the compelling interest test applies; the classification cannot stand unless the state's interest is compelling and the classification is the least restrictive means of achieving the state's goal.[470] When neither of these elements is involved but there is a significant individual interest other than mere economics,[471] the classification must bear a *substantial relation* to a legitimate state objective.[472]

The common-law doctrine of intoxication permits involuntarily intoxicated defendants to negate the requisite *mens rea* for general intent crimes by introducing evidence of intoxication, but denies such an opportunity to voluntarily intoxicated defendants. These two classes of defendants clearly are situated similarly—in both cases intoxication impairs their mental ability. Assuming that both are equally intoxicated at the time of the alleged *actus reus*, their ability to formulate the requisite general *mens rea* is also equal. Nevertheless, the two classes of defendants are treated unequally. While legal treatment of voluntarily intoxicated criminal defendants may not interfere with a suspect class or a fundamental

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468. *See* Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Levy v. Louisiana, 391 U.S. 68 (1968) (illegitimacy); Korematsu v. United States, 323 U.S. 214 (1944) (race).

469. *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (voting); Griffin v. Illinois, 351 U.S. 12 (1956) (access to appeal in criminal cases); Skinner v. Oklahoma, 316 U.S. 535 (1942) (procreation).

470. Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

471. If the interest involved is one of mere economics, then the rational basis test applies; the classification must bear only a *rational relation* to a legitimate state interest. Dandridge v. Williams, 397 U.S. 471 (1970); McGowan v. Maryland, 366 U.S. 420 (1961); Williamson v. Lee Optical Co., 348 U.S. 483 (1955). When this standard of review is utilized, great deference is given to the legislative judgment employed in drawing the classification—almost any justification, whether articulated or implied, will sustain the statutory scheme. Gunther, *Foreward: In Search of Evolving Doctrine On a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-20 (1972).

472. Zablocki v. Redhail, 434 U.S. 374 (1978). This strand of equal protection analysis has developed over the past ten years and provides heightened judicial scrutiny for important noneconomic interests that the court has not declared fundamental and for "semi-suspect" classes. *See, e.g.*, Jackson v. Indiana, 406 U.S. 715 (1972) (invalidating a state statute that provided for the commitment of incompetent criminal defendants on terms different from all other individuals); Reed v. Reed, 404 U.S. 71 (1971) (invalidating a gender based classification); Williams v. Illinois, 399 U.S. 235 (1970) (invalidating a state statute that exposed indigents to incarceration beyond the statutory maximum to "work off" their fines). *See also* Gunther, *supra* note 471; Yarbrough, *The Burger Court and Unspecified Rights: On Protecting Fundamental and Not-So-Fundamental "Rights" or "Interests" Through a Flexible Conception of Equal Protection*, 1977 DUKE L.J. 143.

interest, the unequal treatment clearly affects a significant noneconomic interest: remaining free from incarceration.[473] Thus, under equal protection analysis this classification should be required to bear a substantial relation to a legitimate state goal.

The state's justification for unequal treatment of these two groups typically is explained by various legal fictions termed transferred intent or constructive intent. Essentially, intent is transferred back to the time of voluntary intoxication, constructed from the act of voluntary intoxication, or presumed from the facts of voluntary intoxication.[474] These fictions, however, mask the relaxed notion of intent to which voluntarily intoxicated defendants are held—only this class of defendants may be prosecuted on the basis of presumed intent supplied by an otherwise lawful antecedent act. The logical outcome of these fictions is that the state punishes not the criminal act, which may be the accidental outcome of intoxication, but the act of voluntary intoxication. It is this result—punishment of the voluntary intoxication—that is susceptible to an equal protection challenge. The state discriminates, in effect, between persons who accidentally commit a "criminal act" while voluntarily intoxicated and those who accidentally do not commit such an act.

This analysis simply points out that the state does not meet the burden of showing a substantial relation between the classification and a legitimate state interest. If intoxicated defendants are

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473. Stated conversely, voluntarily intoxicated defendants are denied the opportunity to have every element of the crime charged against them proved beyond a reasonable doubt. The Supreme Court has indicated that individuals have a significant interest in remaining free from incarceration and improperly extended incarceration. In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Court sustained an equal protection challenge to a state statute that subjected criminal defendants to a more lenient commitment standard and to a more stringent release standard from mental institutions than those applicable to all other individuals. The Court identified the defendant's concern in the matter as an interest in remaining free from what amounted to "a commitment for life." *Id.* at 723, 724. Although a specific standard of review was not articulated, the Court obviously required that the classification bear a substantial relation to a legitimate state interest by rejecting the state's contention that the existence of pending criminal charges justified the classification. *Id.* at 729-30. *See also* Humphrey v. Cady, 405 U.S. 504 (1972) (challenge to commitment procedures under Wisconsin's Sex Crimes Act); Baxstrom v. Herold, 383 U.S. 107 (1966) (challenge to commitment procedures under New York Correction Law).

The interest in remaining free from incarceration has also received heightened scrutiny from the Court in the due process arena. *See* Morrissey v. Brewer, 408 U.S. 471, 482 (1972) ("[T]he liberty of a parolee . . . includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee. . . ."); Williams v. Illinois, 399 U.S. 235, 263 (1970) (Harlan, J., concurring) ("[T]his Court will squint hard at any legislation that deprives an individual of his liberty—his right to remain free.").

474. *See* text accompanying notes 300-33 *supra*.

capable of formulating intent sufficient to satisfy the general *mens rea* requirement,[475] then there is no logical reason to distinguish between voluntary and involuntary intoxication. Although the involuntariness of a defendant's intoxication should remain a viable defense, the prosecution still should be required to prove both the *actus reus* and the *mens rea* of each offense charged regardless of the reasons for the intoxication.[476] Furthermore, because critical analysis demonstrates that the state actually punishes the act of voluntary intoxication and not the crime charged, then the only conceivable way to avoid an equal protection challenge is to impose criminal sanctions for voluntary intoxication.

The foregoing analysis applies, *a fortiori,* to the distinction currently drawn between voluntarily intoxicated defendants charged with general intent crimes and voluntarily intoxicated defendants charged with specific intent crimes. In the former situation the defendant cannot offer intoxication as evidence of lack of intent, yet in the latter case the defendant is permitted to assert that his intoxicated state negated the ability to form the specific intent required for the crime.[477] Thus, intoxication alone may never be the basis for an acquittal if the defendant is charged with a general intent crime, but it may lead to an acquittal of a specific intent crime charge.[478] This distinction clearly discriminates between similarly situated persons, and it is difficult to see how this particular classification bears a substantial relation to a legitimate state interest. Under this unequal treatment, it is possible for an intoxicated defendant to be convicted of a relatively mild general intent crime while another equally intoxicated defendant might be acquitted of a heinous specific intent crime.

The difficulties exposed by equal protection analysis could be avoided by abolishing the legal fictions currently drawn between voluntarily and involuntarily intoxicated defendants with respect

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475. *See* R. PERKINS, *supra* note 379, at 900-02.

476. Furthermore, in crimes requiring negligence or recklessness as a *mens rea* component, the fact of voluntary intoxication alone might be enough to show the requisite mental state.

477. This distinction is sanguinely explained in the treatises by arguing that intoxication is not a defense nor exculpatory evidence, but rather prevents the formation of a necessary element of a specific intent crime. *See, e.g.,* R. PERKINS, *supra* note 379, at 900. This argument, however, applies equally well to general intent crimes; this application is avoided by relying on the legal fictions of transferred, constructive, or presumed intent. *See* text accompanying note 473 *supra.*

478. *See, e.g.,* Edwards v. State, 178 Miss. 696, 174 So. 57 (1937); State v. Reagin, 64 Mont. 481, 210 P. 86 (1922); Daugherty v. State, 154 Neb. 376, 48 N.W.2d 76 (1951).

to general intent crimes and between voluntarily intoxicated defendants charged with general intent crimes and similar defendants charged with specific intent crimes. Instead, prosecutors should be required to prove each element of every offense regardless of the manner in which a particular defendant acquired the intoxicated state. Correspondingly, intoxicated defendants should be permitted to offer evidence of their intoxication to negate the presence of the requisite *mens rea*. As long as our jurisprudence adheres to the concept of *mens rea* in criminal law, legal fictions attached to this concept should not be permitted to mask serious equal protection problems.

B. Eighth Amendment

The principle that criminal responsibility will be assessed to an individual only when his actions are a voluntary product of a free will[479] has long been regarded as a cornerstone of the common law. Reflected in the requirement that punishment be morally legitimate,[480] the viability of this tenet is tested by an examination of how the law defines the scope of a drug addict's[481] criminal responsibility. Although the Supreme Court recognized as early as 1925 that narcotics addiction was a disease,[482] it was not until the Court's 1962 decision in *Robinson v. California*[483] that major legal efforts to relieve an accused drug addict of criminal responsibility were galvanized.

In *Robinson* the Supreme Court reversed the conviction of a defendant who had been prosecuted under a state statute that made it a crime to "be addicted to the use of narcotics."[484] The

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479. If a defendant was to be punished for an act which was involuntary or not based on the exercise of free will, no deterrent purpose would be served by the imposition of criminal sanctions. Morissette v. United States, 342 U.S. 246, 250-51 (1952). Thus, the acts performed by those who are insane, unconscious, or under duress are considered to lack the element of *mens rea* and are generally not punished by the criminal law. *See, e.g.* Brawner v. United States, 471 F.2d 969 (D.C. Cir. 1972); Virgin Islands v. Smith, 278 F.2d 169 (3d Cir. 1960); Rex v. Crutchley, 172 Eng. Rep. 909 (1831).

480. *See, e.g.*, J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 70-75, 163-70 (2d ed. 1960); Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROB. 401, 423-24 (1958).

481. Congress has defined a "drug addict" by statute as: "[A]ny individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction." 21 U.S.C. § 802(1) (1976).

482. Linder v. United States, 268 U.S. 5, 18 (1925).

483. 370 U.S. 660 (1962).

484. CAL. HEALTH & SAFETY CODE § 11721 (West 1957), *amended* 1963 Cal. Stats., ch. 913, *repealed* 1972 Cal. Stats., ch. 1407: "No person shall use, or be under the influence of, or be addicted to the use of narcotics, except when administered by or under the direction

Court found that the California statute made the " 'status' of narcotics addiction a criminal offense" for which the offender could be punished "whether or not he has ever used or possessed any narcotics within the State. . ."[485] and held that the statute thus inflicted a cruel and unusual punishment in violation of the proscriptions of the eighth amendment as applied to the states through the fourteenth.[486] The scope of the Court's decision was uncertain, however, because the majority also emphasized the inability of the states to punish a disease or illness,[487] especially one that could be contracted "innocently or involuntarily."[488] Cases soon clogged the courts, spawned by this "disease prong" of the opinion, which argued that *Robinson* did not merely proscribe the punishment of a status with no concomitant *actus reus*,[489] but that the eighth amendment prohibited the application of criminal sanctions to those whose actions were compelled by addiction.[490] Prior to focus-

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of a person licensed by the State to prescribe and administer narcotics."

485. 370 U.S. at 666.

486. *Id.* at 667. Five justices adhered to the majority's eighth amendment rationale. Justice Harlan concurred on the basis that the statute as construed autborized punishment for "a bare desire to commit a criminal act." *Id.* at 679.

487. *Id.* at 666-67. "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.* at 667.

488. Justice Stewart noted that persons might become addicted from legitimate medical prescriptions or that an infant might be born addicted as a result of its mother's habit. *Id.* at 667 n.9.

489. The majority of jurisdictions that have considered the scope of *Robinson* have adhered to this status-act distinction, construing *Robinson* narrowly as prohibiting punishment of an addict only for a condition of the body or mind and thus viewing the eighth amendment as offering no defense if the craving for the drug is accompanied by an act such as possession, use, self-administration, purchase, or concealment. *See* Sanchez v. Nelson, 446 F.2d 849 (9th Cir. 1971) (possession distinguisbed); United States v. Rundle, 429 F.2d 1316 (3d Cir. 1970) (per curiam) (conviction for unlawful use of drugs distinguished); Bailey v. United States, 386 F.2d 1 (5th Cir. 1967) (possession); United States *ex rel.* Swanson v. Reincke, 344 F.2d 260, *cert. denied*, 382 U.S. 869 (1965) (self-administration); People v. Zapata, 220 Cal. App. 2d 903, 34 Cal. Rptr. 171 (1963), *appeal dismissed*, 377 U.S. 406 (1964) (possession); Nutter v. State, 8 Md. App. 635, 262 A.2d 80 (1968) (acts resulting from cocaine addiction); State v. Margo, 40 N.J. 188, 191 A.2d 43 (1963) (per curiam) (under the influence); Browne v. State, 24 Wis. 2d 491, 129 N.W.2d 175, *cert. denied*, 379 U.S. 1004 (1965) (use of nonprescribed drugs).

490. While most of the cases cited in note 489 *supra* make reference to this implication, for arguments criticizing the narrow status-act interpretation of *Robinson* on the ground that certain conduct is symptomatic of the addiction and thus unpunishable under *Robinson*, or should be considered inseparable from the status of addiction, see Powell v. Texas, 392 U.S. 514, 554 (1968) (Fortas, J., dissenting); Watson v. United States, 439 F.2d 442 (D.C. Cir. 1970); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966) (holding limited by *Powell v. Texas*); Dubin, Mens Rea *Reconsidered: A Plea for a Due Process Concept of Criminal Responsibility*, 18 STAN. L. REV. 322, 365 (1966); Greenawalt, *"Uncontrollable" Actions and the Eighth Amendment:*

ing on how *Robinson*'s progeny have analyzed and delineated the scope of the eighth amendment's application to addiction and related conduct, a brief examination of the cruel and unusual punishment provision is appropriate.

The eighth amendment[491] to the United States Constitution prohibits the federal government from imposing cruel and unusual punishment for federal crimes.[492] The principle traces its roots to the Magna Charta, and the phrase "cruel and unusual punishment" was first incorporated in the English Declaration of Rights of 1688.[493] While the cruel and unusual punishment clause was viewed at the time of its enactment as proscribing only cruel and inhumane methods of physical punishment,[494] its scope has been extended to embody changing notions of contemporary values and civilized behavior, and in modern times it has been held to prohibit more sophisticated methods of punishment.[495]

In *Weems v. United States*[496] the Supreme Court held that the eighth amendment precluded excessive punishment when the penalty imposed was disproportionate to the seriousness of the offense, although the method of punishment was not inherently cruel. Chief Justice Warren defined the basic concept underlying the eighth amendment in *Trop v. Dulles* as "nothing less than the dignity of man. While the State has the power to punish, the amendment stands to assure that this power be exercised within the limit of civilized standards."[497] *Robinson,* holding that the Cal-

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Implications of Powell v. Texas, 69 COLUM. L. REV. 927 (1969); Comment, *Demise of "Status"-"Act" Distinctions in Symptomatic Crimes of Narcotic Addiction,* 1970 DUKE L.J. 1053 (1970).

491. The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

492. While almost all the states have similar constitutional provisions, the due process clause of the fourteenth amendment prohibits the states from applying criminal sanctions for state crimes that would violate the eighth amendment. A state is, however, free to construe its constitutional provision more broadly than the federal government.

493. *See* Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment,* 36 N.Y.U. L. REV. 846 (1961); Note, *The Constitutional Prohibition Against Cruel and Unusual Punishment—Its Present Significance,* 4 VAND. L. REV. 680 (1951).

494. *See, e.g., In re* Kemmler, 136 U.S. 436, 446-47 (1890); Wilkerson v. Utah, 99 U.S. 130, 135-36 (1878); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law,* 79 HARV. L. REV. 635, 637 (1966).

495. Trop v. Dulles, 356 U.S. 86 (1958) (loss of citizenship); *see* Comment, *Criminal Responsibility and the Drug Dependence Defense—A Need for Judicial Confrontation,* 42 Fordham L. Rev. 361, 368 (1973).

496. 217 U.S. 349 (1910).

497. 356 U.S. at 100-01.

ifornia statute exceeded the limits imposed by the eighth amendment, identified a third class of situations in which the protection of the cruel and unusual punishment clause could arise—not only to prohibit the method or amount of punishment that could be applied but also to restrain the power of the states to define crimes.

The courts wrestled for more than a decade with the issue of how the concept of criminal responsibility for the drug addict had been affected by the novel application of the eighth amendment in *Robinson* before the parameters of the decision could be regarded as accepted by a consensus of the circuits. While the *Robinson* Court distinguished between holding the addict liable for his status and prosecuting him for acts relating to his disease,[498] there is a logical inconsistency in prohibiting punishment for a disease but allowing it for acts such as possession and use that are not only symptomatic of that disease but in practical terms necessary for addiction to exist. This inconsistency provoked some courts and numerous strong dissents[499] to argue that *Robinson* could be read to offer exculpation for crimes related to addiction. A narrow interpretation of *Robinson,* however, would merely preclude such crimes of status or condition similar to the California statute.

It is doubtful that all offenses generally falling under the rubric of "status crimes" could be considered to violate the eighth amendment under *Robinson* because many have established traditions in the common law.[500] At the other extreme, the extension of an eighth amendment defense to offenses not incidental to addiction, such as larceny, forgery, and robbery, has been uniformly rejected by all courts which have considered such arguments.[501] Although arguments that the eighth amendment should be extended to acts incidental to addiction have also generally failed, it is within this area that controversy has flourished over the interpre-

498. 370 U.S. at 666.

499. *See* cases cited in note 490 *supra.*

500. *See Cruel and Unusual Punishment, supra* note 494, at 647. In many cases prior acts can be imputed from the statute's wording. Habitual offender statutes have been upheld on the rationale that they constitute sentencing measures, not substantive crimes. Status crimes had been invalidated prior to *Robinson* on the grounds of violating substantive due process and of being void-for-vagueness. *See* Langetta v. New Jersey, 306 U.S. 451 (1977); *In re* Newbern, 53 Cal. 2d 786, 350 P.2d 116, 3 Cal. Rptr. 364 (1960).

501. *See, e.g.,* United States v. Krehbiel, 493 F.2d 497 (9th Cir. 1974) (bank robbery); 37 Cal. Rptr. 734, *superseded on other grounds,* 62 Cal. 2d 748, 401 P.2d 928, 44 Cal. Rptr. 320 (1965) (operating motor vehicle while addicted to narcotics); Bryson v. State, 7 Md. App. 353, 255 A.2d 469 (1969) (grand larceny); DeVougas v. State, 29 Wis. 2d 489, 139 N.W.2d 17 (1966) (forgery of prescription).

tation to be afforded *Robinson.*

The first significant extension of *Robinson* came four years after the decision when two federal circuit courts held that chronic alcoholics could not be held criminally liable for public drunkenness. In *Driver v. Hinnant*[502] the Fourth Circuit reversed the accused's conviction under a North Carolina statute making it a misdemeanor punishable by imprisonment to be drunk in a public place.[503] The court labeled chronic alcoholism a disease, and, although concluding that *mens rea* was lacking,[504] it interpreted *Robinson* as controlling because while "[t]he California statute criminally punished a 'status'—drug addiction—involuntarily assumed; the North Carolina Act criminally punishes an involuntary symptom of a status—public intoxication."[505] The District of Columbia Circuit reached the same result as the *Driver* court in *Easter v. District of Columbia.*[506] The case presented essentially the same facts as did *Driver,*[507] but the court declined to consider the applicability of *Robinson* to crime induced by or related to addiction[508] and instead focused on common law grounds and statutory interpretation.[509]

Although numerous cases raised the issues that *Robinson* proscribed the punishment of a narcotics addict for acts such as possession, use, and self-administration, the Supreme Court consistently refused to grant certiorari to delineate the scope of its holding.[510] Thus, because lower courts viewed the related act as

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502. Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966) (holding severely limited by *Powell v. Texas).*

503. It was the defendant's third offense, and he had been sentenced to two years imprisonment. *Id.* at 763.

504. *Id.* at 764.

505. *Id.* at 764-65.

506. 361 F.2d 50 (D.C. Cir. 1966).

507. Unlike *Driver,* however, the defendant in *Easter* was not proven to be a chronic alcoholic; the trial judge had excluded evidence to that effect, ruling that chronic alcoholism was not a defense to the charge. *Id.* at 51.

508. *Id.* at 55 n.8.

509. D.C. CODE ANN. §§ 24-501 to 24-513 (1961) (amended as §§ 24-521 to 24-535 D.C. CODE ANN. (1968)). The *Easter* court reasoned that, notwithstanding the relevance of the Congressional statute "[o]ne who is a chronic alcoholic cannot have the *mens rea* necessary to be held responsible criminally for being drunk in public." 361 F.2d at 53.

510. Castle v. United States, 347 F.2d 492 (D.C. Cir. 1964), *cert. denied,* 381 U.S. 929 (1965); Hutcherson v. United States, 345 F.2d 964 (D.C. Cir.), *cert. denied,* 382 U.S. 894 (1965); United States *ex rel.* Swanson v. Reincke, 344 F.2d 260 (2d Cir.), *cert. denied,* 382 U.S. 869 (1965); Lloyd v. United States, 343 F.2d 242 (D.C. Cir. 1964), *cert. denied,* 381 U.S. 952 (1965); Browne v. State, 24 Wis. 2d 491, 129 N.W.2d 175, *motion for rehearing denied,* 131 N.W.2d 169, *cert. denied,* 379 U.S. 1004 (1965).

distinct from the status of addiction, they continued to hold that punishment for narcotics related offenses was not precluded by *Robinson*.[511]

The Supreme Court failed to clarify the scope of the *Robinson* decision in *Powell v. Texas*,[512] in which the Court was asked to hold, as had the Fourth Circuit in *Driver*, that the eighth amendment prevented conviction of a chronic alcoholic for intoxication. Justice Marshall, writing for a four member plurality that upheld the conviction, interpreted *Robinson* as a limitation on the power of the states to impose punishment when no *actus reus* had occurred, and he distinguished *Powell* since it involved the act of being drunk in public.[513] Justice Powell identified the source of much of the confusion pertaining to the scope of the eighth amendment and its relationship to the issue of the criminal responsibility of an addict, however, when he stressed that the "doctrines of *actus reus, mens rea,* insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man."[514]

Justice Fortas, writing for the dissent, viewed *Robinson* not only as proscribing punishment for a status unaccompanied by an act, but also for any "condition" that is a characteristic pattern of a disease and the result of a compulsion symptomatic of a disease.[515] The dissent's rationale would thus not apply to such "independent acts or conduct" as drunk driving or robbery.[516]

The plurality in *Powell*, however, maintained that *Robinson* stood for the simple proposition that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change."[517] The decisive vote to affirm the conviction was cast by Justice White in concurrence. He viewed the trial record as in-

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511. *See* cases cited in note 489 *supra*. *But cf.* Morales v. United States, 344 F.2d 846, 849 n.2 (9th Cir. 1965) (dictum).

512. 392 U.S. 514 (1968).

513. *Id.* at 533.

514. *Id.* at 536.

515. *Id.* at 567-69 (Fortas, J., dissenting).

516. *Id.* at 559 n.2. Compare Justice Fortas' views with those expressed by Chief Judge Bazelon, whose suggested insanity proposal would allow a defense in any situation where it could be shown that the defendant lacked the power to control his behavior to such an extent that he could not be held justly responsible for his conduct. United States v. Brawner, 471 F.2d 969 (D.C. Cir. 1972) (en banc) (Bazelon, C.J., dissenting).

517. *Id.* at 567; *See* Bason, *Chronic Alcoholism and Public Drunkenness*-Quo Vadimus Post Powell, 19 AM. U.L. REV. 48, 59 (1970).

sufficient to support a finding that the appellant was under a compulsion to be drunk in a public place.[518] Justice White's view of *Robinson,* however, offered vitality to those who contended that the eighth amendment provided a drug defense for the addict-possessor:

> If it cannot be a crime to have an irresistible compulsion to use narcotics . . . I do not see how it can constitutionally be a crime to yield to such a compulsion. Punishing an addict for using drugs convicts for addiction under a different name. . . . Unless *Robinson* is to be abandoned, the use of narcotics by an addict must be beyond the reach of the criminal law.[519]

In 1970 the District of Columbia Circuit suggested in *Watson v. United States*[520] that the eighth amendment would bar the punishment of an addict for the possession of narcotics maintained solely for personal use.[521] Although resolving the case on other constitutional grounds,[522] the court recognized that acts necessary for possession could not logically be considered separate from the sta-

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518. Justice White noted that it might be possible for some alcoholics to make a satisfactory showing that they could not refrain from frequenting public places; *Robinson* would then prevent their conviction for public intoxication. 392 U.S. at 552 n.4. (White, J., concurring). His words suggest that the burden upon an alcoholic asserting a *Robinson* defense to such a charge would be easier to meet if the defendant was homeless.

519. *Id.* at 548-49 (White, J., concurring) (citation omitted). Justice White's view of *Robinson* is consistent with his dissenting opinion in that decision, when he declared: "If it is 'cruel and unusual punishment' to convict appellant for addiction, it is difficult to understand why it would be any less offensive to the Fourteenth Amendment to convict him for use on the same evidence of use which proved he was an addict." 370 U.S. at 688 (White, J., dissenting). He further noted that the majority, in enumerating instances where the States retained power to legislate against the narcotics trade, made no mention of the use of narcotics. *Id.* No case has held, however, that proof of addiction alone is a defense to possession or any other addiction-related crime.

520. 439 F.2d 442 (1970) (rehearing en banc): "[I]f *Robinson* . . . means anything, it must also mean in all logic that (1) Congress either did not intend to expose the nontrafficking addict possessor to criminal punishment, or (2) its effort to do so is as unavailing constitutionally as that of the California legislature." *Id.* at 452.

Watson was prosecuted for the possession of thirteen capsules of heroin, one-half his daily habit. For an analysis of the amount of controlled substances necessary for conviction of the statutes regulating controlled substances in the various American jurisdictions, see Note, *Criminal Liability for Possession of Unusable Amounts of Controlled Substances,* 77 COLUM. L. REV. 596 (1977).

521. *See* cases cited in note 510 *supra* for earlier cases in which this argument was made.

522. The court vacated and remanded for resentencing after holding that the Narcotic Addict Rehabilitation Act, 18 U.S.C. §§ 4251-4255 (1970), which excluded addicts from consideration for civil commitment if they had been convicted of two prior felonies, violated the equal protection concept of due process as applied to the appellant. The appellant also argued that due process demanded the recognition of a defense of addiction for the acts compelled by such addiction; his primary argument in trial court had stressed an insanity defense.

tus of addiction, which *Robinson* had held to be immune from punishment. The court did not view *Powell* as a barrier to establishing a drug defense based on *Robinson* for the nontrafficking addict-possessor.[523] It withheld such an extension of the eighth amendment, however, pending further explication of *Robinson* and *Powell* by the Supreme Court.[524]

The Supreme Court never addressed the issue raised by the dicta in *Watson*. Three years later the District of Columbia Circuit, the only circuit to have lobbied for an extension of the eighth amendment to provide a limited drug addiction defense, brought itself into conformity with the other jurisdictions. After lower courts in the District of Columbia split on whether to adopt *Watson*'s eighth amendment rationale,[525] a sharply divided plurality of the Court of Appeals, in *United States v. Moore*,[526] viewed neither *Robinson* nor *Powell* as offering any precedent for an eighth amendment drug defense and affirmed the conviction of a nontrafficking addict for possession.

In *Moore* appellant argued that common-law principles dictated that the capacity of an accused addict to control his criminal behavior was a prerequisite to imposing criminal liability for the illegal acts of purchase, possession, and use of drugs to satisfy the addict's personal craving.[527] Integrally related to this argument was

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523. 439 F.2d at 451. The court's discussion of the distinction between trafficking and nontrafficking addicts was instigated by the appellant's contention that the crucial question was not whether a defendant was an addict or non-addict, but whether he was a trafficking or nontrafficking addict. This argument is more palatable to those who resist the creation of a drug defense, since the implications for reducing the narcotics traffic are less radical. *See* Comment, *supra* note 495, at 377.

524. 439 F.2d at 451. The *Watson* court was hesitant to make such a holding based on the insufficiency of the trial record. *Id.* at 453.

525. In United States v. Ashton, 317 F. Supp. 860 (D.D.C. 1970), the court seized upon the dicta in *Watson* to hold that a nontrafficking addict could not be punished under the federal narcotics statutes, basing its holding on the alternate grounds of statutory interpretation and the eighth amendment. *See* quote cited in note 520 *supra*. *Accord*, United States v. Lindsey, 324 F. Supp. 55 (D.D.C. 1971), *aff'd without opinion*, 479 F.2d 922 (D.C. Cir. 1973) (by implication) (defendant did not prove by preponderance of the evidence he was nontrafficking addict); *contra*, Wheeler v. United States, 276 A.2d 722 (D.C. Ct. App. 1971).

526. 486 F.2d 1139 (D.C. Cir.), *cert. denied*, 414 U.S. 980 (1973). Spanning 120 pages and containing six separate opinions, *Moore* represents the most comprehensive and exhaustive judicial attempt to explore the scope of the addict's criminal responsibility.

527. The appellant framed the issue as follows:

> Is the . . . evidence of . . . [appellant's] dependence on (addiction to) injected heroin, resulting in substantial impairment of his behavior controls and a loss of self-control over the use of heroin, relevant to his criminal responsibility for unlawful possession
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> . . . .

486 F.2d at 1144.

the appellant's contention that the eighth amendment as construed in *Robinson* and *Powell* precluded holding a nontrafficking addict liable for simple possession of heroin.[528]

The *Moore* plurality interpreted *Robinson* as limited clearly to situations which concerned conviction for status alone.[529] The plurality viewed *Powell* as perpetuating the status-act dichotomy because the defendant in that case was ultimately held criminally responsibile. The court further noted that in *Powell* the initial act of ingesting an alcoholic beverage was not illegal, while in *Moore* the initial intake of narcotics was prohibited.[530] Clearly apprehensive about the practical problems that would result from implementing the proposed drug defense,[531] the plurality found no basis for the defense in the common law notions of *mens rea*, duress, or necessity.[532] In addition, the *Moore* court found the paradox of allowing the addict-possessor to vitiate his criminal accountability while levying criminal punishment for acts not incidental to addiction to be analytically troublesome and logically inconsistent.[533]

The dissent viewed the "disease prong" of *Robinson* and the court's decision in *Easter* as ample precedent for the drug defense. The dissenters believed the common law concept of *mens rea* had evolved sufficiently to encompass a defense to charges of possession and use against "a drug addict who, by reason of his use of drugs, lacks substantial capacity to conform his conduct to the requirements of the law. . . ."[534] Engaging in a cost-benefit analysis

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The Government admitted appellant's heroin addiction. Testimony was elicited from the appellant at trial that he had never engaged in drug trafficking and was present at the site of arrest only to purchase heroin for his own use.

528. Appellant's third argument in *Moore* was based on statutory grounds—that Congress had constructively exempted a nontrafficking addict from criminal penalties for possession, use, and purchase. *Id.* at 1142-43.

529. The majority also did not consider *Robinson* to have based its eighth amendment rationale on any loss of compulsion or self-control that might support a narcotics addiction defense. *Id.* at 1048-50.

530. *Id.* at 1151. This distinction would obviously not be pertinent when a defendant-addict had acquired his habit through the use of a legal prescription. Furthermore, it is doubtful that the question whether addiction was acquired through a legal or nonlegal act is germane to a "free-will" analysis—for example, when an insanity defense is asserted, how one's condition was acquired is not material; the issue is the state of mind of the defendant at the time of the alleged offense. *See* Part IV *supra*.

531. *Id.* at 1144-46.

532. *Id.* at 1178-81.

533. The court noted that "if it is absence of free will which excuses the mere possessor-acquirer, the more desperate bank robber for drug money has an even more demonstrable lack of free will and derived from precisely the same factors as appellant argues should excuse the mere possessor." *Id.* at 1146 (original emphasis removed).

534. *Id.* at 1209 (Wright, J., dissenting). Chief Judge Bazelon, mindful of the inconsis-

to rebut the majority's determination that the practical dislocations caused by the proposed defense would not justify its adoption, the dissent concluded that civil commitment of the nontrafficking adult was a viable alternative. Such an approach, according to the dissent, would be consistent with congressional intent,[535] would offer more effective rehabilitation without the stigma of criminal conviction, and would relieve an overcrowded criminal court system inundated with drug offenders.[536]

Moore was the last significant attempt to utilize the cruel and unusual punishment provision of the eighth amendment as a vehicle to relieve a narcotics addict of criminal responsibility for acts symptomatic of his addiction. The purview of *Robinson* has now been uniformly established to be extremely narrow—it precludes only the punishment of a status or condition when no accompanying criminal act is present. The nature and history of the cruel and unusual punishment clause, however, suggests that evolving notions of what is considered to be humane, civilized, and morally decent by our society can be expected to again alter the presently well-defined boundaries of the eighth amendment and question the validity of the status-act dichotomy.

C. *State Constitutional Law*

While the federal courts have not interpreted the eighth

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tency noted by the majority in restricting the defense to addicts charged with possessory offenses, advocated relieving an addict of criminal responsibility for *any* act if, because of the duress or compulsion caused by his habit, he was unable to conform his conduct to the requirements of law. *Id.* at 1260 (Bazelon, C.J., dissenting).

535. Since Congress had not "expressly and unequivocally manifested its intent to preclude such a defense," it was within the province of the judiciary to establish a drug defense in order for "the law . . . [to serve] the needs of the present." 486 F.2d at 1249 (Wright, J., dissenting). The dissent emphasized that Title II of the Narcotics Addict Rehabilitation Act, 18 U.S.C. §§ 4251-4255 (1970), which applied to both *Watson* and *Moore*, provided for involuntary civil commitment procedures for an addict after he had been convicted of the criminal offense. *Id.* at 1247.

536. The procedural nightmares foreseen by the majority that would result from the adoption of a drug defense were, in the dissent's view, largely imaginary. As suggested in *Watson*, a defendant would raise the proposed defense as an affirmative defense at trial and bear the burden of going forward with some evidence of addiction. *See* note 510 *supra*. The prosecution would then bear the burden of proving the defendant's nonaddiction beyond a reasonable doubt. *Id.* at 1259 (Wright, J., dissenting). Analogous to an insanity defense, the question of the defendant's addiction would be for the trier of fact to resolve on the basis of any evidence relevant to the issue of criminal responsibility, including expert testimony. The ultimate issue would be "whether, at the time of the offense, the defendant, as a result of his repeated use of narcotics, lacked substantial capacity to conform his conduct to the requirements of the law." *Id.* at 1258 (Wright, J., dissenting). *Cf.* MODEL PENAL CODE § 4.01 (1962).

amendment as barring criminal prosecution for acts compelled by a defendant's addiction, a state court is free to construe its corresponding state constitutional guarantees more broadly. In response to the narrowing of the scope of constitutional protections by the Burger Court, particularly in the area of criminal procedure, a trend emerged among higher state courts of interpreting state constitutional provisions to afford greater protection to an accused than the parallel, often identical, provisions in the United States Constitution.[537] Such state court holdings, if based at least in part on state constitutional law, are not subject to review by the federal courts since they rest on "adequate and independent state grounds"; consideration of federal issues is unnecessary if the conclusion is predicated on state law.[538]

An example of the utilization of state constitutional provisions to proscribe state conduct deemed permissible under the eighth

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537. Mosk, *Contemporary Federalism*, 9 PAC. L.J. 711, 718 (1978). *See* Scott v. State, 519 P.2d 774 (Alaska 1974); Grossman v. State, 457 P.2d 226 (Alaska 1969); People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976); People v. Longwill, 14 Cal. 3d 943, 538 P.2d 753, 123 Cal. Rptr. 297 (1975); People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); Reynolds v. Superior Court, 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974); Blocker v. Blackburn, 228 Ga. 285, 185 S.E.2d 56 (1971); Corley v. Lewless, 227 Ga. 745, 182 S.E.2d 766 (1971); State v. Kaluna, 55 Hawaii 361, 520 P.2d 51 (1974); State v. Santiago, 53 Hawaii 254, 492 P.2d 657 (1971); Haas v. South Bend Comm. Sch. Corp., 259 Ind. 515, 289 N.E.2d 495 (1972); State v. Mullen, 216 N.W.2d 375 (Iowa 1974); People v. Beavers, 393 Mich. 554, 227 N.W.2d 511, *cert. denied*, 423 U.S. 878 (1975); People v. White, 390 Mich. 245, 212 N.W.2d 222 (1973); People v. Turner, 390 Mich. 7, 210 N.W.2d 336 (1973); State v. Granberry, 491 S.W.2d 528 (Mo. 1973); Baker v. State, 88 Nev. 369, 498 P.2d 1310 (1972); State v. Johnson, 68 N.J. 349, 346 A.2d 66 (1975); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973); Johnson v. Hassett, 217 N.W.2d 771 (N.D. 1974); Chandler v. State, 501 P.2d 512 (Okla. Ct. Crim. App. 1972); State v. Brown, 262 Ore. 442, 497 P.2d 1191 (1972); Commonwealth v. Triplett, 462 Pa. 244, 341 A.2d 62 (1975); Commonwealth v. Campana, 455 Pa. 622, 314 A.2d 854, *cert. denied*, 417 U.S. 969 (1974); State *ex rel.* Payne v. Walden, 156 W. Va. 60, 190 S.E.2d 770 (1972); McConville v. State Farm Mut. Auto Ins. Co., 15 Wis. 2d 374, 113 N.W.2d 14 (1962); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court*, 62 KY. L.J. 421, 450 (1974).

538. "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. . . . [O]ur power is to correct wrong judgments, not . . . to render . . . advisory opinion[s]. . . ." Herb v. Pitcairn, 324 U.S. 117, 125-27 (1945). In recent years, the Supreme Court has been vigilantly reviewing state court decisions that purport to expand protection of civil liberties on the basis of *both* state and federal constitutional provisions to insure that state law furnishes an independent ground for the result. *See, e.g.*, Oregon v. Hass, 420 U.S. 714 (1975) (reversing Oregon Supreme Court ruling that U.S. Constitution barred use for impeachment purposes of statements obtained in violation of *Miranda);* People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), *vacated and remanded*, 409 U.S. 33 (1972) (judgment vacated and cause remanded to California Supreme Court to clarify whether state or federal constitution utilized to rule defendant had reasonahle expectation of privacy in trash).

amendment is *People v. Anderson.*[539] In *Anderson,* the Supreme Court of California ruled that the death penalty violated the California constitution's section forbidding cruel *or* unusual punishment.[540] Although a state constitutional referendum was passed to override the decision, the case illustrates a possible argument open to defense attorneys in drug cases. While many states explicitly interpret their constitutional bans on cruel and unusual punishment as having the same parameters as the eighth amendment,[541] other states might be willing to extend the protection afforded by their cruel and unusual punishment prohibitions beyond federal constitutional precedents. Notwithstanding the fact that most of the state court cases expanding the defendant's protection have not dealt with substantive limitations on the power of the state to impose criminal punishment,[542] the defense attorney should be aware of Justice Brennan's admonition:

> [T]he decisions of the Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. [S]tate court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts. . . . I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions.[543]

VI. CONCLUSION

This Special Project has carried out three broad purposes. First, it has synthesized and organized materials concerning drugs and criminal responsibility into a useful guide for legal practitioners and others interested in the problems of the drug dependent defendant. Second, it has identified serious analytical flaws in many of the defenses available to the criminal defendant. Finally, it has responded to these deficiencies with proposals intended to

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539. 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied,* 406 U.S. 958 (1972).

540. CAL. CONST. art. 1, § 6 (1849), *amended* 1974 (now art. 1, § 17). In Gregg v. Georgia, 428 U.S. 153 (1976), the United States Supreme Court held that the death penalty per se does not violate the eighth amendment prohibition against cruel and unusual punishment. *Id.* at 187; Note, *Expanding State Constitutional Protections and the New Silver Platter: After They've Shut the Door, Can They Bar the Window?,* 8 LOY. CHI. L.J. 186 (1976).

541. *See, e.g.,* Cozzolino v. State, 584 S.W.2d 765 (Tenn. 1979), in which the Tennessee Supreme Court ruled that the Tennessee constitution's ban on cruel and unusual punishment places no greater restriction on punishment than does the federal constitution. *Id.* at 767.

542. *See* cases cited in note 537 *supra.*

543. Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489, 502 (1977) (footnotes omitted).

protect not only the legal rights of the drug dependent defendant but also the rights of society pertaining to criminal justice. While these societal interests include the swift imposition of criminal penalties when warranted, they should not be allowed to diminish the concomitant rights of the criminal defendant. In fact, societal rights would be better served by a reexamination and reinterpretation of several traditional legal theories concerning drugs and criminal defendants. A recognition by courts and legislatures of the existing analytical flaws should lead to the development of more equitable theories and a search for alternative forms of treatment and rehabilitation for the drug dependent defendant. Rather than hiding behind the guise of legal history and moral judgment, courts and legislatures should respond to illogical and insufficient theories that fail to deal with the drug dependent defendant in an equitable and just manner.

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