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Jerome Hall

Indiana University School of Law

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INTOXICATION AND CRIMINAL RESPONSIBILITY

DRUNKENNESS is of exceptional theoretical importance for the criminal law not only because it involves the basic postulates of liability, but also because it constitutes an essential feature of numerous fact-situations whose impact on the rules has had curious and instructive effects. A rare opportunity is thus presented to study the incidence of the bare abstractions of legally embodied ethical principles in the actualities of administration. The ambiguities that inevitably abound in such general principles can be reduced in any study of their meanings in the specific contexts of the issues raised in connection with the penal responsibility of inebriates. The need for such an analysis is indicated by the paucity of extant studies, in marked contrast to the literature on the law of insanity which is practically boundless. The reason cannot be the lesser social importance of the former, for although mental disease is not an uncommon determinant of antisocial behavior, quantitatively it pales into insignificance by comparison with the extent of intoxication.

One may well believe that traditional attitudes of hostility toward drunkenness¹ render rational and just determinations more difficult than in insanity cases.² The recent rise of a scientific literature on alcoholism makes re-examination of the traditional doctrines all the more important, indeed, imperative, for those who sense the tragedy of unwitting harshness towards the weak, especially as it is revealed in this branch of the administration of the penal law. For, although there has been much wise insight into inebriety in the past, only within the last quarter of a century has research been intensive and far-ranging. The veil has been drawn sufficiently to stir profound and troublesome problems, questions that challenge long-accepted standards and suggest that in this broad field of human behavior where intoxication and serious harm

¹ See *People v. Townsend*, 214 Mich. 267, 183 N. W. 177 (1921).

² See East, *Murder, From the Point of View of the Psychiatrist* (1935) 3 MEDICO-LEGAL & CRIMINOL. REV. 61, 92.

concur, the criminal law is an inefficient engine of severe and indiscriminate repression. In addition to reflection on the portentous social implications of this challenge, the study of harms committed by inebriates requires careful analysis of the relevant meanings of traditional principles of culpability, and of the effect of the increased knowledge on their application by legal tribunals. The central issues thus raised chiefly concern, on the one hand, the courts' resistance to recent scientific discovery. On the other hand, in the context of modern social theory, the problem involves the positivist thesis that the difficulties can be eliminated and a correct solution reached only by repudiation of the traditional principles of responsibility. There are serious errors both in this thesis and in the prevailing law.

COMMON LAW AND THE EXCULPATORY DOCTRINE

The early common law apparently made no concession whatever because of intoxication, however gross,³ although the contemporaneous records indicate mild treatment of insane homicides,⁴ and mediaeval canon law, though not without uncertainty, recommended indulgence to inebriate wrongdoers.⁵ The earliest English report⁶ is dated 1551, and it approves the death sentence for a homicide committed in extreme intoxication. Such approbation is typical of the era of the greatest severity in the entire history of English criminal law rather than of the earlier law. An age which gloried in the capital penalty for minor offenses would hardly be impressed by the niceties of mediaeval ethical discrimination concerning inebriates. In any event, it is certain that from that time to the early part of the nineteenth century, the rigorous rule prevailed, though it is not without significance that the efforts by Coke and Blackstone to hold inebriety an aggravation met with no success.

The reasons advanced in support of the rule that voluntary

³ See Singh, *History of the Defense of Drunkenness in English Criminal Law* (1933) 49 L. Q. REV. 528, 530.

⁴ *Ibid.* In 1330 a lunatic homicide was pardoned by the king. Fitz. Abr. No. 351, cited in *id.* at 530, n.9.

⁵ See Mittermaier, *On the Effect of Drunkenness upon Criminal Responsibility and the Application of Punishment* (1840) 23 AMER. JURIST 294.

⁶ *Reniger v. Fogossa*, 1 Plowden 1, 75 Eng. Rep. 1 (K. B. 1551).

drunkenness is no defense have been highly effective. Hale supported the rule "partly from the easiness of counterfeiting the disability."⁷ Wharton believed that "There could rarely be a conviction for homicide if drunkenness avoided responsibility,"⁸ and he also feared it would deliberately be resorted to "as a shield." Other competent observers, Stephen included, believed that most homicides and many other crimes were caused by intoxication, and that, apparently by sheer force of statistics, it would not do to relax the restraint. Story, apparently influenced by Coke's somber righteousness, stressed the merit of "the law allowing not a man to avail himself of the excuse of his own gross vice and misconduct to shield himself from the legal consequences of such crime."⁹ These views can be supplemented by widely varying rules in different countries. They fall into no readily perceived pattern. Thus there are civilian systems which punish as severely as do the common-law countries, and on substantially similar grounds. There are Latin countries, like France, where the penalties are more severe than are those of the German and Austrian imperial codes. Such a diversity of legislation¹⁰ must itself raise doubt concerning the validity of the arguments of the eminent proponents of the Anglo-American rules. In such circumstances the reliance of the contemporary investigator can only be on the best available knowledge, in the light of which the various policies implied in these views and legal systems can be appraised.

But one of the grounds put forth, that drunkenness can be readily feigned, may be disposed of at once. No reason has been advanced why determination of this fact presents any greater difficulty than do those raised by "mistake," "legal provocation," "insanity," or many others; indeed, the contrary seems more probable when it is considered that the history of the defendant and the events preceding his wrongful act are examined in greater detail

⁷ 1 HALE, *HISTORY OF THE PLEAS OF THE CROWN* (1736) 32.

⁸ 1 WHARTON, *CRIMINAL LAW* (1932) 95; cf. H. M. COMMISSIONERS' SEVENTH REPORT ON CRIMINAL LAW (1843) 19.

⁹ *United States v. Drew*, 25 Fed. Cas. No. 14,993 (C. C. D. Mass. 1828). Note his premise that the crime charged has been committed, that the intoxication is merely something superadded.

¹⁰ See Lee, *Drunkenness and Crime* (1902) 27 LAW MAG. & REV. (5th ser.) 144, 157, 308; Mittermaier, *On the Effect of Drunkenness upon Criminal Responsibility and the Application of Punishment* (1840) 23 AMER. JURIST 294; BARBIER, *LE DÉLIT ALCOOLIQUE* (1930) 56 ff., 99 ff.

in the drunkenness cases than is usual. Moreover the burden of proving intoxication was, and usually is, placed on the defendant.¹¹ Simulation of intoxication to avoid responsibility for a crime presupposes, moreover, high intelligence, histrionic ability, and careful calculation. Even a superficial survey of the cases shows that the inebriate offenders typify the very opposite qualities — they are weak, impulsive, and frequently diseased. In light of these various considerations, the persistently voiced fear of deception suggests the presence of influences other than the reasons that are expressed. Since a person who planned to commit a crime would not wish to incapacitate himself by becoming grossly intoxicated (and that is the degree relevant to the moot issues of penal responsibility), even less persuasive is the argument that prospective offenders would actually become intoxicated “as a shield.” Such professed grounds of decision indicate bias against inebriate wrongdoers rather than rational support of the rule.

There is, moreover, internal evidence in Anglo-American law that the supporters of the prevailing rules themselves experienced serious doubts, misgivings that were reflected in mitigating doctrines left at odds with countervailing legal principles, but, nonetheless, steps in a wiser, more humane direction. Although the rule concerning voluntary intoxication has persisted formally, a radical modification in the law occurred in the nineteenth century. It seems to have been suggested first by Holroyd in a murder case in 1819 that, while voluntary drunkenness could not be a complete excuse, it should be considered in determining premeditation.¹² The prescient Justice is said to have later retracted this view; in any event, Justice Park later confidently asserted that “there would be no safety for human life if it were to be considered as law,”¹³ and the defendant in the case was executed. There was some tendency to relax the rule in a later case of aggravated assault but this was largely negated by equivocal instructions that if a stick were used, then the drunkenness was relevant, “but where a dangerous weapon is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration

¹¹ *Wilson v. State*, 60 N. J. L. 171, 37 Atl. 954 (1897); *Gustavenson v. State*, 68 Pac. 1006 (Wyo. 1902); see UNDERHILL, *CRIMINAL EVIDENCE* (4th ed. 1935) 625.

¹² *Rex v. Grindley*, quoted in *Rex v. Carroll*, 7 C. & P. 145, 173 Eng. Rep. 64 (N. P. 1835).

¹³ *Id.* at 147, 173 Eng. Rep. at 65.

of the malicious intent of the party."¹⁴ But in 1838 in a case of assault with intent to murder, the jury was instructed that gross intoxication might disprove the intention required for the aggravated offense.¹⁵ The exception, slow to take root,¹⁶ was carefully stated by Stephen in language which became accepted as the major exculpatory doctrine, establishing the most important change in the entire law of criminal responsibility of inebriates. "Although," said Stephen, "you cannot take drunkenness as any excuse for crime, yet when the 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."¹⁷ Stephen's formulation definitely established the emerging avenue to long-desired mitigation of punishment of grossly inebriated homicides. It was technically persuasive; it has been applied and reiterated in hundreds of cases. The 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.

One might well have imagined that the new exculpatory doctrine would have undermined the rigorous traditional rule completely in such a field as criminal law where *mens rea* is a general requisite. But the indicated limitations persist,¹⁸ enmeshed in an intricate structure of theory that is posited on basic principles whose validity is assumed. These complexities are, of course, not found in the

¹⁴ *Rex v. Meakin*, 7 C. & P. 297, 173 Eng. Rep. 131 (N. P. 1836); cf. *State v. Kale*, 124 N. C. 816, 32 S. E. 892 (1899), where a conviction of murder in the first degree was affirmed. The court there stated that "Drunkenness . . . does not repel malice nor lower the grade of the crime." *Id.* at 819, 32 S. E. at 896.

¹⁵ *Regina v. Cruse*, 8 C. & P. 541, 173 Eng. Rep. 610 (N. P. 1838).

¹⁶ It was stated in *Regina v. Monkhouse*, 4 Cox Cr. C. 55 (N. P. 1849).

¹⁷ *Regina v. Doherty*, 16 Cox Cr. C. 306, 308 (N. P. 1887). In his *Digest of the Criminal Law* (5th ed. 1894), at p. 22, Stephen used the term "specific intention." In *Regina v. Baines* (Lancs. Assizes, 1886), Justice Day said: "I have ruled that if a man were in such a state of intoxication that he did not know the nature of his act or that his act was wrongful, his act would be excusable." *London Times*, Jan. 25, 1886, p. 10, col. 4. No English case has gone to that extent despite a similar dictum in *Beard's Case* (14 Crim. App. 197 (H. L. 1920)).

¹⁸ See pp. 1051-54, 1065-66 *infra*.

few states which simply reject the exculpatory doctrine *in toto*.¹⁹ So, too, the doctrine is sometimes ignored in cases that outrage morality,²⁰ as in a recent Texas decision where the defendant failed to stop his automobile after hitting a woman. His plea that he was "crazy drunk" and did not know his car had struck the woman was rejected, the defendant's "lack of knowledge having arisen because of his voluntary intoxication."²¹ Even when lip-service is paid the exculpatory doctrine, it is sometimes sharply curtailed, even rendered entirely ineffective, by the insistence that "the intoxication must be, in order to be available, of that degree and extent as renders the defendant practically an automaton."²² And the burden of proof of lack of capacity to entertain the required intent is placed upon the defendant.²³ Thus there continues to be explicit resistance to the exculpatory doctrine in many quarters, and the types of cases in which this occurs as well as the reasons advanced illustrate the persistence of traditional moral attitudes. But the doctrine permitting disproof of intention has been widely accepted and, no doubt, it has functioned to ameliorate the severe operation of the older law in most jurisdictions. It is these jurisdictions, at any rate, that provide the complex and interesting problems.

The major qualification on the potential efficacy of the exculpatory doctrine results from its limitation to *specific* intention. As Bishop, summarizing the prevailing rule, put it: "Evidence of intoxication therefore is admissible for the purpose of ascertaining . . . whether he was incapable of entertaining the specific intent charged, where such an intent, under the law, is an essential ingredient of the particular crime alleged to have been committed."²⁴ It is necessary, before examining the validity of this interpretation of the meaning of the exculpatory doctrine, to note the effect of

¹⁹ *E.g.*, MO. REV. STAT. ANN. (1939) c. 31, art. 4, § 4379. See Note (1925) 26 U. OF MO. BULL. L. SER. 32, 59.

²⁰ *E.g.*, assault with intent to rape. See Note (1934) 25 J. CRIM. L. 457, 458; *cf.* State v. Comer, 296 Mo. 1, 247 S. W. 179 (1922).

²¹ *Martinez v. State*, 137 Tex. Cr. App. 434, 441, 128 S. W.(2d) 398, 401 (1939).

²² *Tate v. Commonwealth*, 258 Ky. 685, 695, 80 S. W.(2d) 817, 821 (1935).

²³ See note 11 *supra*.

²⁴ 1 BISHOP, CRIMINAL LAW (9th ed. 1923) 299. *Cf.* ". . . where a particular intent is charged, and such intent forms the gist of the offense, as contradistinguished from the intent necessarily entering into every crime . . ." *Crosby v. People*, 137 Ill. 325, 342, 27 N. E. 49, 52 (1891).

judicial decision operating on these premises and applying the exculpatory doctrine to the most serious harms.

The application of the doctrine in homicide cases results mostly in conviction for second degree murder. In a minority of states and in England, the reduction is greater, and the judgment is manslaughter.²⁵ This diversity might be expected to result from differences in statutes as to the requirement of "intent" in murder of the second degree; but usually only premeditation is excluded.²⁶ Hence it is clear that there are influences other than the statutes. Thus in a recent Pennsylvania case,²⁷ where the statute is of the more frequent type, the court held that intoxication would not mitigate unless the defendant were "incapable of conceiving any intent," in which event "his grade of offense is reduced to murder in the second degree."²⁸ The formula accepted in the majority view is that: "As between the two offenses of murder in the second degree and manslaughter, voluntary intoxication cannot be a legitimate subject of inquiry. What constitutes murder in the second degree by a sober man is equally murder in the second degree if committed by a drunken man."²⁹ While the courts do not adequately explain why manslaughter cannot be "a legitimate subject of inquiry," the reasons may be surmised. The dominating analogy is "legal provocation," and since intoxication is presumed to be unacceptable to that end, the majority view is strictly consistent with the law of voluntary manslaughter,³⁰ which includes intentional homicide. The presence of influences other than statutes is revealed in the dogmatism of the majority view that "Where a homicide results from the use of a dangerous and deadly weapon,

²⁵ For a collection of cases, see Notes (1921) 12 A. L. R. 861, 875; (1932) 79 A. L. R. 897, 904. See also Note (1920) 29 YALE L. J. 928.

Some doubt is cast on the English law by several harsh decisions. *E.g.*, *Rex v. Scholey*, 3 Crim. App. 183 (Crim. App. 1909).

²⁶ See *Borland v. State*, 249 S. W. 591 (Ark. 1923).

²⁷ *Commonwealth v. Lehman*, 309 Pa. 486, 164 Atl. 526 (1932).

²⁸ *Id.* at 499, 164 Atl. at 530.

²⁹ *Wilson v. State*, 60 N. J. L. 171, 184, 37 Atl. 954, 958 (1897). This formula has been applied "even when the intoxication is so extreme as to make a person unconscious of what he is doing, or to create a temporary insanity." *Gustavenson v. State*, 68 Pac. 1006, 1010 (Wyo. 1902). In this latter case, the court cites as authority, *Upstone v. People*, 109 Ill. 169 (1883), and 2 BISHOP, CRIMINAL LAW (8th ed. 1892) § 400. *Cf.* *Johnson v. Commonwealth*, 135 Va. 524, 115 S. E. 673 (1923).

³⁰ See *State v. Aragon*, 35 N. M. 198, 292 Pac. 225 (1930).

the law implies malice, and an intention to kill from the effective use of the weapon, and, therefore, the crime is presumably murder in the second degree."³¹ It is apparent also that although the minority view³² reaches results that are defensible, the avowed methods and analysis are fallacious. Frequently the cases show reliance on the patently false assumption that "intent" is not required in manslaughter.³³ If intent were actually lacking, the effect of application of the exculpatory doctrine would, at most, be involuntary manslaughter which requires only "criminal negligence,"³⁴ but this is nowhere alleged to be the ground for liability. Both majority and minority interpretations are further confused by the overriding doctrine that murder requires no "specific intent," that "general intent" is sufficient.³⁵ Thus, a majority of American states implement the exculpatory doctrine only as regards premeditation whereas in the minority, the doctrine is applied both to exclude premeditation and to provide an equivalent for "legal provocation."

There is not the least admission anywhere, however, that drunkenness constitutes "legal provocation." On the contrary, so far as their utterances are concerned, it is clear that the courts do not relax the rules on "legal provocation" to include homicides under gross intoxication.³⁶ They deny legal effect to the admitted fact that drunken persons are more easily aroused and lose self-control more readily than do sober ones. Nor will they allow intoxication

³¹ *Aszman v. State*, 123 Ind. 356 (1889); *cf. People v. Leonardi*, 135 N. Y. 360, 38 N. E. 372 (1894). "He may be perfectly unconscious of what he does and yet responsible. He may be incapable of express malice; but the court imputes malice in such a case." *Johnson v. Commonwealth*, 135 Va. 524, 527, 115 S. E. 673, 674-75 (1923).

³² See *Laws v. State*, 144 Ala. 118, 42 So. 40 (1905); *State v. Rumble*, 105 Pac. 1 (Kan. 1909); *State v. Corrivau*, 93 Minn. 38, 100 N. W. 638 (1904).

³³ In these instances, no special statutes are involved, nor is the manslaughter classified as "involuntary."

³⁴ See Note (1921) 6 CORN. L. Q. 193.

³⁵ See pp. 1064-65 *infra*.

³⁶ At least one case, however, states that "where what the law deems sufficient provocation has been given," drunkenness may be considered because "passion is more easily excitable." *Rex v. Thomas*, 7 C. & P. 817, 173 Eng. Rep. 356 (N. P. 1820). This rather ambiguously suggests modification of the usual rule, but no English case appears to have adopted the implication. *Cf. Rex v. Birchall*, 9 Crim. App. 91 (Crim. App. 1913); *Rex v. Letenock*, 12 Crim. App. 221 (Crim. App. 1917); *State v. Hurley*, 1 Houst. Cr. Rep. 28 (Del. 1858).

to enter the jury's determination on "cooling-time." On the contrary, they do not hesitate to color the jury's calculation by instructing that: "The question is, was there time for a reasonable man, in like circumstances, to have cooled, not a drunkard or a madman,"³⁷ stressing that no indulgence should be granted to one who had "taken the quantity of liquor requisite to make him a savage."³⁸ The reason for refusing to equate drunkenness with legal provocation, namely, that since "drunkenness does not excuse homicide, so by the same token it may not be available as a factor contributing to heat of passion,"³⁹ is hardly persuasive in the light of the exculpatory doctrine that is simultaneously avowed. When it is recalled that "legal provocation" is a mitigating doctrine which "indulgeth human frailty,"⁴⁰ the import of the refusal to relax the rules on account of drunkenness is recognized. The meaning must be that there are different evaluations that are defensible, that it is right to reduce a killing to voluntary manslaughter if committed in a fight⁴¹ or in sight of adultery, whereas a person who "deliberately gets drunk" merits no like extenuation. The courts, interpreting the exculpatory doctrine quite literally, find no inconsistency in restricting it to the requirement of intention and at the same time rejecting any claim of loss of control because of intoxication. But such insistence hardly squares with the facts which show just as plainly as in legal provocation that the defendant did entertain the necessary intention but was without normal control of his conduct. Rather obviously, harms committed by inebriates reveal not wild, disorganized, aimless, motor

³⁷ *State v. McCants*, 1 Speers 391 (S. C. 1843).

³⁸ *Id.* at 395.

³⁹ *State v. Aragon*, 35 N. M. 198, 200, 292 Pac. 225, 227 (1930). *Cf.* *Bishop v. United States*, 107 F.(2d) 297 (App. D. C. 1939); *McGaffin v. State*, 178 Ala. 40, 59 So. 635 (1912); *Commonwealth v. Hawkins*, 3 Gray 463 (Mass. 1855); *Keenan v. Commonwealth*, 44 Pa. 55 (1862); *Pirtle v. State*, 9 Humph. 663 (Tenn. 1849).

Similarly when mistake is pleaded, the courts generally refuse to permit drunkenness to be considered. *Springfield v. State*, 11 So. 250 (Ala. 1892); *State v. Davis*, 43 S. E. 99 (W. Va. 1903). But *cf.* *Rex v. Letenock*, 12 Crim. App. 221 (Crim. App. 1917). And in a prosecution for negligent homicide, a court held the defendant subject to the same degree of care as a sober person. *Haynes v. State*, 224 S. W. 1100 (Tex. Cr. App. 1920).

⁴⁰ *Discourses*, in *FOSTER, CROWN CASES* (1762) 291.

⁴¹ *Cf.* the even more liberal European law on excessive self-defense and the absence of the "objective" test.

activity but conduct well adapted to attain specific goals.⁴² This suggests that confusion is inescapable in the prevailing attempted implementation of a mitigating doctrine stated in terms of "intention" where lack of intention is not an essential differentia as a matter of fact.

The policy implicit in the prevailing law represents compromises between the punishment of inebriate offenders in complete disregard of their condition, because it was brought on voluntarily, and the total exculpation suggested by the actual facts at the time the harm occurred. A balance, in other words, has been compounded from a realization, on the one hand, that the moral culpability of a drunken homicide should be distinguished from that of a sober person effecting a like injury, and from a persistence of the belief, on the other hand, that a person who voluntarily indulges in alcohol should not escape the consequences.

"VOLUNTARY INTOXICATION"

The incapacity of the inebriate is one pillar of the prevailing evaluation, the other centers on the voluntariness of the intoxication. The initial difficulty in ascertaining the meaning of "voluntary," in connection with intoxication, results from the failure of the courts to define the term explicitly. It is therefore necessary to scrutinize the facts and analyze the relevant judicial language. In the first English report on a drunken homicide⁴³ which affirmed volition as its rationale, it was said that though the defendant "did it through ignorance . . . that ignorance was occasioned by his own act and folly, and he might have avoided it."⁴⁴ The rule, as formulated by Baron Parke, became fixed: "voluntary drunkenness is no excuse for crime."⁴⁵ The current adjudication represents a continued adherence to a rationalistic psychology that ignores the complex, psychic apparatus of self-restraint.

The chief aid in defining "voluntary," which the courts have

⁴² See *Johnson v. State*, 129 Wis. 146, 160, 108 N. W. 55, 61 (1906). See also H. M. COMMISSIONERS' SEVENTH REPORT ON CRIMINAL LAW (1843) 20.

⁴³ *Reniger v. Fogossa*, 1 Plowden 1, 75 Eng. Rep. 1 (K. B. 1551). See 8 HOLDSWORTH, HISTORY OF ENGLISH LAW (1937) 441.

⁴⁴ 1 Plowden at 19, 75 Eng. Rep. at 31.

⁴⁵ *Pearson's Case*, 2 Lew. C. C. 144, 168 Eng. Rep. 1108 (N. P. 1835). Baron Alderson, the following year, could add to the already classic formula only the illuminating remark that "If a man chooses to get drunk, it is his own voluntary act." *Rex v. Meakin*, 7 C. & P. 297, 173 Eng. Rep. 131, 132 (N. P. 1836).

provided, has been by way of specific exception from liability, for example, Baron Parke's remark in *Pearson's Case*: "If a party be made drunk by stratagem, or the fraud of another, he is not responsible."⁴⁶ The courts interpret "coercion" in this connection, quite literally, to mean that one was "forced . . . to drink"⁴⁷ by overt, physical acts. "Fraud," which is generally equated with force in the criminal law, is also so rigorously restricted as, for example, to exclude imposition upon the young and inexperienced by calculating adults. Thus a boy of sixteen was admitted to a gambling house where the proprietor plied him with whiskey in order to cheat him in the play. In a fight, the boy, drunk to the point of admitted "temporary insanity," killed the calloused operator. Holding that "involuntary intoxication is a very rare thing and can never exist where the person intoxicated knows what he is drinking, and drinks the intoxicant voluntarily, and without being made to do so by force or coercion," the court affirmed a conviction and sentence of twelve years imprisonment.⁴⁸ In a tragic case of patricide, the son sought to show that his father supplied the liquor and urged him to drink it. The intoxication was held "voluntary."⁴⁹ In a much more suggestive case, a college student under eighteen, who had never before tasted intoxicating liquor, was given a ride by the deceased in his automobile. The latter had been drinking heavily and insisted that the boy participate, becoming abusive and threatening to put him off in the Arizona desert if he refused. The court, noting that the "defendant, being alone, penniless, and fearing that he might be ejected and left on the desert did drink some beer and whiskey," nonetheless held that involuntary intoxication "must be induced by acts amounting in effect to duress."⁵⁰ So, finally, although it has been stated that "taking liquor prescribed by a physician" is a defense,⁵¹ a court was unwilling to entertain the plea that the defendant drank to obtain relief from an acute pain.⁵²

These cases are not selected specimens of extreme adjudication.

⁴⁶ 2 Lew. C. C. at 145, 168 Eng. Rep. at 1108.

⁴⁷ *Borland v. State*, 249 S. W. 591, 594 (Ark. 1923).

⁴⁸ *Perryman v. State*, 12 Okla. Cr. App. 500, 159 Pac. 937 (1916).

⁴⁹ *State v. Sopher*, 30 N. W. 917 (Iowa 1886).

⁵⁰ *Burrows v. State*, 38 Ariz. 99, 116, 297 Pac. 1029, 1036 (1931).

⁵¹ See *Choate v. State*, 19 Okla. Cr. App. 169, 197 Pac. 1060 (1921); *Johnson v. Commonwealth*, 135 Va. 524, 115 S. E. 673 (1923).

⁵² *Johnson v. Commonwealth*, 135 Va. 524, 115 S. E. 673 (1923).

The 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*. It is hazardous to generalize so unqualifiedly concerning such an enormous body of law as that on crimes committed by inebriates; but the reports record hardly a single decision actually holding that the defendant was involuntarily intoxicated.⁵³ The opinions invariably hold that the intoxication was "voluntary," but with equal uniformity they reiterate that fraud or coercion is a perfect defense. The encyclopedias and treatises give the dicta equal status with the judgments, enhancing the illusion that the matter has been adjudicated and that there exists an actual rule. But the contrary import of the huge volume of relevant case-law and of the enormous diversity of situations represented is plain: "fraud," narrowly interpreted in these cases to require complete innocence of the nature of alcoholic drink, wrongfully induced, cannot be perpetrated even on normal children of the age of legal capacity. As regards "coercion," the case-law implies that a person would need to be bound hand and foot, and the liquor literally poured down his throat, or that he would have to be threatened with immediate serious injury, before the exception, so universally voiced, would have any effect on judicial decision. So far as the extant law is concerned, there would be no difference in the actual rule if it were announced flatly that no intoxicated person could ever claim that his condition was effected by fraud or coercion. Thus it is apparent that the courts sternly affirm that phase of the accepted policy that is posited on the volition inferred from the drinking of alcoholic liquor. The prevailing adjudication is so rigorous in this regard as to transform

⁵³ The reason for the slight qualification is the apparently unreported case of *Regina v. M. R.*, quoted in Lee, *Drunkenness and Crime* (1902) 27 LAW MAG. & REV. (5th ser.) 147. And in a case decided more than one hundred years ago, the complainant sold the defendant, a child of twelve, a cigar and a strong alcoholic drink. Later the boy took the complainant's watch, and on a charge of larceny, the court instructed the jury: "this case essentially differs from that where a crime is committed by a person, who by a free indulgence of strong liquors, has at the time voluntarily deprived himself of his reason." *Commonwealth v. French*, Thacher's Cr. C. 163 (Mun. Ct. Boston 1827). But the court also intimated that the child might have been temporarily insane, which diminished the force of the instruction as to the lack of volition.

the avowed "exceptions" into mere dicta which function only as balm for the judicial conscience's rationalizing the infliction of severe penalties. It is accordingly worth emphasis that the validity of the ultimate principles of culpability on which the decisions rest does not depend on administration alone. These principles, signifying that voluntary conduct may be punishable but that involuntary conduct is not within the reach of punitive sanctions, are not impeached because judges continue the routine of invoking the precept that "voluntary drunkenness is no excuse" in circumstances where it is plain that the drunkenness was anything but "voluntary" in any realistic connotation.

Nor is the validity of the traditional principles impaired because judges, untouched by modern science in these matters, hold many persons liable, though they are in fact afflicted with well-known diseases. The suspicion of a harsh moralistic bias raised by the narrow construction of "fraud" and "coercion" where the courts deal with the "voluntary intoxication" of normal defendants is further supported by a consideration of certain typical cases that involve abnormal persons. A rather frequent defense is that a serious injury predisposed the defendant to alcoholic addiction. It is claimed that a fracture of the skull,⁵⁴ a blow on the head,⁵⁵ an injury to the brain,⁵⁶ or some other serious accident⁵⁷ stimulated indulgence or resulted in complete lack of control. These claims are uniformly rejected by the courts, and the defendants are treated as normal. But a recognized student of these problems reports that persons "having had severe head injuries and sun-strokes, are particularly predisposed" to mental disease when under the influence of alcohol.⁵⁸ Yet the courts insist that "this is in law no excuse whatever" ⁵⁹ On the contrary, such a person is held even more culpable because, so it is argued, knowing his weakness, he should have put forth greater efforts to abstain, and convictions, even of murder, are upheld in such cases.

⁵⁴ See *Choice v. State*, 31 Ga. 424 (1860).

⁵⁵ See *State v. Wilson*, 104 N. C. 868, 10 S. E. 315 (1889).

⁵⁶ See *State v. Kavanaugh*, 4 Penne. 131, 53 Atl. 335 (Del. Ct. Gen. Sess. 1902).

⁵⁷ See *H. M. Advocate v. Campbell*, [1921] Session Cases 1 (Ct. Just. 1920).

⁵⁸ Lewis, *Psychiatric Resultants of Alcoholism: Alcoholism and Mental Disease* (1941) 2 Q. J. STU. ALC. 293, 296.

⁵⁹ Apparently the drug addict is similarly treated. See Note (1942) 17 NOTRE DAME LAWYER 145.

The judicial logic is superb, but, unfortunately, their premises are fallacious because they are formulated in disregard of available medical knowledge. For in these cases, the claim of a serious head injury is typically accompanied by well-marked psychopathic symptoms of incapacity during sobriety as well as by sharp deterioration under intoxication.

Nonetheless, even if the defendant is believed to have been temporarily insane, he is held punishable because, in a perversion of Blackstone's phrase, it is "an artificial voluntarily contracted madness."⁶⁰ In many cases it is clear that the defendant is mentally diseased. These are usually homicides where the motive for killing was obviously irrational. The intoxicated defendant "cruelly shot down the deceased, while he was performing neighborly and kindly acts for him."⁶¹ He was found guilty of murder and sentenced to die. A drunken blacksmith killed a dear friend.⁶² There was considerable evidence of insanity, testimony that liquor made the defendant "crazy wild"; that his conduct at the time of the killing was of a "very strange, wild and irrational character"; that his mother, a sister and three brothers were insane, the mother, sister and one brother dying in insane asylums, etc. The superintendent of the state insane asylum, a qualified expert, testified that in his opinion the defendant was insane. In this case the intoxication was merely a symptom of a major psychosis. But the court treated the condition as the temporary result of voluntary drunkenness, and the defendant was held guilty of murder. In a case where the defendant killed a theatre cashier in an attempted robbery, there was considerable testimony of mental abnormality, accompanied by long excessive drinking. The defendant's eyes were described as "wild and stormy and froth was running out of his mouth." He kept talking to himself, refused to eat, had to be carried into his home in a helpless drunken condition. On the

⁶⁰ Blackstone was describing the gross intoxication of normal persons. One hundred years after Blackstone, an American judge held that "A man may have partial or general insanity, and that, too, from blows on the head, yet if he drink, and bring on temporary fits of drunkenness, and while under the influence of spirits, takes life, he is responsible." *Choice v. State*, 31 Ga. 424, 480-81 (1860).

This opinion contains some of the choicest bits of psychological erudition exhibited in legal literature anywhere, *e.g.*, "The fact is, responsibility depends upon the possession of will—not the power over it." *Id.* at 474.

⁶¹ *Buckhannon v. Commonwealth*, 86 Ky. 110, 111, 5 S. W. 358 (1887).

⁶² *Upstone v. People*, 109 Ill. 169 (1883).

night of the killing, his mother had called the police, asking them to take her son to a hospital. Here again, the intoxication was merely symptomatic of a serious psychosis, but it stimulated the bias against "voluntary" inebriates. He was found guilty of murder and hanged.⁶³ The harshness of prevailing adjudication is evident in a case where the defendant killed a clerk over a petty argument about being served, and the court held, "Temporary insanity, occasioned immediately by drunkenness, does not destroy responsibility for crime, where the defendant, when sane and responsible, voluntarily makes himself drunk."⁶⁴ The theory is that unless the defendant is "permanently" insane, his mental condition should be entirely ignored on the inhibiting assumption that the intoxication was "voluntary." As a Michigan court forthrightly stated, "he must be held to have intended this extraordinary derangement . . . and the other results produced by it."⁶⁵ Such decisions are not rare; they represent settled judicial attitudes which could be illustrated indefinitely.

The rigor of the prevailing doctrine would be considerably lessened if the courts recognized that addiction to alcohol is a disease. But the level of diagnosis characteristic of these cases is also represented in the judges' opinion that dipsomania is not a defense.⁶⁶ Thus a conviction of murder in the second degree was sustained where the defendant, who had become a morphine addict five years previously following the death of his wife, also drank very heavily, consuming a quart of liquor a day for several years preceding the killing.⁶⁷ A like decision was upheld where the evidence showed that the defendant was a degenerate, who, for ten years preceding the homicide, "had been addicted to strong drink, including whiskey, brandy, absinthe, and every other kind of drink sold in saloons; that he . . . suffered from delirium tremens, and . . . with a chronic disease which deeply impaired his nervous system; that on the night in question he was suffering from a recent surgical operation which gave him great pain," and so on.⁶⁸ There are

⁶³ *People v. Brislane*, 295 Ill. 241 (1920).

⁶⁴ *Collier v. State*, 17 Okla. Cr. App. 139, 151, 186 Pac. 963, 966 (1920), quoting from *Cheadle v. State*, 11 Okla. Cr. App. 566, 571, 149 Pac. 919, 921 (1915).

⁶⁵ *Roberts v. People*, 19 Mich. 401, 422 (1870).

⁶⁶ See *State v. Kidwell*, 62 W. Va. 466, 59 S. E. 494 (1907).

⁶⁷ *State v. English*, 164 N. C. 497, 80 S. E. 72 (1913).

⁶⁸ *Atkins v. State*, 119 Tenn. 458, 462, 105 S. W. 353, 354 (1907).

many similar cases whose clinical picture bears unmistakable marks of mental abnormality. A court which heard credible evidence that the defendant was from boyhood known as "crazy Nick," that drinking "put him in a frenzy," that he was "a steady drinker," that after a night's absence, he came home "terribly intoxicated," took his Sunday clothes and chopped them into little pieces, still found that the intoxication was "voluntary," and therefore there was no excuse "even when the intoxication is so extreme as to make the person unconscious of what he is doing, or to create a temporary insanity."⁶⁹ The court summarily dismissed the claim of delirium tremens, asserting there was "nothing more or less than the condition of mind usually resulting from a condition of thorough drunkenness."⁷⁰ To cap its tragic innocence of the relevant psychiatric knowledge, the court confidently added: "It would be utterly impossible to distinguish between the two conditions of mind, if in reality there be a difference between the two."⁷¹ In a recent California case the defendant had been taken from an old men's home and given employment doing odd chores. After a trivial dispute, the deceased pushed the defendant who shortly thereafter became intoxicated and killed him. The alienists testified that the defendant "was very emotional and alcohol releases these inhibitions"; that the man would never do such a deed unless he had been drinking. He was syphilitic, had hardening of the arteries, was quite susceptible to the alcohol, "was definitely confused and reacted emotionally and almost instinctively." The court held that his condition at the time of the homicide "was a state voluntarily brought about, and therefore was no excuse for the crime." It affirmed conviction of murder in the first degree and the death sentence.⁷²

Thus we find many competent courts ignoring serious physical injuries, addiction, chronic alcoholism, delirium tremens, confusing psychoses because accompanied by intoxication, and, in general, adhering to a course of adjudication that can only be regarded as unenlightened. The combined result of narrowing "fraud" and "coercion" to the vanishing point when dealing with normal

⁶⁹ *State v. Kraemer*, 49 La. 766, 22 So. 254 (1897).

⁷⁰ *Id.* at 774, 22 So. at 257.

⁷¹ *Ibid.*

⁷² *People v. Smith*, 14 Cal.(2d) 451, 95 P.(2d) 453 (1939).

persons and refusing to acknowledge that many defendants are diseased, implemented by traditional, and in its proper place praiseworthy, disapproval of drunkards is harsh law that adds cruelty to misfortune. The personal remorse consequent on realization of what happened is exceeded by the social tragedy of severe punishment for harms committed under gross intoxication, not infrequently by persons who are seriously diseased. Yet it is clear that at least since Stephen, able judges have tried to alleviate the rigor of the criminal responsibility of inebriates. It is equally plain that the continued unsatisfactory state of the law is in large part due to the methods employed to achieve the desired mitigation. Thus in the existing law there is confusion resulting from the application of the exculpatory doctrine to the defendant's condition at the time he committed the harm as well as a formalism and rigor in the interpretation of "voluntary intoxication."

"SPECIFIC INTENT" AS A TECHNIQUE OF MITIGATION

It is easy to understand the motivation that led Stephen and succeeding judges to reliance on the "general intent" principle as the most likely technique to achieve mitigation, and thus to formulate the exculpatory doctrine by reference to it. The solid, unavoidable fact was that a harm committed under gross intoxication ought to be clearly distinguished from a like injury by a sober person. The challenge to ethical judgment and to common sense was unmistakable. On the other hand, the commission by a normal person of a serious injury, combined with traditional moral attitudes stigmatizing intoxication as a vice, indicated with equal clarity the impropriety of complete exculpation. The rules on intent lay closest at hand to provide a plausible mediation. Most of the harms met in these cases were homicides and aggravated assaults,⁷³ and here the doctrines concerning general and specific intent operated to produce the precise results desired.

These doctrines, supplying the ultimate support of the exculpatory rule, imply that "specific intent" is distinguishable from "general intent." They signify also that certain crimes, notably

⁷³ See Gray and Moore, *The Incidence and Significance of Alcoholism in the History of Criminals* (1941) 3 J. CRIM. PSYCHOPATH. 289, 294; Lewis, *Personality Factors in Alcoholic Addiction* (1940) 1 Q. J. STU. ALC. 21, 29-30.

murder, manslaughter, and assault, require only "general intent" whereas most of the other offenses require certain "specific" intents. The incidence of the exculpatory doctrine on the latter rules requires that wherever a "specific" intent is an essential element of a crime, and no lesser cognate offense requiring only "general intent" is available, the inebriate defendant must be acquitted. Accordingly, in numerous crimes the exculpatory doctrine has sweeping effect. Thus, in cases of assault with intent to murder,⁷⁴ assault with intent to rape,⁷⁵ burglary,⁷⁶ attempted burglary,⁷⁷ larceny,⁷⁸ passing counterfeit notes,⁷⁹ and others, the defendant was acquitted. Obviously complete exculpation in these situations is at odds with the doctrine that "voluntary intoxication is no excuse"; it is opposed by scientific judgment that there is partial responsibility in many of these cases. Moreover, such complete exculpation is posited on an alleged lack of "specific intent" and on an avowed refusal to make any concessions because of impairment of control. Yet it is commonplace that in most of these cases a criminal intent is present; it is normal restraint that has dissolved in the flowing cup.

The chief import of this total exculpation may be inferred from the fact that the vast majority of cases, at least of those reported, which involve serious harms by inebriates are homicides and cases of serious assault—and here drunkenness is usually admitted only to refute murder in the first degree and aggravation of the assault. In these latter situations it is emphasized that "of course . . . voluntary intoxication furnishes no excuse for crime."⁸⁰

⁷⁴ *Roberts v. People*, 19 Mich. 401 (1870), held that this crime was not like murder, which requires no specific intent. The court relied on *Bishop* as authority.

⁷⁵ *State v. Donovan*, 61 Iowa 369, 16 N. W. 206 (1883).

⁷⁶ *Schwabacher v. People*, 165 Ill. 618, 46 N. E. 809 (1897); *State v. Bell*, 29 Iowa 316 (1870).

⁷⁷ *People v. Jones*, 263 Ill. 564, 105 N. E. 744 (1914).

⁷⁸ *Chatham v. State*, 9 So. 607 (Ala. 1891) (citing *Regina v. Moore*, 3 C. & K. 319, 175 Eng. Rep. 571 (N. P. 1852)); *State v. Kavanaugh*, 4 Penne. 131, 53 Atl. 335 (Del. Ct. Gen. Sess. 1902); *Bartholomew v. People*, 104 Ill. 601 (1882); *People v. Walker*, 38 Mich. 156 (1878).

⁷⁹ *United States v. Roudenbush*, 27 Fed. Cas. No. 16,198 (C. C. E. D. Pa. 1832); *O'Grady v. State*, 36 Neb. 320, 54 N. W. 556 (1893); *Pigman v. State*, 14 Ohio 555 (1846). But cf. *Clinton v. State*, 132 Tex. Cr. App. 303, 104 S. W.(2d) 39 (1937) (burglary). Texas has a rigorous statute on the subject, TEX. ANN. PEN. CODE (Vernon, 1925) art. 1545-47.

⁸⁰ *State v. Bell*, 29 Iowa 316, 319 (1870).

Certainly the doctrinal effect suggested by juxtaposition of the decisions on robbery, larceny, etc. and those on homicide and aggravated assault is an odd composition. It obliges us to reject the convention that intoxication is never admitted as an "excuse" but only to establish the lack of a material element of certain crimes. Even where "excuse" is sharply distinguished from "justification," as in European systems, the former concerns personal grounds for exculpation, like insanity or infancy — and intoxication is clearly included here rather than under "justification" which relates to certain external facts, such as self-defense. The common assertion that intoxication is no "excuse" amounts not to any such technical distinction, but rather to a patent rationalization of inconsistency with an avowed moral attitude. Viewed solely from grounds of policy, it is impossible to support the widely divergent results. Certainly some of the crimes admittedly requiring "specific intent" are as harmful as many cases of manslaughter, and carry more severe penalties. Yet there is complete exculpation in the former and only occasionally does a more inquiring court note the incongruity.⁸¹ The particular question to be considered is the technical validity of the ultimate legal doctrines relied upon, namely, the distinction between "general" and "specific" intent, and the allegation that only the former is required in the case of homicide or assault.

The meaning of any term employed in legal discourse is either popular or technical, the latter frequently representing the imposition of a professional superstructure upon an initially common word. Hence, in analysis of such conceptions as "general" and "specific" intent, it will be agreed that one had better start with the ordinary meaning of the terms. It is true, of course, that "intention," even when not technically interpreted, has various meanings. But a common unequivocal core persists and it is that mean-

⁸¹ "The law does not imply the intent in cases of the kind, from the breaking and entering, or entering without breaking. If life, however, be taken, by the use of a deadly weapon, the law implies malice, and there would hence be murder, though the perpetrator was drunk. This is the more evident when we know that one may be guilty of murder without intending to take life, as he may in other cases intend to take life and yet not commit a crime. Or, still again, drunkenness may quite supply the place of malice aforethought, which may be general, not special, but it cannot that of specific intent. Bishop's Cr. Law, vol. 1 §§ 389, 490, 491; notes and cases there cited. We confess that the doctrine touching cases of this character is not placed upon the clearest ground in the books." *Id.* at 320.

ing which is designated in legal discourse differentiating it from "motive." Ordinary introspection and most psychologies in one fashion or another recognize "intention" as a state of mind, referable to intelligence, and evidenced by the overt adaptation of means to attain desired ends. While there are degrees of concentration or intensity in the response designated "intentional conduct," the paramount fact is that neither common experience nor psychology knows any such actual phenomenon as "general intent" that is distinguishable from "specific intent." Viewed from this surest base in the shifting linguistic terrain, the most likely alternative is that "general intent" has a technical meaning in law, one which does not denote any reality but which may nonetheless serve a useful purpose. This interpretation is supported by examination of the situations to which "general intent" is applied. The most important class of such situations are cases where the defendant, intending to commit a particular wrong, actually commits another, unintended harm. Thus in assault⁸² and in homicide, the typical facts are that the defendant attempts to strike *A*, misses him and hits *B*; the defendant attempts to kill *A*, fails and kills *B*. In such cases the unvarying ethical judgment expressed in Anglo-American law is that the defendant is just as culpable as if he had succeeded in carrying out his actual intention (although the doctrine of other legal systems, that the defendant has committed two crimes, attempted murder of *A* and manslaughter of *B*, should stimulate re-examination of our law). But the fundamental principles of criminal law require that there be an intention to commit a battery or to kill or seriously injure and that this intention "concur" with the harmful effects actually produced. The courts exhibit their usual penchant for consistency of doctrine in their discourse; the actual intent is "transferred" (formally) to the actual consequences, and the rationalization is that the defendant had a "general criminal intent," which means not one tittle more than that he had an actual intent to commit a battery or to kill or seriously injure some person.⁸³ "General intent" is employed similarly in discussion of reckless and negligent conduct whenever the harmful effects are such that sound policy seems to require penal liability.⁸⁴

⁸² *Keeton v. Commonwealth*, 92 Ky. 522, 18 S. W. 359 (1892).

⁸³ *Cf. Sayre, Mens Rea in Criminal Law*, in *HARVARD LEGAL ESSAYS* (1934) 399, 412.

⁸⁴ *Cf. Perkins, A Rationale of Mens Rea* (1939) 52 *HARV. L. REV.* 905, 909.

In the reification of their technique, the courts also speak of "transferred" or "constructive" intent, which obviously denote no existing reality. What has been said of "general intent" applies equally to "constructive" intent and "transferred" intent — only more plainly. Such "intent" has never been nor can it be experienced by any mind. The import, again, is that some ground of policy justifies or is thought to require responsibility despite the absence of any actual intent to commit the harm. It may be assumed for the present argument that, as regards intentional conduct, where the harm actually effected was foreseeable and as serious as the one sought, such verbal techniques as "transferred intent" and "general intent," however cumbersome and hazardous to clear analysis, are defensible on grounds of policy, although, as indicated in other legal systems, the results reached are by no means unquestionable. But, even though we assume the validity of this underlying policy, the chief point to be stressed is not that there was no "specific intention," but that on the contrary, there was an intention (specific!) to assault or kill a human being, and that therefore, in light of the actual results, the error in execution is inconsequential.

If this essential meaning of the situations to which the "general intent" doctrine applies is borne in mind, it is clear that the material facts in the intoxication cases must be interpreted differently. Here we do not have a sober person who intends to commit one harm, and actually commits another one. On the contrary, a grossly intoxicated person commits the very harm he intends to commit. Thus it is true here, to stress the salient fact, that *there was never an intent to kill or seriously injure by a sober person*. But the other equally important fact is that *in some cases* the state of dangerousness under intoxication was culpably induced. These facts constitute the central problem to be confronted, which no amount of technicality can obscure to common sense. It must now be plain that if the courts actually applied the exculpatory doctrine without violence to the established meaning of the words, that application would have little, if any, effect since (specific) intent is present in harms by inebriates; typically what is lacking is control and ethical sensitivity. We have seen that, in fact, the exculpatory doctrine is given diverse effect. The prevailing confusion is the result of misdirected efforts to implement an exculpatory doctrine that is erroneously formulated in terms that are irrelevant

to the situations actually found in harms by inebriates. The diverse rules resulting from application of the exculpatory doctrine rest on and augment the existing confusion in the criminal law produced by the fiction of "general" and "specific" intent.

THE INFLUENCE OF INVALID ANALOGIES ON RESPONSIBILITY

The "specific intent" doctrine is a technique for expression of the policy of alleviation of the rigor of penal liability of inebriates. Equally potent, but far less defensible because they limit the formation of a sound policy, are certain other doctrines that strengthen the prevailing evaluation of "voluntary intoxication." Specifically, the judges are met by "criminal negligence" and the felony-murder, misdemeanor-manslaughter doctrine; the law on the criminal responsibility of inebriates is confused by reliance upon these doctrines, whose validity is assumed, as analogies. Obviously a modification of opinion on the "wrongness" of intoxication would affect such reliance radically.⁸⁵

The confusion in the current law of homicide — and that law is the chief reference of the analogies noted above — results in large measure from the ambiguity of "criminal negligence," and its consequent inconsistency with principles that are defensible bases of penal liability.⁸⁶ Despite formal acknowledgment that "criminal negligence" means recklessness, it is apparent that ordinary negligence is frequently held criminal.⁸⁷ The consequent rationalizations concerning manslaughter comprise a dialectics of insidious, entangling gossamer the farther the courts recede from the rational bases of penal liability. If the underlying assumptions should be recognized as false, if, *e.g.*, ordinary negligence were excluded from penal liability, much of the current law of manslaughter must necessarily fall. It would follow that statutes which impose liability for homicide caused by "criminal negligence" would

⁸⁵ A consideration of this problem from the viewpoint of contemporary science is made at pp. 1072-76 *infra*, since change in the traditional mores may be influenced by an understanding of the facts.

⁸⁶ The writer has discussed this problem at length elsewhere, arguing that only intentional and reckless misconduct are proper grounds for penal liability. See Hall, *Interrelations of Criminal Law and Torts: I* (1943) 43 Col. L. Rev. 753, 775-78.

⁸⁷ See *Jones v. Commonwealth*, 213 Ky. 356, 281 S. W. 164 (1926); *Njecick v. State*, 178 Wis. 94, 189 N. W. 147 (1922).

be confined to reckless misconduct. It would then follow, also, that only when an inebriate was reckless in becoming intoxicated could he be held criminally liable for a subsequent harm. Nor would other, less articulated but nonetheless potent, value-judgments in the law of involuntary manslaughter persist to confound the law on the penal responsibility of inebriates.

But closest at hand, and most influential in sustaining the present law on responsibility of inebriates, is the prevailing felony-murder, misdemeanor-manslaughter doctrine.⁸⁸ This doctrine is hardly distinguishable analytically from the "general intent" rule and may be viewed as a phase of that same notion. But whereas the policy underlying the latter rule is defensible where the defendant is held liable for an unintended harm only if he intended to commit an equally serious one, here we confront a markedly different situation. Under the felony-murder, misdemeanor-manslaughter doctrine, defendants are held liable for much more serious offenses than they intended to commit or were foreseeable. The ambiguity of the value-judgment concerning "voluntary intoxication" provides ample scope for reference back to a prior "wrong." The proximity, indeed, identity of the voluntary intoxication rule with the general notion of holding a person responsible for a harm because he committed another "wrong" causally connected with it is thus plain.

The underlying rationale of the felony-murder doctrine — that the offender has shown himself to be a "bad actor," and that this is enough to exclude the niceties bearing on the gravity of the harm actually committed — might have been defensible in early law. The survival of the felony-murder doctrine is a tribute to the tenacity of legal conceptions rooted in simple moral attitudes. For as long ago as 1771, the doctrine was severely criticized by

⁸⁸ "This is the first time, that I ever remember it to have been contended, that the commission of one crime was an excuse for another. Drunkenness is a gross vice, and, in contemplation of some of our laws is a crime; and I learned in my earliest studies that so far from its being in law an excuse for murder, it is rather an aggravation of its malignity." Mr. Justice Story, in *United States v. Cornell*, 25 Fed. Cas. No. 14,868 (C. C. D. R. I. 1820). Such a statement by so great a judge reveals the complexity, if not the hopelessness, of the problem. The fact is that drunkenness was never a crime at common law, and it never served as an aggravation. Nevertheless, when an intoxicated person committed a harm, it has seemed quite persuasive for countless judges to posit responsibility on "voluntary intoxication."

Eden,⁸⁹ who felt that it "may be reconciled to the philosophy of slaves; but it is surely repugnant to that noble, and active confidence, which a free people ought to possess in the laws of their constitution, the rule of their actions."⁹⁰ One hundred years later, it seemed definitely on its way to be entirely discarded in *Regina v. Pembliton*.⁹¹ The defendant had thrown a stone, intending to hit certain persons, but instead it broke a window, and he was charged with the statutory crime of malicious injury to property. The prosecution stressed "general" and "transferred" intent, that there was malice against the persons at whom the stones were aimed, and that "a man must be taken to intend the consequence of an unlawful act." But the court rejected this argument even though the defendant was engaged in the intentional commission of a crime — the situation where, under the earlier law, least difficulty was felt in holding him responsible for whatever happened. Even more significant was *Regina v. Faulkner*⁹² where the defendant, a sailor on a ship carrying a cargo of rum, went to the fore-castle to steal some of it, bored a hole in a cask, and the flowing liquor contacting a lighted match held by the defendant caused a fire, completely demolishing the ship. The Crown contended that since the defendant was engaged in commission of a felony, the lack of intent to burn the ship was irrelevant. Only the traditional doctrine was involved because the foreseeability of the vessel's burning was not presented to the jury. The authorities relied upon were cases of homicide and arson. But the court rejected the doctrine; it relied on and extended the *Pembliton* case, although there the defendant was not engaged in committing a felony. The determinant was that: "The prisoner did not intend to set fire to the ship — the fire was not the necessary result of the felony he was attempting,"⁹³ and the accused was exonerated.⁹⁴ Ten years later, the major blow to the felony-murder doctrine was given by

⁸⁹ See EDEN, PRINCIPLES OF PENAL LAW (1771) 206-209.

⁹⁰ *Id.* at 210.

⁹¹ 12 Cox. Cr. C. 607 (Crim. App. 1874).

⁹² 13 Cox. Cr. C. 550 (Crown C. Res. Ireland 1877).

⁹³ *Id.* at 557.

⁹⁴ *Cf.* *People v. Pavlic*, 227 Mich. 562, 199 N. W. 373 (1924), where the defendant illegally sold liquor to the deceased who froze to death after losing his way as a result of his intoxication. The appellate court held that he could not be convicted of manslaughter "unless he commits the act carelessly and in such a manner as manifests a reckless disregard of human life." *Id.* at 566, 199 N. W. at 374.

Stephen in the *Serné* case.⁹⁵ By holding that the actual harm must have been foreseeable, he identified the requisite situation with those dealt with under ordinary rules of causation, in effect repudiating the chief distinctive feature of the traditional felony-murder doctrine.⁹⁶

Thus that doctrine was well on its way to abandonment when the House of Lords decided *Beard's Case*.⁹⁷ There is no decision of comparable importance in any American jurisdiction, for no court of equal prestige has discussed the law of homicide by inebriates in as great detail, and in the context of the felony-murder doctrine. It will be recalled that Beard, under the influence of liquor, committed a rape on a young girl; and that, in the course of violent resistance by the girl, he seized her by the throat, causing her death. He was convicted of murder but this was reversed by the Court of Criminal Appeal⁹⁸ which substituted manslaughter on the ground that the trial judge should have instructed, according to *Meade's Case*,⁹⁹ that if the defendant was so intoxicated "that he was incapable of knowing that what he was doing was dangerous, i.e., likely to inflict serious injury," he should be convicted of manslaughter.¹⁰⁰ The conviction of murder was reinstated in the House of Lords, and their decision was based squarely on the felony-murder doctrine, thus apparently overruling both *Meade's Case* and *Regina v. Serné*.¹⁰¹ The decision, in effect, denied the possibility that Beard might have been so drunk as not to have un-

⁹⁵ *Regina v. Serné*, 16 Cox Cr. C. 311 (N. P. 1887).

⁹⁶ A similar conclusion was reached by Gläntzer in 1756. "The doer is not liable for murder if he was not aware that a death could result from his action as readily as the end which he had directly in view." Quoted in GRIFFON, *DE L'INTENTION EN DROIT PÉNAL* (1911) 11. Griffon says that this was the first challenge to the mediaeval doctrine, "Versanti in re illicita imputantur omnia quae sequuntur ex delicto," which had been defended by St. Thomas Aquinas and Bernard of Pavia. See *id.* at 7-9.

⁹⁷ 14 Crim. App. 159 (H. L. 1920).

⁹⁸ 14 Crim. App. 110 (Crim. App. 1919).

⁹⁹ [1909] 1 K. B. 895. Cf. *Rex v. Grindley*, cited in 2 RUSSELL, *CRIMES AND MISDEMEANORS* (8th ed. 1857) 8, n.n.

¹⁰⁰ [1909] 1 K. B. at 899. Justice Day went further in *Regina v. Baines*. See note 17 *supra*.

¹⁰¹ This phase of *Beard's Case* has been adversely criticized in an excellent analysis describing the trend away from the felony-murder doctrine, and concluding that "The result of *Beard's Case* . . . nullified all the progress in improving the law of murder which had been achieved during the past century." Turner, *The Mental Element in Crimes at Common Law* (1936) 6 CAMB. L. J. 31, 64.

derstood the dangerousness of his act. He was attempting rape and he consummated it; therefore, held the judges, it cannot be maintained that the defendant was too intoxicated to realize that he was seriously injuring the girl. The combination of rape and drunkenness was sufficiently persuasive to reinstate the abandoned notion that one who intentionally commits a serious wrong is so vicious a person that he should be liable for any consequences however unforeseeable and unsought. The assumption that a person who can commit rape is competent to, and actually did, have an intent to kill or seriously injure thus substituted legal presumptions for determinations of fact. This also imposed a sharp limitation on the exculpatory doctrine¹⁰² since under that doctrine a charge of murder could be met by disproof of "specific" intent, but it must now be the law of England that where an inebriate has committed a felony in the course of which he has killed someone, he will not be permitted to disprove his intent as to the homicide; the requisite *mens rea* is conclusively presumed.¹⁰³

Moreover, the insistence of the Lords that insanity must invariably be sharply separated from drunkenness raised an additional barrier to improvement of the law on criminal responsibility of inebriates. For while it is true that most courts refuse to recognize temporary insanity "caused by drunkenness" as a defense, they have not drawn a hard line between the two. The characterization of gross intoxication as insanity, common since Hale, served to focus attention on the actual condition at the time the harm occurred and thus to preserve the possibility of a correct estimate of culpability. In some diseases, *e.g.*, delirium tremens, it is impossible to separate "the" disease from the intoxication. We may speak as though the disease exists independently, and merely mani-

¹⁰² A more hopeful handling of the felony-murder doctrine — not in its opinion, but in the decision reached — was indicated in *People v. Koerber*, 244 N. Y. 147, 155 N. E. 79 (1926).

¹⁰³ In light of the decision reached it is rather surprising to find a dictum to the effect that drunkenness which rendered a person incapable of wrongful intent should provide a complete defense. 14 Crim. App. at 197. This suggests that though the Lords took a harsh view where the felony-murder doctrine was applicable, they might elsewhere give an extremely tolerant interpretation, such as that suggested by Justice Day. See note 17 *supra*. The dictum in *Beard's Case* is severely criticized in Stroud, *Constructive Murder and Drunkenness* (1920) 36 L. Q. REV. 268. But Stroud, like Austin, failed to draw certain necessary distinctions regarding essentially different classes of inebriate wrongdoers. See pp. 1077-78 *infra*.

feats itself in intoxication; but, actually, the disease includes certain conditions of which intoxication is an essential element. Hence to insist that disease entirely excludes intoxication can only strengthen the prevailing bias against certain diseased persons. It is thus apparent that *Beard's Case* helps to perpetuate the rationalistic psychology on "intention" which continues to be characteristic of Anglo-American decisions on crimes by inebriates, despite the obvious fact that drunkenness lifts the bars of inhibition and stimulates the flood of instinctual drives.¹⁰⁴

The policy of justifying punishment for a harm by reliance on an earlier "wrong" has been even more strongly and fallaciously implemented by the misdemeanor-manslaughter doctrine, indeed, by the harshest phase of that doctrine which includes reliance on intended acts that, though immoral, are not even misdemeanors.¹⁰⁵ That the accused "voluntarily" became intoxicated, even if that is assumed to describe his conduct accurately, does not provide an ethical defense for the imposition of the severe sanctions that are typically imposed. Certainly it is pushing ethics to a formalistic extreme, as Aristotle was apparently willing to do when he approved of double penalization of intoxicated offenders,¹⁰⁶ to hold for the sole reason that an individual drank intoxicating liquor, that he should be responsible for whatever harm he subsequently does while grossly inebriated. Even if the matter is put in terms that deprecate the taking of intoxicating liquor in the smallest quantity, the same general evaluation must obtain because the significance of the volition manifested in the drinking cannot be assessed apart from the knowledge that accompanied it. Only if drinking usually led to intoxication, and intoxication were normally followed by the commission of serious harms, could the prevailing dogma be upheld. But the facts are palpably otherwise. The modern tendency has been to oppose policy-formation such as that embodied in or extended from the felony-murder doctrine. It has insisted on a decent regard for the facts and on sanctions that represent fair evaluations of these facts and not of the supposed character of the offender. Most emphatically the progressive

¹⁰⁴ See Davis, *Drunkenness and the Criminal Law* (1941) 5 J. CRIM. L. (London) 166, 169; Lewis, *Personality Factors in Alcoholic Addiction* (1940) 1 Q. J. STU. ALC. 21, 32-33.

¹⁰⁵ *Regina v. Prince*, 13 Cox Cr. C. 138 (Crim. App. 1875).

¹⁰⁶ NICHOMACHEAN ETHICS bk. III, c. 5.

tendency has been to repudiate the imposition of severe penalties where bare chance results in an unsought harm. In the light of this criticism, it should occasion little wonder that the logic of the felony-murder, misdemeanor-manslaughter doctrine as well as that of criminal negligence obscures analysis of the penal responsibility of inebriates, and retards the discovery of sound policy.

FINDINGS OF SCIENTIFIC RESEARCH ON ALCOHOLISM

A principal objective of the analysis of the exculpatory doctrine and its application has been to remove certain technical supports of the law on the criminal responsibility of inebriates, which, so long as they are assumed to be valid, must retard solution of the problem. Available empirical knowledge now leads to a direct criticism of the dominating attitudes and the immediately relevant legal doctrines. It is plain that the lack of official information concerning alcoholism and the invalidity of current evaluations of conduct and harms committed by inebriates are important determinants of the case-law. In stressing the discoveries of twentieth century research on alcoholism, one must avoid the extravagant claim that little was known about intoxication in past times. In fact, careful observers noted its typical characteristics very precisely many hundreds of years ago. Seneca's *Epistle on Drunkenness* abounds in shrewd observations that can hardly be improved.¹⁰⁷ And skipping centuries of like sophistication, even experts cannot improve on Kant's definition of drunkenness as "the unnatural state of inability to organize sense impressions according to the laws of experience"¹⁰⁸ and Dr. Kerr's book,¹⁰⁹ originally published in 1888, may still be read with much profit. But there has been great progress during the past quarter century which may fairly be said to mark the emergence of sustained scientific research on the problems of alcoholism. This research is chiefly the result of epochal advances in psychiatry and of the application of the laboratory phases of medicine to this field. That the available knowledge is still inadequate is evident from the diversities of opinion regarding such primary problems as the meaning of

¹⁰⁷ See Note (1943) 3 Q. J. STU. ALC. 302, 303.

¹⁰⁸ See Note (1941) 1 Q. J. STU. ALC. 777.

¹⁰⁹ INEBRIETY OR NARCOMANIA (3d ed. 1894). Cf. Crothers, *The Scientific Study of Inebriate Criminals*, in THE MEDICAL JURISPRUDENCE OF INEBRIETY (1888) 57.

"drunkenness,"¹¹⁰ and from the lack of knowledge concerning other important problems, such as statistics on the incidence of intoxication in criminal behavior.¹¹¹

But on many questions of the utmost importance for the law of criminal responsibility there is unanimity of expert opinion concerning which courts seem quite unaware. The disparity between judicial and available knowledge is indicated by the need to point out that one of the commonest of expert agreements is that "alcoholic addiction" (dipsomania) is a disease. "It cannot be disputed," writes a recognized specialist, "that some people find it impossible to refrain from alcohol in spite of repeated experience which should prove to them that its use always leads to very unpleasant situations."¹¹² The disease is no more difficult to diagnose than many others that are commonly recognized, and it is definitely distinguishable from habitual intoxication.¹¹³ Yet the common attitude of the courts continues to be an unvarying rigorous interpretation of "voluntary" intoxication. Delirium tremens has also long been clearly recognized as a definite disease in medical classifications everywhere.¹¹⁴ In this particular instance, many courts have shown a willingness to accept the known facts.¹¹⁵ But even here, we find courts still skeptical, some of them thinking the disease can be simulated, others still insisting that it is nothing more than the ordinary result of extreme intoxication.¹¹⁶ Equally unfounded is the rule that temporary insanity brought on by intoxi-

¹¹⁰ See Hall, *Drunkenness as a Criminal Offense* (1941) 1 Q. J. STU. ALC. 751, 754-56, reprinted in (1941) 32 J. CRIM. L. 297.

¹¹¹ Kinberg, *Alcohol and Criminality* (1914) 5 J. CRIM. L. 569.

¹¹² He continues: "These unfortunate persons know that if they yield to the temptation of the first drink, all power of inhibition is lost. They know that they will go on and on with a spree of intoxication ending only when the flesh rebels. Such people drink in spite of losing their standing in society, their ability to hold positions and their physical health. The suffering of dependents is no deterrent. During periods of sobriety they grieve and repent but in a short time they are off on another debauch." Darling, *Inebriety: A Classification* (1942) 2 Q. J. STU. ALC. 677, 678.

¹¹³ For a diagnosis of the dipsomaniac and the differences between him and the habitual drinker, see KRAFFT-EBING, *TEXT BOOK OF INSANITY* (Chaddock trans. 1904) 434-36; HAGGARD AND JELLINEK, *ALCOHOL EXPLORED* (1942) 156-57.

¹¹⁴ See Wortis, *Delirium Tremens* (1940) 1 Q. J. STU. ALC. 251.

¹¹⁵ For a collection of cases, see Note (1921) 12 A. L. R. 895-900.

¹¹⁶ Stephen's farsighted opinion in *Regina v. Davis* (14 Cox. Cr. C. 563 (N. P. 1881)) should have effected a more enlightened judicial result long ago. See 1 WHARTON AND STILLES, *MEDICAL JURISPRUDENCE* (3d ed. 1873) 209.

cation is no defense. The avowed ground is that insanity which is not "permanent" in the sense of continuing beyond the intoxication is not a true mental disease, but again the courts run definitely counter to generally held expert opinion.¹¹⁷ The dogma that the defendant "voluntarily" became intoxicated¹¹⁸ is least persuasive here. For such adjudication is not only accompanied by complete indifference to the symptoms of recognized disease, it also presupposes awareness by the defendant that he is subject to attacks of temporary insanity, *i.e.*, that he has correctly diagnosed his illness, and that though diseased he is able to act precisely as a healthy person.¹¹⁹ In many of these cases the symptoms of psychopathic states are unmistakable. There is a widely-held expert opinion, moreover, that excessive drinking is itself frequently symptomatic of serious mental disease.¹²⁰ Dipsomania and delirium tremens are merely two of the more commonly known mental diseases which involve inebriety in some form. There are various others, equally recognizable, and rather uniformly diagnosed.¹²¹ It is known,

¹¹⁷ Cf. "One of the popular conceptions of insanity is that the condition usually lasts for a considerable time and cannot be transient. This is not the case, and some forms of insanity, notably those associated with acute infections, may be of very short duration." Davis, *Drunkenness and the Criminal Law* (1941) 5 J. CRIM. L. (London) 166, 181.

¹¹⁸ Cf. "If insanity follows immediately upon the drunken state, the mere fact that it assumes the form of *delirium tremens* rather than some other form can make no difference in principle and should not excuse. Such a result seems to violate neither logic nor sound policy. The decisive question should simply be whether in a given case the temporary frenzy can fairly be said to be voluntary." Book Review (1902) 15 HARV. L. REV. 755, 755-56.

¹¹⁹ Kinberg shows that various abnormalities which are entirely controlled during sobriety are manifested in drunkenness, *e.g.*, homosexual acts, the setting of fires "without ever having shown in a state of sobriety any pyromanic tendencies." Kinberg, *Alcohol and Criminality* (1914) 5 J. CRIM. L. 569, 573. He cites various other harms committed by persons in a drunken state who never did any of them while sober. *Ibid.* These manifestations are sometimes followed by complete amnesia as to the conduct during the drunken condition.

¹²⁰ ". . . there is a great agreement among present-day psychiatrists on the question of alcohol addiction as symptomatic of many psychoses rather than as their primary cause." Bowman and Jellinek, *Alcoholic Mental Disorders* (1941) 2 Q. J. STU. ALC. 312, 315.

"Alcohol sometimes precipitates mental disorders, in other instances its use modifies the picture and course of mental disorder and in still other cases it is merely one of the symptoms." Lewis, *Psychiatric Resultants of Alcoholism: Alcoholism and Mental Disease* (1941) 2 Q. J. STU. ALC. 293, 295.

¹²¹ For classification and description, see Blair, *Alcoholism—A Medico-Legal Survey* (1941) 9 MEDICO-LEGAL & CRIMINOL. REV. 211, 215-18; Bowman and Jel-

also, that many inebriates who commit crimes are so impaired physically and psychically as to be only partially responsible for their misconduct.¹²² They do not exhibit well-marked psychoses, but they are definitely abnormal, hence the indication here is neither complete exculpation nor normal capacity.¹²³ These generalizations, taken from recent researches on alcoholism, could be considerably amplified. They indicate the need for thorough re-examination of the knowledge that is current in official circles and of the consequent evaluations of inebriate harms. The unfortunate fact is that the intoxication is an irritating stimulus to righteous judges; it is easier to vent moral disapproval than to probe the scientific literature.

In its most extreme form, a criticism of the prevailing rules demands complete exculpation of all inebriates. It is therefore equally important to emphasize that such sweeping claims are not supported by expert opinion. On the contrary such opinion is, of course, discriminating in terms of the great diversity in personality types and etiology involved.¹²⁴ The crux of the matter, as stated by distinguished experts in this field, is that "the progress of . . . research . . . has been impeded by two misconceptions: the first that *all* habitual excessive drinking is a disease, and the second,

Jellinek, *Alcoholic Mental Disorders* (1941) 2 Q. J. STU. ALC. 312, 314, 315; Lewis, *Psychiatric Resultants of Alcoholism: Alcoholism and Mental Disease* (1941) 2 Q. J. STU. ALC. 293. The *Quarterly Journal of Studies on Alcohol* is an invaluable source of information on the entire problem.

¹²² See Lewis, *Personality Factors in Alcoholic Addiction* (1940) 1 Q. J. STU. ALC. 21, 29.

¹²³ There is a serious need, in dealing with these problems, for a vocabulary that correctly denotes the well-recognizable states of intoxication and the various mental diseases. This demand is adequately met by a simple statement of terms and definitions that reflects the best contemporary research in this country. See HAGGARD AND JELLINEK, *ALCOHOL EXPLORED* (1942) 8-16. The authors classify inebriates as "normal excessive drinkers, symptomatic drinkers, stupid drinkers, and addicts." *Id.* at 13. (Italics in original.) In symptomatic drinkers, "drinking is a symptom of their psychotic state." *Id.* at 14. Stupid drinkers are the feeble-minded. The most confused term is "chronic alcoholic." "Chronic alcoholism is not the habitual drinking of large amounts of alcohol but definite disease conditions resulting from such habits. . . . an addict is not necessarily a chronic alcoholic. . . . An alcohol addict is a person with an 'uncontrollable craving for alcohol. The outstanding criterion is the inability to break with the habit.'" *Id.* at 15.

¹²⁴ See Jellinek and Jolliffe, *Effects of Alcohol on the Individual: Review of the Literature of 1939* (1940) 1 Q. J. STU. ALC. 110, 135; cf. HAGGARD AND JELLINEK, *ALCOHOL EXPLORED* (1942).

that it is the same disease."¹²⁵ And "it must be stressed that mere drunkenness is not regarded in the scientific literature as evidence of either addiction or chronic alcoholism."¹²⁶ The experts emphasize the futility of generalizing about all inebriates "as if the term denoted a well-defined individual."¹²⁷ They believe that about "50.0 per cent of inebriates have definite nervous and mental abnormalities," but that "30.0 per cent of the inebriates show no abnormalities at all. . . . The true addicts constitute at present the smallest group of inebriates."¹²⁸ "Delirium tremens is a mental disorder of brief duration which occurs only in some 4.0 per cent of heavy drinkers."¹²⁹ "There are many excessive drinkers who by all appearances have normal personalities."¹³⁰ These findings are significant in regard to the penal responsibility of inebriates.¹³¹ They support the thesis that sound criticism does not require wholesale repudiation of existing law, especially of the basic principles of culpability. On the contrary, "false sentimentality should not be permitted to enter into the situation. It must be recognized that many inebriates are simply criminals who drink excessively, not victims of drink driven to crime, and such individuals are properly the wards of penal institutions."¹³² The avenue to reform is marked out by the juncture of the above analysis of the defects in the existing rules and knowledge of the relevant facts.

¹²⁵ Jellinek and Jolliffe, *Effects of Alcohol on the Individual: Review of the Literature of 1939* (1940) 1 Q. J. STU. ALC. 110, 143.

¹²⁶ Bowman and Jellinek, *Alcohol Addiction and Its Treatment* (1941) 2 Q. J. STU. ALC. 98, 100-101; cf. KERR, *INEBRIETY OR NARCOMANIA* (3d ed. 1894) 12-14.

¹²⁷ HAGGARD AND JELLINEK, *ALCOHOL EXPLORED* (1942) 153.

¹²⁸ *Id.* at 151, 157.

¹²⁹ *Id.* at 230.

¹³⁰ *Id.* at 163-64.

¹³¹ Banay, *Alcoholism and Crime* (1942) 2 Q. J. STU. ALC. 686, controverts the general impression that the majority of crimes are caused by drunkenness. Commenting on Dr. Banay's findings, Drs. Jellinek and Haggard say: "This study differs from others in that the prisoners are classified according to the role of inebriety in their crimes. It appears from Dr. Banay's analysis that the usual estimate of crimes caused by inebriety given as 60.0 per cent, must be lowered to 25.0 per cent. This is, however, still a formidable proportion." HAGGARD AND JELLINEK, *ALCOHOL EXPLORED* (1942) 163.

¹³² *Id.* at 273. See East, *Alcoholism and Crime in Relation to Manic-Depressive Disorder* (1936) 230 LANCET 161, 163. But cf. Kinberg, *Alcohol and Criminality* (1914) 5 J. CRIM. L. 569, 584, 587-88.

PROPOSED LEGAL REFORMS

In considering the reform of the law on the penal responsibility of inebriates, we must bear in mind that the wrong charged is a harm committed during gross intoxication. The actor, while sober, had no intention to harm anyone, and, when he did commit a harm, he did not realize the dangerousness of his conduct and was unable to restrain his impulses. Certain astute critics, meritoriously influenced by these facts, have argued that logical solution requires penalization for the voluntary intoxication and complete exculpation for the harm done while intoxicated.¹³³ But voluntary intoxication in itself was, with rare exception, no crime at all at common law, and under modern statutes the penalties for the accompanying "disorderly conduct" are so small as to be entirely nugatory. Their indiscriminate imposition on ordinary drunken conduct and on such drunkenness followed by serious harm would seem socially incongruous, however logical. But there is an element of validity in this view, which suggests that under certain conditions, serious penalties should be attached to voluntary intoxication¹³⁴ and that this could be done consistently with traditional principles of culpability.

A more persuasive theory in support of substantial punitive sanctions for harms by inebriates was put forth by Austin, who, expressing the common attitude toward drunkenness in terms of legally significant principle, argued that a person who voluntarily became intoxicated acted recklessly in so doing since he deliberately induced a state of dangerousness in himself, in disregard of public safety.¹³⁵ Austin, however, took no cognizance of facts which have become of paramount importance, *e.g.*, that the inebriate might be a habitual drunkard or an alcoholic addict. Nor did Austin or Stroud, who followed him,¹³⁶ distinguish these cases from that of an inexperienced acute drunkard who had no foreknowledge of his probable conduct when intoxicated. Hence the present need

¹³³ ". . . the true effect of presuming knowledge or intention, in spite of the facts, is to make drunkenness itself an offense, which is punishable with a degree of punishment varying with the consequences of the act done." MARKBY, *ELEMENTS OF THE LAW* (6th ed. 1905) 363; *cf.* 1 LE SELLYER, *TRAITÉ DE LA CRIMINALITÉ, DE LA PÉNALITÉ ET DE LA RESPONSABILITÉ* (1874) 140.

¹³⁴ Analogous crimes are "reckless driving," "possession of burglar's tools," etc.

¹³⁵ See AUSTIN, *LECTURES ON JURISPRUDENCE* (1879) 512-13.

¹³⁶ See STROUD, *MENS REA* (1914) 115.

is to supplement the above theory in light of facts and knowledge now available concerning alcoholism. The initial step in this direction is a classification of inebriates and fact-situations that is both defensible empirically and also relevant to the problems of penal responsibility. On these criteria, inebriates who commit harms are (1) normal or diseased, "normal" including not only the inexperienced acute drunkard but also, at the other extreme of this category, the habitual drunkard; and (2) they are intoxicated in various degrees when they commit the harms charged against them.

The latter problem can be disposed of quite briefly. We must, for the present purpose, eliminate the two extremes, *i.e.*, slight intoxication, which ordinarily would have only the effect of mitigation, and intoxication so gross as to induce complete loss of control of elementary physical movements or even stupor, in which condition motor activity of any kind is simply impossible. In the cases relevant to the problem, the defendant is in a state of intoxication between these extremes. What we find here is not incapacity to perform simple acts or such a failure of the intelligence as to exclude purposive conduct,¹³⁷ but rather such a blunting of ethical sensitiveness as to destroy the understanding of the moral quality of the act, combined with a drastic lapse of inhibition. All of this closely resembles "insanity" of both recognized varieties — inability to distinguish right from wrong and irresistible impulse.¹³⁸

Within the limits of the typical situation, certain distinctions must be drawn between the two groups of normal offenders, *i.e.*, between those who had no previous experience with intoxication that induced a dangerous state, and those with such experience. As regards the inexperienced inebriate, it is submitted that on principle he can not be held criminally liable simply because his indulgence was voluntary. For such persons, the gross drunkenness at the time the harm was committed excludes the required conditions of culpability entirely. There can be no valid reference

¹³⁷ See East, *Murder, From the Point of View of the Psychiatrist* (1935) 3 MEDICO-LEGAL & CRIMINOL. REV. 61, 78.

¹³⁸ "Writing in 1877, Sir Arthur Mitchell put the matter thus: 'It should be at once understood that alcoholic intoxication, *i.e.* ordinary drunkenness, is really a state of insanity.'" Quoted in Christie, *Intoxication in Relation to Criminal Responsibility* (1920) SCOTS L. T. NEWS 75, 80. "'In reality the acute alcoholic intoxication is a poisoning of the brain and can be placed side by side with the severest mental disturbances which are known to us.' (Megendorfer)." Bowman and Jelinek, *Alcoholic Mental Disorders* (1941) 2 Q. J. STU. ALC. 312, 319.

back to the drinking, which though "voluntary" was quite innocent. Complete exculpation is not only just in such cases, but it is a necessary implication of the only rational basis of penal liability available (that posited on moral culpability). Complete exculpation in such cases might shock public opinion and traditional judicial attitudes concerning drunkenness. But aside from principles that must on rational grounds challenge even deeply rooted mores, there are certain practical considerations that should effect the feasibility of the above reform. Thus there is the widely-held expert opinion that serious harms are very rarely committed by normal inexperienced inebriates.¹³⁹ The cases support this view, exhibiting addiction or long histories of repeated dangerous intoxication. In addition, nonpunitive treatment of the inexperienced normal inebriate wrongdoer may be indicated and should be available.¹⁴⁰

The experienced, normal inebriate, described in legally relevant terms, ranges from persons who at least once previously to the harm in issue have been intoxicated and acted dangerously in that condition to those persons whose behavior exhibits such a regular pattern of such occurrences as to be "habitual." It is the combination of experience of prior intoxication and of dangerousness

¹³⁹ "The acute alcoholic intoxication is different in persons who are chronic alcoholics than in those who are intoxicated for the first time. It seems that in the chronic alcoholic the acute intoxication brings forward more primitive material." Schilder, *The Psychogenesis of Alcoholism* (1941) 2 Q. J. STU. ALC. 277, 290.

¹⁴⁰ Another situation, rarely met, but relevant to the above class of inebriates and theoretically interesting, concerns deliberate intoxication in order to facilitate desired criminal behavior. It has been frequently asserted and rarely challenged that if a person intending to commit a crime becomes intoxicated to increase his pluck, as Austin put it, his intoxication should be an aggravation. But this is questionable. *Ex hypothesi*, the offense was committed under gross intoxication and on that score is less culpable than the like conduct by a sober person. Next, if reference is back to the intoxication and its malevolent purpose during sobriety, it must be conceded also that a person who requires intoxication to steel his courage is less vicious than one who can proceed deliberately to the commission of the crime without such stimulation. There is, in addition, a very nice question of fact that underlies much of the dialectics, can a grossly intoxicated person remember his earlier intention to commit a crime, retain that purpose during the course of his gross intoxication and act accordingly. It is generally assumed that this is possible, and aggravation of the penalty beyond that imposed on sober persons for the like harm is posited thereon. For the reason suggested above, however, the relevant question is whether mitigation or the usual penalty (in disregard of the intoxication) should be applied. Other difficult problems that can be raised depend on whether the harm committed under gross intoxication was caused by the earlier decision during sobriety or whether the two were merely coincidental.

while in that condition that must have been in the mind of the inebriate wrongdoer when he was sober and indulged his desire that is legally significant. For this group, it is apparent that the drinking itself was a serious matter; indeed, as suggested, it should itself be made criminal and punished much more severely than the "disorderly conduct" associated with ordinary intoxication.¹⁴¹ As regards distinctions drawn between the inexperienced and the habitual drunkard, some writers¹⁴² have posed this problem: the habitual drunkard knows the effect of alcohol on him, whereas the inexperienced drinker lacks such knowledge. This factor signifies the culpability of the habitual inebriate. On the other hand, he is assailed by much greater temptation, his self-control is impaired. This implies lack of culpability. The dilemma thus raised rests on two fallacies: it confuses the habitual drunkard (who is normal) with the addict (who is diseased); and it assumes that because the drinking was voluntary, the intoxication of the uninitiated is culpable, indeed that it is more so than that of the habitual drunkard. These views are untenable. So long as the habitual drunkard is "normal," he, while sober, has a "sufficient" degree of understanding of the dangerousness of his indulgence and also of self-control to justify his being held responsible.¹⁴³

¹⁴¹ A rather serious question concerning the proposed solution is raised by the fact that in some instances the conduct during intoxication is completely forgotten on the return of sobriety. But such complete amnesia is rare. In addition, information regarding his behaviour during his intoxication is almost invariably conveyed. And it is usually believed since it is not solely hearsay, there is some awareness of the intoxication and some impression is made by the behaviour. But there may be exceptions and they will call for considerable mitigation.

¹⁴² See, e.g., TARDE, *PENAL PHILOSOPHY* (Howell trans. 1912) 190-91.

¹⁴³ To facilitate a more complete evaluation of these proposals, one would want to consider in this context "legal provocation" and recklessness resulting in homicide. The latter conduct is similar to that of the experienced inebriate; both are culpable because of the awareness of exposing others to increased danger. But the experienced inebriate is the less culpable because of his impaired capacity to control his indulgence. "Legal provocation" raises more serious difficulties chiefly because of the imposition of the "objective" test as regards both the initial loss of control and concerning "cooling-time." To state the bare conclusions, the "objective" test is ethically indefensible, but if the "subjective" test were applied manslaughter would be justifiable. Since all normal persons do not kill under the given circumstances, the inference is that a substantial, though diminished, ability to control is actually available to normal persons. But the culpability for homicide under "legal provocation" would seem to be less than either that of the experienced inebriate or the sober reckless person since there was no fault whatever in creating the situation that produced the emotion and loss of control. Thus, of the four types of cases discussed: a homicide caused by recklessness, unaffected by intoxication, is

But careful study of the case-histories of such offenders, who constitute a majority of the inebriate perpetrators of serious harms, indicates plainly that these persons are defective, though remaining within the limits of normality. Hence they are only "partially responsible," and should be subjected to both punitive and nonpunitive sanctions. A substantial medical literature has developed the idea of "partial responsibility," and the question merits examination as regards treatment of inebriate offenders. The relevant thesis is that "normal" and "incompetent" represent merely extremes. There is an intermediate zone of persons who are "weak" physically and psychically, *i.e.*, there is an unbroken continuum from "normal" to "incompetent," composed of imperceptible gradations that can be separated only arbitrarily. Hence the legal classification is unsound — so concludes the criticism. Certainly to a nonlegal mind, it must seem highly probable that there are countless persons whose classification within either extreme category does violence to the facts. Hence the claim that there should be a third legally recognized category, "the semi-responsible," has been vigorously asserted.¹⁴⁴ The fallacy of such proposals, however, arises from a failure to grasp the nature of law and the purposes and limitations of legal control. Legal adjudication and the inexorable logic of its method, implied in the issue whether a person does or does not fall within the reach of the prescriptions, require a determination that the defendant is responsible or that he is not responsible. There is no other alternative. Hence, interpreted not merely as a scientific category, but also as a legally significant one, "semi-responsible" must imply two things: responsibility, and a lesser degree of responsibility. In short, it represents no new category; it signifies simply that one of the present legal categories ("normal" or "responsible") is divisible into degrees, ranging from an ideal of maximum capacity to that least degree of capacity which satisfies the accepted, minimum standard of "normality." The European codes typically include "partial responsibility" as a distinctive category; we do not, believing that the problem is met by exercise of discretionary powers.

most culpable; that caused by an experienced ("normal") inebriate is next culpable; that caused by a person, actually provoked by a situation not brought on by himself, is least culpable of the three; and that caused by an inexperienced gross inebriate is not culpable at all.

¹⁴⁴ See GRASSET, *THE SEMI-INSANE AND THE SEMI-RESPONSIBLE* (Jelliffe trans. 1907).

A surer indication that other legal systems are farther advanced than ours as regards treatment of harms by inebriates is their frequent provision for hospitalization¹⁴⁵ in addition to punitive sanctions. Such "measures of safety" raise delicate problems. It is the authorities who determine what are nonpunitive measures — and recent European history should shed the last illusion regarding the possibility of abuse. The lesson clearly demands a rigorous insistence on attention to the facts, sanctions consistent with democratic values, and a decent regard for the meanings of words. As to the commission of serious harms by diseased persons who are, therefore, properly classified as "dangerous," the basic need is recognition of the principle that "dangerousness," in this context, posits lack of responsibility. Nor can "dangerousness" be permitted to mean suspicion or even probability of criminal behavior, even though predicted by recognized experts. Except for violations of probation and parole, where the term may be properly given a more extensive meaning, "dangerousness" must be limited to determinations following, and based on, actual behavior violative of specific prescriptions in the criminal law. It is the conjunction of such behavior with incapacity that justifies even nonpunitive treatment. On the other hand, it must be recognized that it is highly dubious, even from a purely theoretical viewpoint, whether any interference with normal living can ever be completely nonpunitive. Perhaps all that can be done is to sensitize the authorities to a keen awareness of their duties in such cases, and to encourage release from confinement on any fair showing that a cure has been effected.

CONCLUSION

The exculpatory doctrine represented a sound insight and the beginning of a valid policy on the penal responsibility of inebriates. But its formulation in terms of the negation of "specific intent" was highly unfortunate. The problem cannot be solved by ignoring the facts or by fiction. The principal facts that must be taken account of in the formulation of the legal rules concern (a) the lack of control and ethical understanding at the time the harm was committed and (b) circumstances during sobriety which sig-

¹⁴⁵ See 61 & 62 VICT., c. 60, § 1 (1898); POLISH PENAL CODE OF 1932 (Lemkin trans. 1939) c. 12, art. 82; SWISS PENAL CODE art. 44.

nify that drinking of intoxicating liquor by certain types of persons is reckless misconduct.

The above analysis suggests the following specific changes in the law on the penal responsibility of inebriates: 1) the general rule concerning "voluntary drunkenness" should be limited to normal experienced inebriates; 2) the cumbersome indirections resulting from an exculpatory doctrine, irrelevantly phrased in terms negating "specific intent," should be entirely eliminated; 3) the invocation of unsound analogies, and especially the continued bar to systematization of the criminal law that is raised by the felony-murder, misdemeanor-manslaughter doctrine and by negligence, as bases for penal liability, should be terminated; 4) the majority rule (murder in the second degree) should be changed to manslaughter.

The rules should be expressed, not in terms of lack of "intent" but in terms of "lack of understanding of the ethical quality of the act and of ability to control" (thus building on *Meade's Case*). It is a corollary of the above that complete exculpation in many cases of robbery, larceny, etc. is not warranted.¹⁴⁶ Some courts have taken this position, refusing to apply the exculpatory doctrine on the ground that a person who took another's property should not be permitted to plead that he did not intend to do so, *i.e.*, by giving "intent" its correct meaning, and thus nullifying the exculpatory doctrine in these cases. Other courts, which do apply the exculpatory doctrine fully to these offenses, do so only by a strained interpretation of "intent" or by encouraging the jury to acquit. But if it is fair to hold certain experienced inebriates guilty of manslaughter by relation back to their indulgence, then it is impossible to defend complete exculpation in cases of larceny and robbery, since the same conditions exist. But here too the claim for mitigation should be heard.¹⁴⁷ In all cases of harms by inebriates there is clear need for open-mindedness concerning the presence of a diseased condition, operative either at the time of indulgence or when the harm was committed or at both times. The courts should recognize that intoxication is frequently a symptom of a mental disorder and should give an unbiased hearing to such pleas.

¹⁴⁶ The typical situation here is the experienced drunkard with a past history of taking other persons' property while intoxicated.

¹⁴⁷ Barbier quotes the result of researches to the effect that lesser degrees of intoxication are found in crimes against property. See BARBIER, *LE DÉLIT ALCOOLIQUE* (1930) 21-22.

In summary:

1. The scientific literature on alcoholism does not indicate that traditional principles of culpability, stated in terms of voluntary misconduct and punishment, are invalid, but suggests the need for reinterpretation, in the light of the presently available knowledge, of the meanings of those principles when they are applied to harms committed during gross intoxication.

2. The general principle of penal responsibility requires that normal persons who intentionally or recklessly commit harms forbidden by penal law should be punished. But since drinking is not usually followed by intoxication, and intoxication does not usually lead to the commission of such harms, it follows that normal persons who commit harms while grossly intoxicated, should not be punished unless, at the time of sobriety and the voluntary drinking, they had such prior experience as to anticipate their intoxication and that they would become dangerous in that condition. This would require a major change in the existing rules. But, since it is rare for normal persons, without prior experience of dangerousness while intoxicated, to commit harms, their complete exculpation, warranted on principle, should evoke no misgivings. Moreover, this change in law is essential to a correct formulation of all the rules concerning the penal responsibility of inebriates. In addition, the need for treatment, perhaps hospitalization, may be clearly indicated.

3. Voluntary intoxication is not an excuse if the defendant is a normal person whose previous experience should have forewarned him that he will probably become intoxicated if he drinks, and that he is dangerous when intoxicated.¹⁴⁸ Such a person acts recklessly when he drinks liquor, and if he kills a human being, while grossly intoxicated, he is guilty of manslaughter. The crime cannot be murder in any degree because at no time in the sequence of events from the indulgence to the killing was there an intention to kill or seriously injure by a sober, normal person. There is at least partial responsibility here, and both punishment for manslaughter and hospitalization are warranted.

Jerome Hall.

INDIANA UNIVERSITY SCHOOL OF LAW.

¹⁴⁸ This conclusion is supported by many writers. See, e.g., 1 BENTHAM, WORKS (Bowring ed. 1843) 79; GILSON, MORAL VALUES AND THE MORAL LIFE (Ward trans. 1931) 293-94; PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY (1817) 171.