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JUST SAY NO EXCUSE: THE RISE AND FALL OF THE INTOXICATION DEFENSE

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I. INTRODUCTION

On perhaps no other legal issue have courts so widely differed, or so often changed their views, as that of the legal responsibility of intoxicated offenders.[1] The question contrasts the individual's right to avoid punishment for the unintended consequences of his acts with what then-New Hampshire Supreme Court Justice David Souter described as the individual's "responsibility . . . to stay sober if his intoxication will jeopardize the lives and safety of others."[2] The issue presents the choice of whether the magnitude of an offense should be measured from the objective perspective of the community or the subjective perspective of the offender.[3]

Prompted by myriad changes in social, political, medical and legal philosophies, nineteenth and early twentieth century courts greatly expanded the exculpatory effect of intoxication. Beginning in the 1980s and 1990s, however, the pendulum began to swing back toward a policy of accountability for acts committed while intoxicated. Throughout this process, the issue has been highlighted by the competing positions of courts and legislatures. For example, in 1994 both the California and Canada Supreme Courts issued decisions which protected or expanded a defendant's right to introduce evidence of his intoxication.[4] Both decisions sparked public outrage,[5] and were in effect reversed by new statutes in 1995.[6]

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1 Evers v. State, 20 S.W. 744, 746 (Tex. Crim. App. 1892).

2 State v. Dufield, 549 A.2d 1205, 1208 (N.H. 1988).

3 Note, *Constructive Murder—Drunkenness in Relation to Mens Rea*, 34 HARV. L. REV. 78, 80-81 (1920) [hereinafter *Constructive Murder*].

4 People v. Whitfield, 868 P.2d 272, 273 (Cal. 1994); Daviault v. The Queen [1994] 3 S.C.R. 63, 65.

5 *See* Mitchell Keiter, *Excuses for Intoxicated Killers*, S.F. CHRON., Aug. 8, 1995, at A17; Clyde H. Farnsworth, *Women in Canada Upset by Court Rulings on Drunkenness*, N.Y. TIMES, Nov. 9, 1994, at A7.

6 CAL. PENAL CODE § 22 (West 1988 & Supp. 1996); Act of July 13, 1995, ch. 32, 1995

The United States Supreme Court's decision in *Montana v. Egelhoff*[7] will likely have a profound effect on the debate surrounding the intoxication defense. The Court upheld a Montana statute which holds intoxicated[8] offenders fully responsible for the consequences of acts they commit while intoxicated. While the plurality, concurring, and various dissenting opinions reflected differing perspectives, none found it would be unconstitutional for a state to equate a severe state of intoxication with the requisite mens rea for any crime. The Court's approval will likely influence other states to adopt a full responsibility policy.[9]

Many serious crimes are committed by an individual under the influence of alcohol or illegal drugs;[10] in 1989, more homicides were committed by an intoxicated assailant than with a firearm.[11] Abolition of the intoxication defense may further efforts to stop not only drug abuse but all serious crimes.

Part II of this article reviews the history of the intoxication defense in America, describing the social, cultural and scientific trends which shaped the course of the doctrine. Part III surveys the laws of the partial responsibility states, and Part IV distinguishes the intoxica-

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S.C. 32.

7 116 S. Ct. 2013 (1996).

8 Unless otherwise indicated, the term "intoxication" in this article refers to "voluntary" or "self-induced" intoxication. The Model Penal Code defines this to mean "intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime." MODEL PENAL CODE § 2.08(b) (1962). The Montana statute exempts a defendant from responsibility where he affirmatively shows he did not know the substance was an intoxicant. MONT. CODE ANN. § 45-2-203 (1995).

9 Ten states have such "full responsibility" laws. *See infra* Appendix. These states bar intoxication from serving as a legal defense but not as a factual one. Defendants may introduce intoxication evidence to demonstrate they did not commit the charged offense, but not to show they did not intend it.

Two states, Pennsylvania and Virginia, admit evidence of intoxication to evaluate a murderer's mental state and determine the degree of murder, but exclude it in every other prosecution. *See* 18 PA. CONS. STAT. ANN. § 308 (1983); Chittum v. Commonwealth, 174 S.E.2d 779, 783 (Va. 1970). Indiana currently stands alone among the states in admitting intoxication evidence as a complete defense to any crime. *See* Terry v. State, 465 N.E.2d 1085, 1088 (Ind. 1984). Every other state follows a partial responsibility policy which permits intoxication as a defense to some crimes but not to others. *See infra* Appendix. The offenses for which intoxication is not a defense are ussually lesser counterparts to offenses for which intoxication is a defense. People v. Gutierrez, 225 Cal. Rptr. 885, 887 (Ct. App. 1986); GEORGE FLETCHER, RETHINKING CRIMINAL LAW 848-49 (1978).

10 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T. OF JUSTICE, SURVEY OF STATE PRISON INMATES, 1991, at 26 (1993) [hereinafter SURVEY].

11 BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1992, 381 tbl. 3.133, 603 tbl. 6.54 (Kathleen Maguire et al. eds., 1993) [hereinafter SOURCEBOOK-1992].

tion defense from other criminal defenses. Part V examines the Montana statute reviewed in *Montana v. Egelhoff.* Part VI offers a policy rationale for a full responsibility doctrine. Part VII concludes by contending the ultimate policy decision to determine the proper extent of responsibility for intoxicated offenders is one which properly rests not with courts but with the people and their elected representatives.

II. The History of the Intoxication Defense

A student could learn much about modern history from studying the history of the criminal law's position toward intoxicated offenders. The contraction and expansion of intoxicated offenders' criminal responsibility has not occurred in a vacuum; it has reflected the major cultural trends and values of the past two centuries. "The doctrines of *actus reus, mens rea,* insanity, mistake, justification, and duress have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical and medical views of the nature of man."[12] The history of this issue illuminates all of these themes as well as the changing relationship between the individual and society.

The common law punished sober and intoxicated offenders equally. According to *Reniger v. Fogossa,*[13] an English case from the year 1551:

> [I]f a person that is drunk kills another, this shall be felony, and he shall be hanged for it, and yet he did it through ignorance, for when he was drunk he had no understanding nor memory; but inasmuch as that ignorance was occasioned by his own act and folly, and he might have avoided it, he shall not be privileged thereby.[14]

Because the offender created his disability, it could not serve to exculpate.

This analysis flowed from the law's former "harm-oriented" framework, which considered harm a prima facie case of guilt.[15] A valid defense (which intoxication was not) could negate the prima facie case.[16] In contrast, the modern "act-oriented" framework first considers the mental state of the defendant.[17] Where there is no mens rea, there is no need to consider the extent of the harm caused. The absence of mens rea is thus not an affirmative defense but the absence

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12 Powell v. Texas, 392 U.S. 514, 536 (1968).

13 75 Eng. Rep. 1 (Ex. Ch. 1551).

14 *Id.* at 31, *quoted in* People v. Whitfield, 868 P.2d 272, 292 (Cal. 1994) (Mosk J., concurring).

15 *See* Fletcher, *supra* note 9, at 238.

16 *See id.*

17 *See id.* at 238-39.

of an essential element of the crime charged.[18]

This analytical shift has affected the law's posture toward crimes committed under severe intoxication.[19] One who cannot form a criminal intent due to intoxication has not violated the mental element of the offense. In *Terry v. State*,[20] the Indiana Supreme Court stated, "The murder statute clearly requires an intentional act on the part of the perpetrator . . . . In order to form intent . . . the perpetrator must be acting consciously and competently. Any situation which renders the perpetrator incapable of forming intent frees him from the responsibility of his acts."[21] Thus, in the modern framework, where there is no mental element, there also is no punishable wrong, the harm notwithstanding.[22]

The evolution of the law from *Reniger v. Fogossa* to *Terry v. State*[23] resulted not only from a new procedural framework but also from changing substantive ideals of justice. In most of the nineteenth century, the classical school of criminology prevailed. The classical model was based on the premise of a social contract through which people surrendered liberties to the state in exchange for protection from criminals and wrongdoers.[24] Influenced by the Enlightenment, the

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18 *See id.* at 238.

19 Evidence of slight intoxication does not exculpate as a matter of law; there must be evidence that the intoxication interfered with the actor's forming the requisite intent. *See, e.g.*, CAL. PENAL CODE § 22 (West 1988 & Supp. 1996).

The circumstances in which intoxication evidence is admissible reflect changing attitudes about intoxication. Initially, a defendant's responsibility for his conduct was an irrebuttable presumption. See, for example, *Roberts v. People*, 19 Mich. 401 (1870), in which the court stated:

> He must be held to have purposely blinded his moral perceptions, and set his will free from the control of reason—to have suppressed the guards and invited the mutiny; and should therefore be held responsible as well for the vicious excesses of the will, thus set free, as for the acts done by its prompting.

Id. at 419.

The twentieth century approach requires the prosecution show beyond a reasonable doubt that the intoxication was not so severe "as to completely paralyze the will of the defendant and to take from him the power to withstand evil impulses." State v. McGehearty, 394 A.2d 1348, 1351 n.5 (R.I. 1978). The law now sees becoming intoxicated as a passive act, of which the inebriate is the victim.

20 465 N.E.2d 1085 (Ind. 1984).

21 *Id.* at 1087-88 (quoting Sills v. State, 463 N.E.2d 228, 240-41 (Ind. 1984) (Givan, J., concurring)).

22 Most states view the act of becoming stuporous as adequate to constitute some level of mens rea. *See* Arnold H. Loewy, *Culpability, Dangerousness and Harm: Balancing The Factors On Which Our Criminal Law Is Predicated*, 66 N.C. L. Rev. 283, 297 n.100 (1988). These states permit intoxication to serve as a defense to some crimes, which are usually the most serious. *See infra* Part III.

23 The Canada Supreme Court followed the logic of *Terry v. State* in *Daviault* in allowing intoxication to serve as a complete defense to any charge. *See* Daviault v. The Queen [1994] 3 S.C.R. 63, 64.

24 C. RAY JEFFERY, CRIMINOLOGY, AN INTERDISCIPLINARY APPROACH 65 (1990).

classical school assumed that people were rational agents motivated by self-interest. "The cardinal principal of criminal jurisprudence is that a crime is the act of a voluntary and responsible agent who chooses between the lawful and unlawful. From this standpoint, guilt, like sin, is personal, because each man is the captain of his own conduct."[25] Punishing criminals served the communal purpose of sanctioning deviant behavior and thereby deterring future recurrences.

By the late nineteenth century, the scientific school had begun to displace its classical forerunner.[26] The scientific school attributed criminal behavior to biological and environmental determinism, believing criminals to be neither selfish nor sinful, merely sick. The scientific school promoted the notion that the questions of crime in general and intoxication in particular were not moral in nature but medical.[27]

In 1956, the American Medical Association first recognized alcoholism as a "disease." This declaration advanced the theory that even self-induced intoxication could be classified as "involuntary," comparable to mental illness.[28] "If alcoholism, however, is recognized as a 'sickness,' a concomitant recognition must be that, similar to an insane person, the alcoholic does not 'sin' when he takes a drink . . . ."[29] Two federal circuit courts agreed, comparing punishing an alcoholic's involuntary drinking and subsequent public appearance with punishing an insane person, an infant or a leper.[30]

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25 Massachusetts Supreme Court Justice Lemuel Shaw, *quoted in* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 209-10 (1985). Oliver Wendell Holmes noted that because of the law's assumption "that every man is able as every other to behave as they command," legal standards thus "take no account of incapacities unless the weakness is so marked as to fall into well-known exceptions such as infancy or madness." *Id.* at 210. *See* Act of Apr. 16, 1850, ch.99, § 3, 1850 Cal. Stat. 229 (codified in CAL. PENAL CODE § 21 (Deering 1996)).

26 RUTH MASTERS & CLIFF ROBERSON, INSIDE CRIMINOLOGY 103 (1990).

27 Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 893 n.62 (1990).

> It was popular to speak of crime in medical terms—crime was no more or less than a treatable disease, as the 1931 Wickersham Commission explained: "Physicians, upon discovering disease, cannot name the day upon which the patient will be healed. No more can judges intelligently set the day of release from prison at the time of trial."

Id. See also Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1852-54 (1984).

28 The law had traditionally distinguished between the "voluntary madness" of intoxication and mental illness for which the subject was not responsible. *See* Hendershott v. People, 653 P.2d 385, 396 (Colo. 1982); United States v. Cornell, 25 F. Cas. 650, 658 (C.C.D.R.I. 1820) (No. 14,868). Three years after the AMA's pronouncement, the California Supreme Court conflated the defenses of intoxication and mental illness in a case which involved both. *See* People v. Gorshen, 336 P.2d 492, 501-03 (Cal. 1959).

29 Daniel R. Coburn, Note, Driver *to* Easter *to* Powell: *Recognition of the Defense of Involuntary Intoxication*, 22 RUTGERS L. REV. 103, 116 (1967).

30 Easter v. District of Columbia, 361 F.2d 50, 52 (D.C. Cir. 1966) (insane person and

The United States Supreme Court arrested this trend in *Powell v. Texas*,[31] finding that the Eighth Amendment did not prevent states from criminalizing public intoxication.[32] The *Powell* dissent recognized the "uncontrollable compulsion to drink,"[33] but stressed that such a compulsion was a proper defense only to charges of public intoxication, and not to more serious charges such as driving while intoxicated, assault, theft or robbery.[34] Justice Marshall found this distinction artificial and illogical.[35] One advocate of the defense was more candid about its scope:

> Since it is now judicially as well as medically and legislatively recognized that alcoholism is a "disease" which compels its victims to drink involuntarily, there is no logical reason why an alcoholic should be held responsible for *any* conduct performed while involuntarily intoxicated .... the traditional punishment of an alcoholic for conduct performed while involuntarily intoxicated as a result of alcoholism "is as archaic as the medieval outlook that the community once had with respect to insanity, tuberculosis and leprosy."[36]

Commentators who believed "criminal" behavior was not freely chosen but biologically determined naturally had a different perspective on punishment than that advanced by the classical school.

The scientific school favored rehabilitation over deterrence as the function of criminal law. Since the goal was not for the law to deter rational actors but for medicine to heal dysfunctional ones, punishment was directed not to the crime but to the criminal.[37]

In accordance with this sentencing trend, the law began to focus more on subjective intents rather than objective harms. The law had

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infant); Driver v. Hinnant, 356 F.2d 761, 764-65 (4th Cir. 1966) (leper).

31 392 U.S. 514 (1968).

32 *Id.* at 532, 535-37. Significantly, a majority of the justices accepted as fact the contention that an alcoholic's intoxication was involuntary in a legal sense. *Id.* at 549 (White, J., concurring); *id.* at 558 (Fortas, J., dissenting) (Justices Douglas, Brennan, and Stewart joined the dissent). Justice White's swing opinion, which accepted the dissent's position that an alcoholic was "compelled to drink," found no comparable compulsion for the alcoholic to appear in public. *Id.* at 549-50 (White, J., concurring). If the statute had proscribed intoxication anywhere, Powell likely would have prevailed.

33 *Id.* at 557 (Fortas, J., dissenting).

34 *Id.* at 559 n.2 (Fortas, J., dissenting).

35 *Id.* at 534 (Marshall, J., dissenting).

36 Coburn, *supra* note 29, at 122-23, 125 (qouting Johns, *A Practical Approach*, *in* REPORT OF PROCEEDINGS OF THE ROCKY MOUNTAIN CONFERENCE OF MUNICIPAL JUDGES 52 (Oct. 1959)).

37 *See* United States v. Grayson, 438 U.S. 41, 46 (1978) (citation omitted); Nagel, *supra* note 27, at 893. *See also* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 216-17 (1993), citing a letter from Cesare Lombroso to John W. Wigmore of the National Conference on Criminal Law and Criminology (1899) which "emphasize[d] the importance of apportioning penalties, not according to the offense but according to the offender." *See also* Paul Johnson, *God and the Americans*, COMMENTARY, Jan. 1995, at 40-41.

always recognized the potential injustice to intoxicated offenders who received full punishment, but had formerly determined criminality from the community's perspective.

> In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order, than to an accurate discrimination as to the moral qualities of individual conduct.[38]

The law thus promoted the public interest by imposing a duty to avoid a potentially dangerous state of stupefaction on those who consumed intoxicants. "It is a duty which every one owes to his fellow-men and to society, to say nothing of more solemn obligations, to preserve, so far as it lies in his own power, the inestimable gift of reason."[39] Consistent with social contract theory, the individual forfeited his "right" to be exonerated for the unintended consequences of his acts for the greater good of communal safety.

The subjective focus undertaken in *Terry v. State* shifted this burden of injustice. Rather than impose any injustice on the offender by punishing his unintentional conduct, *Terry* imposed an injustice on the victim and the community, which had to endure harm without incapacitating the offender and deterring future offenses.[40]

The expansion of the intoxication defense also reallocated the burden of avoiding the infliction of harm. "Society has a duty to the individual subject to its control to protect him 'against the misuse of the criminal law by fairly defining the acts and omissions prohibited, authorizing sentences reasonably related to the conduct and character of the convicted person, and prescribing fair and reasonable post-conviction procedures.'"[41] The duty no longer lay with the individual inebriate, but with the justice system prosecuting him.

This shift mirrored the larger cultural trend in which individual rights replaced individual responsibilities.[42] Citizens became more interested in what society owed them than the reverse. The societal transformation produced by urbanization, technology and immigration shaped a new relationship between the individual and the community. The development of modern cities, with their anonymity,

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38 People v. Rogers, 18 N.Y. 9, 18 (1858).

39 *Id.*

40 This injustice occurs to a lesser extent in partial responsibility states.

41 Case Comment, *Criminal Law: Chronic Alcoholism as a Defense to Crime*, 61 MINN. L. REV. 901, 917 (1977) (quoting MINN. STAT. § 609.01(2) (1976)).

42 *See* Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. CHI. L. REV. 131, 148 (1995).

weakened traditional family, neighborhood and religious bonds, as did the successive developments of railroads, telephones, automobiles, radio, movies, jet airplanes and television.[43] Migration between states and countries further loosened the individual's connection to any community.[44] Individuals increasingly came to see their interests through their own perspectives, rather than that of a community to which their grandparents had owed loyalty and duty. The law responded by reallocating rights enjoyed by the community to the individual.

The new priority on individual autonomy over communal welfare had a special effect on cultural attitudes regarding intoxication. The culture had long regarded alcohol as a social evil.[45] Primarily through schools and religious institutions, nineteenth-century America invested heavily in programs to promote impulse control.[46] But the new forces which eroded community and religious norms fostered individual autonomy about the decision whether and how much to drink. "What 'respectable society' labeled vice, a substantial minority (or majority?) labeled pleasure. . . ."[47] Like other behaviors that were once believed to require social intervention, drinking was no longer considered to be a public wrong but a private choice.[48]

As society came to see intoxication as involuntary (for "alcoholics") or respectable (for everyone else), the law could no longer infer culpability per se from the act of becoming intoxicated. The law

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[43] JAMES Q. WILSON & RICHARD HERRNSTEIN, CRIME AND HUMAN NATURE 451 (1985). These technological developments may also have contributed to Americans' shrinking time-horizons, which have prompted many people to favor their immediate interests over their long-term ones. *Id.* at 417-22. Such a value preference may have influenced the law to protect the individual's immediate interest in unrestrained drinking over the more intangible goal of communal safety.

[44] FRIEDMAN, *supra* note 37, at 193.

[45] *See, e.g., Proverbs* 20:1; Atkins v. State, 105 S.W. 353, 361 (Tenn. 1907) ("[T]his degrading and disgraceful, yet too common, vice, [should be] hunted from society as the bane of social and domestic happiness.").

[46] WILSON & HERRNSTEIN, *supra* note 43, at 434.

[47] FRIEDMAN, *supra* note 37, at 341. The nascent twentieth century culture promoted self-fulfillment and self-gratification over self-discipline. Schneider, *supra* note 27, at 1851.

> In the nineteenth century scarcely anyone dissented from the view that character formation required teaching people to restrain self-indulgent impulses. By the 1920s, popular versions of the theories of Sigmund Freud had led many to believe that adult problems arose *because* children and adolescents had been taught to repress their instincts.

WILSON & HERRNSTEIN, *supra* note 43, at 435 (emphasis in original). *See also* FRIEDMAN, *supra* note 37, at 346 ("[In] the age of individuality. . .[t]he finger of doom [was] now pointed at *repression*. . . .").

[48] WILSON & HERRNSTEIN, *supra* note 43, at 436. The new thinking minimized the societal danger associated with intoxication. Jerome Hall characterized the harm inflicted by a grossly intoxicated person as "bare chance result[ing] in an unsought harm." Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1072 (1944).

redirected blame away from the offender toward the intoxicant itself.[49] "So long as this release [of inhibitions] is traced to a drug rather than a quality inherent in the individual, it is more difficult to blame the individual for the ensuing behavior."[50] In a triumph for the scientific school, the law relaxed rules of personal responsibility while tightening restrictions against the use of illicit drugs.[51] These trends combined to produce the bizarre result whereby states such as California punished possession of certain substances more severely than killing under their influence.[52]

States began to expand the legal responsibility of intoxicated offenders in the late twentieth century. As with the earlier trend which reduced the liability of intoxicated offenders, both attitudes about crime in general and intoxication in particular have shaped the law's new direction.

As the crime rate rose in the 1960s and 1970s,[53] the imperative of

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[49] John Kaplan, *Alcohol, Law Enforcement, and Criminal Justice, in* ALCOHOLISM AND RELATED PROBLEMS: ISSUES FOR THE AMERICAN PUBLIC 78, 85 (Louis Jolyon West ed., 1984).

[50] *Id.* The growing class of alcohol consumers became a growing class of jurors reluctant to cast the first stone at an accused inebriate. Although people acknowledged the nominal blameworthiness of intoxication, "people were also ready . . . to believe that the liquor [and] drugs . . . robbed you of your mind, your freedom, your very self." FRIEDMAN, *supra* note 37, at 148.

[51] Chester N. Mitchell, *Intoxication, Criminality and Responsibility,* 13 INT'L. J.L. & PSYCHIATRY 1, 4 (1990). *See also* Mimi Ajzenstadt and Brian E. Burtch, *Medicalization and Regulation of Alcohol and Alcoholism: The Professions and Disciplinary Measures,* 13 INT'L. J.L. & PSYCHIATRY 127, 135 (1990) for an explanation of the "scientific" roots of this redirection:

> Drawing scientific support from psychology, biology and medicine, new modes of knowledge in the 19th century—and in particular "the sciences of criminology"—challenged the assumptions which saw individuals as responsible for their own behavior. The sources of criminal activity were now traced to physical and biological factors, or social conditions beyond the control of each individual. *This epistemological approach to "social problems" had the effect of undermining the responsibility of individuals, while simultaneously allowing the State to assume even greater powers in "correcting" problems now deemed beyond the individual's power to alter.*

(emphasis added).

[52] *Compare* CAL. HEALTH & SAFETY CODE § 11378.5 (West 1991) (possession for sale of designated substance is punishable by imprisonment for three, four or five years), § 11379(b) (transportation for sale of specified controlled substances is punishable by imprisonment for three, six or nine years) *and* § 11379.6(a) (manufacturing of specified controlled substances is punishable by imprisonment for three, five or seven years) *with* People v. Ray, 533 P.2d 1017, 1023 (Cal. 1975) ("[I]f an accused is unable to harbor malice and an intent to kill because of voluntary intoxication . . . he cannot be guilty of an unlawful homicide greater than involuntary manslaughter. . . .") *and* CAL. PENAL CODE § 193(b) (West 1988) ("Involuntary manslaughter is punishable by imprisonment in the state prison for two, three, or four years.").

[53] From 1960 to 1980, for instance, the national homicide rate increased from 4.5 to 11 per 100,000 people. MASTERS & ROBERSON, *supra* note 26, at 42. In that period, per capita alcohol consumption increased 30%. Louis Jolyon West, *Alcoholism and Related Problems: An Overview, in* ALCOHOLISM AND RELATED PROBLEMS: ISSUES FOR THE AMERICAN PUBLIC 1, 3 (Louis Jolyon West ed., 1984).

public order replaced procedural fairness for defendants as a societal priority.[54] A Federal Sentencing Guidelines Committee Report emphasized the need for courts to "consider justice for the public as well as justice for the offender."[55] The law thus began to return to a more objective evaluation of crime, punishing offenses rather than offenders. Empirical evidence has discredited goals and means which proceeded from an individualist perspective such as rehabilitation, sentencing discretion and indeterminate sentencing.[56] Legislatures have since been more inclined to see inebriated killers as killers rather than as inebriates.

Society's perception of intoxication has also changed over the past two decades. Citing the work of Herbert Fingarette, the United States Supreme Court has recognized that alcoholics are not powerless in regulating their consumption.[57] At the same time, the culture has come to recognize the catastrophic consequences of unrestricted drug and alcohol consumption. A prominent campaign against driving while intoxicated informed the public that fatalities were a natural consequence of extreme intoxication, not the result of "bare chance."[58] The South Carolina Supreme Court thus reaffirmed the traditional opinion of intoxication.

> The effect of drunkenness on the mind and on men's actions . . . is a fact known to everyone, and it is as much the duty of men to abstain from placing themselves in a condition from which such danger to others is to be apprehended as it is to abstain from firing into a crowd, or doing any other act likely to be attended with dangerous or fatal consequences.[59]

Intoxication has lost much of its exculpatory effect as society has come to recognize it as both voluntary and dangerous.

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54 FRIEDMAN, *supra* note 37, at 305-06.

55 Nagel, *supra* note 27, at 915.

56 *Id.* at 895-97.

57 Traynor v. Turnage, 485 U.S. 535, 550-51, 564 (1988) (citing Herbert Fingarette, *The Perils of* Powell: *In search of a Factual Foundation for the Disease Concept of Alcoholism*, 83 HARV. L. REV. 793, 802-08 (1970)). *See also* HERBERT FINGARETTE, HEAVY DRINKING: THE MYTH OF ALCOHOLISM AS A DISEASE 34-37 (1988); HERBERT FINGARETTE & ANN FINGARETTE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 101-02 (1979); Chester N. Mitchell, *The Intoxicated Offender—Refuting the Legal and Medical Myths*, 11 INT'L J.L. & PSYCHIATRY 77, 96-97 (1988). Alcoholics Anonymous posits the subject's personal responsibility as central to her success. Warren Lehman, *Alcohol, Freedom and Moral Responsibility*, 13 INT'L J.L. & PSYCHIATRY 103, 111 (1990); *see also* Rosemary L. McGinn, *For Me, Alcohol is a Disease*, N.Y. TIMES, Dec. 3, 1987, at 35 ("My alcoholism *is* a disease, medically treatable. But my ongoing recovery depends on making healthy responsible choices every day."), *quoted in* Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PA. L. REV. 2245, 2274 n.103 (1992).

58 *See id.* at n.48.

59 State v. Vaughn, 232 S.E.2d 328, 331 (S.C. 1977) (quoting 22 C.J.S. *Criminal Law* § 66 (1961)).

Although the recent trend has been to increase the legal responsibility of intoxicated offenders, most states still consider a state of incapacitating intoxication as warranting partial mitigation. Part III describes the two major doctrines through which states achieve a compromise of partial responsibility.

III. THE PARTIAL RESPONSIBILITY DOCTRINES

Most states maintain a compromise position through which intoxication evidence is admissible to defend against some charges but not others. The two major doctrinal methods for achieving this compromise are the "specific intent" doctrine and the Model Penal Code rule. This Part examines these two frameworks currently used by thirty-seven states and the federal courts.

Courts developed the distinction between specific and general intent crimes in response to the problem of the intoxicated offender.[60] The "specific intent" doctrine serves as a "compromise between the conflicting feelings of sympathy and reprobation for the intoxicated offender."[61] Intoxication evidence is admissible in prosecutions for offenses containing a "specific intent"[62] as an element, but is immate-

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60 *See, e.g.*, People v. Hood, 462 P.2d 370, 377 (Cal. 1969) (en banc).

61 *Id.* "On the one hand, the moral culpability of a drunken criminal is frequently less than that of a sober person effecting a like injury. On the other hand, it is commonly felt that a person who voluntarily gets drunk and while in that state commits a crime should not escape the consequences." *Id.*

62 This intent may resemble the Model Penal Code's definition of "purpose." *See* People v. Zekany, 833 P.2d 774, 778 (Colo. Ct. App. 1991). Some jurisdictions, however, include crimes requiring only "knowledge" as specific intent crimes. *See, e.g.*, State v. Primeaux, 328 N.W.2d 256, 259 (S.D. 1982); State v. D'Amico, 385 A.2d 1082, 1084 (Vt. 1978). California has classified implied malice murder, which requires an "*actual[ ] appreciat[ion]*" of risk, as a specific intent crime. *See* People v. Whitfield, 868 P.2d 272, 278, 281 (Cal. 1994). *See also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW 305-06 (1986) [hereinafter LAFAVE & SCOTT].

The Model Penal Code's four culpability states are defined in pertinent part:

(2) KINDS OF CULPABILITY DEFINED.

(a) *Purposely.*

A person acts purposely with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(b) *Knowingly.*

A person acts knowingly with respect to a material element of an offense when: (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

(c) *Recklessly.*

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such nature and degree

rial in prosecutions for crimes requiring only a "general intent."[63]

The California Supreme Court distinguished specific intent from general intent offenses in the widely cited case of *People v. Hood*.[64]

> When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent. When the definition refers to defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific intent.[65]

The essential distinction is thus between the intent to commit an act (general intent) and the intent to produce a consequence (specific intent).[66]

The distinction is far from perfect. Even the *Hood* court acknowledged the difficulty in applying the distinction. "There is no real difference, however, only a linguistic one, between an intent to do an act already performed and an intent to do that same act in the future."[67] Any general intent crime may thus be defined as a specific intent crime as well.[68] An even more basic problem is that an actor who is so intoxicated that he is unable to intend a proscribed consequence is likely to be similarly unable to intend a forbidden act.[69]

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that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.

(d) *Negligently.*

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such nature and degree that the actor's failure to perceive it, considering the nature and purpose of the actor's conduct and the circumstances known to him, involve a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

MODEL PENAL CODE § 2.02 (1962).

63 *See, e.g.*, State v. Bitting, 291 A.2d 240, 243 (Conn. 1971).

64 462 P.2d 370, 377-78 (Cal. 1969).

65 *Id.* at 378.

66 *Id.*

67 *Id.*

68 *Id.*

69 The *Hood* court recognized the technical limitations of the doctrine. The court concluded that intoxication could be a defense to offenses requiring an intended consequence but not to those requiring only an intended act because the latter were so likely to be committed while intoxicated. *Id.* at 379.

The compiled data reveal otherwise. The following surveys have shown that offenses defined by California law as specific intent offenses (homicide [murder], robbery and burglary) are more frequently committed while intoxicated than those (assault, sex offenses) classified as general intent.

The five columns reflect the following: (a) a 1991 United States Department of Justice survey interviewing prison inmates about their criminal experiences; (b) a 1989 study using the same process; (c) a 1991 Drug Use Forecasting (DUF) program which tested arrestees' urine samples for recent illegal drug use (not necessarily at the time of the offense); (d)

There is no intrinsic meaning to the terms "specific intent" and "general intent";[70] they are merely the means through which states achieve the compromise of partial liability and partial mitigation.[71]

> "General intent" and "specific intent" are shorthand devices best and most precisely invoked to contrast offenses that, as a matter of policy, may be punished despite the actor's voluntary intoxication (general intent) with offenses that, also *as a matter of policy*, may not be punished in light of such intoxication if it negates the offense's mental element (specific intent).[72]

Because of the technical difficulties involved in applying the specific intent doctrine, the Model Penal Code developed a new method for achieving partial responsibility for intoxicated offenders.

The Model Penal Code allows intoxication evidence to be admitted in prosecutions for crimes requiring purpose or knowledge, but not in those requiring only recklessness or negligence.[73] The Model

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the 1989 DUF study; and (e) a 1951-1953 study of the Columbus, Ohio Police Department testing arrestees' urine samples for alcohol.

	(a)	(b)	(c)	(d)	(e)
Assault	49	59	48	55	44
Sex Offenses	41	46	37	44	45
Homicide	52	69	48	57	66
Robbery	52	53	65	73	59
Burglary	N/A	58	68	75	65

See SURVEY, *supra* note 10, at 26; SOURCEBOOK-1992, *supra* note 11, at 459 tbl. 4.31, 603 tbl. 6.54; BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1991, at 473 tbl. 4.32 (Timothy J. Flanagan & Kathleen Maguire eds., 1992); Ralph Slovenko, *Alcoholism and the Criminal Law*, 6 WASHBURN L.J. 269, 273 (1967).

The studies seem to confirm that specific intent offenses are *more* likely to be committed while intoxicated than general intent offenses. Of course, it is possible that the statistics merely reflect that specific intent offenses are more difficult to commit while intoxicated, and thus inebriates are more likely to be apprehended when they commit such offenses. *See id.* at n.8.

70 People v. Kelley, 176 N.W.2d 435, 443 (Mich. Ct. App. 1970); Hall, *supra* note 48, at 1064.

71 FLETCHER, *supra* note 9, at 850.

72 People v. Whitfield, 868 P.2d 272, 287 (Cal. 1994) (Mosk, J., concurring and dissenting) (emphasis added); *see also* People v. Gutierrez, 225 Cal. Rptr. 885, 887 (Ct. App. 1986).

73 MODEL PENAL CODE § 2.08(1) (1962). See MODEL PENAL CODE, *supra* note 62, for definitions of purposely, knowingly, recklessly and negligently. Some states have absorbed the Model Penal Code approach into the specific intent doctrine.

> Specific intent crimes would be limited only to those crimes which are required to be committed either purposefully or knowingly, while general intent crimes would encompass those crimes which can be committed either recklessly or negligently. Thus, in order to commit a specific intent crime, an offender would have to subjectively desire or know that the prohibited result will occur, whereas in a general intent crime, the prohibited result need only be reasonably expected to follow from the offender's voluntary act, irrespective of any subjective desire to have accomplished such result.

State v. Primeaux, 328 N.W.2d 256, 259 (S.D. 1982) (quoting State v. Rush, 294 N.W.2d 416, 417 (S.D. 1980)). *Accord* State v. D'Amico, 385 A.2d 1082, 1084, (Vt. 1978). *But see*

Penal Code also provides that "[w]hen recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial."[74]

A tentative draft of the Model Penal Code explains the policy's rationale.

> [T]here is the fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor's powers of perception and of judgment is conduct which plainly has no affirmative social value to counterbalance the potential danger. The actor's moral culpability lies in engaging in such conduct.[75]

The rationale for excluding intoxication evidence in crimes requiring only recklessness is readily apparent: "the element of recklessness itself—defined as conscious disregard of a substantial risk—encompasses the risks created by [a] defendant's conduct in getting drunk."[76] Many state codes, as well as federal law, have adopted the Model Penal Code policy.[77]

Some states preclude intoxication evidence from being admitted

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People v. Zekany, 833 P.2d 774, 778 (Colo. Ct. App. 1992) (specific intent crimes require purpose, general intent crimes require knowledge). The *Primeaux* definition of general intent does not completely comport with the Model Penal Code concept of recklessness, which requires the "conscious[ ] disregard [of] a . . . risk." MODEL PENAL CODE § 2.02(2)(c) (1962). *Primeaux* defines a general intent crime as one where the prohibited result must be *reasonably expected to follow* from the offender's voluntary act, not a risk which is consciously disregarded. *Primeaux*, 328 N.W.2d at 259.

74 MODEL PENAL CODE § 2.08(2) (1962).

75 MODEL PENAL CODE § 2.08, at 8-9 (Tentative Draft No. 9, 1959). The draft also noted "the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes and the relative rarity of cases where intoxication really does engender unawareness as distinguished from imprudence." *Id. See also* State v. Honeycutt, 693 S.W.2d 363, 365 (Tenn. Crim. App. 1985) (quoting Atkins v. State, 105 S.W. 353, 361 (Tenn. 1907)):

> Instances, however, of heinous offenses, committed under [incapacitating intoxication], are believed to be of rare occurrence. They are much oftener the result of that midway state of intoxication which, although sufficient to stimulate the evil-disposed to actions correspondent with their feelings, would not excite the good man to criminal deeds. It is generally the drunken man acting out the sober man's intent. He says and does when drunk what he thinks when sober.

76 People v. Register, 457 N.E.2d 704, 709 (N.Y. 1983).

77 *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-7 (West 1994); ME. REV. STAT. ANN. tit. 17-A, § 37(2) (West 1994); N.H. REV. STAT. ANN. § 626:2(II)(c) (1996); N.Y. PENAL LAW § 15.05(3) (McKinney 1984); United States v. Johnson, 879 F.2d 331, 334 n.1 (8th Cir. 1989); United States v. Fleming, 739 F.2d 945, 948 n.3 (4th Cir. 1984). *See also infra* Appendix.

in prosecutions for knowing crimes, permitting such evidence only when the crime charged requires purpose.[78] This is a reasonable extension of the Model Penal Code policy, as the difference between knowledge and recklessness is a narrow one, the degree of risk perceived.[79] Such a quantitative difference hardly forms a qualitative difference around which to base a policy distinguishing offenses which warrant punishment despite intoxication and those which do not.

Twelve states, including Montana, follow the common law rule that intoxicated offenders are fully responsible for their conduct, regardless of their intoxication.[80] Part IV places the issue of harms committed while intoxicated in context with other unintentional harms and concludes that an intoxication "defense" is a criminal law anomaly.

IV. THE ANOMALOUS DEFENSE OF VOLUNTARY INTOXICATION

"The broad purposes of the criminal law are . . . to make people do what society regards as desirable and to prevent them from doing what society regards as undesirable."[81] The law may therefore punish actors whose behavior is both deterrable and socially harmful.[82] Full responsibility states have recognized that both grounds warrant punishing intoxicated offenders. A survey of criminal defenses reveals that unintentional harm due to intoxication is different from any other unintentional harm.[83] States may therefore deny intoxication any exculpatory value in their pursuit of public safety.

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78 *See, e.g.*, Alaska Stat. § 11.81.900(a)(2) (Michie 1995); COLO. REV. STAT. ANN. § 18-3-103(2) (West 1994) ("Diminished responsibility due to lack of mental capacity or self-induced intoxication is not a defense to murder in the second degree."); *id.* § 18-1-804(1) ("Intoxication of the accused is not a defense to a criminal charge . . . but in a prosecution for an offense, evidence of intoxication of the defendant may be offered by the defendant when it is relevant to negative the existence of a specific intent if such intent is an element of the crime charged.").

79 Ohio law, for instance, distinguishes knowledge, which describes the perception of a "probable" result, and recklessness, which describes the perception of a "likely" result. OHIO REV. CODE ANN. § 2901.22(B),(C) (Banks-Baldwin 1994).

80 *See infra* Appendix. Two of these states, Pennsylvania and Virginia, admit evidence of intoxication to evaluate a murderer's mental state and determine the degree of murder, but exclude it in every other prosecution. *See* 18 PA. CONS. STAT. ANN. § 308 (West 1983); Chittum v. Commonwealth, 174 S.E.2d 779, 783 (Va. 1970).

81 LAFAVE & SCOTT, *supra* note 62, at 30.

82 People v. Hoy, 158 N.W.2d 436, 439 (Mich. 1968).

83 Some specific intent crimes are defined in such a way that where there is no intent, the act itself is not harmful. For instance, a statute may proscribe touching a child's genitals with a lewd intent. If, however, a mother touches her infant's genitals while washing the baby, without any lewd intent, there is not only no harmful intent, there is also no harmful act. In these cases, the intent of the actor determines the harm of the act. Such analysis does not apply to homicides committed while intoxicated; the victim is no less dead when killed by an inebriate than when killed by a sober assailant.

The law excuses some actors who cause harm unintentionally because they lack the capacity to intend the harm.[84] Insanity, infancy and involuntary intoxication are recognized as defenses based on the defendant's criminal incapacity.[85] Individuals described by these conditions cannot choose to create or avoid creating harms, and therefore they are not punished.[86] The other position asserts that moral culpability is a prerequisite for punishment, and thus those who lack the capacity to determine their conduct connot be blamed for their actions or their consequences.[87]

The law also recognizes the affirmative defenses of necessity, duress and self-defense.[88] These defenses are available to individuals who commit the elements of a crime to avoid a greater harm.[89] The law does not seek to modify such individuals' behavior because, under the circumstances, it enhances social utility.[90]

Accidents also produce harm without intent; however, accidents are, by definition, not deterrable. "Accidents occur by chance, without the contribution of human action."[91] Since no human action contributed to the harm, there is no action for the law to deter.[92]

The intoxication "defense" most closely resembles a mistake of fact "defense." Neither affirmatively exculpates; rather, they represent a failure of proof of an essential element (the requisite mens rea) of the crime, as evaluated in the act-oriented framework. The two are closely related. A mistake of fact may occur when a person shoots at what she believes to be a tree but is actually a person.[93] The voluntary

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84 DAVID A. JONES, CRIME AND CRIMINAL RESPONSIBLITY 44 (1978).

85 *Id.*

86 Henry M. Hart, *The Aims of Criminal Law,* 23 LAW & CONTEMP. PROBS. 401, 414 n.31 (1958).

87 *See* FLETCHER, *supra* note 9, at 804-05.

88 LAFAVE & SCOTT, *supra* note 62, at 614, 627, 649.

89 *Id.* The law recognizes a non-aggressor's suffering of harm to be a greater evil than the aggressor's suffering of comparable harm. However, the law does not allow an individual to respond to nonlethal force with lethal force, suggesting that the non-aggressor's suffering of a slight injury may be a lesser evil than the aggressor's suffering of death. *Id.* at 657-58.

90 Louis Michael Seidman, *Soldiers, Martyrs and Criminals: Utilitarian Theory and the Problem of Crime Control,* 94 YALE L.J. 315, 324 (1984).

91 FLETCHER, *supra* note 9, at 488.

92 Harm which results from culpable negligence is punishable, unlike accidental harms. *See, e.g.,* CAL. PENAL CODE §§ 191.5, 192, 192.5 (West 1988 & Supp. 1996).

93 FLETCHER, *supra* note 9, at 487. A sober person's unawareness of the wrongfulness of excessive drug or alcohol consumption, however, more closely resembles a mistake of law defense. Mistake of law is generally not regarded as a valid defense because it replaces objective societal norms with the subjective beliefs of the offender in a manner which undermines the "general good." LAFAVE & SCOTT, *supra* note 62, at 587 (quoting OLIVER W. HOLMES, THE COMMON LAW 48 (1881)); *cf.* United States v. Moore, 486 F.2d 1139, 1184 (D.C. Cir. 1973) (en banc).

consumption of intoxicants is an act likely to produce such a mistake.[94]

There is a significant difference, though, both with respect to culpability and deterrence, between an actor who shoots a human being because of a mistake due to voluntary intoxication and one whose mistake stems from another source. One who voluntarily creates the condition which causes him to act unreasonably is more blameworthy than one whose inability to evaluate circumstances correctly is due to a lack of intelligence or other factors beyond his control.[95] In voluntarily forfeiting his ability to avoid mistakes, he forfeits the deserved application of the excuse.[96] "A mistake or accident may happen to a man, whether drunk or sober, and if they are more likely to occur when in the former predicament, he is not entitled to any advantage over the sober man by reason of this."[97] Furthermore, the law can deter stupefaction, but it cannot deter stupidity.[98]

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94 *See* State v. Hall, 214 N.W.2d 205, 206-07 (Iowa 1974).

95 People v. Langworthy, 331 N.W.2d 171, 179-80 (Mich. 1982).

96 *Cf.* Model Penal Code § 210.3 commentary at 64 (1985). "[E]xtreme emotional disturbance will not reduce murder to manslaughter if the actor has intentionally, knowingly, recklessly or negligently brought about his own mental disturbance . . . ." *Id.*

97 State v. Cross, 27 Mo. 332, 337 (1858).

98 The law may deter some mistakes, but at a very high cost. Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1221, 1226 (1985). For instance, several jurisdictions punish a homicide committed in the actual but unreasonable belief that lethal force is necessary for self-defense as voluntary manslaughter. *E.g.*, People v. Flannel, 603 P.2d 1, 7 (Cal. 1979). Such a mistaken belief, although unreasonable, is still a valid defense to murder because of the cost of overdeterrence. The law has no interest in deterring those who act reasonably to defend themselves. If the law punished unreasonable self-defense too severely, it could deter reasonable self-defense also, since those who perceive imminent harm may have difficulty deciding quickly whether self-defense is reasonable, and what degree of force is warranted. "Detached reflection cannot be demanded in the presence of an uplifted knife." Brown v. United States, 256 U.S. 335, 343 (1921). If the law deters those who otherwise would have acted reasonably in self-defense, the result could be serious harm or even death to those who were blameless and entitled to defend themselves. The death of innocent people would be a grave social harm.

No comparable social harm would result from overdeterring intoxication. There would likely be less illegal drug and alcohol consumption, which would produce societal benefits beyond a decrease in crimes following such consumption. Furthermore, excluding intoxication evidence could deter sober or mildly intoxicated individuals who would no longer be able to commit crimes expecting to fabricate an intoxication defense. "All that a crafty criminal would require for a well-planned murder . . . would be a revolver in one hand to commit the deed, and a quart of intoxicating liquor in the other with which to build his excusable defense." State v. Arsenault, 124 A.2d 741, 746 (Me. 1956). *Cf.* David Crump & Susan Waite Crump, *In Defense of the Felony Murder Doctrine*, 8 HARV. J.L. & PUB. POL'Y 359, 371 (1985) (felony murder rule deters intentional killings as well as accidental ones, by depriving killer of opportunity to fabricate defense that homicide was accidental); Loewy, *supra* note 22, at 291.

Such "crafty" criminals have already appeared in Canada since *Daviault*. *See supra* note 23. One victimized woman told how "her husband came home sober, beat her up and then proceeded to get drunk while holding the telephone in his lap. When he had con-

A policy of excluding evidence of an offender's voluntary intoxication comports with the general rule that criminal defenses are unavailable to actors who are at fault in creating the conditions supporting the defense. Actors who culpably create circumstances which require them to commit the otherwise excusable harm may not cite such circumstances in their defense. Neither the affirmative defenses of self-defense,[99] duress,[100] necessity,[101] nor the mitigating grounds of provocation[102] and extreme emotional disturbance[103] are available to actors who cause their predicament.

The exclusion of intoxication as an exculpatory factor represents a considered policy choice that an individual who knowingly casts off the restraint and judgment of sobriety does not deserve to plead that he would not have committed the harm when sober.

> [Principles of fundamental justice] encompass as an essential attribute and are predicated upon the moral responsibility of every person of sound mind for his or her acts. The requirement of *mens rea* is an application of this principle. To allow generally an accused who is not afflicted by disease of the mind to plead absence of *mens rea* would be to undermine, indeed negate, that very principle which the requirement of *mens rea* is intended to give effect to.[104]

New York courts have recognized that intoxication turns men into "beasts preying upon society,"[105] and thus such inebriates are as responsible for subsequent harm as if they unleashed an actual dangerous animal upon defenseless victims.[106] One who releases a pit bull into a room of helpless infants is responsible not because he controlled the animal's actions in killing a child, but because he voluntarily forfeited his control over the dog. A similar rationale applies to inebriates.

Jerome Hall, in arguing for increased mitigation for intoxicated offenders, asserted that the severely intoxicated often lack ethical sensitivity.[107] In light of the devastating consequences which extreme intoxication produces, one may ask whether ethical insensitivity is a result of excessive intoxication or its cause.

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sumed two cases of beer, he threw the phone at her and said, 'Now phone the cops, you bitch.'" Elizabeth Sheehy, *The Intoxication Defense in Canada: Why Women Should Care*, 24 CONTEMP. DRUG PROBS. 595, 611 (1996).

99 LAFAVE & SCOTT, *supra* note 62, at 657-58.

100 *See* United States v. Moore, 486 F.2d, 1139, 1180-81 (D.C. Cir. 1973).

101 LAFAVE & SCOTT, *supra* note 62, at 640.

102 State v. Manus, 597 P.2d 280, 285 (N.M. 1979).

103 MODEL PENAL CODE § 210.3 (1985).

104 Daviault v. The Queen [1994] 3 S.C.R. 119 (Sopinka, J., dissenting).

105 People v. Batting, 49 How. Pr. 392, 395 (N.Y. Ulster Oyer & Terminer 1875).

106 People v. Register, 457 N.E.2d 704, 707 (N.Y. 1983).

107 Hall, *supra* note 48, at 1065.

There are many defenses which apply to actors who commit unintentional harms. These include insanity, infancy, involuntary intoxication, mistake, duress, necessity and self-defense. Some of these cover actions the law cannot deter, and others cover actions the law should not deter, because they benefit society. Alternatively, some of these defenses cover actors who cannot be blamed because of their incapacity, and others cover actors who cannot be blamed because their actions benefit society.[108] Voluntary intoxication stands out as a defense offered by those who can be and should be deterred.

In 1987, Montana embraced these arguments and enacted legislation ascribing equal legal responsibility to sober and intoxicated offenders alike.[109] The United States Supreme Court's 1996 review of that statute produced the Court's first detailed analysis of the intoxication defense in more than a century.[110] Part V examines the issues raised in *Montana v. Egelhoff*.[111]

V. *MONTANA V. EGELHOFF*: THE UNITED STATES SUPREME COURT REVIEWS THE FULL RESPONSIBILITY RULE

In 1987, the Montana Legislature amended its law to provide as follows:

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition.[112]

At the conclusion of James Egelhoff's trial for the murders of Roberta Pavola and John Christianson, the court read the statute as an instruction to the jury, which then convicted Egelhoff of two counts of deliberate homicide.[113]

The Montana statute is a composite of the two methods by which states provide for full responsibility for intoxicated offenders. The first section, which declares an inebriate "criminally responsible for his conduct," resembles Mississippi's doctrine, which declares, "If a defendant, when sober, is capable of distinguishing between right and wrong, and the defendant voluntarily deprives himself of the ability to

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108 *See supra* notes 84-87.

109 MONT. CODE ANN. § 45-2-203 (1987).

110 *See* Hopt v. People, 104 U.S. 631, 633-34 (1882).

111 Montana v. Egelhoff, 116 S. Ct. 2013 (1996).

112 MONT. CODE ANN. § 45-2-203 (1995).

113 State v. Egelhoff, 900 P.2d 260, 263 (Mont. 1995), *rev'd*, 116 S. Ct. 2013 (1996) (omitting the words "smoked, sniffed, injected or otherwise ingested" from its instruction).

distinguish between right and wrong by reason of becoming intoxicated and commits an offense while in that condition, he is criminally responsible for such acts."[114] The second part of section 45-2-203, which declares that intoxication "is not a defense," resembles the laws of Arizona,[115] Arkansas,[116] Delaware,[117] Georgia,[118] Hawaii,[119] Pennsylvania,[120] South Carolina,[121] Texas,[122] and Virginia.[123] Furthermore, Missouri law resembles the Montana statute in combining the "criminal responsibility" and "no defense" provisions.[124]

At the trial, the prosecution presented compelling evidence which showed that Egelhoff fatally shot Pavola and Christianson. Police found a station wagon with Egelhoff lying in the back seat, with the two deceased victims, Egelhoff's gun and two empty casings in front.[125] Police tests revealed Egelhoff had gunshot residue on his hands and a blood alcohol count of .36 percent.[126] The trial court allowed the jury to consider Egelhoff's intoxication in determining whether he committed the physical acts necessary to complete the murder, but not in determining whether Egelhoff killed "knowingly" or "purposely" as required by Montana law for a deliberate homicide conviction.[127] The Montana Supreme Court reversed Egelhoff's convictions, finding the instruction violated his constitutional right to present a defense.[128]

Justice Scalia's plurality opinion upheld the statute as a legitimate rule excluding relevant evidence for valid policy reasons.[129] Justice

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114 McDaniel v. State, 356 So. 2d 1151, 1161 (Miss. 1978) (Sugg, J., specially concurring).

115 ARIZ. REV. STAT. ANN. § 13-503 (West 1994 & Supp. 1996).

116 White v. State, 717 S.W.2d 784, 787-88 (Ark. 1986).

117 DEL. CODE ANN. tit. 11, § 421 (1995); Wyant v. State, 519 A.2d 649, 654 (Del. 1986).

118 GA. CODE ANN. § 16-3-4(c) (1994).

119 HAW. REV. STAT. § 702-230(2) (1993); State v. Souza, 813 P.2d 1384, 1385-86 (Haw. 1991).

120 18 PA. CONS. STAT. ANN. § 308 (West 1983 & Supp. 1996).

121 State v. Vaughn, 232 S.E.2d 328, 330 (S.C. 1977).

122 TEX. PENAL CODE ANN. § 8.04(a) (West 1994).

123 Chittum v. Commonwealth, 174 S.E.2d 779, 783 (Va. 1970).

124 State v. Erwin, 848 S.W.2d 476, 483 (Mo. 1993) (en banc).

125 State v. Egelhoff, 900 P.2d 260, 262 (Mont. 1995), *rev'd*, 116 S. Ct. 2013 (1996).

126 *Id.*

127 *Id.* at 262-63.

128 *Id.* at 266. Any partial responsibility state law which excludes evidence of intoxication where it may have affected the defendant's mental state could conceivably be characterized as an unconstitutional restriction of a defendant's right to present a defense. Oral Argument Transcript, Montana v. Egelhoff, 116 S. Ct. 2013 (1996) *available in* WESTLAW, 1996 WL 134508, at *14. Indeed, Egelhoff acknowledged during oral argument that he considers the Model Penal Code policy unconstitutional, as it denies a defendant an opportunity to show he lacked the requisite subjective awareness of the risk. *Id.*

129 Montana v. Egelhoff, 116 S. Ct. 2013, 2017-24 (1996).

Scalia dismissed the "proposition that the Due Process Clause guarantees the right to introduce all relevant evidence" as "simply indefensible."[130] The plurality opinion noted other instances where relevant evidence may be excluded, *i.e.*, on grounds of privilege, prejudice, confusion, unreliability, or failure to comply with procedural requirements.[131] The Due Process Clause permits states to regulate judicial procedures unless these rules offend "some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[132] The absence of any intoxication defense at common law, and the contemporary popularity of the full responsibility rule compelled the conclusion that there was no fundamental right to introduce intoxication evidence.[133]

The plurality opinion properly qualified the Montana Supreme Court's interpretation of *Chambers v. Mississippi*.[134] A defendant has a fundamental right to present a defense, but only if state law recognizes the defense as valid.[135] The Montana Supreme Court had cited *Martin v. Ohio*,[136] which held, *inter alia*, that a defendant had a right to present evidence to the jury that he killed in self-defense, even if he failed to prove the defense by a preponderance of the evidence, as state law required.[137] However, *Martin* provided no support for Egelhoff. Ohio law recognized as exculpatory evidence a showing that the defendant acted in self-defense, whereas Montana law expressly denies intoxication evidence any exculpatory value.[138] Similarly, *Chambers v. Mississippi* protected the defendant's right to show he was not factually guilty of the charged murder because someone else had committed it.[139] *Martin* and *Chambers* stand merely for the uncontroversial proposition that a defendant may present evidence which the law recognizes as material to a determination of his guilt of the crime charged.

Justice Ginsburg's opinion read the Montana statute not as a re-

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130 *Id.* at 2017.

131 *Id.*

132 *Id.* (quoting Patterson v. New York, 432 U.S. 197, 201-02 (1977)).

133 *Id.* at 2017-21.

134 *See id.* at 2021-22 (discussing the holding in Chambers v. Mississippi, 410 U.S. 284, 294 (1973)).

135 *Id.* at 2022.

136 480 U.S. 228 (1987).

137 *Id.* at 233-34.

138 *Compare* Ohio v. Martin, 488 N.E.2d 166, 167-68 (Ohio 1986) *with* MONT. CODE ANN. § 45-2-203 (1995).

139 *Chambers*, 410 U.S. at 297. The trial court followed this precedent in allowing Egelhoff to introduce intoxication evidence to show he was physically unable to commit the murders. *See* State v. Egelhoff, 900 P.2d 260, 262 (Mont. 1995), *rev'd*, 116 S. Ct. 2013 (1996).

striction on evidence but as a substantive rule of criminal law.[140] Her concurrence found that Montana had redefined the requisite mens rea for deliberate homicide by adopting section 45-2-203 of the Montana Code.[141] "To obtain a conviction, the prosecution must prove only that (1) the defendant caused the death of another with actual knowledge or purpose, *or* (2) that the defendant killed 'under circumstances that would otherwise establish knowledge or purpose "but for" [the defendant's] voluntary intoxication.'"[142] Justice Ginsburg's opinion answered the Montana Supreme Court's citation to *In re Winship*'s[143] rule—that a state must prove a defendant's guilt beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged[144]—by noting "[t]he applicability of the reasonable-doubt standard . . . has always been dependent on how a State defines the offense that is charged."[145]

The dissents[146] agreed with the principle that a rule holding an intoxicated person fully responsible for his acts violated no constitutional protection. Both Justice O'Connor and Justice Souter refused,

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140 *Egelhoff*, 116 S. Ct. at 2024-26 (Ginsburg, J., concurring).

141 *Id.* at 2024 (Ginsberg, J., concurring).

142 *Id.* (quoting Brief for American Alliance for Rights and Responsibilities et al. at 6, Montana v. Egelhoff, 116 S. Ct. 2013 (1996) (No. 95-566)).

143 397 U.S. 358 (1970).

144 *Id.* at 364.

145 *Egelhoff*, 116 S. Ct. at 2024 (quoting Patterson v. New York, 432 U.S. 197, 211 n.12 (1977)).

It is axiomatic that a state's authority to define valid defenses is coextensive with its authority to define offenses. For instance, some states require a showing that a defendant engaged in conduct for the purpose of causing death for a murder conviction. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-54a(a) (West 1994); OHIO REV. CODE ANN. § 2903.02 (Banks-Baldwin 1992). Some states require knowledge. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1105(A) (West 1994 & Supp. 1996); IND. CODE ANN. § 35-42-1-1 (West 1994 & Supp. 1996). Some states require recklessness. *See, e.g.*, N.H. REV. STAT. ANN. § 630:1-b (1996); UTAH CODE ANN. § 76-5-203(1)(c) (1995 & Supp. 1996). Some require only negligence. *See, e.g.*, State v. Michaud, 513 A.2d 842, 846-47 n.1 (Me. 1986); Stidham v. Millvale Sportsmen's Club, 618 A.2d 945, 951 (Pa. Super. Ct. 1992).

In turn, some states hold that an actor may be held responsible, despite his intoxication, for crimes requiring negligence. *See, e.g.*, State v. Gates, 462 N.E.2d 425, 430 (Ohio Ct. App. 1983); State v. Collins, 632 P.2d 68, 75 (Wash. Ct. App. 1981). Some permit responsibility for crimes requiring recklessness. *See, e.g.*, ME. REV. STAT. ANN. tit. 17-A, § 37(2) (West 1994); N.D. CENT. CODE § 12.1-04-02(2) (1985). Some permit responsibility for crimes requiring knowledge. *See, e.g.*, ALASKA STAT. § 11.81.900(a)(2) (Michie 1995); COLO. REV. STAT. ANN. § 18-3-103(2) (West 1986 & Supp. 1996). Some permit responsibility for crimes requiring purpose. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-503 (West 1994); MO. REV. STAT. § 562.076(1) (West 1978 & Supp 1996). Defining which facts are necessary to constitute a crime, and which are immaterial, is the role of a legislature, not a court. Schad v. Arizona, 501 U.S. 624, 637 (1991).

146 *See Egelhoff*, 116 S. Ct. at 2026 (O'Connor, J., dissenting) (joined by Justices Stevens, Souter, and Breyer); *id.* at 2032 (Souter, J., dissenting); *id.* at 2034 (Breyer, J., dissenting) (joined by Justice Stevens).

however, to follow Justice Ginsburg's finding that Montana had redefined the requisite mens rea since the Montana Supreme Court, the final authority on Montana law, had found no such redefinition.[147] Only Justice Breyer's dissent reserved the question of the constitutionality of a hypothetical statute which equated voluntary intoxication with knowledge or purpose.[148]

The United States Supreme Court's decision in *Fisher v. United States*[149] rendered inescapable the conclusion that a defendant has no constitutional right to introduce evidence of his intoxication.[150] In *Fisher*, the Court rejected the defendant's request to instruct the jury to consider evidence of his mental disorder, which was short of insanity, in determining whether he premeditated and deliberated a murder.[151]

> [T]here was sufficient evidence to support a verdict of murder in the first degree, if petitioner was a normal man in his mental and emotional characteristics. But the defense takes the position that the petitioner is fairly entitled to be judged as to deliberation and premeditation, not by a theoretical normality but by his own personal traits. In view of the status of the defense of partial responsibility in the District and the nation no contention is or could be made of the denial of due process.[152]

If a defendant has no constitutional right to introduce evidence of a personal condition for which he might not have been responsible, *a fortiori*, he has no right to introduce evidence of a condition which his own blameworthy conduct created.[153]

The Montana statute's language stating that "[a] person who is in an intoxicated condition is criminally responsible for his conduct"[154] expressed the Montana Legislature's decision to hold intoxicated offenders to the same standards as their sober counterparts. The laws of the "no defense" states are deficient, however, as they fail to establish what the State must affirmatively prove.[155] A better rule would state

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147 *Id.* at 2031 (O'Connor, J., dissenting); *id.* at 2032-34 (Souter, J., dissenting).

148 *See id.* at 2035 (Breyer, J. dissenting).

149 328 U.S. 463 (1946).

150 *Id.* at 473-77.

151 *Id.* at 473.

152 *Id.* at 466 (citation omitted).

153 United States *ex rel.* Goddard v. Vaughn, 614 F.2d 929, 935 (3d Cir. 1980). *Fisher* noted that a specific Utah statute authorized the admissibility of intoxication evidence to determine the presence of premeditation. 328 U.S. at 473 n.11 (discussing Hopt v. People, 104 U.S. 636, 634 (1881) and *Hopt's* reliance on section 20 of the Penal Code of Utah (1876) (codified as UTAH CODE ANN. § 76-2-306 (1995))). The Montana statute specifically *excluded* intoxication evidence from the jury's consideration in determining a defendant's mental state. *See* MONT. CODE ANN. § 45-2-203 (1995).

154 MONT. CODE ANN. § 45-2-203 (1995).

155 *See* Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 643 n.126 (1984).

explicitly that an offender's intoxication which prevents him from forming a required mental state substitutes for that state. Part VI demonstrates such a rule is consistent with well-established principles of criminal law.

VI. The Rationale of the Full Responsibility Rule

A state that seeks to hold intoxicated offenders fully responsible for their conduct may avoid procedural challenges by explicitly declaring that extreme intoxication satisfies the requisite mens rea for a charged offense. Such a policy would comport with recognized principles of criminal liability.

Critics of full responsibility disagree with the policy of holding individuals responsible for consequences they did not intend, or even subjectively foresee.[156] Such analysis follows the subjectivist theory that criminal conduct should be evaluated on the exclusive basis of the offender's intent. This exclusive focus on the offender's subjective perspective ignores other important considerations which support full responsibility.

There are three elements involved in determining an offense's magnitude: the offender's culpability, the danger posed by the offender's conduct, and the harm which results from it.[157] The combination of these three factors determines how the criminal law grades the offense; more of one factor may compensate for less of another.[158] A review of basic criminal statutes reveals the interrelation of the three factors.

First, harm may compensate for culpability. Aggravated battery in California requires an intent to inflict unlawful force against the victim's person and a harm of serious injury.[159] Involuntary manslaughter does not require an intentional infliction of force—a lack of due care (criminal negligence) is sufficient—but it does require the greater harm of death.[160] The net result is an equal sentence for the

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Even the Montana-Missouri combination has its limitations. The Missouri Supreme Court upheld the constitutionality of section 562.076.1 of the Missouri Code, which declares in part that intoxication "does not relieve a person of criminal responsibility," but ruled that trial courts could not read it as a jury instruction. *See* State v. Erwin, 848 S.W.2d 476, 483-84 (Mo. 1993). "There are limitless factors, e.g., race, gender, religion, education, etc., that 'do not relieve a person of criminal responsibility,' but no form instruction is given on these factors." *Id.* at 483 n.4 (quoting Mo. Ann. Stat. § 562.076.1 (West 1997)).

156 Some states allow the admission of intoxication evidence in defense against a charge the defendant acted recklessly. *See supra* note 145.

157 Loewy, *supra* note 22, at 283.

158 *Id.*

159 People v. Mansfield, 245 Cal. Rptr. 800, 802-03 (Ct. App. 1988).

160 People v. Clark, 181 Cal. Rptr. 682, 688 (Ct. App. 1982).

two offenses.[161]

The law punishes danger and harm on a similar sliding scale. Aggravated battery carries the same sentence as aggravated assault.[162] The former involves serious injury (harm),[163] whereas the latter involves the use of a deadly weapon or force likely to produce injury (danger).[164]

As a greater harm compensates for a lesser culpability, and a greater danger compensates for a lesser harm, a greater danger compensates for a lesser culpability. It is not, as some commentators have asserted, that an inebriate's culpability equals that of a sober offender,[165] but that the great danger posed by an inebriate to many victims compensates for his lesser culpability.[166] "[A] drunk is required to comply with the law while drunk, not because drunkenness is culpable, but because it is dangerous."[167]

It has long been recognized that the crimes that are most dangerous to the public[168] warrant the most severe punishment.[169] Many

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161 *Compare* Cal. Penal Code § 193 *with* § 243(d).

162 *Compare id.* § 243(d) *with id.* § 245(a).

163 *Id.* § 243(d).

164 *Id.* § 245(a).

165 *See, e.g.*, R. W. Gascoyne, Annotation, *Modern Status of the Rules as to Voluntary Intoxication as Defense to Criminal Charge*, 8 A.L.R. 3d 1236, 1240 (1966).

166 People v. Rogers, 18 N.Y. 9, 18 (1858). This analysis assumes a constant harm, i.e., a single death. *Id.* at 10. Even nonfatal conduct, however, which gravely endangers many potential victims, such as attempted trainwrecking, may be punished more severely than the premeditated, purposeful murder of a single victim. People v. Thompson, 29 Cal. Rptr. 2d 847, 851-52 (Ct. App. 1994).

167 Loewy, *supra* note 22, at 297. The danger factor also justifies statutes which provide additional penalties for individuals who commit their offenses with a firearm. Mitchell, *supra* note 51, at 3. *See also* People v. Aguilar, 108 Cal. Rptr. 179, 184 (Ct. App. 1973).

168 Justice Breyer's *Egelhoff* dissent evaluated the challenged statute from a subjectivist perspective; it focused on an offender's culpability without considering his dangerousness. *See* Montana v. Egelhoff, 116 S. Ct. 2013, 2034-35 (1996) (Breyer, J., dissenting). Justice Breyer found absurd the notion that a drunk driver who accelerates into a pedestrian may be found guilty of murder where a similarly intoxicated driver who collides with another vehicle may be convicted of manslaughter. *Id.* at 2035. Justice Breyer understandably would prefer a rule equating voluntary intoxication with the requisite mens rea. *See id.* But, it is not completely unreasonable for a legislature to prescribe punishment in accordance with the objective danger posed by an offender's conduct as well as his subjective intent. A legislature may reasonably find that an inebriate who decides to practice his target shooting in the woods threatens public safety less than a similarly intoxicated individual who shoots his target practice on a crowded city street.

169 THOMAS HOBBES, LEVIATHAN 230 (Edwin Curley ed., 1994). *See also* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 168 (H. Burns & H.L.A. Hart eds., Athlone Press, 1982). Moses Maimonides, in his twelfth-century work, *The Guide for the Perplexed*, cites four factors which determine the severity of punishment. *See* MOSES MAIMONIDES, THE GUIDE FOR THE PERPLEXED 345 (M. Friedlander trans., 2d ed. 1904). These include the harm caused by the offense, the frequency of the offense, the temptation the offense poses to the offender, and the difficulty of detecting the offense. *Id.* In light of the proportion of crimes committed while intoxicated, and the addiction of some

states have developed criminal codes which explicitly recognize that an act's additional danger may compensate for an actor's reduced culpability. For example, in Tennessee, a second degree murder conviction requires that the killing be a knowing one,[170] whereas a reckless killing "committed as the result of the unlawful throwing, placing or discharging of a destructive device or bomb" is punishable as first degree murder.[171] Thus a reckless killing which endangers many potential victims is punished more severely than a knowing killing, and equally as severely as a premeditated, purposeful killing.[172] Washington law embraces the same principle, but does not list specific reckless conduct warranting a first degree murder conviction. Washington law punishes nonintentional homicides which manifest a depraved indifference to human life in general as first degree murder, but otherwise requires an intent to kill for a second degree murder conviction.[173]

The United States Supreme Court has recognized that a killer's intent is not the only relevant consideration in grading homicides.

> [S]ome nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of the robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified [such] behavior . . . along with

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offenders to alcohol or illegal drugs, all but the last factor appear to support maximum punishment for those who commit homicides while intoxicated.

170 TENN. CODE ANN. § 39-13-210(a)(1) (1994).

171 *Id.* § 39-13-202(a)(3). Intentional, premeditated and deliberate killings are also punishable as first degree murder. *Id.* § 39-13-202(a)(1).

172 *See also* CAL. PENAL CODE § 189 (West 1997), which punishes as first degree murder, *inter alia*, premeditated, purposeful killings, as well as reckless killings involving poison, explosive devices, or drive-by shootings.

173 WASH. REV. CODE ANN. §§ 9A.32.030(1)(a), 9A.32.050(1)(b) (West 1988); State v. Bowerman, 802 P.2d 116, 123 (Wash. 1990). Alabama's murder statute rests on the same principle. *See* ALA. CODE § 13A-6-2 (1975). An individual is guilty of murder (Alabama has only one degree) if he intends another person's death, or if he recklessly exhibits an extreme indifference to human life generally. *Id.*; *Ex parte* Washington, 448 So. 2d 404, 408 (Ala. 1984).

Massachusetts law, which defines homicides with common law terms, punishes danger through sentencing rather than through its definition of offenses. *See* MASS. GEN. LAWS ANN. ch. 265, §§ 1, 2 (West 1994). Massachusetts punishes a killing without malice as manslaughter; the possible sentence is two and one-half to twenty years imprisonment. MASS. GEN. LAWS ANN. ch. 265, § 13 (West 1994). Where a person commits manslaughter by means of an explosive device, however, he may be sentenced to life imprisonment, as would be one convicted of murder. MASS. GEN. LAWS ANN. ch. 265 §§ 1, 2, 13 (West 1994). In essence, Massachusetts substitutes the great risk of harm to society for the mental state of malice to sentence such killers to life imprisonment. *See id.*

intentional murders.[174]

An offender's intent is not the *sine qua non* of criminal liability.

Conspiracy is one doctrine which permits an offender's legal responsibility to exceed his intended result.[175] Due to the increased danger posed by multiple conspirators, the law holds a conspirator liable for the actual, rather than the intended crime, committed "on the policy conspirators should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion."[176] Thus an individual who conspires to commit an aggravated assault may be convicted of first degree murder when the assault results in death.[177] By joining the conspiracy, the conspirator "forfeit[s] personal identity," and the right to be held liable only for those acts subjectively intended.[178] An inebriate similarly forfeits personal identity in consuming intoxicants to the point of losing his ability to understand his actions or control them.

Perhaps the most widely recognized example of additional danger compensating for reduced culpability is the felony-murder rule. The felony-murder rule and the full responsibility doctrine are closely related.[179] The felony-murder rule has also been criticized for erod-

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174 Tison v. Arizona, 481 U.S. 137, 157 (1987).

175 *See* People v. Luparello, 231 Cal. Rptr. 832 (Ct. App. 1986).

176 *Id.* at 847, 849.

177 *Id.* at 851-53. Assault, of course, is a general intent offense, thus permitting the introduction of intoxication evidence. WASH. REV. CODE ANN. § 9A.36 (West 1988). Washington, however, allows intoxication evidence to be introduced in a prosecution for any homicide except for second degree manslaughter. *See* State v. Collins, 632 P.2d 68, 75 (Wash. Ct. App. 1981). Although intoxication is a factor which will foreseeably turn an assault into a homicide (in 1991, 3.48% of all homicides were deaths resulting from brawls prompted by drug or alcohol consumption, SOURCEBOOK-1992, *supra* note 11, at 386 tbl. 3.139), Washington punishes an intoxicated offender the same regardless of whether the victim dies or suffers minor injury. WASH. REV. CODE ANN. §§ 9A.32.070, 9A.36.030 (West 1988).

An even more anomalous result occurred in California before California reformed its law in 1995. Prior to 1995, California punished assaults (committed under the incapacitating influence of intoxication) on certain victims (peace officers or firefighters) or with certain weapons (machine-guns or semiautomatic weapons) more severely than it punished homicides committed under a comparable level of intoxication. *See* CAL. PENAL CODE 245 (West 1995); *supra* note 52. Offenders thus received a lighter sentence for killing than for wounding.

178 Joshua Dressler, *Redressing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem*, 37 HASTINGS L.J. 91, 111 (1985).

179 Consuming LSD, for instance, is an inherently dangerous felony supporting a murder conviction for one who kills under the intoxicating influence of the drug. *See, e.g.*, Clayton v. State, 272 So. 2d 860-61 (Fla. Dist. Ct. App. 1973). Moreover, courts have recognized that the administering or furnishing of certain illegal drugs *to another person* is an inherently dangerous felony supporting a murder conviction. *See, e.g.*, People v. Mattison, 481 P.2d 193, 198 (Cal. 1971) (methyl alcohol); People v. Poindexter, 330 P.2d 763, 767 (Cal. 1958); People v. Taylor, 169 Cal. Rptr. 290, 295-96 (Ct. App. 1980); People v. Taylor, 89 Cal. Rptr. 697, 698 (Ct. App. 1970) (heroin); People v. Cline, 75 Cal. Rptr. 459, 463 (Ct.

ing the relation between criminal liability and moral culpability.[180] On the other hand, the societal interest underlying the felony-murder rule is the preservation of human life, so often casually forfeited in the commission of crimes of violence.[181] Although the law holds the felon accountable for consequences he did not intend, "[t]he statute was adopted for the protection of the community and its residents, not for the benefit of the lawbreaker."[182]

By recognizing an intentional act may unintentionally endanger many innocent victims, both the felony-murder rule and a full responsibility rule protect the community at the expense of the lawbreaker. The felony-murder rule advances three major functions of punishment: deterrence, education and condemnation. These goals likewise support a full responsibility rule for intoxicated offenders.

The felony-murder rule deters on several levels. It deters against "accidental" killings during felonies[183] and it deters the underlying felonies themselves,[184] by attaching severe penalties to their potential consequences. Similarly, a full responsibility rule will deter instances of severe intoxication[185] as well as promote responsible behavior by inebriates, such as locking away firearms and car keys before consum-

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App. 1969) (phenobarbital); Ureta v. Superior Court, 18 Cal. Rptr. 873, 875-76 (Ct. App. 1962) (morphine); Sheriff, Clark County v. Morris, 659 P.2d 852, 858-59 (Nev. 1983) (chloral hydrate); State v. Taylor, 626 A.2d 201, 202-03 (R.I. 1993) (methadone). *But see* People v. Taylor, 8 Cal. Rptr. 2d 439, 448-50 (Ct. App. 1992) (PCP).

Some states have created such a rule by statute. For example, Florida punishes as capital murder the distribution of dangerous drugs where it results in the death of the user. FLA. STAT. ANN. § 782.04(1)(a)(3) (West 1994). Tennessee punishes reckless killings which result from the distribution of dangerous drugs as second degree murder, even though second degree murder in Tennessee ordinarily requires a mental state of knowledge. TENN. CODE ANN. § 39-13-210 (1994).

Consumption of a dangerous drug endangers the user either because of the drug's intrinsic qualities or its capacity to induce the user to harm himself. The drug may kill the user by directly causing cardiac arrest, for instance, or by inducing him to jump off a roof. The inherent danger of the drug may also manifest itself where the user pushes another person from a roof. Drug consumption threatens the safety of the entire community, not just the health of the user. *Taylor*, 8 Cal. Rptr. 2d at 449 n.17.

The cases which hold that administering drugs to another person is an inherently dangerous felony vindicate the life of the "victim" who deliberately consumes the fatal dose. If the law protects the interests of those who deliberately consume illegal drugs, it should also protect the interests of their unwilling victims. Homicide is worse than suicide.

180 People v. Washington, 402 P.2d 130, 134 (Cal. 1965).

181 Gillespie v. Ryan, 837 F.2d 628, 631 (3d Cir. 1988); Commonwealth v. Sparrow, 370 A.2d 712, 720 (Pa. 1977).

182 People v. Chavez, 234 P.2d 632, 640 (Cal. 1951).

183 *Washington*, 402 P.2d at 133.

184 *Id.* at 136 (Burke, J., dissenting).

185 FLETCHER, *supra* note 9, at 815. Although an individual may be unable to control himself once he has become grossly intoxicated, he may avoid becoming grossly intoxicated in the first place. People v. Hoy, 158 N.W.2d 436, 440 (Mich. 1968).

ing. One who fails to take such precautions is not only more dangerous but more culpable as well.[186] A full responsibility rule deters sober and mildly intoxicated offenders as well by informing them they cannot commit crimes and rely on a fabricated intoxication as an excuse.[187]

Far from deterring excessive intoxication, states limiting intoxicated offenders' responsibility effectively subsidize intoxication to the extent they allow it to exculpate. Limits on their legal responsibility assure inebriates they may consume dangerous intoxicants, secure in the knowledge that the law will shield them from serious punishment. The offender enjoys the "benefits" of the consumption (the perceived pleasure of intoxication) while the victim (or society) absorbs the costs.

The criminal law may educate the public as well as deter.[188] The substantial decline in alcohol-related automobile fatalities in recent years[189] may have had less to do with drivers actually weighing the penal disincentives of driving while intoxicated than with the social stigma which has recently attached to such behavior.[190] An intoxication defense which permits offenders to attribute their misconduct to intoxication teaches potential offenders that antisocial behavior is tolerated when it is committed under the influence of illegal drugs or alcohol.[191]

Justice Scalia's plurality opinion cited studies suggesting "that drunks are violent not simply because alcohol makes them that way, but because they are behaving in accord with their learned belief that drunks are violent."[192] For example, subjects in a laboratory study who acted aggressively after being given a placebo in place of alcohol demonstrated "that the expectation that drinking will stimulate aggressive behavior is sufficient to stimulate aggression."[193] Another

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186 Professor George Fletcher's proposal to punish dangerous intoxication as a distinct offense, *see* FLETCHER, *supra* note 9, at 847-48, 852, fails to promote such precautions. Professor Fletcher considers intoxication to be a fixed harm; the punishment should be a constant, regardless of the extent of subsequent harm to any victims. *See id.* But such a law would only deter intoxication; it would not provide the inebriate with incentive to avoid harming others after he has become intoxicated.

187 *See* LAFAVE & SCOTT, *supra* note 62, at 657-58.

188 *See id.* at 34 n.32; FRANKLIN ZIMRING, PERSPECTIVES ON DETERRENCE 4-5 (1971).

189 The past decade has seen a 30% decline in such deaths. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993, at 349 tbl. 3.104 (Kathleen Maguire & Ann L. Pastore eds., 1994) [hereinafter SOURCEBOOK-1993].

190 *See* Franklin E. Zimring, *Law, Society, and the Drinking Driver: Some Concluding Reflections, in* SOCIAL CONTROL OF THE DRINKING DRIVER 381 (Michael D. Laurence et al. eds., 1988).

191 Mitchell, *supra* note 57, at 86.

192 Montana v. Egelhoff, 116 S. Ct. 2013, 2021 (1996) (citing Collins, *infra* note 193).

193 James J. Collins, *Suggested Explanatory Frameworks to Clarify the Alcohol Use/Violence Rela-*

study pointed to differing rules of accountability to explain how members of two Central Mexican Indian tribes drank heavily, but in only one did the members become violent after drinking.[194]

As intoxication is a factor in the commission of most serious crimes, there is an urgent need to change public attitudes regarding its danger. The law cannot prevent every factor which contributes to crime, or automobile fatalities. Nevertheless it has substantially reduced the total number of auto fatalities by singling out for special punishment the factor common to so many accidents.[195] Similarly, although the law cannot easily erase the personal animosities which cause intentional homicides and assaults, the law can prevent many such attacks by punishing a factor common to so many crimes.[196] Absent the factor of illegal drugs or alcohol, some lethal attacks would produce only minor injuries, and some would not occur at all.[197]

One educational benefit of the felony-murder rule is that it expresses a simple, commonsense, readily enforceable and widely known principle which informs the public about the severe consequences of dangerous felonies.[198] An assessment of criminal guilt may "depend upon whether [the actor] has been put on notice of his duty to use his ability to a degree which makes his unawareness of the duty . . . genuinely blameworthy."[199] Nothing would more surely remove any ambiguity regarding an individual's duty to avoid the well-known dangers of severe intoxication than replacing the confusing specific/general intent doctrine with an easy to understand rule that intoxication is not an excuse for criminal conduct.[200]

Finally, the felony-murder rule fulfills the function of condemning unacceptable behavior. If punishment tells the members of a community what it considers wrong, the absence of punishment must

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tionship, 15 CONTEMP. DRUG PROB. 107, 115 (1988), *cited in Egelhoff*, 116 S. Ct. at 2021. *See also* NATIONAL INST. OF JUSTICE, ALCOHOL USE & CRIMINAL BEHAVIOR 16 (1981).

194 NATIONAL INST. OF JUSTICE, *supra* note 193, at 14-15.

195 *See* People v. Bennett, 819 P.2d 849, 853 (Cal. 1991).

196 Intoxication is a more common factor in conventional homicides than in traffic fatalities. *See* SOURCEBOOK-1992, *supra* note 11, at 349 tbl. 3.104; SURVEY, *supra* note 10, at 26.

197 In 1993, 2.76% of all homicides nationwide were deaths caused by brawls due to the influence of illegal drugs or alcohol. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 334 tbl. 3.111 (Kathleen Maguire & Ann L. Pastore eds., 1994) [hereinafter SOURCEBOOK-1994].

198 Crump & Crump, *supra* note 98, at 370-71.

199 Hart, *supra* note 86, at 417.

200 *See* Atkins v. State, 105 S.W. 353, 361 (Tenn. 1907).

> All civilized governments must punish the culprit who relies on so untenable a defense [i.e., intoxication]; and in doing so they preach a louder lesson of morality to all those who are addicted to intoxication, and to parents and to guardians, and to youth and society, than "comes in the cold abstract from pulpits."

Id. (citation ommitted).

tell them what it does not consider wrong.[201] For this reason, a community which is too ready to forgive the wrongdoer may end up condoning the crime.[202]

Punishment also expresses the community's solidarity with the victims of crime.[203] The Bible manifests this concept by providing that a monetary fine could serve as a penalty for a property offense, but was an insufficient response to a homicide.[204] Society devalues human life when it allows it to be taken at minimal cost.[205] A full responsibility rule, like the felony-murder rule, reaffirms the sanctity of human life by prescribing punishment commensurate with the gravity of its wrongful taking.[206] The burden of injustice properly lies with the offender, not the victim.

Perhaps the most important message sent by punishment is that the law continues to protect the community from harm.[207] Insufficient punishment of intoxicated offenders communicates to the public that there is a class of persons, able and likely to inflict harm on others, whom the law is powerless to restrain.

> The ordinary citizen who is badly beaten up would rightly think little of the criminal law as effective protection if, because his attacker had deprived himself of the ability to know what he was doing by getting himself drunk or going on a trip with drugs, the attacker is to be held innocent of any crime in the assault.[208]

The state has a duty to its people to maintain peace and order[209]

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201 WILSON & HERRNSTEIN, *supra* note 43, at 495.

202 *Id.* Accordingly, a sentence should lead to "community condemnation, or the reaffirmation of societal norms for the purpose of maintaining respect for the norms themselves." State v. Chaney, 477 P.2d 441, 444 (Alaska 1970).

203 Crump & Crump, *supra* note 98, at 368.

204 *See Exodus* 21:37, 22:3-6; *Numbers* 35:31; *Deuteronomy* 21:1-9. *See also* MAIMONIDES, *supra* note 169, at 344. The principle retains its relevance today. The recent debate over the alleged racial disparity in capital sentencing reflects how punishment demonstrates respect for crime victims. Regarding statistics showing that murderers of white victims were more likely to receive the death penalty than murderers of black victims, one commentator stated, "[T]he cultural message is unmistakable: murderers of whites are more seriously punished than murderers of blacks because white lives are more highly valued than black lives." *The Supreme Court, 1986 Term—Leading Cases*, 101 HARV. L. REV. 119, 157 (1987). The message is unmistakable; punishment of a wrongdoer expresses society's value of his victim.

205 JAMES Q. WILSON, THINKING ABOUT CRIME 207 (1977). *See also* Mitchell Keiter, *Why Should Murderers Get Parole?*, L.A. TIMES, May 23, 1995, at B7.

206 Crump & Crump, *supra* note 98, at 368.

207 *Id.*

208 Loewy, *supra* note 22, at 297 (quoting D.P.P. v. Majewski, 2 All E.R. 142, 171 (1976)). *See also* State v. Gamron, 182 N.W.2d 425, 427 (Neb. 1970) ("The lives and property of the public are entitled to protection against the criminal conduct of those who become voluntarily intoxicated.").

209 *See* Hamilton v. Regents, 293 U.S. 245, 262 (1934). *See also* People *ex. rel.* Gallo v. Acuna, 60 Cal. Rptr. 2d 277, 284 (Cal. 1997).

which it breaches when it excuses its most dangerous offenders.[210] Society must not invite the menace of extreme intoxication by exculpating those who create it.

Opponents of the felony-murder rule may likewise oppose a full responsibility doctrine for intoxicated offenders which might increase the distance between the offender's legal guilt and moral culpability.[211] But an exclusively subjectivist framework for evaluating criminal conduct imposes costs on the rest of the community. Applying different legal standards to judge sober and intoxicated offenders undermines four major purposes of criminal punishment.

> By evaluating the abnormal individual on his terms, it decreases the incentives for him to behave as if he were normal. [Deterrence.] It blurs the law's message that there are certain minimal standards of conduct to which every member of society must conform. [Education.] By restricting the extreme condemnation of liability for murder to cases where it is fully warranted in a relativistic sense, diminished responsibility undercuts the social purpose of condemnation. [Condemnation.] And the factors that call for mitigation under this doctrine are the very aspects of an individual's personality that make us most fearful of his future conduct. [Danger Control.][212]

The question underlying the merits of both the felony-murder rule and the full responsibility rule is whether the criminal law is written to protect the interests of the community and its residents (including inebriates), or the interests of the lawbreaker.[213] There is no particular method mandated by law for balancing the interests of intoxicated offenders and their victims. Part VII submits that courts must therefore respect legislatures' choices in resolving this tension.

VII. WHO DECIDES?

The extent to which intoxicated actors should be held responsible for their conduct is a policy choice, on which reasonable minds

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210 A common feature of homicides committed during felonies or under the influence of intoxicants (or with a firearm) is that they are more likely to victimize a person unknown to the offender. People are particularly fearful of being victimized by strangers. Crump & Crump, *supra* note 98, at 366 n.31. There are several reasons why the law treats the killing of a stranger as a graver harm than a killing of an acquaintance or relative. One, the former are considerably more difficult for police to solve. Adam Walinsky, *The Crisis of Public Order*, ATLANTIC MONTHLY, July 1995, at 39, 46. Two, the stranger had neither warning nor any possible blame for the killer's motive, which may not always be true when the victim was specifically selected by the killer. Third, there is the concern of recidivism. Whereas the killer of an acquaintance or relative may confine his malice to that particular victim, one who kills a stranger is capable of killing anyone.

211 MODEL PENAL CODE § 210.3 commentary at 71-72 (1962); *Constructive Murder*, *supra* note 3, at 81.

212 MODEL PENAL CODE § 210.3 commentary at 71-72 (1962).

213 *See* People v. Chavez, 234 P.2d 632, 640 (Cal. 1951).

may differ. The ultimate question is not which choice is superior but who should make the choice. The challenged Montana statute reflects the people of Montana's choice about their preferences, and therefore deserves respect from the United States Supreme Court.[214]

Outside of Prohibition, Americans have always had a right to drink, tempered by a responsibility to avoid an extreme level of intoxication, in which "they [would] be like beasts preying upon society."[215] To the extent that states limit the legal responsibility of intoxicated offenders, there is a qualified right to immunity from the consequences of one's acts while stuporous. This result follows Roscoe Pound's analysis of American legal development. "[T]he whole emphasis is on liberty as contrasted with order, on rights as contrasted with duties, . . . on the danger of governmental oppression as contrasted with the menace of anti-social individual action."[216]

Creating new rights for some individuals necessarily imposes costs on others.

> The idea of individual responsibility has been submerged in individual rights—rights or demands to be guaranteed by Big Brother and delivered by public and private institutions. The cost of sloth, gluttony, alcoholic intemperance, reckless driving, sexual frenzy and smoking have now become a national, not an individual responsibility, and all justified as individual freedom. But one man's or woman's freedom in health is now another man's shackle in taxes and insurance premiums.[217]

Other such shackles borne by the public are diminished physical safety and the fear it produces. As offenders benefit from the "right" to mitigated punishment, the community suffers the burden of a reduced ability to deter, incapacitate or condemn its most dangerous members.[218]

Viewed another way, the issue presents individual rights in conflict. An individual's right to be excused for unintended consequences competes with an individual's right to personal security.[219]

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214 *See* Medina v. California, 505 U.S. 437, 445-46 (1992).

215 People v. Batting, 49 How. Pr. 392, 395 (N.Y. Ulster Oyer & Terminer 1875).

216 ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 132 (1930).

217 Ajzenstadt & Burtch, *supra* note 51, at 129 n.8 (quoting John Knowles, the late President of the Rockefeller Foundation).

218 Japanese culture places a far greater emphasis on the individual's duties to his neighbors than on his rights from the state. WILSON & HERRNSTEIN, *supra* note 43, at 456. This ethos may have helped Japan limit the incidence of crime. The United States has a per capita murder rate which is 9.7 times that of Japan, an aggravated assault rate which is 81.5 times that of Japan, and a robbery rate 146 times as high. Nicholas D. Kristof, *Japanese Say No to Crime: Tough Methods, at a Price*, N.Y. TIMES, May 14, 1995, § 1, at 1. Underreporting appears to be a greater problem in the United States, suggesting the actual disparity could be even greater. *Id.*

219 Craig v. Superior Court, 126 Cal. Rptr. 565, 570 (Ct. App. 1976) (Elkington, J.,

Although Jerome Hall once described the "severe punishment for harms committed under gross intoxication" as a "social tragedy,"[220] the families of Roberta Pavola and John Christianson might consider the real tragedy not the subsequent punishment of James Egelhoff but the harms he committed in killing two people. The debate reduces to a value preference: Would people prefer to be safe from punishment for the unintended consequences of their acts while intoxicated or safe from the harm of others' unintended acts while intoxicated?

H.L.A. Hart has posited that one function of excuses is to provide peace of mind to people who would otherwise fear being convicted and punished for conduct they could not avoid.[221] In response, Lloyd Weinreb has contended that more people fear being victimized by an offender who escapes punishment than fear being punished for crimes they commit unintentionally.[222] Weinreb understands that citizens know they are far more likely to be victims of undeserved harm than of undeserved punishment.

A Justice Department survey may illuminate the subject. When asked what threatened their rights and freedoms, eighty-three percent of the respondents considered crime a "very serious threat," whereas two percent deemed crime "not much of a threat."[223] "Police overreaction to crime" was cited by twenty-six percent as a "very serious threat," and by thirty-two percent as "not much of a threat."[224] Especially in the aftermath of the April 19, 1995, bombing of an Oklahoma City federal building, it is debatable whether more Americans fear the "danger of governmental oppression" or the "menace of anti-social individual action."

The poll results suggest public opinion favors greater accountability for intoxicated offenders; the contrast between legislative and judicial action on the subject proves as much. Legislative enactments uniformly increase the responsibility of inebriates; only courts minimize the accountability of the severely intoxicated.[225] One may infer that Americans value the right to consume intoxicating substances and be protected from the legal consequences of their conduct less than they value the right to walk in their neighborhoods, protected from the physical consequences of another's intemperance.

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concurring).

220 Hall, *supra* note 48, at 1061.

221 Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS., 47, 77 n.84 (1986) (citing H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 46-47, 181-82 (1968)).

222 *Id.*

223 SOURCEBOOK-1994, *supra* note 197, at 144 tbl. 2.7.

224 *Id.*

225 *See infra* Appendix.

A democracy respects its citizens' choices about how to maximize their welfare. Increasing the criminal responsibility of intoxicated offenders involves tradeoffs; the policy reallocates burdens and benefits within a society. No court should usurp authority for such a decision from the people who must live with its consequences.[226]

VIII. CONCLUSION

In the nineteenth century, Americans had a right to drink alcohol, tempered by the responsibility to avoid an extreme level of intoxication which would endanger others. This balance properly recognized the risk of harm intoxication presents, and the rule allocated the burden of that risk to those who chose to create it.

By the twentieth century, the right to drink had become a right to become stuporous and received partial (or complete) immunity for the consequences of one's acts.[227] This shift was due to a convergence of several new philosophies. New political values asserted that society, not the individual, has the duty to prevent harm. New medical values considered intoxication and its consequences to be beyond the individual's power to control. New criminological values stressed rehabilitation of the offender instead of protection of the potential victim. Finally, new cultural values exalted the immediate physical gratification available through intoxication over the long-term and less tangible benefit of a safer community. These new philosophies shaped the law in a new cultural environment in which the former value of self-control was displaced by the goal of individual self-expression.

Unfortunately, this shift coincided with an outburst of crime.[228] Expanding rights for one class of people, without tying these rights to reciprocal duties, by definition contracts the rights of everyone else. Laws that make offenders less vulnerable to punishment have rendered all other citizens more vulnerable to criminal violence. By legislating for the "private good" rather than the "common good,"[229] states allowing a defense of voluntary intoxication may have undermined

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226 *Cf.* Ronald C. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359-62 (1994).

227 This right to drink was of course nonexistent from 1919-1933. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI. However, there appears to be a correlation between the diminished responsibility demanded of drinkers and drug users and their diminished right to enjoy such substances. *See supra* notes 46-47. As the California Supreme Court has observed, "Freedom and responsibility are joined at the hip." People *ex rel.* Gallo v. Acuna, 929 P.2d 596, 603 (Cal. 1997).

228 FRIEDMAN, *supra* note 37, at 441.

229 ST. THOMAS AQUINAS, *De Regimine Principum*, *in* ON POLITICS AND ETHICS, 14, 15 (Paul E. Sigmund ed. and trans., 1988).

both.[230] The security and protection of the community is the bedrock on which the superstructure of individual liberty rests.[231] An individual's rights cannot be safe if she is not.

In 1969, the California Supreme Court declared that the intoxication defense was a "compromise between the conflicting feelings of sympathy and reprobation for the intoxicated offender."[232] Increasingly, states are realizing that the law's sympathy, and its protection, belong not with an individual who consumes a stupefying amount of intoxicants and shoots two innocent people in the head, but with the victims of such slaughter. With more than 10,000 people dying each year at the hands of intoxicated killers, it is no time for compromise.

230 Inebriates themselves are likely even more vulnerable than sober citizens to crime.

231 *Gallo*, 60 Cal. Rptr. 2d at 284.

232 People v. Hood, 462 P.2d 370, 377 (Cal. 1969) (en banc).

APPENDIX

The following states do not admit intoxication evidence as a defense to any crime.

Arizona[233]
Arkansas[234]
Delaware[235]
Georgia[236]
Hawaii[237]
Mississippi[238]
Missouri[239]
Montana[240]
South Carolina[241]
Texas[242]

The following states admit intoxication evidence as a defense only to first degree murder.

Pennsylvania[243]
Virginia[244]

The following states admit intoxication evidence as a defense only to crimes requiring purpose.

Alaska[245]
Colorado[246]

The following states follow the Model Penal Code and admit intoxication evidence as a defense only to crimes requiring purpose or knowledge.

Alabama[247]

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233 *See* ARIZ. REV. STAT. ANN. § 13-503 (West 1989 & Supp. 1996).
234 *See* White v. State, 717 S.W.2d 784, 787-88 (Ark. 1986).
235 *See* DEL. CODE ANN. tit. 11, § 421 (1995); Wyant v. State, 519 A.2d 649, 654 (Del. 1986).
236 *See* GA. CODE ANN. § 26-704(c) (1988).
237 *See* HAW. REV. STAT. ANN. § 702-230(1) (Michie 1993); State v. Souza, 813 P.2d 1384, 1386 (Haw. 1991).
238 *See* McDaniel v. State, 356 So. 2d 1151, 1161 (Miss. 1978) (Sugg, J., specially concurring).
239 *See* MO. REV. STAT. § 562.076.1 (West 1979 & Supp. 1996); State v. Erwin, 848 S.W.2d 476, 482 (Mo. 1993) (en banc).
240 *See* MONT. CODE ANN. § 45-2-203 (1995).
241 *See* State v. Vaughn, 232 S.E.2d 328, 330 (S.C. 1977).
242 *See* TEX. PENAL CODE ANN. § 8.04(a) (West 1977).
243 *See* 18 PA. CONS. STAT. ANN. § 308 (West 1994).
244 *See* Chittum v. Commonwealth, 174 S.E.2d 779, 783 (Va. 1970).
245 *See* ALASKA STAT. § 11.81.900(a)(2) (Michie 1989 & Supp. 1995).
246 *See* People v. Zekany, 833 P.2d 774, 778 (Colo. Ct. App. 1991).
247 *See* ALA. CODE § 13A-3-2(b) (1994).

Connecticut[248]
Kentucky[249]
Maine[250]
New Hampshire[251]
New Jersey[252]
New York[253]
North Dakota[254]
Oregon[255]
Tennessee[256]
Utah[257]
Wisconsin[258]

The following states admit intoxication as a defense only to crimes requiring a "specific intent."

California[259]
Florida[260]
Idaho[261]
Illinois[262]
Iowa[263]
Kansas[264]
Louisiana[265]
Maryland[266]
Massachusetts[267]
Michigan[268]

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248 *See* CONN. GEN. STAT. ANN. § 53a-7 (West 1994).

249 *See* KY. REV. STAT. ANN. § 501.020(3) (Michie 1990). Kentucky's term for the mental state described by the Model Penal Code's definition of recklessness is "wanton[ness]." *Id.* § 501.020(3). Kentucky defines recklessness with the Model Penal Code definition of negligence. *Id.* § 501.020(4).

250 *See* ME. REV. STAT. ANN. tit. 17-A, § 37(2) (West 1994).

251 *See* N.H. REV. STAT. ANN. § 626:2-II(c) (1996).

252 *See* N.J. STAT. ANN. § 2C:2-8(b) (West 1995).

253 *See* N.Y. PENAL LAW § 15.05[3] (McKinney 1987).

254 *See* N.D. CENT. CODE § 12.1-04-02 (1985).

255 *See* OR. REV. STAT. § 161.125(2) (1995).

256 *See* TENN. CODE ANN. § 39-11-503(b) (1991).

257 *See* UTAH CODE ANN. § 76-2-306 (1995).

258 *See* WIS. STAT. ANN. § 939.24(3) (West 1996).

259 *See* People v. Hood, 462 P.2d 370, 377-78 (Cal. 1969) (en banc).

260 *See* Linehan v. State, 476 So. 2d 1262, 1264 (Fla. 1985).

261 *See* State v. Enno, 807 P.2d 610, 619-20 (Idaho 1991).

262 *See* People v. Mocaby, 551 N.E.2d. 673, 677 (Ill. App. Ct. 1990).

263 *See* State v. Caldwell, 385 N.W.2d 553, 557 (Iowa 1986).

264 *See* State v. McDaniel, 612 P.2d 1231, 1237 (Kan. 1980).

265 *See* LA. REV. STAT. ANN. § 14:15(2) (West 1986).

266 *See* Hook v. State, 553 A.2d 233, 235-36 (Md. 1989).

267 *See* Commonwealth v. Troy, 540 N.E.2d 162, 166-67 (Mass. 1989).

268 *See* People v. Langworthy, 331 N.W.2d 171, 177 (Mich. 1982).

Minnesota[269]
Nebraska[270]
Nevada[271]
New Mexico[272]
North Carolina[273]
Oklahoma[274]
Rhode Island[275]
South Dakota[276]
Vermont[277]
West Virginia[278]
Wyoming[279]

The following states admit intoxication as a defense to all crimes requiring purpose, knowledge or recklessness.

Ohio[280]
Washington[281]

The following state admits intoxication evidence as a defense to any crime.

Indiana[282]

269 *See* State v. Kjeldahl, 278 N.W.2d 58, 61 (Minn. 1979).
270 *See* State v. Lesiak, 449 N.W.2d 550, 552 (Neb. 1989).
271 *See* Nevius v. State, 699 P.2d 1053, 1060 (Nev. 1985).
272 *See* State v. Tapia, 466 P.2d 551, 553 (N.M. 1970).
273 *See* State v. White, 229 S.E.2d 152, 157 (N.C. 1976).
274 *See* Boyd v. State, 572 P.2d 276, 278-79 (Okla. Crim. App. 1977).
275 *See* State v. Sanden, 626 A.2d 194, 199 (R.I. 1993).
276 *See* State v. Primeaux, 328 N.W.2d 256, 259 (S.D. 1982).
277 *See* State v. D'Amico, 385 A.2d 1082, 1084 (Vt. 1978).
278 *See* State v. Keeton, 272 S.E.2d 817, 820 (W. Va. 1980).
279 *See* Crozier v. State, 723 P.2d 42, 51 (Wyo. 1986).
280 *See* State v. Gates, 462 N.E.2d 425, 430 (Ohio Ct. App. 1983).
281 *See* State v. Collins, 632 P.2d 68, 75 (Wash. Ct. App. 1981).
282 *See* Terry v. State, 465 N.E.2d 1085, 1088 (Ind. 1984).