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# Criminal Law: Chronic Alcoholism as a Defense to Crime

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## Criminal Law: Chronic Alcoholism as a Defense to Crime

Defendant was charged with hit and run driving,<sup>1</sup> careless driving,<sup>2</sup> and simple assault.<sup>3</sup> He contended at trial that he had unexpectedly lost control of himself due to the effects of Valium,<sup>4</sup> a drug recently prescribed by his doctor.<sup>5</sup> Arguing that he lacked the requisite state of mind for the three offenses,<sup>6</sup> defendant requested jury instructions on the defense of involuntary intoxication.<sup>7</sup> The trial court refused and gave instead

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1. MINN. STAT. § 169.09(2) (1976). Defendant made an illegal left turn into an oncoming garbage truck. He immediately backed up and slowly drove away from the scene of the collision in the badly damaged automobile. Police observed the accident and stopped defendant about a block from the scene. *Minneapolis v. Altimus*, 238 N.W.2d 851, 853 (Minn. 1976).

2. MINN. STAT. § 169.13(2) (1976).

3. MINNEAPOLIS, MINN., CODE OF ORDINANCES § 870.160 (1973) (current version at § 385.190 (1976)). Following the accident police officers took defendant to a hospital, but he fled after police established his identity. Defendant refused to identify himself to an off-duty uniformed policeman who spotted him. In defendant's attempt to escape, an altercation occurred in which the officer's nose was broken. 238 N.W.2d at 854.

4. Defendant claimed that on the day of the incident the drug began to have a strange effect on him. He testified that he did not know who owned the automobile he had been driving and that he was unable to remember anything about the accident or the events which followed. 238 N.W.2d at 854. One police officer testified that defendant appeared somewhat confused about his own identity after the accident. *Id.* at 853. Defendant's doctor listed drowsiness, fatigue, ataxia, confusion, and hyperexcitability as possible side effects of Valium. The doctor further testified that he did not know if the drug might cause one to be confused as to his identity, but in response to a hypothetical question setting forth the facts of the case, the doctor stated that in his opinion defendant may have been suffering from the effects of the drug. *Id.* at 854.

5. Defendant's doctor testified that he had prescribed Valium, emperin, bed rest, and heat. *Id.* at 854.

6. *Id.* The traffic offenses with which defendant was charged are crimes of general intent. It is unclear whether simple assault is a general intent or specific intent offense. See note 8 *infra*.

7. The proposed instructions read:

Intoxication is involuntary when it is produced in a person without his willing and knowing use of intoxicating liquor, drugs or other substance and without his willing assumption of the risk of possible intoxication.

Proof of the involuntary intoxication of a defendant should be considered by the jury in determining whether the defendant had the capacity or ability to commit any of the . . . offenses with which he is charged or to form a criminal intent at the time the offenses are alleged to have been committed.

238 N.W.2d at 854 n.2.

a voluntary intoxication instruction for the assault charge only.<sup>8</sup> Defendant was acquitted of assault, but convicted of the two traffic offenses.<sup>9</sup> On appeal the Supreme Court of Minnesota found that the trial court had erred in refusing to give the requested instructions, *holding* that involuntary intoxication is a defense to crimes that require proof of general intent or negligence when defendant proves he committed the criminal act while laboring under such a defect of reason due to involuntary intoxication as not to know the nature of his act or that it was wrong. *Minneapolis v. Altimus*, 238 N.W.2d 851, 857 (Minn. 1976).

At common law, two distinct defenses were available to one who committed a criminal act when intoxicated, each defined according to the "voluntariness" with which the intoxicant was consumed. The defense of "voluntary" intoxication reflected competing policy considerations:<sup>10</sup> intoxication impaired the inebriate's ability to regulate his behavior and therefore made him less culpable than one who acted while sober,<sup>11</sup> but the

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8. The trial court instructed that defendant's alleged intoxication would be a defense if it made him unable to formulate the specific intent to inflict bodily harm, which the court claimed was an essential element of the crime of simple assault. The supreme court did not decide whether the voluntary intoxication instruction was appropriate, but it noted that it had never determined whether that defense applied to simple assault. *Id.* at 854. The trial court gave no similar instruction for the two traffic offenses because voluntary intoxication is not a defense to crimes of general intent. *Id.* at 855. See note 15 *infra* and accompanying text.

9. Defendant was sentenced to terms of 30 and 90 days in the county workhouse, to be served concurrently with revocation of parole from federal prison. 238 N.W.2d at 853.

10. The early common law rule was that all intoxication was "voluntary" and thus was never a defense to a criminal charge. See *Pearson's Case*, 168 Eng. Rep. 1108 (1835). See generally W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 341-51 (1972); Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045 (1944). Eventually courts recognized that gross intoxication could reduce an actor's culpability, see note 12 *infra*, but a moral bias against intoxication—whether "voluntary" or "involuntary"—has persisted. See Hall, *supra*, at 1057.

11. The criminal law assumes that everyone has free will and can distinguish and choose between right and wrong. *Morissette v. United States*, 342 U.S. 246, 250 & n.4 (1952); *Salzman v. United States*, 405 F.2d 358, 364-66 (D.C. Cir. 1968) (Wright, J., concurring); Greenawalt, "Uncontrollable" Actions and the Eighth Amendment: Implications of *Powell v. Texas*, 69 COLUM. L. REV. 927, 940-45 (1969). Assuming that a person can adhere to the "right" if he is able to recognize it, conduct deviating from that standard is sufficiently blameworthy to warrant punishment. Hence, the law's assumption that free will exists means that a crime, to be justly punishable, must consist of both a culpable act (*actus reus*) and a culpable state of mind prompting that act (*mens rea*).

inebriate was also blameworthy because he had freely assumed the impairment, thereby reducing his ability to protect himself and others against the risks created by his conduct.<sup>12</sup> To mitigate the intoxicated offender's criminal liability, while at the same time punishing him for his overindulgence,<sup>13</sup> courts seized on the distinction made in criminal law between crimes of "specific" and "general" intent; "voluntary" intoxication negated the existence of the former,<sup>14</sup> but was no defense to crimes

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The mens rea, or culpable intent, "refers to the blameworthiness entailed in choosing to commit a criminal wrong." S. KADISH & M. PAULSEN, *CRIMINAL LAW AND ITS PROCESSES* 87 (3d ed. 1975). Without such a blameworthy choice there is ordinarily insufficient reason for punishment; if the defendant "did not know that the act was ethically wrong, if he did not 'freely and deliberately' choose to commit the act, and if he did not have the will to prevent the act, there is missing an ingredient that has almost universally been considered essential before a crime can be committed." *State v. Rawland*, 294 Minn. 17, 42, 199 N.W.2d 774, 788 (1972). Because the "voluntary" inebriate can freely choose whether to drink and thus to impair his ability to regulate his conduct, he is culpable and can be justly punished for his crimes. See note 15 *infra*. The "involuntary" inebriate, on the other hand, is not considered blameworthy since "drunkenness without fault cannot supply the criminal intent." 1 J. BISHOP, *CRIMINAL LAW* § 405 (9th ed. 1923). The distinction between culpable and nonculpable intoxication appears to depend, then, on the presence of mens rea—on the ability of the intoxicated offender to choose to become intoxicated.

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

Hall, *supra* note 10, at 1054. See note 15 *infra*.

13. "If a man is punished for doing something when drunk that he would not have done when sober, is he not in plain truth punished for getting drunk?" G. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* 957 (2d ed. 1961).

14. See LAFAVE & SCOTT, *supra* note 10, at 341; Hall, *supra* note 10, at 1046-54, 1061-66. Minnesota's statutory equivalent of the common law exculpatory doctrine reads as follows:

An act committed while in a state of voluntary intoxication is not less criminal by reason thereof, but when a particular intent or other state of mind is a necessary element to constitute a particular crime, the fact of intoxication may be taken into consideration in determining such state of mind.

MINN. STAT. § 609.075 (1976). See notes 16-17 *infra* and accompanying text.

Whether it is desirable to mitigate the voluntarily intoxicated offender's liability is a matter of controversy. On the one hand, it has been forcefully argued that the doctrine has a sound policy basis;

based on general intent or negligence.<sup>15</sup> Proof of intoxication alone, however, was insufficient to establish that the offender was incapable of formulating the specific intent necessary to commit a particular crime; the defendant also had to show that he was so intoxicated that he was unable to understand the nature of his act or that it was wrong<sup>16</sup>—the same

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The present policy of the law which permits the disproof of knowledge or purpose by evidence of extreme intoxication is sound enough. If a crime (or a degree of crime) requires a showing of one of these elements, it is because the conduct involved presents a special danger, if done with purpose or knowledge or the actor presents a special cause for alarm. A burglar, one who breaks in with a purpose to commit a felony, is more dangerous than the simple housebreaker. The aggravated assaults are punished more severely precisely because of the danger presented by the actor's state of mind.

Paulsen, *Intoxication as a Defense to Crime*, 1961 U. ILL. L.F. 1, 11.

On the other hand, the doctrine has sometimes produced incongruous results that undermine the rule that "voluntary intoxication is no excuse for crime." For example, if the defendant is found incapable of formulating the specific intent necessary for the crime with which he is charged, he may be convicted instead of a lesser included general intent offense. Yet in some cases there may be no related general intent offense on which conviction can be based, and complete acquittal will result. See, e.g., *People v. Jones*, 263 Ill. 564, 105 N.E. 744 (1914) (attempted burglary); Hall, *supra* note 10, at 1062. Thus, the intoxicated offender may be denied exculpation, receive partial exculpation, or receive total exculpation, depending upon the nature of the crime with which he is charged. As one commentator concludes: "It is thus apparent that the criminal liability of the grossly intoxicated offender depends upon the crime fortuitously committed while incapacitated." Note, *Volitional Fault and the Intoxicated Criminal Offender*, 36 U. CIN. L. REV. 258, 276 (1967). Indeed, the purported distinction between crimes of "specific" and "general" intent is itself considered suspect by many, Paulsen's argument notwithstanding. Judge Kirbans summarizes the views of these critics in the context of chronic alcoholism: "Criminal liability should be keyed to the chronicity of the offender's alcoholism rather than to the artificiality of the classification of crimes." Kirbans, *Chronic Alcohol Addiction and Criminal Responsibility*, 54 A.B.A.J. 877, 881 (1969).

15. Punishment was warranted for crimes of general intent or negligence because voluntary consumption increased the risk of harm to others:

It is precisely this possibility of choice that lies behind the typical judicial expressions concerning intoxication and its significance for the criminal law. . . . Through a choice, of the sort normally operative in the law, the inebriate has increased the risk of harm to others by reducing his own capacity for taking dangers into account and for controlling himself. It would be incongruous if an election of that sort would exculpate.

Paulsen, *supra* note 14, at 5.

16. It is not sufficient for the defendant to prove that he had been drinking or even that he was drunk at the time the act was performed, see, e.g., *State v. DeFoe*, 241 N.W.2d 635 (Minn. 1976); *State v. Annis*, 241 N.W.2d 482 (Minn. 1976), because there is no presumption that

requirement imposed under some versions of the test for insanity.<sup>17</sup>

The "involuntary" intoxication defense was based on the assumption that one who consumed an intoxicant against his will or without full awareness of the implications of his conduct was not blameworthy. Several categories of "involuntary" intoxication were recognized at common law: intoxication produced by external duress or coercion;<sup>18</sup> intoxication produced by innocent mistake or the trickery of another;<sup>19</sup> intoxication unexpectedly excessive in light of the amount consumed;<sup>20</sup> and intoxica-

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a person who has been drinking is incapable of formulating an intent to commit a certain crime. See *State v. Lund*, 277 Minn. 90, 151 N.W.2d 769 (1967); *State v. Anderson*, 270 Minn. 411, 134 N.W.2d 12 (1965). The defendant must show that he was so intoxicated that he was unable to distinguish right from wrong. *State v. Weltz*, 155 Minn. 143, 193 N.W. 42 (1923) (test); *State v. Grear*, 29 Minn. 221, 13 N.W. 140 (1882) (burden of proof). That proof only serves to negate specific intent; it does not prove that the defendant was "insane" within the meaning of the insanity defense. See note 25 *infra*.

17. This standard is essentially the same as the M'Naghten test for insanity, which permits acquittal of an accused if his "disease of the mind" made him ignorant of "the nature and quality of his act" or the fact that his act was wrong. M'Naghten's Case, 4 St.Tr.N.S. 847, 8 Eng. Rep. 718 (1843). See note 25 *infra*.

18. See *Borland v. State*, 158 Ark. 37, 249 S.W. 591 (1923); *State v. Sopher*, 70 Iowa 494, 30 N.W. 917 (1886); *State v. Bunn*, 283 N.C. 444, 196 S.E.2d 777 (1973); *Perryman v. State*, 12 Okla. Crim. 500, 159 P. 937 (1916). "Coerced intoxication" is discussed by the court in *Altimus* as one of the four types of involuntary intoxication traditionally recognized by the common law. 238 N.W.2d at 856. The opinion noted that although some courts have indicated a willingness to recognize coerced intoxication as a complete defense to criminal liability, they have "strictly construed the requirement of coercion . . . so that acquittal by reason of intoxication is an exceedingly rare result." *Id.* The court cited *Burrows v. State*, 38 Ariz. 99, 297 P. 1029 (1931), as an example of this tendency. In that case an eighteen-year-old youth was picked up while hitchhiking in the Arizona desert. The driver urged the youth to drink some alcohol but the boy refused, never having tasted liquor before. The driver persisted, became abusive, and threatened to put him out of the car. The youth, "being alone, penniless, and fearing that he might be ejected and left on the desert," *id.* at 104, 297 P. at 1031, drank the alcohol, became intoxicated, and killed the driver. The court approved the trial court's instruction that defendant's involuntary intoxication would relieve him of all criminal liability if he had been compelled to drink against his will by a coercive influence amounting to legal duress and "that the mind of the defendant was incapable of understanding the criminal nature of his act." *Id.* at 116, 297 P. at 1036. The jury apparently found that defendant's intoxication was "voluntary," for he was convicted of murder. See note 26 *infra*.

19. See *Pribble v. People*, 49 Colo. 210, 112 P. 220 (1910); *People v. Penman*, 271 Ill. 82, 110 N.E. 894 (1915); *LaFAVE & SCOTT*, *supra* note 10, at 348.

20. See *Kane v. United States*, 399 F.2d 730 (9th Cir. 1968), *cert.*

tion that was an unforeseen side effect of a medically prescribed drug.<sup>21</sup> Intoxication in these instances was deemed blameless because the offender did not freely choose to become intoxicated.<sup>22</sup> Unlike the "voluntary" inebriate, then, the "involuntary" inebriate did not willingly assume the risks of his intoxicated conduct.<sup>23</sup> "Involuntary" intoxication was therefore recognized as a complete defense even to crimes of general intent or negligence when the defendant established that his intoxication caused him to be "temporarily insane" at the time of the act.<sup>24</sup> Thus, although both the "voluntary" and "involuntary" inebriate (and, indeed, the insane offender) may have acted with the same impaired state of mind, the law provided the involuntarily intoxicated offender a much broader defense.<sup>25</sup> In practice,

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denied, 393 U.S. 1057 (1969); *Martinez v. People*, 124 Colo. 170, 235 P.2d 810 (1951); Note, *supra* note 14, at 277. This is "pathological intoxication," defined by the Model Penal Code as "intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." MODEL PENAL CODE § 2.08(5)(c) (Proposed Official Draft, 1962). The court in *Altimus* suggested that pathologically intoxicated offenders have been relieved of criminal liability when they consumed the intoxicant without knowing that they were especially susceptible to its effects, but that some courts had limited the defense to cases in which the intoxicated offender was deprived of mental capacity to the degree necessary for an insanity defense. 238 N.W.2d at 856.

21. See *Perkins v. United States*, 228 F. 408 (4th Cir. 1915); *Burnett v. Commonwealth*, 284 S.W.2d 654 (Ky. 1955); *Saldiveri v. State*, 217 Md. 412, 143 A.2d 70 (1958). Intoxication resulting from ingestion of a medically prescribed drug was traditionally a defense when the drug was taken pursuant to medical advice and had unexpected intoxicating effects on the defendant. This was the defense raised in *Altimus*. 238 N.W.2d at 857.

22. See notes 11 & 15 *supra*.

23. Compare the jury instructions in note 7 *supra* with the jury instructions in note 72 *infra*.

24. See notes 25 & 30-31 *infra* and accompanying text.

25. According to the court in *Altimus*, involuntary intoxication is a defense only when the defendant was "temporarily insane" at the time of the act. 238 N.W.2d at 857. The court meant that the insanity standard is traditionally used to determine the extent of the offender's impairment at the time of the act. In contrast, a full-fledged defense of insanity is normally not available to the intoxicated offender unless his mental "illness" or "defect" is "settled." Thus far the only form of "settled" (that is, actual) insanity recognized as resulting from alcoholic overindulgence is delirium tremens. See Note, *Intoxication as a Criminal Defense*, 55 COLUM. L. REV. 1210, 1219-20 (1955). The rationale appears to be that the defendant is not insane "just because he is intoxicated, for insanity requires a 'disease of the mind' (or, in modern terminology, 'mental disease or defect'), a requirement which mere drunkenness cannot satisfy; and therefore, being sane, he is not eligible for the defense of insanity." LAFAYE & SCOTT, *supra* note 10, at 342. The Model Penal Code reflects a similar rule. See MODEL PENAL CODE § 4.01(2) (Proposed Official Draft, 1962) (frequent drunkenness is insuf-

however, few acquittals have been granted on this ground.<sup>26</sup> Indeed, based on a review of reported cases involving alcohol-related offenses, one authority concluded that the defense of "involuntary intoxication is simply and completely nonexistent."<sup>27</sup>

*Minneapolis v. Altimus* is the first reported Minnesota case involving the defense of involuntary intoxication. The Minnesota supreme court held that "the defendant is entitled to assert the defense of involuntary intoxication if due to such intoxication he unintentionally and non-negligently did the acts for which he is charged."<sup>28</sup> It laid down three requirements for successful assertion of the defense: "defendant must not know, or have reason to know, that the prescribed drug is likely to have an intoxicating effect";<sup>29</sup> "the prescribed drug, and not some

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ficient in itself to establish a mental illness that will excuse crime under an insanity defense).

The law recognizes, however, that the intoxicated offender's mental impairment may be incapacitating. Thus, the test for the defenses of voluntary and involuntary intoxication is stated in terms of the inebriate's ability to understand the nature of his act or that it was wrong, see note 16 *supra* & notes 30-31 *infra* and accompanying text—the same language used in insanity cases under Minnesota's modified version of the M'Naghten test. See MINN. STAT. § 611.026 (1976); *State v. Rawland*, 294 Minn. 17, 199 N.W.2d 774 (1972) (see notes 55-57 *infra* and accompanying text); *State v. Finn*, 257 Minn. 133, 100 N.W.2d 508 (1960); *State v. Scott*, 41 Minn. 365, 43 N.W. 62 (1889); *State v. Gut*, 13 Minn. 315 (1868). Minnesota case law has explicitly recognized this similarity. In *State v. Garvey*, 11 Minn. 95 (1866), the court noted:

It is not pretended that intoxication is in any case an excuse for crime, but when the intention of the party is an element of the crime, insanity of any kind, or from any cause, which renders the party incapable of forming any intention, and which is not voluntarily induced with a view to the commission of a crime while in that state, may be given in evidence to show that he is not guilty of the specific crime with which he is charged.

*Id.* at 103 (emphasis omitted).

One anomaly stemming from these rules is that the intoxicated offender who asserts either the defense of voluntary intoxication to contest the existence of specific intent or, under *Altimus*, the defense of involuntary intoxication may, to some extent, be exculpated if able to qualify under the applicable insanity standard, while the same intoxicated offender who seeks to assert the insanity defense itself is denied exculpation unless suffering from "settled" insanity. See note 75 *infra* and accompanying text.

26. Courts have been unwilling to apply the defense, especially in cases where the intoxication was produced by fraud or coercion. See note 18 *supra*; Hall, *supra* note 10, at 1055-57; Paulsen, *supra* note 14, at 18; Note, *supra* note 14, at 276 ("an acquittal has never occurred").

27. Hall, *supra* note 10, at 1056.

28. 238 N.W.2d at 855.

29. *Id.* at 857. The court stated that a defendant's knowledge of the prescribed drug's likely intoxicating effect means that he is "volun-



other intoxicant, is in fact the cause of defendant's intoxication at the time of his alleged criminal conduct"; and "defendant, due to involuntary intoxication, is temporarily insane."<sup>30</sup> The court adopted the Minnesota codification of the insanity defense as the standard for the third requirement; defendant is exculpated if at the time of the act he was laboring under such a defect of reason as not to know the nature of his act or that it was wrong.<sup>31</sup>

The court's recognition that involuntary intoxication may be a defense to crime when produced unexpectedly by a medically prescribed drug is significant as a matter of first impression in Minnesota. Although this form of involuntary intoxication is but one of the categories recognized at common law, *Altimus* suggests that the court will be equally receptive to the other traditional forms of the defense—coerced and pathological intoxication and intoxication by innocent mistake.<sup>32</sup> The court's standard for testing the involuntarily intoxicated offender's mental capacity—that he not know the nature of his act or that it was wrong—appears applicable to all forms of the defense. Moreover, the same basic policy underlies all of the categories—an offender should not be held criminally liable for his acts where his conduct was blameless because he did not willingly assume the risks of his intoxicated behavior. *Altimus* has thus laid the foundation for the full development of a defense previously unrecognized by the state's courts.

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tarily" intoxicated; he should thus be afforded only the partial defense of voluntary intoxication provided by MINN. STAT. § 609.075 (1976). See note 14 *supra*.

30. 238 N.W.2d at 857. The court noted that the case law is virtually unanimous in holding that involuntary intoxication is a defense only when defendant is legally insane at the time of the act. *Id.* See note 25 *supra*.

31. 238 N.W.2d at 857. See MINN. STAT. § 611.026 (1976). This test is usually referred to as the M'Naghten test, see note 17 *supra*; in Minnesota it has been modified by judicial construction, see note 54 *infra*. The *Altimus* court recognized that other states have followed the Model Penal Code standard, which provides:

Intoxication which (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.

MODEL PENAL CODE § 2.08 (4) (Proposed Official Draft, 1962). It refused to adopt that provision, however, in the absence of an express legislative definition of the involuntary intoxication defense. 238 N.W.2d at 857-58.

32. See text accompanying notes 18-21 *supra*.

But the holding of *Altimus* is perhaps less important than its ultimate implications, for in light of certain principles expressed in prior case law,<sup>33</sup> the availability of the involuntary intoxication defense could lead to a wholly new doctrine of exculpation for a certain class of offenders—chronic alcoholics.<sup>34</sup> This potential development can be understood only in connection with a 1969 Minnesota supreme court case, *State v. Fearon*.<sup>35</sup>

In *Fearon* the Minnesota supreme court faced the issue of the criminal responsibility of the chronic alcoholic for a "status" crime.<sup>36</sup> It held that a chronic alcoholic could not be convicted

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33. In the broadest sense, *Altimus* and *State v. Fearon*, 283 Minn. 90, 166 N.W.2d 720 (1969), see text accompanying notes 36-42 *infra*, display the court's willingness to limit the use of criminal sanctions in dealing with intoxicated offenders. Some members of the court displayed the same tendency in *Prideaux v. State*, 247 N.W.2d 385 (Minn. 1976). There the court held that any person required to take a blood-alcohol test for driving while intoxicated had a statutory right to consult with his attorney before submitting to the test. In a special concurrence, Justice Todd suggested that

[t]he legislature should remove driving under the influence from classification as a crime. Precedent exists for this action since Minnesota has already decriminalized public drunkenness, recognizing the medical, rather than the criminal, nature of this problem. The fact that the intoxicated person is operating a motor vehicle does not change the basic cause of the problem.

*Id.* at 395-96.

The court thus appears to be moving slowly toward a preference for handling the problems of alcoholism through the health professions rather than through the criminal justice system. See note 48 *infra*.

34. For a discussion of the definitional problems surrounding the concept of chronic alcoholism, see generally Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism"*, 83 HARV. L. REV. 793 (1970).

35. 283 Minn. 90, 166 N.W.2d 720 (1969).

36. Many chronic alcoholic defendants have challenged the constitutionality of their convictions under public drunkenness statutes which allegedly punish them for the "status" of alcohol dependence. In *Robinson v. California*, 370 U.S. 660 (1962), the United States Supreme Court held that a California statute making addiction to narcotics a criminal offense violated the eighth amendment prohibition against cruel and unusual punishment. Its holding suggested that to convict a person for a "status," such as addiction, which is unrelated to any anti-social act yet committed within the jurisdiction, is unconstitutional. *Id.* at 667. But the Court's characterization of addiction as an "illness," *id.*, raised the question whether acts committed while influenced by such an "illness" were criminally punishable. Two federal circuit courts of appeals relied on the reasoning of *Robinson* to void the public drunkenness convictions of individuals afflicted with the "illness" of chronic alcoholism; both noted the questionable constitutionality of statutes criminally punishing the chronic alcoholic for "status" acts—those "compulsive as symptomatic of the disease" of chronic alcoholism. *Easter v. District of Colum-*

under a statute prohibiting intoxication produced by the "voluntary" consumption of intoxicating liquors<sup>37</sup> because his drinking was "due to his disease and involuntary."<sup>38</sup> Defendant's chronic alcoholism destroyed his ability to choose to drink and thus prevented formulation of the *mens rea* necessary to convict him.<sup>39</sup> At least for the chronic alcoholic whose drinking was

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bia, 361 F.2d 150 (D.C. Cir. 1966) (*en banc*); *Driver v. Hinnant*, 356 F.2d 761, 764 (4th Cir. 1966).

Efforts to extend the *Robinson* "status" rationale to acts similarly "compulsive as symptomatic of the disease" of chronic alcoholism were hindered, however, by the Supreme Court's decision in *Powell v. Texas*, 392 U.S. 514 (1968). Mr. Justice Marshall's plurality opinion indicated that a chronic alcoholic's public intoxication involved more than "mere status" since the state had an interest in preventing obnoxious public behavior. 392 U.S. at 532. See also *Vick v. State*, 453 P.2d 342 (Alas. 1969); *People v. Hoy*, 380 Mich. 597, 158 N.W.2d 463 (1968); *Seattle v. Hill*, 72 Wash. 2d 786, 435 P.2d 692 (1967), *cert. denied*, 393 U.S. 872 (1968). Nevertheless, the court in *Fearon* regarded the eighth amendment argument as an additional ground for refusing to punish the defendant chronic alcoholic under Minnesota's voluntary drunkenness statute. 283 Minn. at 97, 166 N.W.2d at 724.

37. The statute, in relevant part, read: "Every person who becomes intoxicated by voluntarily drinking intoxicating liquors is guilty of the crime of drunkenness . . ." 1889 Minn. Laws ch. 13, § 1 (codified at MINN. STAT. § 340.96 (1969)) (repealed 1973).

38. 283 Minn. at 97, 166 N.W.2d at 724. Bernard Fearon showed that his excessive alcohol consumption had resulted in a dishonorable discharge from the Army, caused him to lose his family and a series of jobs, and led to numerous arrests for drunkenness. He claimed he had been intoxicated at least 50 percent of the time for over 20 years. He testified that he could not control his drinking, though he had made many attempts to do so, and that he thought about drinking constantly. *Id.* at 91, 166 N.W.2d at 721. Five "expert" witnesses (two psychiatrists, one of whom worked with alcoholics, a psychologist, a social worker, and a minister, all of whom worked extensively with alcoholics) testified that "alcoholism is a disease and is recognized as such by the American Medical Association; that a chronic alcoholic does not drink voluntarily and cannot control his drinking; and that defendant is a 'classic case' of chronic alcoholism." *Id.* at 91-92, 166 N.W.2d at 721. In response to a question on cross-examination as to whether defendant, if sober, would know the consequences of his act, the psychologist indicated that if defendant were an alcoholic, as he believed he was, then even when sober, "there is a very good chance that on many occasions with respect to consuming alcoholic beverages he would not be able to make a judgment of right or wrong in terms of consequences of his act." *Id.* at 92, 166 N.W.2d at 721. One of the psychiatrists testified that, "[a]t the present time, whether this man takes a drink or not is not a matter of choice to him. It is beyond the strength of his will to decide whether to drink or not." *Id.* at 95, 166 N.W.2d at 723. He also stated that loss of control over the consumption of alcohol was the characteristic which made alcoholism a disease. *Id.* Another witness indicated that Fearon's loss of control extended both to when and to how much alcohol was consumed. *Id.* The evidence was unrebutted by the state.

39. *Id.* at 96-97, 166 N.W.2d at 724. See note 11 *supra*. Al-

compelled by disease,<sup>40</sup> *Fearon* rejected the traditional rule that "voluntary intoxication is no excuse for crime"<sup>41</sup> and also undermined the traditional justification advanced for punishing the intoxicated offender—that *choosing* to drink increases the risk of harm to others.<sup>42</sup> Reading *Fearon* and *Altimus* together raises an

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though the statute prohibited "voluntarily" drinking to the point of intoxication, the court noted that "even without the word 'voluntarily' in the statement, it should not be construed to mean that a person who did not choose to drink is subject to conviction," *id.* at 94, 166 N.W.2d at 722-23, since "it has long been clear under Minnesota law that a person cannot be convicted of a crime where there was no intent to do the act which constitutes the crime." *Id.*, 166 N.W.2d at 722. Cf. *State v. Kremer*, 262 Minn. 190, 114 N.W.2d 88 (1962) (motorist who neither intended to commit the offense nor was negligent in maintaining his vehicle held not subject to criminal liability for failing to stop at a red light because his brakes failed).

40. All of the defense evidence was based upon the underlying premise that alcoholism is a disease. The court noted that this concept had only recently received "widespread" medical and public acceptance, attributable to developments "in man's knowledge of himself and his environment." 283 Minn. at 96, 166 N.W.2d at 724.

The court did not specify how the "disease" deprived defendant of the ability to control the consumption of alcohol—whether it was due to physical "addiction," a psychological dependence, a function of a disorder of personality, or some other cause. Most of the testimony seemed to emphasize the psychological nature of the problem. Such imprecision indicates the lack of concrete scientific data on alcoholism. For example, although Mr. Justice Fortas advocated application of the "disease concept of alcoholism" in his *Powell* dissent, he acknowledged that "there is a great deal that remains to be discovered about chronic alcoholism . . . . [M]any aspects of the disease remain obscure . . . ." 392 U.S. at 559. As in the case of mental disease, "[w]e are . . . woefully deficient in our medical, diagnostic, and therapeutic knowledge" of the problem. *Id.* at 559-60. But he emphasized the defendant's inability to "resist the constant, excessive consumption of alcohol" as the essence of the "disease." *Id.* at 558.

Although there is some problem in defining the concept, its core meaning, as agreed by authorities, is that alcoholism is caused and maintained by *something* other than the moral fault of the alcoholic, something that, to a greater or lesser extent depending upon the physiological or psychological make-up and history of the individual, cannot be controlled by him.

*Id.* at 560-61 (emphasis added).

41. The court recognized that in terming *Fearon's* drinking "involuntary" it was taking a novel approach to the problems of the chronic alcoholic: "The fact that a chronic alcoholic would have been considered a voluntary drinker in 1889 does not compel us to conclude that he must be so classed in 1969." 283 Minn. at 96, 166 N.W.2d at 724. See note 10 *supra*.

42. See note 15 *supra*. While the chronic alcoholic's conduct is no less risk-creating than is the voluntary inebriate's since, for both, alcohol intoxication relaxes inhibitory controls and reduces ability to regulate behavior, there is no reason to punish where the loss of control is not the product of choice, that is, where the *mens rea* upon which punish-

interesting possibility: *Fearon* suggests that a chronic alcoholic's intoxication may be "coerced" and therefore not blameworthy; the logical extension of *Altimus* suggests that the defense of coerced intoxication should be available to exonerate the chronic alcoholic from criminal responsibility for offenses committed while intoxicated.<sup>43</sup>

For successful assertion of the coerced intoxication defense, courts have traditionally required that the coercion be from an external source.<sup>44</sup> The clear import of *Fearon*, however, is that the chronic alcoholic's inability to determine when and how much he will drink is also coerced: "on the evidence presented in this case, defendant was no more able to make a free choice as to when or how much he would drink than a person would be who is forced to drink under the threat of physical violence."<sup>45</sup> The logic underlying this analysis of the chronic alcoholic's "compulsion" would support allowing an "involuntarily" intoxicated chronic alcoholic to raise a coerced intoxication defense even to

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ment of the risk-creating conduct theoretically depends is not present. See notes 10-12, 18-24 *supra* and accompanying text.

The Minnesota legislature responded favorably to the decision in *Fearon* by codifying its holding and by repealing the statute under which *Fearon* had been convicted.

Notwithstanding any provision of local laws or ordinances no person shall be charged with or convicted of the offense of drunkenness or public drunkenness. Nothing herein shall prevent the prosecution and conviction of any intoxicated person for offenses other than drunkenness or public drunkenness nor shall this section relieve any person from civil liability for any injury to persons or property caused by such person while intoxicated.

MINN. STAT. § 340.961 (1976).

43. The defense of involuntary intoxication is currently unavailable to the chronic alcoholic in virtually all jurisdictions. The reason is clear: "To date, 'voluntary' drunkenness is any drinking not caused fraudulently or coercively, or by mental disease amounting to insanity. Thus, subject to a few narrow exceptions, all drinking is voluntary." Note, *supra* note 14, at 287.

44. Hall, *supra* note 10, at 1055-56.

45. 283 Minn. at 96, 166 N.W.2d at 724. See also Comment, *Decriminalization of Alcoholism*, 50 Wash. L. Rev. 755, 763 n.46 (1975). In *State v. Pike*, 49 N.H. 399 (1869), the court recognized, in the context of its discussion of the insanity defense, that disease as well as external force can constitute duress:

When disease is the propelling, uncontrollable power, the man is as innocent as the weapon,—the mental and moral elements are as guiltless as the material. If his mental, moral, and bodily strength is subjugated and pressed to an involuntary service, it is immaterial whether it is done by his disease, or by another man, or a brute or any physical force of art or nature set in operation without fault on his part.

*Id.* at 441.

general intent offenses. For such a defense to succeed, however, the defendant would first have to show that the coercion was sufficient to deprive him of the ability to avoid the risk-creating intoxication on the occasion in question. Traditionally, coercion has been measured by a very strict standard, requiring proof of "such duress as would afford a defense to a charge of crime."<sup>46</sup> This standard deprives the defense of much of its practical significance and has undoubtedly contributed to the absence of reported acquittals based upon it.<sup>47</sup> The court's language in *Fearon*, however, equating compulsion by disease with compulsion by physical force, indicates that a more flexible approach may be appropriate in the case of chronic alcoholism, and the defense could thus prove more useful in Minnesota than in other jurisdictions.<sup>48</sup>

Under the suggested analysis drawn from *Fearon* the chronic alcoholic could raise only a fact question as to the "involuntariness" of his intoxication; under *Altimus*, he would also have to show that the involuntary intoxication caused him to be "temporarily insane" at the time of the act.<sup>49</sup> It is apparent from reported Minnesota cases dealing with the voluntary intoxication defense<sup>50</sup> that courts apply the "temporary insanity" test strictly, and reversals based on satisfaction of the requirement are rare, even where the defendant was clearly intoxicated at the time of the act.<sup>51</sup> Similarly, defendants in other jurisdic-

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46. MODEL PENAL CODE § 2.08 (5) (b) (Tent. Draft No. 9, 1959). Cf. MODEL PENAL CODE § 2.08 (5) (b) (Proposed Official Draft, 1962) ("such duress as would afford a defense to a charge of crime" changed to "such circumstances" so as to make applicable the choice of evils defense of section 3.02). See also cases cited in note 18 *supra*; Hall, *supra* note 10, at 1056; Paulsen, *supra* note 14, at 18-19.

47. See text accompanying note 27 *supra*. See also Paulsen, *supra* note 14, at 18-19. It should be noted that coerced intoxication as traditionally defined is likely to arise only infrequently. The *Altimus* court drew a similar conclusion from the lack of case law on involuntary intoxication by prescribed drug. 238 N.W.2d at 858.

48. Both the Minnesota supreme court and the legislature have displayed a willingness to re-examine traditional attitudes and approaches in dealing with alcoholics. As the court noted in *Fearon*, the legislative attitude toward the alcoholic indicates some recognition of the concept of alcoholism as a disease. 283 Minn. at 99, 166 N.W.2d at 762. The court in *Fearon* urged prosecutors to exercise careful discretion in determining whether to seek civil commitment of inebriates for treatment or to impose criminal sanctions, suggesting that the former was more appropriate for the chronic alcoholic. *Id.* at 100, 166 N.W.2d at 726.

49. See text accompanying note 31 *supra*.

50. See note 25 *supra*.

51. See *State v. DeFoe*, 241 N.W.2d 635 (Minn. 1976); *State v. Annis*, 241 N.W.2d 482 (Minn. 1976); *State v. Kolodge*, 293 Minn. 413, 196 N.W.2d

tions who have attempted to interpose chronic alcoholism as a defense have, as yet, been unable to satisfy the temporary insanity requirement.<sup>52</sup>

The chronic alcoholic may more easily meet this burden in Minnesota, however, because the insanity test<sup>53</sup> has recently been liberalized. In *State v. Rawland*,<sup>54</sup> the court held that the trier of fact may consider not only the defendant's ability to know and understand the nature and quality of his act but also his capacity to control his conduct.<sup>55</sup> Although the *Rawland* test is similar to the Model Penal Code test rejected by the court in *Altimus*,<sup>56</sup> it is nevertheless reasonable to presume that the court's adoption of the statutory insanity standard was intended to encompass the court's previous construction of that standard in *Rawland*.<sup>57</sup> Thus, while *Rawland* does not alter the require-

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920 (1972); *State v. Carlson*, 291 Minn. 536, 192 N.W.2d 184 (1971); *State v. Dineen*, 289 Minn. 250, 184 N.W.2d 16 (1971); *State v. O'Donnell*, 280 Minn. 213, 158 N.W.2d 699 (1968); *State v. Bonga*, 278 Minn. 181, 153 N.W.2d 127 (1967); *State v. Wertz*, 155 Minn. 143, 193 N.W. 42 (1923).

52. See *People v. Wyatt*, 22 Cal. App. 3d 671, 99 Cal. Rptr. 674 (1972); *Staples v. State*, 245 N.W.2d 679 (Wis. 1976); *Roberts v. State*, 41 Wis. 2d 537, 164 N.W.2d 525 (1969).

53. See note 25 *supra*. For the text of the Minnesota insanity defense, see MINN. STAT. § 611.026 (1976).

54. 294 Minn. 17, 199 N.W.2d 774 (1972). In *Rawland* the court upheld the constitutionality of Minnesota's insanity statute, which is based on the common law M'Naghten standard. Defendant's conviction was reversed, however, as the court found the evidence sufficient to meet the statutory requirement. While referring to the strict right-and-wrong test of M'Naghten, the court emphasized the role of the factfinder in determining insanity: "In determining whether or not a defendant has met the burden imposed on him by statute to prove absence of guilt because of insanity, the factfinder may give credence to competent evidence that relates to cognition, volition, and capacity to control behavior." *Id.* at 46, 199 N.W.2d at 790. This in effect makes the M'Naghten test similar to the "irresistible impulse" test used in several other jurisdictions. See Note, *Standards of Mental Illness in the Insanity Defense and Police Power Commitments: A Proposal for a Uniform Standard*, 60 MINN. L. REV. 1289, 1292 n.8 (1976).

55. 294 Minn. at 46, 199 N.W.2d at 790.

56. The *Rawland* court referred to a right-and-wrong test of insanity, but emphasized that the test would include incompetency to choose: "Although [the statute] does not use the terms competency or capacity, the statute speaks of laboring under such a defect of reason as not to know the nature of his act or that it was wrong. Upon analysis, we find little distinction." *Id.* at 44, 199 N.W.2d at 789. Like the *Rawland* test, the Model Penal Code emphasizes the capacity of the actor. See note 31 *supra*.

57. There is some inconsistency in assuming that the court intended to adopt the *Rawland* construction of the insanity defense in its definition of involuntary intoxication, since the court explicitly rejected the similar Model Penal Code standard. For a comparison of the *Rawland* test of

ment that the offender be "temporarily insane," its recognition that inability to control behavior is a factor that may be considered in judging mental incapacity affords triers of fact greater flexibility in determining the criminal responsibility of chronic alcoholics asserting a coerced intoxication defense.

While the combined reasoning of *Altimus* and *Fearon* logically suggests that the court would be receptive to an involuntary intoxication defense asserted by a chronic alcoholic, neither case, of course, is authoritatively on point. But the argument favoring recognition of the defense is further buttressed by strong policy considerations. The Minnesota legislature has stated that the most important policies underlying the criminal code are prevention and deterrence, rehabilitation, and isolation.<sup>58</sup> Preventing and deterring crime would not seem to be promoted by criminally punishing the chronic alcoholic. The court in *Fearon*, for example, regarded the lack of deterrent effect as an additional ground for refusing to punish the chronic alcoholic for "voluntary" drunkenness.<sup>59</sup> The threat of criminal punishment is equally unlikely to deter the chronic alcoholic, who is unable to foresee or to intend the criminal consequences of incapacitating intoxication, from committing other types of offenses.<sup>60</sup> Preventing the chronic alcoholic's risk-creating drinking itself would seem to be the only way to prevent his subsequent criminal acts; hence, punishment for the crime would reach the symptom but not the cause of his criminal behavior.<sup>61</sup>

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insanity with that of the Model Penal Code, see note 56 *supra*. Nevertheless, it would seem equally inconsistent to assume that the court would ignore, even in the context of a newly recognized defense, its own construction of the very statute it was adopting. Moreover, in giving guidance to the lower courts in applying the insanity standard as an element of the involuntary intoxication defense, the *Altimus* court specifically referred to Rule 14 of the Minnesota Rules of Criminal Procedure. The commentary to the Rule notes "Rule 14 . . . adds the plea of not guilty by reason of mental illness or mental deficiency as defined by Minn. Stat. § 611.026 (1971) with its *judicial interpretations* . . ." MINN. R. CRIM. P. 14, Comment (emphasis added).

58. MINN. STAT. § 609.01 (1) (1974).

59. 283 Minn. at 98, 166 N.W.2d at 725. But see *Powell v. Texas*, 392 U.S. 514, 528-31 (1968).

60. According to the President's Crime Commission, "[t]he criminal justice system appears ineffective to deter drunkenness or to meet the problems of the chronic alcoholic offender." REPORT OF THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 235 (1967).

61. "One thing is certain, however: Anyone who wants to restore [chronic alcoholics] to their families and communities as useful and self-respecting citizens would better deal with them as problem drinkers who have committed a crime rather than as criminals who happen to be prob-



Nor would a prison sentence ordinarily "rehabilitate" the chronic alcoholic; the effectiveness of jail as a rehabilitative tool for any offender has been seriously questioned.<sup>62</sup> For both of these purposes, civil treatment of the defendant's alcoholism seems a more humane and effective means of protecting society against the potentially threatening aspects of his conduct.<sup>63</sup> Criminal incarceration does serve to isolate the offender, thus protecting society from those chronic alcoholics who may be dangerous to themselves and to others and, therefore, in need of social control;<sup>64</sup>

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lem drinkers." MacCormick, *Correctional Views on Alcohol, Alcoholism, and Crime*, 9 CRIME & DELINQUENCY 15, 26-27 (1963). See note 33 *supra*. Some critics question whether this "problem" may legitimately be identified as the "cause" of a chronic alcoholic's criminality. See, e.g., Bacon, *Alcohol, Alcoholism, and Crime*, 9 CRIME & DELINQUENCY 1, 14 (1963) ("Simply stating that alcohol (or drunkenness or alcoholism) was a cause or, even worse, the cause of criminality is likely to increase misunderstanding and result in ineffective answers. This sort of over-simplification is on a par with the other single-cause explanations of crime: climate, ethnic background, poverty, lack of affection, boredom, overstimulation, or devils.").

62. On the dubious "rehabilitative" effects of imprisonment generally, see Robison & Smith, *The Effectiveness of Correction Programs*, 17 CRIME & DELINQUENCY 67, 71-72 (1971) ("It is difficult to escape the conclusion that the act of incarcerating a person at all will impair whatever potential he has for crime-free future adjustment and that, regardless of which 'treatments' are administered while he is in prison, the longer he is kept there the more will he deteriorate and the more likely is it that he will recidivate."). Some inmate alcoholics have, however, been helped by Alcoholics Anonymous, which has established chapters at most American penal institutions. See MacCormick, *supra* note 61, at 24-27.

63. Criminal incarceration and punishment are not necessarily inconsistent with "treatment" of the offender:

Punishment is manifestly unpleasant and may or may not "work," whereas treatment, while not intrinsically pleasant, escapes the definitely unpleasant connotations of punishment; furthermore, it is impliedly effective: treatment, almost by definition, is that which results in improvement of a condition. Thus, treatment gains both an aura of being nicer (more humane) and better (more effective).

In correctional practice, treatment and punishment generally coexist and cannot appropriately be viewed as mutually exclusive. . . . The punitive conditions are viewed as necessary for the administration of treatment, and the treatments are believed to account for whatever favorable results occur.

The real choice in correction, then, is not between treatment on one hand and punishment on the other but between one treatment-punishment alternative and another.

Robison & Smith, *supra* note 62, at 79-80. A noncriminal treatment-punishment alternative for the chronic alcoholic offender, however, has much to recommend it. See note 72 *infra*. See generally Kittrie, *The Divestment of Criminal Law and the Coming of the Therapeutic State*, 1 SURFOLK U.L. REV. 43, 70-76 (1967).

64. See *Powell v. Texas*, 392 U.S. 514, 538-39 (1968) (Black, J., concurring).

but civil commitment and treatment is still superior, for it simultaneously isolates the offender and treats the underlying cause of his dangerousness.<sup>65</sup> 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."<sup>66</sup> Punishing the chronic alcoholic seems to constitute precisely such misuse; it merely removes him from public view without helping to eliminate the cause of his risk-creating conduct. Society derives little benefit from punishing those who are unable to control themselves.<sup>67</sup>

It is also evident, however, that society would not benefit from abuse of the coerced intoxication defense by defendants who claim to be "chronic alcoholics" but actually can control their drinking to some degree. Accurately identifying those defendants whose "involuntary" criminal conduct may legitimately be attributed to chronic alcoholism would, therefore, seem to present the most crucial problem in administering the defense. The focus must be on the individual defendant, since not all chronic alcoholics are so compelled by their disease to drink to the point of incapacitation as to support a claim of duress or coercion.<sup>68</sup> Because our understanding of alcoholism does not yet permit us confidently to identify the cause of its appearance in a particular individual or to predict its effects on his conduct,<sup>69</sup> many alcoholics who assert the defense will and should

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65. See note 72 *infra* and accompanying text.

66. MINN. STAT. § 609.01(2) (1976).

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

68. See Comment, *supra* note 45, at 778.

69. Labelling the individual offender a "chronic alcoholic" or terming his alcohol consumption "involuntary" adds little to the analysis of the behavior of a particular intoxicated offender. Clearly, proof of actual loss of control over intake must be required in every case in which a defendant seeks to assert a defense of involuntary intoxication based on chronic alcoholism. The presence of behavioral control was an obvious factor, for example, in *Salzman v. United States*, 405 F.2d 358 (D.C. Cir. 1968), where the court rejected a defendant's claim that his chronic alcoholism should itself be sufficient to raise a criminal responsibility issue. Instead, "[t]he accused must show some evidence that he has lost the capacity to control his behavior not simply with respect to drinking, but in other contexts as well." *Id.* at 364. Trial by label

be unsuccessful. Nevertheless, if the trier of fact is convinced that a defendant was so intoxicated at the time of the act that he could not have exercised the restraint necessary to avoid the criminal act, and that the intoxication resulted from an inability to control the consumption of alcohol due to the disease of chronic alcoholism, then that defendant should be excused from criminal responsibility regardless of the nature or seriousness of the offense.<sup>70</sup> Any other conclusion would be contrary to the theory on which the involuntary intoxication defense is based, that criminal blameworthiness depends upon the presence of the choice to become intoxicated.<sup>71</sup> Acquittal should not, however, necessarily result in the chronic alcoholic's release, for the likelihood that he would repeat his behavior would endanger the community. Thus, civil commitment and treatment would seem to be required whenever an acquittal for a serious crime was based on this defense.<sup>72</sup>

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should be avoided, for "[n]owhere is the lack of scientific data more evident than in the consideration of the derelict's involvement with alcohol." Murtagh, *Arrests for Public Intoxication*, 35 *FORDHAM L. REV.* 1, 9-10 (1966). See also Kirbens, *supra* note 14, at 882.

70. See MODEL PENAL CODE § 2.08(4) (Proposed Official Draft, 1962) (text in note 31 *supra*); Kirbens, *supra* note 14, at 881; Comment, *supra* note 45, at 772.

71. See notes 11 & 15 *supra*.

72. The jury would be instructed that if it finds that the defendant was suffering from a disease, and that his actions were a product of that disease, it should find the defendant not guilty.

Using civil commitment procedures, the defendant should then be committed to an appropriate treatment facility.

Salzman v. United States, 405 F.2d 358, 372 (D.C. Cir. 1968) (Wright, J., concurring). See Greenawalt, *supra* note 11, at 971; Kirbens, *supra* note 14, at 882-83. Civil commitment is certainly no panacea. Counsel for *amici curiae* in *Powell*, representing the ACLU and other groups, indicated that the legal battles in *Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966), and *Driver v. Hinnant*, 356 F.2d 761, 764-65 (4th Cir. 1966), were not waged in order for defendants to be involuntarily committed even longer than their possible jail sentences, without assurance that they would receive appropriate care and treatment. *Powell v. Texas*, 392 U.S. 514, 529-30 n.24 (1968). As Mr. Justice Marshall argued in *Powell*

[F]acilities for the attempted treatment of indigent alcoholics are woefully lacking throughout the country. It would be tragic to return large numbers of helpless, sometimes dangerous and frequently unsanitary inebriates to the streets of our cities without even an opportunity to sober up adequately which a brief jail term provides. Presumably no State or city will tolerate such a state of affairs. Yet the medical profession cannot, and does not, tell us with any assurance that, even if the buildings, equipment and trained personnel were made available, it could provide anything more than slightly higher-class jails for our indigent habitual inebriates. Thus we run the grave risk that nothing will be accomplished beyond the hanging of a new sign—reading 'hospital'—over one wing of the jailhouse.

Extension of the coerced intoxication defense to the chronic alcoholic would significantly change the existing law of intoxication. The common law now provides only the defenses of voluntary intoxication and insanity to the chronic alcoholic who acts while intoxicated.<sup>73</sup> Both defenses are of limited utility, since voluntary intoxication serves only to reduce the severity of the offense for which the defendant can be convicted and applies only to specific intent offenses,<sup>74</sup> while insanity, although a complete defense, is available only to the alcoholic offender suffering from delirium tremens.<sup>75</sup> The coerced intoxication defense, on the other hand, would apply to both general and specific intent offenses and would eliminate all criminal responsibility.<sup>76</sup> Thus, the defendant relieved of criminal liability in *Fearon* for the "status" offense of voluntary drunkenness could potentially be excused for a non-status offense such as murder. The latter is a new possibility for intoxicated offenders

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*Id.* at 528-29. See also Hutt, *Modern Trends in Handling the Chronic Alcoholic Offender*, 19 S. CAR. L. REV. 305, 318-23 (1967); Szasz, *Alcoholism: A Socio-Ethical Perspective*, 6 WASHBURN L.J. 255, 260-68 (1967).

The Minnesota Hospitalization and Commitment Act, MINN. STAT. §§ 253A.01-.21 (1976), governing the involuntary commitment of "inebriates," seems to provide, however, a procedure by which the chronic alcoholic convicted of a non-status offense could receive treatment while isolated for the protection of society. Under Rule 20.02(8) of the Minnesota Rules of Criminal Procedure, a defendant found not guilty by reason of insanity or mental irresponsibility is to be committed under the provisions of the Hospitalization and Commitment Act, subject to the review of the trial court on the duration of commitment. Though such commitment would be inappropriate in cases like *Altimus*, where the defendant's involuntary intoxication was unlikely to recur, the criminally irresponsible chronic alcoholic may pose a continuing threat to society. Hence, though complete criminal exculpation would be appropriate, civil commitment and treatment would seem necessary where a chronic alcoholic has successfully asserted an involuntary intoxication defense to a serious crime.

73. See LAFAYE & SCOTT, *supra* note 10, at 341-50; Note, *Intoxication as a Criminal Defense*, 55 COLUM. L. REV. 1210 (1955).

74. See note 14 *supra* and accompanying text.

75. See note 25 *supra*. The insanity defense is often denied to the chronic alcoholic simply on the basis of the law's moral bias against the "voluntary" consumption of alcohol. After reviewing a series of cases demonstrating precisely this point, Professor Hall concluded: "Thus we find many competent courts ignoring serious physical injuries, addiction, chronic alcoholism, delirium tremens, confusing psychoses because accompanied by intoxication, and, in general, adhering to a course of adjudication that can only be regarded as unenlightened." Hall, *supra* note 10, at 1060. The fact is that, "[w]hile alcoholism may not be a mental disease recognized clinically, heavy drinking is often a symptom of deep mental disturbance." Paulsen, *supra* note 14, at 21.

76. See note 18 *supra*. See also 22 C.J.S. *Criminal Law* § 69 (1961); LAFAYE & SCOTT, *supra* note 10, at 341.

in Minnesota<sup>77</sup> and thus could be a source of controversy. But recognition of this defense would be logically consistent with Minnesota case law and the policies underlying the criminal code. The chronic alcoholic who is unable to resist his compulsion to drink is not blameworthy when his disability has led to incapacitating intoxication. Chronic alcoholics who commit offenses while so incapacitated as to be "temporarily insane" should, therefore, be excused. The goals of protecting society and humanely dealing with the chronic alcoholic offender would be better served by treatment and, where appropriate, civil commitment than by traditional criminal penalties. The coerced intoxication defense would serve both of these ends.

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77. The insanity defense has been of limited utility to most offenders with alcohol-related problems. See note 25 *supra*.