Chapter 12. VOLUNTARY INTOXICATION AND CAUSING ONE'S OWN DEFENSE

The imputation of a culpable state of mind occurs most frequently in cases of voluntary intoxication. The justification for treating the actor as if she has a culpable state of mind (usually recklessness) that she does not in fact have is said to be the actor's culpability in voluntarily becoming intoxicated. Section 12.1 examines the governing rules in this area and considers whether the justification for imputation is persuasive. Section 12.2 looks at the general problem of an actor creating the conditions of her own defense, a problem that can arise in a variety of defense situations.

SECTION 12.1 VOLUNTARY INTOXICATION NEGATING AN OFFENSE ELEMENT

Food for Thought

Sharon and Buff have become very close as they struggled together through their first year of law school. Buff is particularly appreciative of Sharon's support because Buff's husband, Peter, is so unsupportive. Buff is somewhat understanding about her husband's complaints. She knows she has been moody and, during the past exam week, even verbally and emotionally abusive. Sharon is less understanding. She thinks Peter is a worthless, whining leech who is taking gross advantage of her friend. She repeatedly urges Buff to, "Kill the pig!," only half in jest.

After their last exam, Sharon suggests that they stop at a local club for a few drinks to celebrate and unwind. Sharon's real plan is to get roaring drunk. She wants to kill Peter and knows that when she gets drunk she becomes violent toward people she does not like, the more drunk the more violent. She assumes that, while intoxicated, their conversation will turn to Peter and that he will become the focus of

her drunken rage. In such a drunken state she knows she will not hesitate to kill him, but has learned from her criminal law outline that she will not be responsible for the killing because, if she is sufficiently intoxicated, she will not at the time be acting consciously. Sharon does not tell Buff of her plan. At the club Sharon orders two Bloody Marys. Buff orders a glass of white wine. Sharon wants Buff to help her in the killing and figures that white wine won't do the trick, so she adds a few pills to both of their drinks, telling Buff that the pills will give the drinks more zap. "It'll really make us fly." Buff is hesitant. She generally doesn't drink, but she has just finished a tough year, she reminds herself. She deserves to celebrate. She sips her glass of wine while Sharon has three more Bloody Marys, with additive, in quick succession. Both women are now grossly intoxicated and barely coherent. Sharon is babbling incessantly about killing "Peter-the-Pig."

A friend of Buff's sees them at the club, falling out of their chairs, and insists on taking Buff home. Sharon goes along. When they arrive, they stagger from the friend's car and sprawl on Buff's front yard. Buff discovers that she is lying on her law books, apparently thrown from the upstairs window by a disgusted Peter angry at her exam week abuse. "My books!" "The pig!," Sharon responds. They storm into the house, rip pages from the books, and stuff them into sleeping Peter's mouth. Both break into a chant of "Eat pig, eat."

The next morning, Sharon and Buff awake in bed with Peter's body. Neither woman remembers anything after the first drink at the club. Peter is found to have died of asphyxiation. From witnesses, the police piece together the events, including Sharon's plan to kill Peter by making herself grossly intoxicated. What should be the extent of Sharon's and Buff's liability, if any? What will be their liability, if any, under the Model Penal Code?

Model Penal Code §2.08(1), (2) & (5)(b)
Intoxication Negating an Offense Element

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(1) Except as provided in Subsection (4) of this Section [a defense for involuntary intoxication causing dysfunction analogous to insanity], intoxication of the actor is not a defense unless it negatives an element of the offense.

(2) When 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.

(5) Definitions. In this Section unless a different meaning plainly is required: . . .

(b) "self-induced intoxication" means 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; . . .

Director of Public Prosecutions v. Majewski
House of Lords
[1976] 2 All E.R. 142

[Each of seven Law Lords prepared an address and each reached the same conclusion. Only the address of Lord Edmund-Davies is reproduced here.]

Lord EDMUND-DAVIES. My Lords, during a brawl in a public house the appellant attacked the landlord and two others, injuring all three of them. When the police arrived, he assaulted the officer who arrested him. Another officer was struck by the appellant when he was being driven to the police station. The next morning in his cell he attacked a police inspector. As a result, he was indicted at the Chelmsford Crown Court on four counts of occasioning actual bodily harm and on three counts of assaulting a police constable in the execution of his duty. The appellant testified that he had no recollection of the greater part of what had transpired after he entered the public house, and that during the preceding 48 hours he had taken a substantial quantity of drugs and had ordered one drink at the public house. There was adduced a statement from a doctor who saw him the following morning and evidence by another doctor as to the possible effect of the ingestion of such drink and drugs as the appellant had spoken of. During the course of legal submissions, the attention of the learned judge was drawn to the short report of Bolton v. Crawley in which the Court of Appeal held that on a charge of assault occasioning actual bodily harm the consumption of drink or drugs was irrelevant to criminal responsibility. Accordingly, after telling the jury that an assault "means some blow, not something which is purely accidental," the judge directed them that—

> . . . the fact that [the appellant] may have taken drink and drugs is irrelevant, provided that you are satisfied that the state which he was in was a result of those drink and drugs [*sic*] or a combination of both was self-induced. . . .

The jury convicted on six of the seven counts and the convictions were upheld by the Court of Appeal, who, however, granted leave to appeal,

certifying that the following point of law of general importance was involved:

> Whether a defendant may properly be convicted of assault notwithstanding that, by reason of his self-induced intoxication, he did not intend to do the act alleged to constitute the assault.

. . . The argument advanced on behalf of the appellant can be summarized in the following propositions: (i) Save in relation to offenses of strict responsibility, no man is guilty of a crime unless he has a guilty mind. (ii) A person who, though not insane, commits what would in ordinary circumstances be a crime when he is in such a mental state (whether it be called "automatism" or by any other name) that he does not know what he is doing, lacks a guilty mind and is therefore not criminally culpable for his actions. (iii) Such freedom from culpability exists regardless of (a) whether the offence charged is one involving a "specific" (or "ulterior") intent or one involving only a "general" (or "basic") intent; and (b) whether the automatism was due to causes beyond the control of the person charged or was self-induced by the voluntary taking of drink or drugs. (iv) Assaults being crimes involving a guilty mind, a man who in a state of automatism unlawfully assaults another must be treated as free from all blame and is accordingly entitled to be wholly acquitted: The certified question therefore demands a negative answer. (v) Not only is it logically and ethically indefensible to convict such a man of assault; it also constitutes a contravention of §8 of the Criminal Justice Act 1967. (vi) There accordingly having been a fatal misdirection the appeal should be allowed.

The basic submission of the Crown, on the other hand, may be far more shortly stated thus: A rule of law has been established that self-induced intoxication can provide a defence only to offenses requiring an "ulterior" intent, and is therefore irrelevant to offenses of "basic" intent such as assaults; the direction given was accordingly right, the certified question must be answered in the affirmative, and the appeal should be dismissed. . . .

If logic is to be the sole guide, it follows that a man can never be regarded as committing an assault unless he is conscious of what he is doing. Whatever be the reason for its absence, if he in fact lacks such consciousness he cannot be said to act either intentionally or recklessly. It is submitted on the appellant's behalf that he was at all material times in a condition of "non-insane automatism resulting from pathological intoxication." In Bratty v. Attorney General for Northern Ireland Lord Kilmuir L.C acceptably defined "automatism" as—

> the state of a person who, though capable of action, "is not conscious of what he is doing. . . . It means unconscious involuntary action, and it is a defence because the mind does not go with what is being done."

In strict logic it may be that a physical action performed in such a state ought never to be punished as a criminal assault, no matter how grievous the injury thereby inflicted on the person attacked.

Then is it the case that a man is always to be absolved by the criminal law from the consequences of acts performed when in a state of automatism, regardless of how that state was brought about? The law is certainly clear and commendable in relation to cases where the actor is wholly free from fault in relation to the onset of such a mental state.

But a markedly different attitude has long been taken in respect of a state of automatism brought about by the *voluntary* act of the person charged with a crime.

. . . [T]he established law then was and is now that self-induced intoxication, however gross, cannot excuse crimes of basic intent such as that giving rise to this appeal.

Of recent years there has been increasing academic criticism of this virtually uniform judicial attitude. Such criticism is understandable, being based on what is advanced as the logical necessity of acquitting an accused who acted without mens rea, whatever be the reason for its absence. Thus Professor Glanville Williams comments: "There is no reason why drunkenness should not negative a battery, if it tends to show that the accused did not intend to hit anyone." The contrary view applied in our courts certainly presents problems. So much so that counsel for the appellate denies that it is the law. He submits without qualification that legal principle requires that automatism shall constitute a complete defence to all crimes (including those having recklessness as a constituent element).

Why, then, should the trial judge have directed the jury: "You can ignore the subject of drink and drugs as being in any way a defence," even though they had reduced the appellant to an automaton? Does the law demand that he be treated differently from one who attacks another in, for example, a diabetic coma . . . simply because he had drugged himself? It seems that all the academic writers answer that question in the negative, and Professor J.C. Smith is good enough to say:

> It is time for the House of Lords to go back to first principles and to recognize that if a particular *mens rea* is an ingredient of an offence no one can be convicted of that offence if he does not have the *mens rea* in question, whether he was drunk at the time or not. . . .

The criticism by the academics of the law presently administered in this country is of a two-fold nature: (1) It is illogical and therefore inconsistent with legal principle to treat a person who of his own volition has taken drink or drugs any differently from a man suffering from

some bodily or mental disorder of the kind earlier mentioned or whose beverage had, without his connivance, been "laced" with intoxicants. (2) It is unethical to convict a man of a crime requiring a guilty state of mind when, *ex hypothesi,* he lacked it. I seek to say something about each of these two criticisms.

(1) Illogicality

The appellant's counsel places strong reliance on a passage in the speech of Lord Hailsham of St. Marylebone in Director of Public Prosecutions v. Morgan in which, alluding to criminal intent, he said:

> . . . once it be accepted that an intent of whatever description is an ingredient essential to the guilt of the accused I cannot myself see that any other direction can be logically acceptable. Otherwise a jury would in effect be told to find an intent where none existed or where none was proved to have existed. I cannot myself reconcile it with my conscience to sanction as part of the English law what I regard as logical impossibility, and, if there were any authority which, if accepted, would compel me to do so, I would feel constrained to declare that it was not to be followed.

Well, I have respectfully to say that were such an attitude rigorously adopted and applied, it would involve the drastic revision of much of our established law. Many would say that this would not be a bad thing, but it is well to realize clearly that such would be the consequence, for the criminal law is unfortunately riddled with illogicalities.

So we find the Court of Appeal decision in R. v. Lipman criticized because Widgery LJ justified the conviction for manslaughter on the basis of death being caused by what was described as the unlawful act of the accused in stuffing bedclothes down his companion's throat under the delusion (induced by the drugs he had taken) that he was dealing with snakes. The criticism is that, although had the verdict been based on a finding that Lipman's act was grossly negligent, it would have been unassailable, on the other hand—

> Had (the victim) survived her "trip" and Lipman faced with any other charge based on her injuries, whether of causing grievous bodily harm with intent of an assault occasioning actual bodily harm he would, in the absence of evidence that he had realized that harm was likely to befall his fellow-tripper, have been acquitted. . . .

The undeviating application of logic leads inexorably to the conclusion that a man behaving even as Lipman unquestionably did must be completely discharged from all criminal liability for the dreadful conse-

quences of his conduct. It was, as I recall, submissions of this startling character which led my noble and learned friend, Lord Simon of Glaisdale, to comment trenchantly to appellant's counsel: "It is all right to say 'Let justice be done though the heavens fall.' But you ask us to say 'Let logic be done even though public order be threatened,' which is something very different."

If such be the inescapable result of the strict application of logic in this branch of the law, it is indeed not surprising that illogicality has long reigned, and the prospect of its dethronement must be regarded as alarming.

(2) Lack of Ethics

It is sometimes said in such cases as the present that it is morally wrong to convict of a crime involving a certain state of mind even where it be established that the charge is based on a man's behavior when he lacked that guilty mind. Rightly or wrongly, Coke was not of that view, for although he asserted that "Actus non facit reum nisi mens sit rea" he also said that, so far from gross intoxication excusing crime, it aggravated the culpability.

Your Lordships are presently concerned with a publichouse brawl, which is said to have been due to the ingestion of drugs rather than drink. Such a plea is becoming much more common, and those acting judicially or who have otherwise acquired any knowledge of addiction are familiar with such parlance of the drug scene as "going on a trip" or "blowing the mind," the avowed intention of the taker of hallucinatory drugs being to lose contact with reality. Irrationality is in truth the very essence of drug-induced phantasies.

Illogical though the present law may be, it represents a compromise between the imposition of liability on inebriates in complete disregard of their condition (on the alleged ground that it was brought on voluntarily), and the total exculpation required by the defendant's actual state of mind at the time he committed the harm in issue. It is at this point pertinent to pause to consider why legal systems exist. The universal object of a system of law is obvious—the establishment and maintenance of order.

> The *first* aim of legal rules is to ensure that members of the community are safeguarded in their persons and property so that their energies are not exhausted by the business of self-protection.

The relevant quotations on the purpose of law are endless and they serve to explain (if, indeed, any explanation be necessary) the sense of outrage which would naturally be felt not only by the victims of such

attacks as are alleged against the appellant—and still more against Lipman—were he to go scot free. And a law which permitted this would surely deserve and earn the contempt of most people. But not, it seems, of the joint authors of Smith and Hogan, who in the third edition of their valuable book write:

> While a policy of not allowing a man to escape the consequence of his voluntary drunkenness is understandable, it is submitted that the principle that a man should not be held liable for an act over which he has no control is more important and should prevail.

They add that this is not to say that such a man should in all cases escape criminal liability but that, if he is to be held liable, it should be for the voluntary act of taking the drink or drug. Such a suggestion is far from new. Thus, it appears from Hale's Pleas of the Crown that some lawyers of his day thought that the formal cause of punishment ought to be the drink and not the crime committed under its influence. Edwards expressed concern in 1965 over the possible existence of this gateway to exemption from criminal responsibility and stressed the need for urgent attention to the provision of new statutory powers under which the courts may place such offenders on probation or commit them, as the case may require, to a hospital capable of treating them for the underlying cause of their propensity to automatism. Glanville Williams anticipated in 1961 the Butler Report on Mentally Abnormal Offenders by recommending the creation of an offence of being drunk and dangerous and the committee itself proposed that a new offense of "dangerous intoxication" be punishable on indictment for one year for a first offence or for three years on a second or subsequent offence.

Such recommendations for law reform may receive Parliamentary consideration hereafter but this House is presently concerned with the law as it is. The merciful relaxation of the old rule that drunkenness was no defence appears to have worked reasonably well for 150 years. As to the complaint that it is unethical to punish a man for a crime when his physical behavior was not controlled by a conscious mind, I have long regarded as a convincing theory in support of penal liability for harms committed by voluntary inebriates, the view of Austin, who argued that a person who voluntarily became intoxicated is to be regarded as acting recklessly, for he made himself dangerous in disregard of public safety.

But, to my way of thinking, the nearest approach to a satisfactory refutation of charges of lack of both logic and ethics in punishing the most drunken man for actions which, were he sober, would call for his criminal conviction is that of Stroud, who wrote:

> It has been suggested by various writers, in explanation of the doctrine respecting voluntary drunkenness as an excuse for crime, that the effect is "to make drunkenness itself an offence, which is punishable with a degree of punishment varying as the consequences of the act done." This is not exactly correct, although it is not far from the true explanation of the rule. The true explanation is, that drunkenness is not incompatible with *mens rea*, in the sense of ordinary culpable intentionality, because mere recklessness is sufficient to satisfy the definition of *mens rea*, and drunkenness is itself an act of recklessness. The law therefore establishes a conclusive presumption against the admission of proof of intoxication for the purpose of disproving *mens rea* in ordinary crimes. Where this presumption applies, it does not make "drunkenness itself" a crime, but the drunkenness is itself an integral part of the crime, as forming, together with the other unlawful conduct charged against the defendant, a complex act of criminal recklessness.
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> This explanation affords at once a justification of the rule of law, and a reason for its inapplicability when drunkenness is pleaded by way of showing absence of full intent, or of some exceptional form of *mens rea* essential to a particular crime, according to its definition.

Reverting to the same topic immediately after the decision in *Beard*, Stroud added:

> It would be contrary to all principle and authority to suppose that drunkenness can be a defence for crime in general on the ground that a "person cannot be convicted of a crime unless the *mens* was *rea*." By allowing himself to get drunk, and thereby putting himself in such a condition as to be no longer amenable to the law's commands, a man shows such regardlessness as amounts to *mens rea* for the purpose of all ordinary crimes *(nam crimen ebrietas et incendit et detegit)*. His drunkenness can constitute a defence only in those exceptional cases where some additional mental element, of a more heinous and mischievous description than ordinary *mens rea*, is required by the definition of the crime charged against him, and is shown to have been lacking in consequence of his drunken condition.

Professor Glanville Williams would probably condemn such an approach as savoring of "judge-made fiction." While generally sharing his dislike of such fictions, in my judgment little can properly be made out of the criticisms that a law which demands the conviction of such persons who behave as the appellant did is both illogical and unethical. It may be that Parliament should look at it, and devise a new way of dealing with drunken or drugged offenders. But, until it does, the continued application of the existing law is far better calculated to preserve order than the recommendation that he and all who act similarly should leave the dock as free men. . . .

For these reasons, I concur in holding that Yes is the proper answer

to the certified question and that, there having been no misdirection, the appeal should be dismissed.

P. Robinson, Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine
71 Va. L. Rev. 1, 14-17, 27, 30-31, 35-36, 51 (1985) (edited)

Most jurisdictions allow a defense of voluntary intoxication negating an offense element for offenses requiring purpose or knowledge but deny it for other, lesser-included offenses. Thus, a voluntarily intoxicated killer is not punished as a murderer, but neither is he given a complete defense, even if he has no culpability as to causing death. Recklessness will be imputed to him and will provide the basis for a manslaughter (reckless homicide) conviction. The most common rationale given for this rule is that the actor's culpability in becoming intoxicated is an adequate basis on which to impute recklessness as to committing the offense.

Denying a failure of proof defense for voluntary intoxication that negates the recklessness required for manslaughter is troubling, however, for a number of reasons. . . . First, the imputation of culpability—recklessness under codes following the Model Penal Code, and greater culpability under many other codes—is generally triggered by a definition of "voluntariness" in becoming intoxicated that requires only negligence. Intoxication is "self-induced" under the Model Penal Code, for example, if the actor "knows or *ought to know*" the tendency of the substance to intoxicate. Assume that *X* kills a pedestrian by driving at a speed that he should know risks such a death, but assume that he does not know of the risk because of his voluntary intoxication. The Model Penal Code would convict him of reckless homicide, despite his unawareness of the risk. His conviction would stand even if he had only been negligent in becoming intoxicated. Thus, he could be found guilty of reckless homicide if a neighbor gave him what he honestly but erroneously believed to be a regular cigarette if he should have known (perhaps because it was hand-rolled) that it might contain an intoxicating substance.

Second, the imputation of recklessness is objectionable because even if the actor is reckless, or even purposeful, as to *getting intoxicated*, it does not follow that he is reckless as to *causing the death of the pedestrian*. The notion that a person risks all manner of resulting harm when he voluntarily becomes intoxicated is common, but is obviously incorrect.[50]

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50. Hawaii rejects the Model Penal Code provision for just this reason: "[The Model Penal Code] equates the defendant's becoming drunk with the reckless disregard by

Finally, the imputation of a culpable state of mind when none truly exists seems particularly strange for the Model Penal Code drafters, who opposed placing the burden of persuasion on the defendant for most defenses. Yet as to intoxication, the drafters permit what is in essence an irrebuttable presumption as to the existence of an element of the offense.

Proposal: Maintaining the Defense for the Offense Conduct But Imposing Liability for Conduct in Causing the Defense Conditions

As has been illustrated above, the current treatment of an actor who is culpable in causing the conditions of his defense is problematic in several respects. An alternative approach suggested here would continue to allow the actor a defense for the immediate conduct constituting the offense, but would separately impose liability on the basis of the actor's earlier conduct in culpably causing the conditions of his or her defense.

This alternative "conduct-in-causing" analysis avoids the problems arising from current law treatment and has several advantages. It avoids the improper assumption that an actor who intends to cause (or risks causing) the conditions under which an offense is committed necessarily intends to commit (or risks committing) the offense. It also properly distinguishes among levels of culpability at the time of causing one's defense in determining the level of liability to be imposed.

A General Principle of Liability for an Actor Who Culpably Causes the Conditions of His Defense

Where an actor brings about the conditions of his defense but at the time has no culpability, not even negligence, as to causing or risking the commission of the subsequent offense, it is appropriate to limit his liability to that imposed by existing statutes. If his conduct constitutes being drunk in public, then such an offense is not properly the extent of his liability. If his conduct does not constitute an offense, he faces no liability.

Where the actor is not only culpable as to causing the defense conditions, but also has a culpable state of mind *as to causing himself to engage in the conduct constituting the offense,* the state should punish him for causing the ultimate offense conduct. His punishment, however, is properly based on his initial conduct of causing the defense conditions

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him of risks created by his subsequent conduct and thereby forecloses the issue." Hawaii Rev. Stat. §702-230 commentary (1976).

with his accompanying scheming intention, not on the offense conduct that he subsequently performs.

Under this analysis, one need simply consider whether, at the time the actor engages in his initial conduct in causing the defense conditions. . . , he has a culpable state of mind as to causing the conduct constituting the offense. [Consider an analogy in the context of justification.] If an actor sets a forest fire with the ultimate objective of creating the conditions that will justify him (or anyone else) to burn his enemy's property as a firebreak to the forest fire, he properly is held liable for intentionally causing the burning of his enemy's property. This is so even though the conduct he causes, burning the firebreak, is legally justified. His liability is based on his conduct of setting the forest fire with his accompanying intention to cause the burning of the firebreak, not on his justified burning of the firebreak. He is liable for the result that he has intentionally caused, yet all persons are still justified in burning the firebreak.

[Now consider the same analysis in the context of] a failure of proof defense where an actor's voluntary intoxication negates an offense element. Under the proposed analysis, the actor's liability for the offense may be based on his conduct at the time he becomes voluntarily intoxicated with his accompanying culpable state of mind as to the elements of the subsequent offense. If he intoxicates himself with the intention of committing a robbery while intoxicated, he would be liable for the crime even though at the time of the robbery he might not have had the required state of mind.

This analysis has several advantages. For example, it properly accounts for different levels of culpability as to causing the subsequent offense. Assume an actor knows that he always beats his wife uncontrollably after he returns from drinking with his buddies and that he knows that the severity of the beating is directly proportional to the extent of his drinking. He decides to kill his wife, goes to the bar intending to drink heavily to cause the desired beating, and returns home and uncontrollably beats his wife to death. The evidence suggests that at the time of the beating, because of his gross intoxication, he was unaware of a risk that his conduct would kill his wife. He may not even have been aware of his conduct. The Model Penal Code would permit his intoxication to negate purpose or knowledge as to the death of his wife; it would impute recklessness and thereby convict him of reckless homicide (manslaughter). It seems clear, however, that a conviction for an intentional killing (murder) would be appropriate here. The proposed conduct-in-causing analysis would hold the actor liable for murder, based on his conduct in causing his intoxication and his then-existing intention to kill his wife.

Not only does the proposed analysis avoid treating such a grand schemer too leniently, but it also protects a less-culpable actor from

being treated too harshly. The Model Penal Code would impute recklessness to the drinker who at the time of his imbibing is unaware of any risk that he may kill or even beat his wife, and thus would convict him of reckless homicide. The proposed analysis would avoid such an unwarranted result. The jury would examine his state of mind as to killing his wife at the time he began to drink and would probably conclude that at that time he was at most negligent as to causing his wife's death. He would thus be liable for, at most, negligent homicide. Indeed, a jury might conclude that a *reasonable person* under the same circumstances would have been unaware of a risk of causing his wife's death; thus, the actor might escape liability even for negligent homicide. . . .

The theory developed above suggests reformulation of the doctrine governing "failure of proof" defenses. Intoxication negating an offense element is the most common such defense raising causing-one's-defense issues:

> Intoxication Negating An Offense Element
>
> (1) Evidence of intoxication, voluntary or involuntary, may be admitted into evidence to negate a culpability element of an offense.
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> (2) If an actor's intoxication negates a required culpability element at the time of the offense, such element is nonetheless established if:
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> (a) the actor satisfied such element immediately preceding or during the time that he was becoming intoxicated or at any time thereafter until commission of the offense, and
>
> (b) the harm or evil intended, contemplated, or risked is brought about by the actor's subsequent conduct during intoxication.
>
> (3) An actor may have a justification or excuse defense to liability under subsection (2) for his conduct in becoming intoxicated.

Thus, the translation from theory to doctrine is relatively easy. Difficulties arise, however, in guaranteeing the feasibility or workability of the resulting doctrine. . . .

Questions

1. *Conflicting Views on Voluntary Intoxication Negating an Offense Element.* The "academics," to whom the *Majewski* opinion (by Lord Edmund-Davies) responds, object to imputing to a defendant any culpable state of mind that she does not in fact possess. What are the arguments in support of this position? Some courts have taken the opposite position, holding that voluntary intoxication may not be used to negate

any required culpable state of mind (other than the deliberation and premeditation required for first degree murder). See, e.g., State v. Stasio, 78 N.J. 467, 396 A.2d 1129 (1979). Can you imagine the arguments that might be offered in support of this position? The court in *Majewski* rejects both of these positions and follows the common law compromise, allowing voluntary intoxication to negate specific intent but not a general intent. What arguments support this position? Is Lord Edmund-Davies right to concede to the academics that it is illogical to impute to an actor a culpable state of mind that she does not in fact have? To which of these three positions is the Model Penal Code closest?

2. *Sharon's and Buff's Liability.* Do Sharon and Buff have the culpable state of mind required for murder at the time they are "feeding the pig"? Do they have the culpability required for manslaughter? For negligent homicide? Assume for a moment that both women voluntarily intoxicated themselves. What culpability, if any, will the law impute to them? What will they be held liable for, if anything? Is the answer different under the common law rule, expressed in *Majewski,* than under the Model Penal Code?

3. *Culpability as to Becoming Intoxicated.* Did Sharon voluntarily intoxicate herself? Did Buff voluntarily intoxicate herself? What is the culpability level of each *as to becoming intoxicated*? What level of culpability *as to causing Peter's death* is imputed to each?

4. *The Grand Schemer and the Negligent Drinker.* What is your intuition as to the general degree of blameworthiness that Sharon has as to Peter's death? Is it closer to that of the offender in a typical murder case, a typical manslaughter case, a typical negligent homicide case, or none of the above? What is your intuition as to Buff? Should the law treat the two cases differently?

5. *An Alternative View of Voluntary Intoxication: Liability for Causing the Conditions of One's Defense.* What would be Sharon's liability, if any, under the proposal offered in the "Causing the Conditions . . ." excerpt? What would be Buff's liability? What problems of proof might a prosecutor have under this approach that would not exist under the common law approach (described in *Majewski*) or under the Model Penal Code approach?

SECTION 12.2 CAUSING THE CONDITIONS OF ONE'S OWN DEFENSE

When an actor satisfies the conditions of a general defense, but has brought about the defense conditions (e.g., by "hanging" with a gang knowing that they will coerce the actor to rob a bank or by setting