Notes and Questions

1. As a purely statutory matter, whose reading of the pertinent penal code section seems more plausible? As a matter of wise policy, do you believe duress should be a full defense to murder, reduce the offense to manslaughter, or neither? Why might some critics of the majority opinion say, "Even if duress should not be a defense, the majority's policy arguments are unpersuasive."

2. Under the Model Penal Code, if a jury determines that a person of reasonable firmness would *not* have killed in the actor's situation, of what crime *is* the defendant probably guilty?

3. *Necessity as an excuse.* As we saw earlier, necessitous circumstances can *justify* violation of a criminal law. Is there any reason why "necessity" should not also serve as an *excuse*? For example, assume that the law will excuse a particular crime committed as the result of a coercive human threat (duress). Does it logically follow that the law should also excuse the same offense if it arises from natural conditions of an equally coercive nature ("compulsion of circumstances")?

Look carefully at the Model Penal Code. Section 2.09 is limited to coercion arising from the use or threatened use of "unlawful" force, which means that coercive natural forces are not covered by the defense (since natural forces cannot be unlawful). Is there a principled way to distinguish coercive human threats from coercive natural conditions?

3. INTOXICATION

There are two legally relevant forms of intoxication in the criminal law: voluntary and involuntary. Almost all cases, including the following one, involve the former variety. Involuntary intoxication is considered in Note 7 following *Graves*.

COMMONWEALTH v. GRAVES

Supreme Court of Pennsylvania, 1975.
461 Pa. 118, 334 A.2d 661.

NIX, JUSTICE.

Daniel Lee Graves was convicted by a jury * * * for first degree murder, robbery and burglary. * * *

On September 28, 1971, Daniel Graves, appellant, and his cousins, Thomas and Edward Mathis, pursuant to a prior conceived plan, burglarized the residence of one Sebastiano Patiri, a 75 year old man and robbed him. During the course of the robbery and burglary, Mr. Patiri sustained injuries which resulted in his death.

Appellant Graves testified at trial that on the day of the incident he consumed a quart or more of wine and had taken a pill which was a form of Lysergic Acid Diephylanide (LSD). Appellant testified that he began hallucinating and saw "cars jumping over each other," as well as other strange phenomena. He then became unconscious and suffered limited

amnesia, thus he contended that he had no recollection of the occurrence at the Patiri home.

The defense called a Dr. Sadoff, a professional psychiatrist who testified that * * * [a]s a result of [his] examination and evaluation, which included a polygraph and a sodium amytal test, he determined that Graves was telling the truth when he stated that he was under the influence of the wine and the LSD tablets during the afternoon of September 28, 1971. The doctor testified that in his opinion, appellant was under the influence of the two intoxicants and at the time of the Patiri attack "his mind was such that he wasn't able to form the proper conscious intent to take a life, to assault." Defense counsel then attempted to elicit from the doctor an opinion as to whether or not Graves at the time of the incident "could consciously form the specific intent to take or steal from a person or individual." An objection to this question was sustained and this ruling is assigned as error. Concomitantly, it is argued that the trial court erred in refusing a request to charge the jury that if they found Graves incapable of forming the intent to commit burglary or robbery because of the consumption of wine or the ingestion of the drug, or both, he could not be guilty of these offenses.

Relying on this Court's decision in Commonwealth v. Tarver, 446 Pa. 233, 284 A.2d 759 (1971), the trial court concluded that evidence of intoxication was irrelevant as to the robbery and burglary charges. Regrettably, although the trial court was adhering to a pronouncement of this Court, this ruling was erroneous and the judgments of sentence must now be reversed.

In Commonwealth v. Tarver, *supra*, this Court stated:

> "If the charge is *felonious* homicide, intoxication, which is so great as to render the accused incapable of forming a wilful, deliberate and premeditated design to kill or incapable of judging his acts and their consequences, may properly influence a finding by the trial court that no specific intent to kill existed, and hence to conclude the killing was murder in the second degree. Although it is clear that this Court has employed the aforementioned rule to *lower the degree of guilt* within a crime, the crime still remains at murder. This Court has never extended the rule to lower murder in the second degree to voluntary manslaughter, nor has it applied this principle to any other crime outside of *felonious* homicide. Thus, exemplifying the fact that the rule has never been applied where its effect would change the nature of the crime, we have always limited its application to changing degrees within a crime. Since there are no analogous degrees of robbery, the principle has no application and defendant's acts are a felony, notwithstanding his alleged intoxication."

In reaching its conclusion that evidence of intoxication is limited to reducing the degree within a crime and may not be introduced to change the nature of the crime, the *Tarver* Court clearly misconceived the underlying basis for the relevance of evidence of intoxication in criminal

matters. It is fundamental law in this jurisdiction that voluntary intoxication neither exonerates nor excuses criminal conduct. The only permissible probative value evidence of intoxication may have in criminal proceedings is where it is relevant to the question of the capacity of the actor to have possessed the requisite intent of the crime charged. Where the legislature, in its definition of a crime, has designated a particular state of mind as a material element of the crime, evidence of intoxication becomes relevant if the degree of inebriation has reached that point where the mind was incapable of attaining the state of mind required. It must be emphasized that although evidence of intoxication never provides a basis for exoneration or excuse, it may in some instances be relevant to establish that the crime charged in fact did not occur.[3]

Rejecting the view that an evidentiary rule relating to the introduction of evidence of intoxication must be strictly construed to avoid condoning voluntarily induced intoxication, most text writers have recognized the issue as being whether the crime in fact has been committed and considered the question accordingly:

> "Where a particular purpose, motive, or intent is a necessary element to constitute the particular kind or degree of crime, it is proper to consider the mental condition of accused, although produced by voluntary intoxication, and, where he lacked the mental capacity to entertain the requisite purpose, motive, or intent, such incapacity may constitute a valid defense to the particular crime charged, and the same rule applies to voluntary intoxication resulting in mental incapacity to indulge premeditation or deliberation, which precludes conviction of an offense wherein premeditation is essential. * * *
>
> The majority rule, holding intoxication to an extent precluding capacity to entertain a specific intent or to premeditate to be a defense, does so not because drunkenness excuses crime, but because, if the mental status required by law to constitute crime be *one of specific intent or of* deliberation and premeditation, and drunkenness excludes the existence of such mental state, then the particular crime charged has not in fact been committed. * * * " 22 C.J.S. Criminal Law § 68, pp. 217–219.[4]

3. "Suppose on the other hand *D* has been arrested for larceny, having been found walking off with *X*'s glass which he had no privilege or authority to carry away. Suppose again the only explanation he has to offer is that he was voluntarily drunk at the time and did not know what he was doing, the evidence indicating that he staggered away from the bar where he had been over-indulging and walked out into the street still clutching the glass from which he had been drinking, but too befuddled by liquor to know he was holding anything in his hand,—and when the glass was taken from him by the apprehending officer *D* stared at it blankly with no idea where it came from. The *actus reus* of larceny is the trespassory taking and carrying away of the personal property of another. *D* has done this and his voluntary intoxication is no excuse, but the facts stated fail to establish larceny." Perkins, Criminal Law, ch. 8, § 3 at 788 (1957).

4. Some text writers have even gone further and suggested that we should not limit the rule to those crimes which we have traditionally accepted as requiring a specific intent. * * *

Relying on a number of decisions that were *only concerned* with the application of intoxication evidence in felonious homicide cases, the *Tarver* Court concluded without precedent that intoxication evidence was only to be received to negate the specific intent to kill required by the crime of murder in the first degree. * * *

It has been argued that an extension in the allowance of the use of intoxication evidence would "only open wide the door to defenses built on frauds and perjuries, but would build a broad, easy turnpike for escape." The obvious fallacy of this argument is that we are not creating a new defense. Under our system of jurisprudence the legislature is charged with the responsibility of defining the elements of crimes. In discharging this responsibility they have required that the crimes of robbery and burglary must be accompanied by a specific intent. It is axiomatic that the presumption of innocence requires the Commonwealth to prove each element of the crime charged beyond a reasonable doubt. * * *

It would clearly be an anomaly to suggest that although the Commonwealth must establish the existence of a mental state beyond a reasonable doubt, and that failure to sustain that burden requires an acquittal; yet preclude the defendant from producing relevant evidence to contest the issue.

There are instances in the law of evidence where testimony which may be relevant to a material fact in issue is nevertheless excluded. However, these instances are limited to that type of evidence that we have deemed to be inherently unreliable, e.g., results of polygraph tests. This admittedly is not the case with reference to evidence of intoxication and its effect on the mental capacity of the accused. For many years we have admitted this testimony in the most serious crime in this Commonwealth, i.e., murder in the first degree. To now contend that it would be less reliable in lesser offenses would be the height of absurdity.

We therefore conclude the *Tarver* decision, insofar as it suggested the evidence of intoxication offered for the purpose of negating the presence of specific intent may not be used in cases other than felonious homicide, is rejected. We also are constrained to find that the trial court committed reversible error in refusing to permit evidence and to charge the jury as to the possible effect of appellant's consumption of alcohol and ingestion of drugs upon his capacity to form the requisite intent required in the charges of robbery and burglary. Further, in view of the fact that the jury was given the option to consider the case under a theory of felony-murder, the finding of murder in the first degree must also be overturned.

Accordingly, the judgments of sentence are reversed and a new trial awarded.

EAGEN, JUSTICE (dissenting).

In the past, this Court has never deviated from the position that voluntary intoxication, no matter how gross or long continued, neither

exonerates nor excuses a person from his criminal acts. "If it were [so], all crimes would, in a great measure, depend for their criminality on the pleasure of their perpetrators, since they may pass into that state when they will." Keenan v. Commonwealth, 44 Pa. 55, 58 (1862). Today, however, the majority has adopted a new position which, in effect, will allow voluntary intoxication to serve as an excuse for criminal responsibility.

The rationale behind our long-standing rule as to voluntary ingestion of intoxicants and drugs is apparent. An individual who places himself in a position to have no control over his actions must be held to intend the consequences. Such a principle is absolutely essential to the protection of life and property. There is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which everyone owes to his fellowmen and to society, to preserve, so far as it lies in his own power, the inestimable gift of reason. If such reason is perverted or destroyed by fixed disease, though brought on by his own vices, the law holds him not accountable. But if by a voluntary act he temporarily casts off the restraints of reason and conscience, no wrong is done him if he is considered answerable for any injury which he, in that state, may do to others or to society.

While adhering to the above-mentioned rule, this Court has recognized there may be instances where an individual has voluntarily placed himself in a state of intoxication so as to be incapable of conceiving any intent. In those instances, we have permitted evidence of such intoxication to lower the *degree of guilt* within a crime, but only where the Legislature has specifically provided for varying degrees of guilt within a crime. Thus "[i]f the charge is *felonious* homicide, intoxication, which is so great as to render the accused incapable of forming a wilful, deliberate and premeditated design to kill or incapable of judging his acts and their consequences, may properly influence a finding by the trial court that no specific intent to kill existed, and hence to conclude the killing was murder in the second degree." As the *Tarver* Court recognized, this exception to the general rule does not change the nature of the crime. Murder still remains murder. Only the degree of the crime has been affected. Because there exist no analogous degrees of robbery (and instantly burglary), the *Tarver* Court refused to extend this exception beyond the homicide area. To hold otherwise, and allow evidence of voluntary intoxication to negate the necessary specific intent required of both robbery and burglary, would permit an individual's voluntary intoxication to serve as a complete exoneration for all criminal acts committed while in that state. This cannot be tolerated.

The majority, while paying lip-service to the fundamental rule that voluntary intoxication is no defense to an individual's criminal acts, nevertheless sanctions such a defense. In ruling that evidence of voluntary intoxication can be offered for the purpose of negating the presence of the required specific intent in both robbery and burglary, the majority has, without good reason, discarded the traditional rule. It matters little that the majority regards such evidence as only bearing upon an element

of the crime, the specific intent of the perpetrator, rather than serving as a defense to such crime. The end result is the same and no amount of legal jargon will make it otherwise. * * * Only a person blind to reality could fail to perceive that there is no practical difference between the admission of evidence to negate an element of the crime and the admission of evidence to constitute a defense. The end result is that human life and property would hardly be considered any longer as being under legal protection. An individual will, henceforth, be permitted to avail himself of his voluntary intoxication to exempt him from any legal responsibility which would attach to him, if sober. As one noted annotator said in speaking of voluntary intoxication as a defense to criminal responsibility, "* * * all that the crafty criminal would require for a well-planned * * * [robbery or burglary] would be a revolver in one hand to commit the deed, and a quart of intoxicating liquor in the other * * *."

Today, all too many murderers, robbers, burglars, rapists and other felons escape the imposition of justice for unsound and unrealistic reasons. The present ruling of this Court widens that avenue of escape.

Notes and Questions

1. *Putting the "voluntary intoxication" issue in historical context.* In Montana v. Egelhoff, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996) (plurality opinion), Justice Scalia described the historical foundation of "voluntary intoxication" law this way:

> By the [early] laws of England, * * * the intoxicated defendant "shall have no privilege by this voluntarily contracted madness, but shall have the same judgment as if he were in his right senses." 1 M. Hale, Pleas of the Crown *32–33. * * * Blackstone, citing Coke, explained that the law viewed intoxication "as an aggravation of the offence, rather than an excuse for any criminal misbehaviour." 4 W. Blackstone, Commentaries *25–26. This stern rejection of inebriation as a defense became a fixture of early American law as well. * * *
>
> The historical record does not leave room for the view that the common law's rejection of intoxication as an "excuse" or "justification" for crime would nonetheless permit the defendant to show that intoxication prevented the requisite *mens rea*. Hale, Coke and Blackstone were familiar, to say the least, with the concept of *mens rea*, and acknowledged that drunkenness "deprive[s] men of the use of reason." It is inconceivable that they did not realize that an offender's drunkenness might impair his ability to form the requisite intent; and inconceivable that their failure to note this massive exception from the general rule of disregard of intoxication was an oversight. * * *
>
> * * * Over the course of the 19th century, courts carved out an exception to the common law's traditional across-the-board condemnation of the drunken offender, allowing a jury to consider a defendant's intoxication when assessing whether he possessed the mental state needed to commit the crime charged, where the crime was one requiring

a "specific intent." The emergence of this new rule is often traced to an 1819 English case * * *. This exception was "slow to take root," however, even in England. * * * Eventually, however, the new view won out, and by the end of the 19th century, in most American jurisdictions, intoxication could be considered in determining whether a defendant was capable of forming the specific intent necessary to commit the crime charged.

A counter-trend is underway. Whereas the public once treated alcoholism as a disease and many intoxicated actors as persons deserving of some compassion, the public's current perception is that intoxication is a free choice of the actor for which he should be held fully responsible. According to one commentator, "the culture has come to recognize the catastrophic consequences of unrestricted drug and alcohol consumption.[j] * * * [As a consequence,] [i]ntoxication has lost much of its exculpatory effect as society has come to recognize it as both voluntary and dangerous." Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. Crim. L. & Criminology 482, 491 (1997).

Although many states retain the "specific intent"/"general intent" dichotomy described by Justice Scalia, the scope of the intoxication "defense" has been narrowed in some states and abolished in others. For example, the legislative response to *Graves* was quick and negative. The Pennsylvania legislature effectively overruled *Graves*, and returned the law to the narrower position set out in *Tarver*:

> "Neither voluntary intoxication nor voluntary drugged condition is a defense to a criminal charge, *nor may evidence of such conditions be introduced to negative the element of intent of the offense,* except that evidence of such intoxication or drugged condition of the defendant may be offered by the defendant whenever it is relevant to reduce murder from higher degree to a lower degree of murder." 18 Pa. Cons. Stat. § 308 (1976) (emphasis added).

Was the legislature right to abandon *Graves*? Why would a legislature permit evidence of voluntary intoxication to reduce the degree of murder, and yet not permit the evidence to reduce the offense? Is there a principled justification for this distinction?

2. *Thinking about the controversy.* Consider the line drawn in *Graves* and by many other courts between specific intent and general intent. Suppose that Tom is charged with assault with intent to commit rape. According to *Graves*, if Tom lacked the capacity, due to intoxication, to form the specific intent to rape, he could only be convicted of the lesser offense of simple assault. But, if Tom lacked the specific intent to rape, how can he have the general intent to assault? If intoxication is relevant to negate a *specific* intent, is it not also relevant to negate the *general* intent required for a crime?

j. About 3 million violent crimes are committed each year in which victims perceive that the offender was drinking at the time of the crime. The problem of intoxication is especially great in residences (about 70% of the alcohol-involved acts of violence occur in homes, usually late at night), and particularly among intimates (about two-thirds of all victims of violence at the hands of an intimate reported that alcohol was a factor). U.S. Dept. of Justice. Bureau of Justice Statistics, Alcohol and Crime (April 1998, NCJ 168632).—Ed.

If you believe that "the same logic and reasoning which impels exculpation due to the failure of specific intent to commit an offense would equally compel the same result when a general intent is an element of the offense," State v. Stasio, 78 N.J. 467, 396 A.2d 1129 (1979), does this mean that a defendant should be permitted to use his self-induced intoxication as a defense to *all* crimes? Or does this suggest that intoxication should have *no* exculpatory force of *any* kind?

If you believe that voluntary intoxication should *not* exculpate, how far would you take this position? Suppose that a defendant wants to prove that, due to voluntary intoxication, he was unconscious at the time of the crime; therefore, he could not have voluntarily committed the offense. Would you bar him from using intoxication in *this* manner? If you would permit such evidence, how do you distinguish this from a *mens rea* claim? See id.

3. Christopher consumes twelve bottles of beer and a half bottle of vodka in a short period of time at a bar, after which he gets into his car, drives in an exceedingly dangerous manner, and unintentionally kills Lori, a pedestrian in the crosswalk. He wants to introduce evidence that, due to his extreme intoxication, he did not realize he was driving fast and dangerously. Assume that his factual assertion is correct. Applying *Graves*, of what homicide offense is Christopher guilty? Of what is he guilty according to Pa. Cons. Stat. § 308 (set out in Note 1)? Use the Pennsylvania homicide code, p. 237 supra, to help answer these questions.

4. *Model Penal Code.* Model Penal Code § 2.08(1) provides that intoxication is a defense if it "negatives an element of the offense." Look with care, however, at § 2.08, subsection (2). Consider again the facts in the last Note. If Christopher were prosecuted in a Model Penal Code jurisdiction, of what form of criminal homicide would he be guilty under the Code?

Why does the Code apply a special definition of recklessness in the case of self-induced intoxication? Isn't the effect of subsection (2) to treat a negligently intoxicated harmdoer as if she were reckless? If so, isn't it the case, as the Commentary to the Model Penal Code concedes, that "the result of [the] special rule is bound to be a liability disproportionate to culpability"? The Commentary defends this outcome as follows:

> The [argument against the MPC rule] * * * is worthy of respect, but there are strong considerations on the other side. There is first the weight of the antecedent law which here, more clearly than in England, has tended toward a special rule for drunkenness in this context. Beyond this, there is the fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that it is not unfair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor's powers of perception and judgment is conduct that plainly has no affirmative social value to counterbalance the potential danger. The actor's moral culpability lies in engaging in such conduct. Added to this are the impressive difficulties posed in litigating the foresight of any particular actor at the time when he imbibes and the relative rarity of cases where intoxication really does

> engender unawareness as distinguished from imprudence. These considerations led to the conclusion, on balance, that the Model Code should declare that unawareness of risks, of which the actor would have been aware had he been sober, is immaterial. Most states with revised codes have taken a similar position.

American Law Institute, Model Penal Code and Commentaries, Comment to § 2.08 at 358–59 (1985).

It isn't always the case that, as the Commentary claims, there is a "general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk"? Read People v. Whitfield, 7 Cal.4th 437, 27 Cal.Rptr.2d 858, 868 P.2d 272 (1994):

> Consider, for example, a hypothetical situation in which a defendant, with no prior history of driving under the influence, consumes alcohol at a social gathering after having arranged to be driven home by his or her spouse. The defendant's spouse unexpectedly becomes ill and the defendant, who is intoxicated, decides to drive, and causes a fatal accident. Under such circumstances, it is would not be anomalous to permit the defendant to defend against a charge of murder on the ground that, due to voluntary intoxication, he or she did not appreciate the dangerousness of his or her conduct, hence did not harbor malice, and should be convicted of the lesser offense of manslaughter.

5. The *Graves* court characterized as anomalous the suggestion that "although the Commonwealth must establish the existence of a mental state beyond a reasonable doubt, and that failure to sustain that burden requires an acquittal; yet preclude the defendant from producing relevant evidence to contest the issue." *Is* it anomalous? Perhaps more importantly, is it constitutional to bar evidence of voluntary intoxication? For example, the State of Montana defines the offense "Deliberate Homicide" as "purposely" or "knowingly" causing the death of another human being. Mont.Code Ann. § 45–5–102 (1995). But another Montana penal code provision, § 45–2–203 (1995), provides:

> A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves [that the intoxication was involuntary].

Is this penal provision constitutional? Can you see what constitutional argument a defendant might make? Does the latter statute mean that an intoxicated person may be convicted of deliberate homicide even if, in fact, he did *not* kill purposely or knowingly? Or, does § 45–2–203 mean that the defendant cannot be convicted unless the prosecutor proves beyond a reasonable doubt that he killed the victim purposely or knowingly, but that one type of evidence, namely voluntary intoxication, cannot be used to disprove *mens rea*?

In Montana v. Egelhoff, 518 U.S. 37, 116 S.Ct. 2013, 135 L.Ed.2d 361 (1996), the Supreme Court, 5–4, upheld the Montana law against constitutional attack, although the majority was divided in its reasoning. Justice

Scalia, for a four-justice plurality, ruled that the statute was constitutional. He rejected the defendant's argument that the statutory scheme violated the Due Process Clause:

> *In re Winship* [p. 10 supra] announced the proposition that the Due Process Clause requires proof beyond a reasonable doubt of every fact necessary to constitute the charged crime, and *Sandstrom v. Montana*, 442 U.S. 510, 524, 99 S.Ct. 2450, 2459, 61 L.Ed.2d 39 (1979), established a corollary, that a jury instruction which shifts to the defendant the burden of proof on a requisite element of mental state violates due process. These decisions simply are not implicated here because, as the Montana court itself recognized, "[t]he burden is not shifted" under § 45–2–203. The trial judge instructed the jury that "[t]he State of Montana has the burden of proving the guilt of the Defendant beyond a reasonable doubt," and that "[a] person commits the offense of deliberate homicide if he purposely or knowingly causes the death of another human being." Thus, failure by the State to produce evidence of respondent's mental state would have resulted in an acquittal. That acquittal did not occur was presumably attributable to the fact * * * that the State introduced considerable evidence from which the jury might have concluded that respondent acted "purposely" or "knowingly." * * *
>
> Recognizing that *Sandstrom* is not directly on point, the Supreme Court of Montana [which declared the statute unconstitutional] described § 45–2–203 as a burden-*reducing*, rather than burden-shifting, statute. * * * What the court evidently meant is that, by excluding a significant line of evidence that might refute *mens rea*, the statute made it easier for the State to meet the requirement of proving *mens rea* beyond a reasonable doubt—reduced the burden in the sense of making the burden easier to bear. But *any* evidentiary rule can have that effect. "Reducing" the State's burden in this manner is not unconstitutional, unless the rule of evidence itself violates a fundamental principle of fairness (which * * * this one does not). We have "reject[ed] the view that anything in the Due Process Clause bars States from making changes in their criminal law that have the effect of making it easier for the prosecution to obtain convictions." * * *
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> * * * The people of Montana have decided to resurrect the rule of an earlier era, disallowing consideration of voluntary intoxication when a defendant's state of mind is at issue. Nothing in the Due Process Clause prevents them from doing so * * *.

Justice Ginsburg provided the fifth vote upholding the Montana statute, but she reached the result differently. She disagreed with the plurality's characterization of § 45–2–203 as a rule intended to keep out relevant exculpatory evidence (in this case, evidence of intoxication). Instead, she interpreted the provision as redefining "deliberate homicide" as follows:

> To obtain a conviction, the prosecution must prove only that (1) the defendant caused the death of another with actual knowledge or purpose, *or* (2) that the defendant killed "under circumstances that would otherwise establish knowledge or purpose 'but for' [the defendant's] voluntary intoxication." Accordingly, § 45–2–203 does not "lighte[n] the

prosecution's burden to prove [the] mental-state element beyond a reasonable doubt," * * * for "[t]he applicability of the reasonable-doubt standard * * * has always been dependent on how a State defined the offense that is charged."

What does Justice Ginsburg mean by (2) above? Does she mean that a jury must assume a fact exists (that the actor was sober) that does not? How does the factfinder conduct the counter-factual exercise of determining what the drunk defendant's state of mind would have been if he had been sober?

6. *Intoxication and insanity.* The defense of insanity is considered in detail in the next section of the chapter. One essential condition for pleading insanity is that the defendant must suffer from a mental disease or defect. As currently understood, neither alcoholism nor drug addiction constitutes a mental disorder, so the insanity defense is not automatically available to persons suffering from either of these conditions.

Long-term and excessive use of alcohol or drugs, however, sometimes brings on an independent mental infirmity that persists even after the short-term effects of the intoxicating substance have worn off. Almost all jurisdictions recognize a defense in such circumstances, even if the defendant possesses the requisite *mens rea* for the offense, but the defense is that of insanity—often termed "settled insanity" in this context—and not intoxication. E.g., People v. Chapman, 165 Mich.App. 215, 418 N.W.2d 658 (1987); Jones v. State, 648 P.2d 1251 (Okla.Crim.App.1982).

Should a person be excused if her "settled insanity" was induced by regular, voluntary ingestion of alcohol or narcotics? At least one court, Bieber v. People, 856 P.2d 811 (Colo.1993), has rejected the principle:

> As a matter of public policy * * * we cannot excuse a defendant's actions which endanger others in his or her community, based upon a mental disturbance or illness that he or she actively and voluntarily contracted. There is no principled basis to distinguish between the short-term and long-term effects of voluntary intoxication by punishing the first and excusing the second. If anything, the moral blameworthiness would seem to be even greater with respect to the long-term effects of many, repeated instances of voluntary intoxication occurring over an extended period of time.

Do you agree? See generally Lawrence P. Tiffany, *The Drunk, The Insane, and the Criminal Courts: Deciding What to Make of Self-Induced Insanity,* 69 Wash.U.L.Q. 221 (1991).

7. *Involuntary intoxication.* On occasion a defendant will assert that she should be exculpated because of *involuntary* intoxication. Successful claims of this sort are rare. City of Minneapolis v. Altimus, 306 Minn. 462, 238 N.W.2d 851 (Minn. 1976) summarizes the categories of involuntary intoxication:

> Four different kinds of involuntary intoxication have been recognized: Coerced intoxication, pathological intoxication, intoxication by innocent mistake, and unexpected intoxication resulting from the ingestion of a medically prescribed drug. Coerced intoxication is intoxication involuntarily induced by reason of duress or coercion. * * * Courts have strictly construed the requirement of coercion, however, so

that acquittal by reason of coerced intoxication is an exceedingly rare result.

Pathological intoxication has been defined as "intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." Model Penal Code, § 2.08(5)(c). Pathologically intoxicated offenders have been held not criminally responsible for their acts when they ingested the intoxicant not knowing of their special susceptibility to its effects. * * *

Involuntary intoxication may also occur when intoxication results from an innocent mistake by the defendant about the character of the substance taken, as when another person has tricked him into taking the liquor or drugs. See, *People v. Penman,* 271 Ill. 82, 110 N.E. 894 (1915). In *Penman,* the defendant killed his victim after apparently taking cocaine tablets which, due to the deception of another, he believed to be breath purifiers. * * *

The last kind of involuntary intoxication recognized in the case law arises when the defendant is unexpectedly intoxicated due to the ingestion of a medically prescribed drug

How does involuntary intoxication exculpate? First, an involuntarily intoxicated individual is entitled to acquittal if, as a result of the condition, he does not form the *mens rea* for the offense. That is, he will be exculpated if, as a result of involuntary intoxication, he lacks the specific intent, if any, of the offense. Also, "[a]lthough there is exceedingly little case law on the matter, it would seem that because the actor's intoxication was contracted in a nonculpable manner, he should also be acquitted of any general-intent offense." Joshua Dressler, Understanding Criminal Law 331 (3rd ed. 2001).

Second, a person whose involuntary intoxication renders the individual "temporarily insane" is entitled to acquittal of any offense. She is entitled to exculpation if, as a result of the intoxication (rather than a mental disease), the actor's condition satisfies that jurisdiction's definition of insanity. The defense, however, is involuntary intoxication, and not insanity. (Thus, the civil commitment procedures that often attach to an insanity acquittal do not apply here.)

4. INSANITY

a. Procedural Context

i. Competency to Stand Trial

A criminal trial may not proceed if the defendant is incompetent to stand trial. An individual can be incompetent for a variety of reasons, including that she is severely mentally ill or disabled, suffers from amnesia, or is unable to communicate with her attorney due to a physical handicap, such as the inability to speak. Generally speaking, a defendant is incompetent to stand trial unless she has sufficient present ability to consult with her lawyer "with a reasonable degree of rational understanding" and has "a rational as well as factual understanding of