

# **DRUGS, ALCOHOL AND THE INSANITY DEFENSE: THE DEBATE OVER “SETTLED” INSANITY**

**CHARLOTTE CARTER-YAMAUCHI**

Research Attorney

e-mail: [yamauchi@capitol.hawaii.gov](mailto:yamauchi@capitol.hawaii.gov)

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## FOREWORD

This study was prepared in response to Senate Concurrent Resolution No. 132, S.D. 1 (1998). The Resolution directs the Legislative Reference Bureau to study the issue of penal responsibility as it relates to whether a person who voluntarily ingests drugs or alcohol and, as a result, suffers from a physical or mental disease, disorder or defect may rely upon the insanity defense to escape responsibility for criminal acts committed by that person. The Resolution further requests the Bureau to identify relevant Hawaii statutory and case law; examine how selected states may have addressed this issue; and review relevant literature and research on the subject. Finally, the Resolution requests the several county prosecutors, the Attorney General, the state Public Defender, and the William S. Richardson School of Law, University of Hawaii to provide assistance to the Bureau.

The Bureau wishes to extend its sincere appreciation to all who provided assistance and cooperation for this study. In particular, the Bureau wishes to acknowledge and thank Ms. Virginia E. Hench, Assistant Professor, William S. Richardson School of Law, University of Hawaii, for her time in providing valuable input.

Wendell K. Kimura  
Acting Director

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# TABLE OF CONTENTS

|  | <b>Page</b> |
|--|-------------|
| <b>FOREWORD</b> .....  | <i>iii</i>  |
| <b>1. INTRODUCTION</b> .....                                       | <b>1</b>    |
| Objective of the Study .....                                       | 1           |
| Methodology of the Study.....                                      | 2           |
| Organization of the Report.....                                    | 2           |
| <b>2. BACKGROUND OF THE INSANITY DEFENSE</b> .....                 | <b>3</b>    |
| Rationale for the Insanity Defense .....                           | 3           |
| What Constitutes Insanity? .....                                   | 4           |
| Insanity Tests .....   | 5           |
| The M’Naghten Rule .....   | 5           |
| Irresistible Impulse Test.....                                     | 6           |
| The Durham or “Product” Test .....                                 | 7           |
| Model Penal Code Test.....   | 8           |
| The Federal Insanity Defense Reform Act.....                       | 9           |
| Frequency of the Insanity Defense .....                            | 11          |
| <b>3. INTOXICATION AND INSANITY</b> .....                          | <b>12</b>   |
| Intoxication .....   | 12          |
| Voluntary Intoxication.....  | 13          |
| General versus Specific Intent Crimes.....                         | 16          |
| Application of Specific Intent Exception.....                      | 17          |
| Involuntary Intoxication.....                                      | 19          |
| The Doctrine of Settled Insanity.....                              | 22          |
| Insanity is Insanity .....   | 22          |
| Settled Insanity Brought on by Long-term Drug or Alcohol Use ..... | 23          |
| Bieber v. People: Rejection of Settled Insanity .....              | 27          |
| Is There Justification for Bieber? .....                           | 28          |
| Conclusion .....   | 30          |

|   | <b>Page</b> |
|---|-------------|
| <b>4. RELEVANT HAWAII LAW ON PENAL RESPONSIBILITY.....</b>  | <b>32</b>   |
| Voluntary Acts and Intoxication .....                       | 32          |
| Voluntary Acts.....   | 32          |
| Intoxication.....   | 33          |
| Case Law Relating to Intoxication Issues .....              | 34          |
| Insanity Law.....   | 36          |
| Case Law Relating to Insanity and Intoxication Issues ..... | 37          |
| Trial Court Cases Relating to “Settled Insanity” .....      | 41          |
| Conclusion .....  | 45          |
| <b>5. FINDINGS AND CONCLUSIONS .....</b>                    | <b>46</b>   |
| Findings.....   | 46          |
| Available Options .....                                     | 49          |
| Recommendations .....                                       | 55          |

### **Appendices**

|   |    |
|---|----|
| A. S.C.R. No. 132, S.D. 1, Nineteenth Legislature, 1998 Regular Session, State of Hawaii..... | 57 |
| B. “Connecticut General Statutes”, §53(a)-13 (1997).....                                      | 59 |
| C. “Delaware Code Annotated” Crimes and Criminal Procedure, §401 (1997).....                  | 60 |
| D. “Colorado Revised Statutes”, §16-8-101.5 (1997) .....                                      | 61 |
| E. S.B. No. 2701, Nineteenth Legislature, 1998 Regular Session, State of Hawaii.....          | 62 |

# Chapter 1

## INTRODUCTION

### Objective of the Study

Substance abuse continues to rise and is responsible for, or associated with, a number of ills that plague our society, including crime, child and spouse abuse, prostitution, driving under the influence offenses, unemployment, gang activities and truancy. Many in the law enforcement community, as well as others, believe that this increasing substance abuse is reflected in rising crime rates. Indeed, studies show a significant correlation between crime and substance abuse, revealing that a substantial percentage of persons arrested for serious nondrug crimes test positive for drug use or alcohol at the time of the offense. It is recognized that, in some instances, the habitual long-term use of intoxicants can result in permanent mental disorders that are symptomatically and organically similar to mental disorders caused by brain disease. There is concern that, as an increasing number of individuals under the influence of alcohol or drugs commit an increasing number of crimes, especially violent crimes, these individuals may be able to escape criminal responsibility for their actions by claiming the insanity defense.

Based upon these concerns, the Legislature, during the Regular Session of 1998, adopted Senate Concurrent Resolution No. 132, S.D. 1 (hereafter Resolution), entitled: "Requesting a Study Relating to Penal Responsibility." The text of the Resolution appears as Appendix A.

The Resolution raises the issue whether the insanity defense should be available to excuse criminal behavior that is the result of the *voluntary* ingestion of intoxicants. More specifically, the Resolution directs the Legislative Reference Bureau (hereafter the Bureau) to study the issue of penal responsibility as it relates to whether a person, who voluntarily ingests drugs or alcohol and, as a result, suffers from a physical or mental disease, disorder or defect, may rely upon the insanity defense to escape responsibility for criminal acts committed by that person. The Resolution further requests the Bureau to:

1. Identify relevant Hawaii statutory and case law;
2. Examine how selected states may have addressed this issue;
3. Review relevant literature and research on the subject; and
4. Submit findings and conclusions.

The Resolution also requests the several county prosecutors, the Attorney General, the state Public Defender, and the William S. Richardson School of Law, University of Hawaii to provide assistance to the Bureau.

## **Methodology of the Study**

In responding to the Resolution, Bureau staff reviewed relevant literature concerning the insanity defense as it relates to intoxication issues and the doctrine of settled insanity. Bureau staff also examined statutory and case law relevant to these issues. Finally, Bureau staff solicited input from the entities previously mentioned.

## **Organization of the Report**

This Chapter presents an introduction to the report.

Chapter 2 provides background on the insanity defense to establish a frame of reference for the reader. It explains the rationale behind the insanity defense and what constitutes insanity, reviews the various tests jurisdictions use to determine insanity, and discusses the frequency with which the insanity defense is invoked.

Chapter 3 provides an overview of the law generally with respect to voluntary intoxication and involuntary intoxication, including pathological intoxication, and discusses the doctrine of settled insanity brought about by long-term drug or alcohol use and how states have responded to this doctrine.

Chapter 4 focuses on Hawaii statutory and case law relevant to these issues and reviews the outcome in each of three relatively recent trials involving the issue of settled insanity.

Chapter 5 presents the Bureau's findings and conclusions.

## Chapter 2

### BACKGROUND OF THE INSANITY DEFENSE

#### Rationale for the Insanity Defense

The insanity defense has been around for centuries. For example, as far back as in ancient Rome, legal codes distinguished between those who were insane, and thus not accountable for their wrongful conduct, and those who were sane, and thus held responsible for their actions.<sup>1</sup> The concept was introduced to English jurisprudence during the fourteenth century, when England's King Edward recognized insanity as a complete defense to criminal charges. The English courts embraced the insanity defense, and it was well established by 1581.<sup>2</sup>

The insanity defense is rooted in the fundamental idea that criminal behavior is punishable only when the actor is morally culpable or blameworthy.<sup>3</sup> It has been said that, under our system of jurisprudence, "a guilty mind must exist for a criminal act to occur."<sup>4</sup> As one commentator has explained:

The idea that responsibility in the criminal law depends upon the presence of a guilty or "blameworthy" mind has ancient roots. All true crimes consist of two parts: the physical act, or *actus reus*, and the mental element of wishing, intending, or risking the harmful consequence of the act, called the *mens rea*. An act alone is neutral; it is by the state of mind moving the actor that we judge the conduct, for it is that wish, intent, or willingness to risk harm that attracts blame, and thus guilt.<sup>5</sup>

A basic assumption of Anglo-American criminal law is that each person has the ability to distinguish and freedom to choose between lawful and unlawful conduct. It is this very capacity to distinguish and choose that provides the moral basis for holding a person criminally responsible for the person's actions.<sup>6</sup> However, as a result of a mental disease, defect or disorder, some individuals may lack even a minimal capacity to make rational and voluntary choices. This absence of the ability to distinguish rationally between lawful and unlawful conduct and make voluntary choices is considered to eliminate the moral authority for imposing criminal sanctions. As the court in *Holloway v. United States* succinctly stated: "Our collective conscience does not allow punishment where it cannot impose blame."<sup>7</sup>

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<sup>1</sup>L. Johnson, "Settled Insanity is Not a Defense: Has the Colorado Supreme Court Gone Crazy? *Bieber v. People*," 43 Kan. L. Rev. 259, 261 (1994) [hereinafter cited as Johnson].

<sup>2</sup>*Id.*

<sup>3</sup>*Id.* at 259; *accord*, Case comment, 60 Notre Dame L. Rev. 177 [hereinafter cited as 60 Notre Dame L. Rev.] ("The rationale is that the blameworthy should be punished and the legally insane are not blameworthy.") (citation omitted). See R. Spring, "The Return to *Mens Rea*," 21 Int'l. J.L. Psych. 187 [hereinafter cited as Spring] (*mens rea*, or the principle of blameworthiness, is the foundation of all advanced systems of criminal law).

<sup>4</sup>J. Meloy, "Voluntary intoxication and the insanity defense," J. Psych. L. 439, 440 (Winter 1992) [hereinafter cited as Meloy].

<sup>5</sup>R. Spring, *supra* note 3, at 188.

<sup>6</sup>Johnson, *supra* note 1, at 259.

<sup>7</sup>148 F.2d 665, 666-67 (D.C. Cir. 1945).

Therefore, when a person acts without either criminal intent or free will, the criminal law will recognize certain defenses that either excuse completely or reduce the person's responsibility or moral blameworthiness.<sup>8</sup> In the case of a person who is deemed legally insane, the person will be completely excused from responsibility for the person's criminal actions and thus spared punishment under the criminal law.<sup>9</sup> It is very important, therefore, to determine what constitutes legal insanity.

## What Constitutes Insanity?

A disease of the mind is the first factor that must be met in successfully establishing an insanity defense. To the layperson, the word "insanity" often connotes mental illness or some type of mental disease. Mental health practitioners often refer to a patient's mental illness, mental disorder or mental disease. However, the terms mental illness, mental disorder or mental disease as used by laypersons and practitioners are not synonymous with insanity. The word "insanity" is a legal term, whereas the terms "mental illness," "mental disorder" and "mental disorder or defect" indicate a condition requiring psychiatric or psychological treatment.<sup>10</sup> For example, for purposes of the insanity defense, the term "mental disorder or defect" generally does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct, mere recidivism, behavioral problems, or emotional stress.<sup>11</sup> Furthermore, in many jurisdictions, a person who is a schizophrenic or who suffers from a psychosis is not necessarily entitled to an acquittal under the insanity defense.<sup>12</sup> Even a state of mental retardation or subnormal intelligence, by itself, is not determinative of whether an accused possesses a sufficiently severe mental disease or defect. Instead, the issue is whether the degree of retardation is such that the accused person is not aware of the wrongfulness of the act.<sup>13</sup> Accordingly, one may suffer from a mental disorder or disease but not be legally insane; however, one cannot be insane without suffering from a mental illness, disease or disorder.

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<sup>8</sup> M. Bidwill & D. Katz, "Injecting New Life Into An Old Defense," 7 U. Miami Ent. & Sports L. Rev. 1, 25 (1989); see *United States v. Freeman*, 357 F.2d 606, 625 (2d Cir. 1966) (defense of lack of responsibility is essentially an acknowledgment by society that certain classes of wrongdoers are improper subjects for criminal punishment because of mental disease or defect).

<sup>9</sup> Johnson at 259-260. The primary objectives of criminal law are deterrence, rehabilitation, protection of the public and retribution. Proponents of the insanity defense argue that the insane do not fit into this scheme. A person who is insane is unable to distinguish right from wrong, thus rendering the deterrence theory useless. Furthermore, imprisonment cannot serve as an example, and thus deterrence, to other insane persons. Imprisoning the mentally ill serves no rehabilitative function, because they need special treatment for their illnesses. Finally, although holding the insane criminally responsible might increase public protection, proponents of the insanity defense argue that the absence of moral blameworthiness renders the resulting retribution unjust. *Id.* at 262 n. 31, citing J. Dressler, *Understanding Criminal Law* 269 (1987) [hereinafter cited as Dressler].

<sup>10</sup> See e.g., *State v. Freitas*, 62 Haw. 17, 608 P.2d 408 (1980); *State v. Crenshaw*, 98 Wash. 2d 789, 659 P.2d 488 (1983) (legal insanity has different meaning and different purpose than concept of medical insanity); Dressler, *supra* note 9, at 297-298; 22 C.J.S. §101.

<sup>11</sup> See Haw. Rev. Stat. §704-400(2)(1993); 22 C.J.S. §101 (notes omitted).

<sup>12</sup> 22 C.J.S. at §101. See *State v. Richmond*, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied 433 U.S. 915, 97 S. Ct. 2988 (1977) (psychopathic or sociopathic condition not necessarily a mental disease or defect that would constitute defense to criminal act).

<sup>13</sup> 22 C.J.S. §101, citing *Hill v. State*, 483 N.E. 2d 746 (Ind. 1985); *State v. Brown*, 414 So.2d 689 (La. 1982).

The lack of a concrete definition of “mental disorder,” either in its scientific or legal context, complicates clear understanding of the issue. Even the American Psychiatric Association’s manual of mental disorders states that there is “no satisfactory definition that specifies precise boundaries for the concept ‘mental disorder.’”<sup>14</sup> One legal authority has speculated that the courts and legislatures have been reluctant to define the phrase “mental disorder” in the context of the insanity defense “because of the psychiatric community’s inability or unwillingness to define the term ... in its scientific inquiry.”<sup>15</sup> In an attempt to bring some clarity to the discussion, another authority has described the requisite mental disease or defect required under the insanity defense as:

[A] severely abnormal mental condition that grossly and demonstrably impairs a person’s perceptions or any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs the processes and capacity of a person to control his actions.<sup>16</sup>

To assist in determining the requisite mental disease or defect required under the insanity defense, the courts or legislatures have adopted various standards or tests. Thus, in a particular case, once the defense shows that a disease or defect of the defendant’s mind exists, the defense then must establish that this mental disease or defect meets the relevant jurisdiction’s insanity standard or test.<sup>17</sup> Accordingly, the answer to the key question “what constitutes insanity” lies in the language of the relevant jurisdiction’s test or standard used to determine legal insanity. These tests have long been the subject of much evaluation and criticism because the determination of who will be found insane, and thus relieved of criminal responsibility, and who will not, often turns on the particular language of the test used.<sup>18</sup>

## Insanity Tests

### *The M’Naghten Rule*

In response to the famous M’Naghten case decided in 1843, the English judiciary established a standard for determining whether a person is insane. This standard, known as the M’Naghten rule, had become the generally accepted legal standard in the United States by 1851.<sup>19</sup> The concept of insanity under M’Naghten is based solely upon cognitive disability. Thus, under this rule, a person is insane if, at the time of the offense, the person was laboring under such a defect of reason, as a result of a disease of the mind, that the person did not know either:

- (1) The nature and quality of the act the person was committing; or

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<sup>14</sup> Dressler, *supra* note 9, at 298, quoting from American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (3d ed. 1980) at 5.

<sup>15</sup> Dressler, *supra* note 9, at 289.

<sup>16</sup> 22 C.J.S. §101 (notes omitted).

<sup>17</sup> *Id.*

<sup>18</sup> Johnson, *supra* note 1, at 177 & n. 2.

<sup>19</sup> Dressler, *supra* note 9, at 296. For a brief discussion of the facts of the M’Naghten case, *see* Johnson, *supra* note 1, at 261; 60 Notre Dame L. Rev., *supra* note 3, at 179.

(2) That what the person was doing was wrong.<sup>20</sup>

There has been much discussion and interpretation concerning this rule. Generally, the first element of the test addresses the ability of a person to comprehend what the person was doing. It is generally accepted that the phrase “know the nature” of an act refers to the ability of a person to be aware of the physical characteristics of an act, that is, to know the true nature of the activity. Knowledge of the “quality” of an act is said to encompass an ability to comprehend the act’s harmfulness.<sup>21</sup> The second element of the M’Naghten rule concerns the ability to distinguish between right and wrong. Under M’Naghten, a person’s capacity to appreciate the wrongfulness of the person’s conduct must be totally impaired; that is, the person must not know that what the person did was wrong.<sup>22</sup> However, there is some ambiguity with respect to the meaning of the word “wrong” among American jurisdictions that rely upon the M’Naghten rule. In some jurisdictions, the accused must know the act was wrong in the moral sense; in others, the notion of “wrong” refers to awareness that an act is legally wrong.<sup>23</sup>

Despite the M’Naghten rule’s widespread use, it was severely criticized for being too restrictive. Critics particularly objected to the M’Naghten rule’s absolutist position of requiring that a person totally lack capacity to understand that what the person is doing is wrong. Critics also contended that its exclusive focus on the cognitive functions of the mind was out of step with modern psychological thought.<sup>24</sup> Finally, the M’Naghten rule’s focus on intellectual awareness and cognition alone offers no defense to those who may know that what they are doing is wrong but are unable to control their actions.<sup>25</sup>

### ***Irresistible Impulse Test***

As a result of such criticism, some state and federal courts expanded the M’Naghten rule by adding a third element to the test to encompass mental illnesses that affect volitional capacity.<sup>26</sup> This third element became known as the “irresistible impulse test,” although no uniform phraseology was adopted by these jurisdictions.<sup>27</sup> Explanations of the test include the following: the defendant knew right from wrong, but nevertheless acted from an irresistible and uncontrollable impulse; the defendant lost the power to choose between right from wrong; the defendant’s free agency to avoid doing the act was destroyed; and the defendant’s will has been so completely destroyed that his actions are beyond his control.<sup>28</sup> Despite the variations in

<sup>20</sup> Dressler, *supra* note 9, at 299.

<sup>21</sup> 22 C.J.S. §103.

<sup>22</sup> *Id.* §104.

<sup>23</sup> *Id.* (notes omitted).

<sup>24</sup> Dressler, *supra* note 9, at 300. *See* 60 Notre Dame L. Rev., *supra* note 3, at 180 n. 16 (ignores current psychological thought that views the mind as an integrated unit).

<sup>25</sup> 60 Notre Dame L. Rev., *supra* note 3, at 180 n. 16. *See also* Loewy, “Cupability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated,” 66 N.C. L. Rev. 283, 293 (1988) [hereinafter cited as Loewy].

<sup>26</sup> *See* Dressler, *supra* note 9, at 301; 60 Notre Dame L. Rev., *supra* note 3, at 180.

<sup>27</sup> 60 Notre Dame L. Rev., *supra* note 3, at 180. Author points out test is misnamed because “no exact formulation or particular language including the phrase ‘irresistible impulse’ is used” by jurisdictions that have adopted the test. *Id.*

<sup>28</sup> *See* Dressler, *supra* note 9, at 301.

phraseology, generally, a jury was instructed to acquit a defendant if the jury found the defendant suffered from a mental disease or defect that prevented the defendant from controlling the defendant's actions.<sup>29</sup> By 1967, eighteen states and the federal courts were using this M'Naghten-irresistible impulse combination test.<sup>30</sup>

Nevertheless, like the M'Naghten rule, the irresistible impulse test was criticized for its compartmentalization of thought processes.<sup>31</sup> Critics also argued that its reasoning was essentially circular, because the only measure of an impulse's irresistibility is whether it, in fact, was resisted.<sup>32</sup> Other critics alternately complained that: the irresistible impulse test unduly broadened the insanity defense; and the irresistible impulse test's focus on a defendant's sudden, impulsive loss of control ignored the possibility of a long-term, gradual loss of control.<sup>33</sup> By the mid-1980's, the irresistible impulse test had fallen into disfavor and only a few states used the M'Naghten-irresistible impulse combination test.<sup>34</sup>

### *The Durham or "Product" Test*

In 1954, the United States Court of Appeals for the District of Columbia formulated a new insanity test in *Durham v. United States*.<sup>35</sup> Relying upon the "fundamental principle that thought processes are an integrated, functional unit," the Court enunciated the test as follows: "an accused is not criminally responsible if his unlawful act was the *product* of mental disease or mental defect."<sup>36</sup> The causal connection between the criminal act and the mental disease or disorder is critical. It must be shown that the defendant had a mental disease or defect at the time of the offense and that, but for the mental disease or defect, the defendant would not have committed the offense.<sup>37</sup>

The Durham test was greeted with substantial comment and controversy and failed to engender much of a following within the legal community. This lack of acceptance has been attributed to: confusion due to the lack of a clear definition for the term "product"; aversion to the notion that a mental disease can "cause an act"; and concern over the conclusory effect that psychiatric testimony apparently has on a jury.<sup>38</sup> Despite the failure of other courts to embrace the Durham test, commentators have credited this break from the traditional M'Naghten rule with encouraging other approaches to the insanity defense.<sup>39</sup>

<sup>29</sup> 60 Notre Dame L. Rev., *supra* note 3, at 180.

<sup>30</sup> For a period of time, the M'Naghten rule, the irresistible impulse test, or some combination of the two was the predominant standard for determining insanity, with only New Hampshire rejecting this standard. *Id.* at 180 n. 21.

<sup>31</sup> *Id.* at 180 n. 20.

<sup>32</sup> Loewy, *supra* note 25, at 293. The author notes that "this problem is exacerbated in those jurisdictions that required the State to prove resistibility beyond a reasonable doubt." *Id.*

<sup>33</sup> 60 Notre Dame L. Rev., *supra* note 3, at 180 n. 20.

<sup>34</sup> These included Alabama, Colorado, Georgia, New Mexico, Virginia, and Wyoming. *See id.* at 180 n. 17.

<sup>35</sup> 214 F.2d 862 (D.C. Cir. 1954).

<sup>36</sup> 60 Notre Dame L. Rev., *supra* note 3, at 181, quoting *Durham v. United States*, 214 F.2d at 874-75 (emphasis supplied).

<sup>37</sup> Dressler, *supra* note 9, at 303.

<sup>38</sup> 60 Notre Dame L. Rev. at 181 n. 24. For further discussion of the product test and criticism of the test, *see* Dressler, *supra* note 9, at 302-304.

<sup>39</sup> 60 Notre Dame L. Rev., *supra* note 3, at 181.

***Model Penal Code Test***

This experimentation led to the American Law Institute's proposal, adopted by the Model Penal Code, which balances the mind's cognitive and volitional functions in a two-prong test. The Model Penal Code test states that:

A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct (the cognitive capacity prong) or to conform his conduct to the requirements of the law (the volitional capacity prong).<sup>40</sup>

Assuming the requisite mental disease or defect exists, the critical issue under the Model Penal Code test is whether and to what extent the accused's cognitive or volitional capacity was impaired as a result of the disease or defect. If the impairment was substantial, the person has a complete defense. If there was no impairment or if the impairment was not substantial, the person is considered sane beyond a reasonable doubt.<sup>41</sup> For example, under this test, a paranoid condition may form the basis for an insanity defense if the condition substantially impairs a person's ability to refrain from wrongful conduct.<sup>42</sup>

The Model Penal Code test has been described as a revised version of the M'Naghten rule and the irresistible impulse test, consisting of the second, and more significant, cognitive element of the former test and the volitional aspects of the latter test.<sup>43</sup> However, in requiring that a defendant lack only substantial capacity<sup>44</sup> either to appreciate the wrongfulness of conduct or to conform conduct to the requirements of the law, the Model Penal Code test moved away from the "unrealistic" requirement of total incapacity prevalent in the M'Naghten rule and irresistible impulse test.<sup>45</sup> As one authority has put it, this significant distinction between the Model Penal Code test and the M'Naghten rule recognizes the concept that "mental illness can effectively destroy an individual's capacity for choice and impair his behavioral controls."<sup>46</sup>

Supporters contend the Model Penal Code test "is more consistent with the available medical testimony regarding insanity, is less rigid, and is simpler for a jury to apply and understand than other tests."<sup>47</sup> The Model Penal Code test received wide acceptance and, in less than two decades, was adopted in some version by approximately one-half of the states and all but one of the federal circuits.<sup>48</sup> Nevertheless, the Model Penal Code had its critics, who

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<sup>40</sup> Model Penal Code §4.01(1) (Official Draft 1962). This language is substantially similar to Haw. Rev. Stat. §704-400. See discussion in Chapter 4 at notes 21-24 and accompanying text.

<sup>41</sup> 22 C.J.S. §105.

<sup>42</sup> *Id.* at §101.

<sup>43</sup> Dressler, *supra* note 9, at 302.

<sup>44</sup> Lack of substantial capacity does not refer to a total lack of capacity, rather it means capacity that has been impaired to such a degree that only an extremely limited amount remains. See *State v. Freitas*, 62 Haw. 17, 608 P.2d 408 (1980).

<sup>45</sup> See e.g., Dressler, *supra* note 9, at 302 (contains further discussion of distinctions between tests); 60 Notre Dame L. Rev., *supra* note 3, at 182 n. 27; 22 C.J.S. §105.

<sup>46</sup> 22 C.J.S. §107.

<sup>47</sup> 60 Notre Dame L. Rev., *supra* note 3, at 181-82, & nn. 27-29.

<sup>48</sup> Dressler, *supra*, note 9, at 297; *accord*, 60 Notre Dame L. Rev., *supra* note 3, at 181-82 & n. 26.

objected to its “unduly broad and fuzzy phrase ‘lack of substantial capacity’”<sup>49</sup> and criticized its volitional prong because of the “increasing doubt” that psychiatrists can reliably evaluate a person’s volitional capacity.<sup>50</sup>

### *The Federal Insanity Defense Reform Act*

Criticism of the volitional prong of the Model Penal Code test, and of the insanity defense in general, increased tremendously in the aftermath of John Hinckley’s attempted assassination of President Ronald Reagan and subsequent acquittal on the ground of insanity.<sup>51</sup> By the end of 1982, more than forty bills had been introduced before Congress to abolish or substantially reform the insanity defense, including one introduced by President Reagan to “abolish the insanity defense in federal criminal prosecutions ‘to the maximum extent permitted under the Constitution.’”<sup>52</sup> In addition, in 1983, the American Bar Association (ABA), the American Psychiatric Association (APA), the American Medical Association (AMA), and the National Commission on the Insanity Defense (NCID) issued separate positions on the insanity defense. The AMA advocated abolishing the insanity plea as a defense in favor of a mens rea approach. The ABA and the APA favored retaining the insanity defense, but without the volitional prong, and the APA also proposed the defense be allowed only in cases of severe mental disturbance. The NCID and the other groups advocated other procedural changes designed to restrict the use of the insanity defense.<sup>53</sup>

In October 1984, Congress substantially amended the federal insanity law by enacting the Insanity Defense Reform Act (IDRA) of 1984, as part of the Comprehensive Crime Control Act of 1984.<sup>54</sup> The IDRA eliminated the volitional prong of the insanity test of federal criminal law and shifted the burden of proof to the defendant to prove the insanity defense by clear and convincing evidence, among other changes.<sup>55</sup> The statute, in pertinent part, provides that it is an affirmative defense to a prosecution under any federal statute if, at the time of the commission of the offense, the defendant, as a result of a *severe* mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of his acts; mental disease or defect does not otherwise constitute a defense.<sup>56</sup> Thus, under the federal statute, a defendant may no longer assert a volitional insanity defense (i.e., inability to conform conduct to the requirements of the law is no longer a defense in a federal case). The IDRA is a retreat from the Model Penal Code

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<sup>49</sup> Dressler, *supra* note 9, at 302.

<sup>50</sup> *See id.*; *accord*, 60 Notre Dame L. Rev., *supra* note 3, at 184 & nn. 43-47.

<sup>51</sup> *See* Dressler, *supra* note 9, at 287; *accord*, Kaplan, Weisberg, Binder, Criminal Cases and Materials 745 (3rd ed. 1996) [hereinafter cited as Kaplan]. The jury in the trial had been instructed under the Model Penal Code test to acquit Hinckley if they found he lacked substantial capacity to conform his conduct to the requirements to the law. *Id.*

<sup>52</sup> *See* Kaplan, *supra* note 51, at 745.

<sup>53</sup> *Id.* at 747. *See also* Dressler, *supra* note 9, at 297.

<sup>54</sup> 18 U.S.C.A. §17. Prior to Congress enacting the IDRA, the federal insanity law had been strictly judge made. Kaplan, *supra* note 51, at 745.

<sup>55</sup> *Id.* at 746 & n. 21. The IDRA also placed limits on the admissibility of expert testimony, eliminated the defense of diminished capacity, provided for a special verdict of “not guilty only by reason of insanity,” which triggers a federal civil commitment proceeding and substantially amended the procedures for disposition of mentally ill offenders.

<sup>56</sup> 18 U.S.C.A. §17 (emphasis added).

test to a M’Naghten like standard, except that it requires a “severe” mental disease or defect and is an affirmative defense that must be proven by clear and convincing evidence.<sup>57</sup>

Many states also reacted to the anti-insanity defense movement, and by 1985, thirty-three states had enacted reforms limiting the scope of the insanity defense.<sup>58</sup> These actions have resulted in a great deal of diversity among the jurisdictions with respect to their insanity tests. By way of illustration, jurisdictions in the United States employ five different tests to determine whether a defendant is legally insane:

- (1) The federal courts follow the IDRA of 1984;
- (2) Twenty-seven states and the District of Columbia use the Model Penal Code test or some modification of it;
- (3) One state uses the Durham or “product” test;
- (4) Fourteen states follow the M’Naghten rule; and
- (5) Five states supplement the M’Naghten rule with the “irresistible impulse” test.<sup>59</sup>

In addition, three states, Idaho, Montana and Utah, have enacted statutes that limit the use of psychiatric evidence to rebutting the prosecution’s *mens rea* evidence, thus effectively abolishing the insanity plea as an affirmative defense.<sup>60</sup> Finally, several states have experimented with some variation of a “guilty but mentally ill” (GBMI) verdict, usually in addition to the traditional verdict of not guilty by reason of insanity.<sup>61</sup>

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<sup>57</sup> See Dressler, *supra* note 9, at 304. Approximately three-fourths of the states, including Hawaii, provide that the insanity defense is an affirmative defense. Spring, *supra* note 3, at 194. See Haw. Rev. Stat. §704-402 (1993).

<sup>58</sup> Kaplan, *supra* note 51, at 746.

<sup>59</sup> See A.Levine, “Denying the Settled Insanity Defense: Another Necessary Step in Dealing With Drug and Alcohol Abuse,” 76 B.U.L. Rev. 75, 79-81 (1998) [hereinafter cited as Levine]. See also Johnson, *supra* note 1, at 262 (citations omitted).

<sup>60</sup> See Levine, *supra* note 59, at 79-82; accord, Dressler, *supra* note 9, at 330. For example, see Idaho Code §8-207 (supp. 1987).

<sup>61</sup> In the late 1970’s and early 1980’s, approximately a dozen states experimented with some variation of a “guilty but mentally ill” (GBMI) verdict, usually in addition to the traditional verdict of not guilty by reason of insanity. The GBMI verdict was intended to limit the scope of the insanity defense and ensure that “guilty” defendants are not set free due to mental illness at the time of the offense. Generally, if the defendant is found GBMI, the defendant is sentenced as if guilty, but the law provides for treatment of the mental illness. If the defendant is cured during the period of the sentence, the defendant is transferred to prison for the remainder of the sentence. These GBMI provisions have been severely criticized. Furthermore, there is evidence that they have had little effect upon insanity acquittals, but have dramatically increased demand for psychiatric service. See generally, Kaplan, *supra* note 51, at 749; Spring, *supra* note 3, at 191. For examples of such statutes, see Alaska Stat. §12.47.030(a) (1984); Ga. Code Ann. §17-7-131-(c)(2) (supp. 1987) Mich. Stat. Ann. §28.1059 (Callaghan 1985).

## Frequency of the Insanity Defense

There appears to be a public perception, probably based upon popular television dramas and movies, that the insanity defense is used frequently and successfully by criminal defendants, especially those on trial for violent crimes. There is considerable evidence that this is far from the truth. It appears that the insanity defense is raised in less than 2% of all cases that go to trial.<sup>62</sup> Moreover, the defense is successful in less than 10% of the cases in which it is raised.<sup>63</sup> For example, a Wyoming study revealed that estimates of the frequency with which the insanity defense is used ranged from 13% to 57% of the time, whereas the actual figure was 0.47%. Estimates regarding the success rate ranged from 19% to 44%, whereas, in reality, less than 1% was successful.<sup>64</sup> Statistics show that for fiscal year 1982, 0.16% of all adult defendants pleaded insanity in New Jersey. The figure was less than 1% in Virginia, less than 2% in New York, and 1.3% in California.<sup>65</sup> Furthermore, a 1991 study of eight states revealed that the insanity defense is successful in only one-quarter of 1% of all felony indictments.<sup>66</sup>

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<sup>62</sup> Kaplan, *supra* note 51, at 761. *See also* D. Brazelon, Questioning Authority: Justice and Criminal Law, 24, 27 (1988); Spring, *supra* note 3, at 188; Encyclopedia of Crime and Justice 1048.

<sup>63</sup> Kaplan, *supra* note 51, at 761.

<sup>64</sup> 60 Notre Dame L. Rev., *supra* note 3, at 189 n. 77.

<sup>65</sup> *Id.* at 189 n. 76.

<sup>66</sup> *See* Meloy, *supra* note 4, at 440 n. 5.

## Chapter 3

### INTOXICATION AND INSANITY

#### Intoxication

The issue presented in this study is whether a person who suffers from a physical or mental disease, disorder or defect caused by the *voluntary* use of intoxicants<sup>1</sup> may rely upon the insanity defense. Or, phrased another way, may a person who has voluntarily caused the person's own insanity be excused, because of the insanity, from responsibility for the person's criminal acts. The consideration of voluntary intoxication<sup>2</sup> within a discussion of the insanity defense raises the issue of personal choice. One legal commentator has framed the issue as follows:

To what extent should society excuse criminal behavior that is the result of the voluntary ingestion of psychoactive drugs? If an individual is chronically abusing psychoactive drugs, is there a psychobiological point at which a mental disorder exists *independently* of the ingestion of the drug and therefore should be considered as a basis for an insanity defense? Or, on the other hand, should an insanity defense be ruled out if the voluntary ingestion of psychoactive drugs was a causative factor in the genesis of the mental disorder, regardless of the current state of the mental disorder?<sup>3</sup>

At the root of the issue is whether insanity should be treated differently if it is caused by voluntary actions, especially if those actions involve illegal or reckless conduct.

Insanity is generally viewed as an involuntary condition that one would not willingly contract. Accordingly, it is the exercise of free will or personal choice involved in insanity that is caused by voluntary intoxication that is troubling. The law has developed special rules with respect to intoxication primarily because of the involvement of personal choice.<sup>4</sup> Indeed the law's treatment of an intoxication defense turns on the "essential legal distinction" between

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<sup>1</sup> The law does not distinguish between alcohol and drugs (prescribed medications and illegal drugs) with respect to intoxication. Model Penal Code §2.08(5)(a). Although the authority on the subject is scant, the rules with respect to criminal responsibility when an act has been committed under the influence of drugs is generally the same as applies when an act has been committed under the influence of alcohol. See *People v. Sameniego*, 118 Cal. App. 165, 4 P.2d 809, (1931); *De Berry v. Commonwealth*, 289 S.W. 2d 495 (1956), cert. denied, 352 U.S. 881, 77 S. Ct. 105 (1956); *State v. White*, 27 N.J. 158, 142 A.2d 65; *Couch v. State*, 375 P.2d 978 (Okla. Crim. 1962); *State v. Roisland*, 1 Or. App. 68, 459 P.2d 555 (1969). Accordingly, the term intoxication, intoxicants and other like terms are used herein to refer to both alcohol and drugs, unless specifically otherwise indicated.

<sup>2</sup> The Hawaii Revised Statutes, following the Model Penal Code, defines "intoxication" as a "disturbance of mental or physical capacities resulting from the introduction of substances into the body." Haw. Rev. Stat. §702-230(5)(a) (1993); Model Penal Code §2.08(5)(a).

<sup>3</sup> J. Meloy, "Voluntary intoxication and the insanity defense," *J. Psych. Law* 439, 440-41 (Winter 1992) [hereinafter cited as Meloy].

<sup>4</sup> See R. Watterson, "Just Say No to the Charges Against You: Alcohol Intoxication, Mental Capacity, and Criminal Responsibility," 19 Bull. Am. Acad. Psych. Law 277, 278 (No. 3 1991) (the law's "special treatment of intoxication is based on the fact that a defendant is usually viewed as having caused his or her mental impairment voluntarily").

intoxication that is considered “voluntary” versus “involuntary.”<sup>5</sup> An intoxication defense is distinct from a typical insanity defense. However, a defense based upon insanity caused by voluntary intoxication is a slightly “different animal” from the typical insanity defense. In a given case, facts that fail to support an insanity defense may give rise to an intoxication defense. Furthermore, because of the involvement of intoxication, the distinction between these defenses may not be readily apparent. Therefore, a brief review of the legal rules regarding intoxication and insanity caused by intoxication is in order to clarify the distinction.

## Voluntary Intoxication

Because the rules differ depending upon whether intoxication is voluntary or involuntary, a distinction must be made between involuntary intoxication and voluntary, or self-induced, intoxication. Although the courts rarely have defined voluntary intoxication, intoxication is considered voluntary if a person knowingly ingests a substance that the person knows or should know can cause the person to become intoxicated, unless the intoxicant was prescribed medication or the ingestion was coerced or fraudulent.<sup>6</sup>

The black letter law indicates the legal rules governing the question of voluntary intoxication were “early settled and may be briefly stated: intoxication, if voluntarily incurred, is ordinarily no defense to a charge of crime based upon acts committed while intoxicated.”<sup>7</sup> It may be argued that a person who is intoxicated may experience a state of mind, much like that of an insane person, in which either: the person does not know what the person is doing or does not know that it is wrong; or the person’s capacity for self-control is substantially impaired. However, it is nearly universally agreed that, except in rare instances, a person who is intoxicated is not insane, for insanity requires a “disease of the mind” or a mental disease or defect; this requirement is one that “mere drunkenness” cannot satisfy.<sup>8</sup> Therefore, an intoxicated person is presumed sane; and a sane person obviously is ineligible for the insanity defense.

The rule that voluntary intoxication at the time a criminal act is committed will not relieve a person of criminal responsibility applies regardless of how “gross and long-continued

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<sup>5</sup> *Id.*

<sup>6</sup> J. Dressler, *Understanding Criminal Law* 276 (1987) [hereinafter cited as Dressler], citing the Model Penal Code §2.08(5)(b).

<sup>7</sup> 21 Am. Jur. 2d *Criminal Law* §155 (citations omitted) and §157.

<sup>8</sup> W. Lafave & A. Scott, *Criminal Law* §4.10 at 388 [hereinafter cited as Lafave]. See L. Tiffany, “The Drunk, The Insane, and the Criminal Courts: Deciding What to Make of Self-Induced Insanity,” 69 Wash. U.L. Rev. 221, 222 (No.1 1991) (“What distinguishes the insanity defense from both voluntary and involuntary intoxication is the notion of ‘mental disease or defect,’ which must be the reason for the actor’s inability to reason, his ‘irrationality’”). *Accord*, *People v. Aragon*, 653 P.2d 715 (Colo. 1982) (self-induced intoxication is not a mental disease or defect, but merely a disturbance of mental or physical capacities caused by substances knowingly introduced into the body, which defendant knew or ought to have known had the tendency to cause resulting disturbance); *Rucker v. State*, 119 Ohio St. 189, 162 N.E. 802 (1928) (acute alcoholism not the same as the unsound mind that insanity requires); *Commonwealth v. Hicks*, 483 Pa. 305, 396 A. 2d 1183 (1979) (voluntary intoxication not a “disease of the mind” under M’Naghten). See also T. Myers, “Halcion Made Me Do It: New Liability and a New Defense – Fear and Loathing in the Halcion Paper Chase,” 62 U. Cin. L. Rev. 603, 633 & n. 186 (Fall 1993) [hereinafter cited as Myers].

the drunkenness may have been.”<sup>9</sup> According to some authorities, the rule applies even to a person so drunk as not to know what the person is doing or to a person afflicted with hallucinations.<sup>10</sup> Even a temporary form of insanity brought about by voluntary abuse of drugs or alcohol has been held not to constitute a defense to a criminal act.<sup>11</sup> This is said to be “true even though the defendant’s temporary state of mind may meet the requirements of legal insanity contained in the M’Naghten rule, or whatever test of criminal responsibility is applied in the particular jurisdiction.”<sup>12</sup>

One legal commentator has offered this rationale for the rule: “Mental illness is a condition that ordinarily is contracted involuntarily. One who voluntarily introduces alcohol or drugs into his body and falls victim to ‘artificial voluntarily contracted madness’ is not considered entitled to the law’s dispensation.”<sup>13</sup> A majority of courts and legal commentators have indicated that public policy requires a ban on temporary insanity claims by voluntarily intoxicated defendants.<sup>14</sup> Another commentator has suggested that absolving from criminal responsibility those individuals who have temporarily destroyed their mental capacities by voluntarily ingesting intoxicants would encourage recklessness.<sup>15</sup>

The common law view seems to have been that intoxication not only did not excuse or palliate, but was an aggravation of, the wrong committed.<sup>16</sup> One commentator’s explanation of the rule that a person who is voluntarily intoxicated at the time of a criminal act cannot escape responsibility for the person’s actions appears to concur with this view:

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<sup>9</sup> 21 Am. Jur. 2d *Criminal Law* §155 (citations omitted).

<sup>10</sup> *Id.* See *State v. Kidwell*, 62 W. Va. 466, 59 S.E. 494 (1907).

<sup>11</sup> *Kane v. United States*, 399 F.2d 730, 736 (9th Cir. 1968), cert. denied, 393 U.S. 1057, 89 S. Ct. 698 (1969); *Johnson v. State*, 43 Ala. App. 224, 187 So.2d 281 (1966) (emotional insanity or temporary mania, usually due to causes such as intoxication, not associated with disease of mind, does not constitute insanity). *State v. Booth*, 169 N.W.2d 869 (Iowa 1969) (refusal of court to instruct on insanity not error where accused did not allege or prove any fixed or settled insanity and defense was dependent wholly upon his state of voluntary intoxication at the time of the alleged offense); *State v. Matthews*, 20 Or. App. 466, 532 P.2d 250 (1975) (not error to refuse to give jury instruction that ignored distinctions between involuntary, as opposed to voluntary, intoxication and short-term, as opposed to long-term, effects of intoxication); *Evilsizer v. State*, 487 S.W.2d 113 (Tex. Crim. 1972) (“If preexisting condition of mind of the accused was not such as would render him legally insane in and of itself, recent use of intoxicants causing stimulation or aggravation of preexisting condition even to the point of insanity may not be relied on as a defense to the commission of crime.”). See *Lafave* §4.10(g) at n. 62 and accompanying text; 21 Am. Jur. 2d *Criminal Law* §55 at n. 7 and accompanying text; 22 C.J.S. §112 at n. 5 and accompanying text. See also cases cited at 21 Am. Jur. 2d *Criminal Law* §54 n. 97.

<sup>12</sup> 21 Am. Jur. 2d *Criminal Law* §54, citing *Evers v. State*, 31 Tex. Crim. 318, 20 S.W. 744 (1892). *Accord*, L. Johnson, “Settled Insanity is Not a Defense: Has the Colorado Supreme Court Gone Crazy? *Bieber v. People*,” 43 Kan. L. Rev. 259, 263 (1994) [hereinafter cited as Johnson] (no excuse even though intoxication may result in type of temporary insanity rendering person unable to distinguish right from wrong); 22 C.J.S. §112 (temporary insanity does not excuse responsibility where accused voluntarily became intoxicated, even though such intoxication produced mental derangement or mental irresponsibility), citing *State v. Wallace*, 170 Or. 60, 131 P.2d 222 (1942); *State v. Huey*, 14 Wash. 2d 387, 128 P.2d 314 (1942).

<sup>13</sup> *Dressler*, *supra* note 6, at 283. See *Wells v. State*, 247 Ga. 792, 279 S.E. 2d 213 (1981) (no insanity defense where delusional; state produced by voluntary drugged condition; “voluntarily contracted madness is no excuse for crime”).

<sup>14</sup> See *Myers*, *supra* note 8, at 633.

<sup>15</sup> *Id.*; *accord* M. Bidwell & D. Katz, “Injecting New Life Into An Old Defense,” 7 U. Miami Ent. Sports L. Rev. 1, 31 n.188 (1989).

<sup>16</sup> 21 Am. Jur. 2d *Criminal Law* §155.

This rule is grounded upon the assumption that “a person is free to choose whether or not to drink.” If one voluntarily chooses to become intoxicated, one willfully increases the risk of harm to others by reducing one’s mental capacity for evaluating danger and controlling one’s actions.<sup>17</sup>

A number of other rationales for this rule have been offered, including the following:

- (1) Individuals who voluntarily cast off restraints of reason and conscience are rightly held responsible for any resulting injury;
- (2) Individuals should be held to intend any consequences springing from the voluntary act of becoming intoxicated; and
- (3) The intent to become intoxicated is itself a wrongful intent that can take the place of ordinary criminal intent.<sup>18</sup>

It also has been observed that the policy behind prohibiting intoxication as a defense to criminal prosecution has been based upon “the fear that such a defense could be so easily simulated as to make prosecutions too difficult.”<sup>19</sup>

One authority has observed that the “law pertaining to voluntary intoxication has developed in an exceedingly hostile environment, one not surprising in light of the effect of alcohol and drugs on their users and the strong correlation between these substances and crime.”<sup>20</sup> Several legal commentators have questioned the continuing validity of the rule. The comments of one are illustrative:

Despite extensive developments in psychiatric research, widespread changes in social, medical, and legal attitudes toward alcoholism, and intense debate as to legal tests of mental responsibility of those charged with crime, the law with respect to the effect of voluntary intoxication upon criminal responsibility has shown little tendency to change or develop.... The rule is frequently stated very broadly and without qualification. Thus, the courts ... have taken little or no notice of modern medical attitudes toward alcoholism as a disease, but have usually assumed that the intoxication must be treated as voluntary for purposes of determining criminal guilt, no matter how compulsive the accused’s addiction to alcohol may have been.<sup>21</sup>

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<sup>17</sup> Watterson, *supra* note 4, at 278 (notes omitted).

<sup>18</sup> See Myers, *supra* note 8, at 633; 21 Am. Jur. 2d *Criminal Law* §155 (notes omitted).

<sup>19</sup> 21 Am. Jur. 2d *Criminal Law* §155 (notes omitted); Tiffany, *supra* note 8 at 226; *accord*, Susan F. Mandiberg, “Protecting Society and Defendants Too: The Constitutional Dilemma of Mental Abnormality and Intoxication Defenses,” 53 *Fordham L. Rev.* 226, 239 (1984) (“defendant may so convincingly feign intoxication or mental abnormality at the time of the crime that lay witnesses will testify in court that the condition appeared to exist. The defendant also may be able to fake the debilitating condition after the fact when examined by forensic experts”).

<sup>20</sup> Dressler, *supra* note 6, at 277.

<sup>21</sup> 21 Am. Jur. 2d *Criminal Law* §155 (footnotes omitted); *accord*, Dressler, *supra* note 6, at 277 (the common law treats as irrelevant the fact that an intoxicated person’s blameworthiness for causing harm often is less than that of a sober wrongdoer who intentionally commits the same offense).

Despite the foregoing discussion, the absolute statement, frequently announced by courts, that “voluntary intoxication is never an excuse for criminal conduct,” is somewhat misleading.<sup>22</sup> Nevertheless, as one authority has stated: “the no-excuse rule is a good starting point from which to appreciate how few are the circumstances in which a voluntarily intoxicated actor may avoid criminal conviction.”<sup>23</sup> These limited circumstances are discussed below.

### *General versus Specific Intent Crimes*

The no-excuse common law rule has now been modified by statute in a majority of jurisdictions to permit intoxication as a defense if it negatives a required element of the offense.<sup>24</sup> Consequently, voluntary intoxication may constitute a defense if a defendant is intoxicated to the point that it would be impossible to accomplish a physical act that is a necessary element of the crime.<sup>25</sup> As this would be a rare case, however, the issue more often arises when intoxication is alleged to negate a particular mental state that is a requisite element of the offense charged.<sup>26</sup> As noted in Chapter 2, the moral basis for imposing criminal punishment is the actor’s moral culpability or blameworthiness.<sup>27</sup> Thus each criminal offense requires a “*mens rea*” or culpable intent.

Jurisdictions that have modified the no-excuse rule, distinguish between general intent crimes that typically require only reckless or negligent conduct<sup>28</sup> and specific intent crimes that expressly require proof of a particular state of mind.<sup>29</sup> One commentator has observed that the

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<sup>22</sup> Dressler, *supra* note 6, at 276; accord Watterson, *supra* note 4, at 278.

<sup>23</sup> Dressler, *supra* note 6, at 276.

<sup>24</sup> See e.g., Lafave, *supra* note 8, §4.10(a) at 388; 21 Am. Jur. 2d *Criminal Law* §155; 22 C.J.S. §110(a).

<sup>25</sup> See e.g., Lafave, *supra* note 8, §4.10(a) at 388 (for example, in a burglary situation, the defendant may be unable to accomplish the requisite breaking and entering of the building). But see Peter Low, *Criminal Law* 139 (Rev. 1st ed. 1990) (noting that the intoxication would have to be so extreme that the defendant would literally have to be comatose).

<sup>26</sup> See e.g., Lafave, *supra* note 8, §4.10(a) at 388; 21 Am. Jur. 2d *Criminal Law* §155; 22 C.J.S. §110(a); Model Penal Code § 2.08(1). See generally, *Latimore v. State*, 534 So. 2d 665 (Ala. App. 1988) (although voluntary intoxication can never justify or excuse crime, excessive intoxication may render person incapable of forming specific intent,); *Ives v. State*, 418 N.E.2d 220 (Ind. 1981) (rape is specific intent crime for which intoxication could be defense); *Shubert v. State*, 652 S.W.2d 425 (Tex. App. 3d Dist.1982) (evidence raised the issue of temporary insanity by reason of intoxication and should have been admitted by way of mitigation of punishment).

<sup>27</sup> See discussion in Chapter 2, at notes 3-5 and accompanying text.

<sup>28</sup> See Loewy, “Culpability, Dangerousness, and Harm: Balancing the Factors on Which Our Criminal Law Is Predicated,” 66 N.C.L. Rev. 283, 295 (no particular state of mind is required); see e.g., *Kane v. United States*, 399 F.2d 730, 736 (9th Cir. 1968) cert. denied, 393 U.S. 1057, 89 S. Ct. 698 (1969).

<sup>29</sup> A. Levine, “Denying the Settled Insanity Defense: Another Necessary Step in Dealing With Drug and Alcohol Abuse,” 76 B.U.L. Rev. 75, 76 (1998) [hereinafter cited as Levine]. In distinguishing between the two, some courts often focus on the presence or absence of statutory language such as “willfully,” “intentionally” or “with intent to,” which have been interpreted as requiring a particular state of mind. Other courts have interpreted specific intent to require “purpose” or “knowledge” as opposed to mere “recklessness.” Whether a particular offense is one requiring specific, rather than only general, intent depends usually upon the language of the statute in a particular jurisdiction, and consequently what may be a general intent crime in one jurisdiction is a specific intent crime in another. 21 Am. Jur. 2d *Criminal Law* §155 n. 6. See Lafave, *supra* note 8, §4.10(a) at 390, criticizing distinction between general intent and specific intent terminology.

distinction between the two is “often more a question of judicial interpretation than statutory definition.”<sup>30</sup> Another has commented that:

Attempts to delineate general from specific intent have generated a jumble of opinions....

...While specific intent can easily be defined as “a particular criminal intent beyond the act done” (whereas general intent is the intent simply to do the physical act), the ease of stating the definition belies the difficulty of applying it in practice.<sup>31</sup>

The definition of general intent most commonly accepted by the courts is the intent to carry out the act actually committed, while specific intent has been interpreted to require an intent to achieve additional consequences.<sup>32</sup> For example, by statutory definition in some jurisdictions, offenses such as murder, burglary, and assault with intent to commit rape are specific intent crimes because they require a preconceived, planned, and deliberate criminal purpose beyond the general carrying out of the act. To convict a defendant of a specific intent offense, the prosecutor must prove the specific intent requirements beyond a reasonable doubt.<sup>33</sup>

### *Application of Specific Intent Exception*

In jurisdictions that have modified the no excuse rule, evidence of voluntary intoxication, regardless of how extreme, still may not be used to negate general intent.<sup>34</sup> Therefore, if the offense is a general intent offense, evidence of voluntary intoxication is not admissible. If, however, the offense requires a specific intent on the part of the actor, evidence of voluntary intoxication is admissible and may be considered in determining whether the actor actually had the specific intent.<sup>35</sup> Accordingly, it has been held that where a particular purpose, motive, or intent is a necessary element to constitute the particular kind or degree of crime, evidence of voluntary intoxication is relevant and admissible to show whether the defendant possessed the

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<sup>30</sup> See Watterson, *supra* note 4, at 279 n. 17.

<sup>31</sup> M. Boettcher, “Voluntary Intoxication: a Defense to Specific Intent Crimes,” 65 U. Det. L. Rev. 33, 41-42 (1987) (citations omitted) [hereinafter cited as Boettcher].

<sup>32</sup> See Watterson, *supra* note 4, at 279 n. 17; *accord*, Boettcher, *supra* note 31, at 42 (most common definition of specific intent is “mental element that is required “above and beyond any mental state required with respect to the *actus reus* of the crime”).

<sup>33</sup> 21 Am. Jur. 2d *Criminal Law* §155 and cases cited at n. 95; *accord*, Lafave, *supra* note 8, at §4.10(a) n. 7.

<sup>34</sup> See e.g., *Ware v. State* 584 So. 2d 939, (Ala. App. 1991) cert. denied (Ala.), 1991 Ala. Lexis 825 (Voluntary intoxication combined with schizophrenia did not constitute defense to charge of intentionally causing serious injury by means of dangerous instrument where evidence indicated defendant was able to appreciate wrongfulness of his actions); *People v. Zekany*, 833 P2d 774 (Colo. App. 1991), cert. denied, (Colo. 1992 Lexis 703); *State v. Erwin*, 848 S.W.2d 476 (1993), cert. denied, 114 S. Ct. 88 (1993) (rule merely treats sober persons and voluntarily intoxicated persons as equally responsible for conduct, and does not violate due process); *Hindman v. State*, 597 S.W.2d 264 (Mo. App. 1980) (terms “mental disease or defect” did not include alcoholism or drug abuse without psychosis, and self-induced intoxication via voluntary intake of alcohol or drugs not a defense).

<sup>35</sup> Generally, the criminal codes provide that intoxication is a defense if it negates a mental state or that evidence of intoxication is admissible whenever relevant to negate an element of the offense charged. Lafave, *supra* note 8, §4.10(a) at 388, n. 7; *accord*, 21 Am. Jur. 2d *Criminal Law* §155 and cases cited at n. 93. For listing of different offenses involving specific intent for which evidence of voluntary intoxication has been permitted, see 21 Am. Jur. 2d *Criminal Law* §155 nn. 6-22.

mental capacity to entertain the requisite purpose, motive, or intent.<sup>36</sup> Evidence of voluntary intoxication has also been allowed as bearing on the issues of malice, deliberation, premeditation, knowledge and scienter.<sup>37</sup> When an element of the offense involves mere recklessness or negligence, however, the Model Penal Code and the majority of jurisdictions do not allow evidence of voluntary intoxication to be introduced.<sup>38</sup>

Legal commentators contend that the purpose of the specific intent exception of allowing evidence of voluntary intoxication is not to excuse or mitigate the criminal act, but to prove that, because one of its necessary elements was lacking, the particular offense was not committed.<sup>39</sup> Nevertheless, the practical effect of the rule is that, if evidence of voluntary intoxication casts doubt upon a specific intent element, the criminal charge typically is reduced to its general intent equivalent, which usually carries a lesser sentence.<sup>40</sup> Consequently, evidence of voluntary intoxication may have the effect of mitigating the severity or reducing the degree of the crime charged.<sup>41</sup>

It should be borne in mind, however, that voluntary intoxication acts as a defense or excuse only where the degree of intoxication is of such extent as to render the defendant incapable of entertaining the specific intent.<sup>42</sup> Indeed, it has been held that the degree of intoxication must “amount to insanity” or be “so extreme as entirely to suspend the power of reason” or reach the “point that the accused’s mental powers are overcome and it is impossible for him to form a criminal intent.”<sup>43</sup> Moreover, intoxication is no defense if the person becomes intoxicated to “nerve or brace himself” to commit a crime<sup>44</sup> or becomes intoxicated subsequent to the act.<sup>45</sup> Furthermore, as noted previously, the result of a successful intoxication defense may be not an acquittal but a conviction of a lesser offense for which no proof of specific intent is required.<sup>46</sup> Finally, it should be remembered that the question of the existence of intoxication

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<sup>36</sup> See e.g., 21 Am. Jur. 2d *Criminal Law* §155 and cases cited at n. 96; 22 C.J.S. at §110(a) and cases cited at n. 86.

<sup>37</sup> 21 Am. Jur. 2d *Criminal Law* §155 and cases cited at nn. 97-99; 22 C.J.S. at §110(a).

<sup>38</sup> See Lafave, *supra* note 8, §4.10(c) at 392-93; *accord*, Watterson, *supra* note 4, at 279. See M.P.C. §2.08(2).

<sup>39</sup> See 21 Am. Jur. 2d *Criminal Law* §155 and n. 95.

<sup>40</sup> See e.g., Watterson, *supra* note 4, at 279; see 21 Am. Jur. 2d *Criminal Law* §155 & n. 26. *But see* Watterson, *supra* note 4, at 279, n. 19 (noting that an acquittal might result in the instance of the few specific intent crimes that have no lesser included general offenses).

<sup>41</sup> See e.g., Lafave, *supra* note 8, §4.10 (a) at 388-89; Goldstein, “The Mickey Finn Defense: Involuntary Intoxication and Insanity,” 20 Bull. Am Acad. Psych. Law 27 (1992); Watterson, *supra* note 4, at 278; 21 Am. Jur. 2d *Criminal Law* §155; 22 C.J.S. §110(a).

<sup>42</sup> *De Boor v. State*, 243 Ind. 87, 182 N.E.2d 250 (1962), cert. denied, 371 U.S. 848, 83 S. Ct. 83 (1962). See also 22 C.J.S. §110 (relevant factors are the degree of intoxication and what effect it had on defendant’s ability to form a specific intent to commit the crime charged).

<sup>43</sup> 22 C.J.S. §110(b) nn. 95-97 and accompanying text.

<sup>44</sup> See *Marshall v. Commonwealth*, 141 Ky. 222, 132 S.W. 139 (1910); *accord*, Lafave, *supra* note 8, §4.10(a) n.31 and accompanying text at 391; Watterson, *supra* note 4, at 280; 22 C.J.S. §110(a) nn. 88-90 and accompanying text.

<sup>45</sup> See e.g., Watterson, *supra* note 4, at 280; 22 C.J.S. §110(a) n. 91 and accompanying text at 139. For further discussion of limits on the voluntary intoxication defense, see Watterson at 279-82.

<sup>46</sup> See e.g., *Kane v. United States*, 399 F.2d 730, 736 (9th Cir. 1968), cert. denied, 393 U.S. 1057, 89 S. Ct. 698 (1969) (1st degree murder reduced to voluntary manslaughter). But some courts have refused to entertain defense of voluntary intoxication to offense of murder to reduce to manslaughter. See 21 Am. Jur. 2d *Criminal Law*

sufficient to negate specific intent frequently is submitted as an issue of fact in a trial and may be rejected by the trier of fact.<sup>47</sup>

Finally, ten states, including Hawaii,<sup>48</sup> have rejected or never adopted the specific intent exception.<sup>49</sup> Statutes in these states generally provide that voluntary intoxication is not a defense to any crime and may not be taken into consideration even on the issue of specific intent.<sup>50</sup> The United States Supreme Court recently considered whether such a statute offends the due process clause of the Fourteenth Amendment. The test for determining whether a state's denial of a criminal defense violates the due process clause is if it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."<sup>51</sup> Using this "fundamental principle" test in *Montana v. Egelhoff*,<sup>52</sup> the Supreme Court provided a detailed historical and policy analysis of the voluntary intoxication defense to a specific intent crime. In a plurality decision, the Court upheld a Montana statute that prohibited the use of voluntary intoxication as a defense to the *mens rea* element of a statutorily defined offense.<sup>53</sup> Thus there is no constitutionally protected due process right to present a voluntary intoxication defense to negate state of mind as an element of a criminal offense and states are free to permit or prohibit such a defense.

## Involuntary Intoxication

While intoxication generally is no defense if it is voluntary, the same is not true if the intoxication is involuntary.<sup>54</sup> As one legal commentator observed, although "occasions for its application have not been frequent, the rule appears to be settled that involuntary intoxication relieves the criminality of an act committed under its influence."<sup>55</sup> Some commentators have indicated the defense is so rare as to be almost nonexistent.<sup>56</sup> Nevertheless, the literature

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§155 and cases cited at n.27. Furthermore, where distinctions between degrees of murder has been abolished, intoxication has been held to be no excuse. *See* 21 Am. Jur. 2d *Criminal Law* §155 and n. 29.

<sup>47</sup> *See* 8 A.L.R.3d §4[a] at 1246 n. 20 (noting that, in the majority of the cases cited, the evidence was held insufficient to show accused did not possess requisite intent or motive and conviction upheld).

<sup>48</sup> Hawaii joined these states in 1986 when the Legislature amended the Hawaii Penal Code to provide that evidence of intoxication is no longer admissible to negate state of mind. *See* Haw. Rev. Stat. §702-230 (1993); *State v. Souza*, 72 Haw. 246, 813 P.2d 1384 (1991).

<sup>49</sup> These states are Arizona, Arkansas, Delaware, Georgia, Hawaii, Mississippi, Missouri, Montana, South Carolina, and Texas. *See* Levine, *supra* note 29, at 91 n. 112.

<sup>50</sup> *Id.*; *accord*, Watterson, *supra* note 4, at 278 n. 16 and accompanying text; 21 Am. Jur. 2d *Criminal Law* §155 n. 92; 22 C.J.S. §110(a) n. 85 and accompanying text. *But see* Lafave, *supra* note 8, §4.10(a) at 390 (arguing this view is wrong). Even though not admissible during trial, some jurisdictions may admit such evidence by way of mitigation of punishment. *See* Shurbet v. State, 652 S.W.2d 425 (Tex. App. 3d Dist. 1982).

<sup>51</sup> Levine, *supra* note 29, at 89, citing *Patterson v. New York*, 432 U.S. 197, 201 (1977).

<sup>52</sup> 116 S. Ct. 2013, 2024 (1996).

<sup>53</sup> *Id.* at 2106. *See* Levine, *supra* note 29, for further discussion of case. *See also* Mont. Code Ann. §45-2-203 (1995).

<sup>54</sup> *See e.g.*, *Kane v. United States*, 399 F.2d 730, 736 (9th Cir. 1968), cert. denied, 393 U.S. 1057, 89 S. Ct. 698 (1969); *State v. Hall*, 214 N.W.2d 205 (Iowa 1974).

<sup>55</sup> 21 Am. Jur. 2d *Criminal Law* §156.

<sup>56</sup> *See* Mandiberg, *supra* note 19, at 268 n. 208; *accord*, Paulsen, "Intoxication as a Defense to Crime," 1961 U. Ill. L.F. 1, 18 (although examples of involuntary intoxication can be hypothesized, "cases in which the defense is successful simply do not exist in the books). *But see* L. Tiffany & M. Tiffany, *The Legal Defense of*

indicates that, for a successful involuntary intoxication defense, the defendant typically must be able to prove three elements:

- (1) The defendant was intoxicated at the time of the criminal act;
- (2) The intoxication was involuntarily created; and
- (3) The defendant's mental state at the time of the offense met the jurisdiction's test for insanity.<sup>57</sup>

According to one legal commentator, the rationale for the involuntary intoxication defense is based upon:

[T]he presumption that one who consumes an intoxicant against one's will, or without full awareness of the implications of one's conduct, is not blameworthy. Thus, ... the offender does not freely choose to become intoxicated and does not willingly assume the risks of one's intoxicated conduct.<sup>58</sup>

Because involuntary intoxication serves as a complete defense, it is critical to distinguish between involuntary and voluntary intoxication. Courts have held intoxication to be involuntary under the following circumstances:

- (1) The intoxication is the result of an innocent mistake by defendant as to the character of the substance taken or the result of fraud.<sup>59</sup>
- (2) The intoxication is the result of duress or coercion.<sup>60</sup>
- (3) The intoxicating substance is administered for medicinal purposes or is taken pursuant to medical advice.<sup>61</sup>

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Pathological Intoxication (1990); L. Tiffany & M. Tiffany, "Nosologic Objections to the Criminal Defense of Pathological Intoxication: What do the Doubters Doubt?" 13 Int'l J. L. Psych. 49 (1990).

<sup>57</sup> Goldstein, *supra* note 41, at 28. For example, the Model Penal Code provides for the defense of involuntary intoxication in language similar to that of the insanity defense: involuntary intoxication is a defense "if by reason of the 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 the law." Model Penal Code §2.08(4).

<sup>58</sup> Watterson, *supra* note 4, at 283 (notes omitted).

<sup>59</sup> See e.g., *People v. Scott*, 146 Cal. App. 3d 823, 194 Cal. Rptr. 633 (1983) (defendant involuntarily intoxicated where, unknown to defendant, PCP put into punch); *Torres v. State*, 585 S.W. 2d 746 (Tex. Crim. App. 1976) (friend gave defendant Alka-Seltzer containing drugs without her knowledge when she complained of headache).

<sup>60</sup> Levine, *supra* note 29, at 77; *accord*, 21 Am. Jur. 2d *Criminal Law* §156, which states that involuntary intoxication may result from or be induced by "force, duress, fraud, or contrivance of another." Further notes that this rule has been given narrow interpretation and is recognized only under strict limitations. *Id.*

<sup>61</sup> See e.g., *City of Minneapolis v. Altimus*, 306, 462, 238 N.W. 2d 851 (1976) (valium; defendant must not know drug is likely to have an intoxicating effect). See also *People v. Low*, 732 P.2d 622 (Colo. 1987) (Psychotic state as result of ingestion of large amounts of cough drops could constitute involuntary intoxication and complete defense where defendant had not been aware of possible side effects of ingestion of large quantity of dextromethorphan). Intoxication as a result of drugs that are medicinally administered is considered involuntary, even if the drug was self-administered. 21 Am.Jr. 2d *Criminal Law* §156, citing *Saldiveri v. State*, 217 Md. 412,

- (4) The individual is aware of the substance the individual is taking, but the resulting reaction is “grossly excessive in degree” and the individual is unaware that the individual is susceptible to an atypical reaction to the substance taken.<sup>62</sup> This is known as “pathological intoxication” or pathological reaction to alcohol.<sup>63</sup>

The critical test for determining the involuntariness of the intoxication is whether there is an “absence of an exercise of independent judgment and volition on the part of the accused in taking the intoxicant.”<sup>64</sup> Consequently, courts have rejected the involuntary intoxication defense in cases in which a defendant knew or had reason to know of the effect the intoxicant was likely to have.<sup>65</sup> Once a defendant successfully shows the intoxication was involuntary, the defendant still must prove that the intoxication made the defendant temporarily insane according to the jurisdiction’s insanity test. Legal commentators indicate that this is a difficult burden to overcome.<sup>66</sup> Finally, although there has been much discussion over the issue by legal commentators, the courts have nearly universally held that the mere fact that the defendant is an alcoholic<sup>67</sup> or an addict<sup>68</sup> is insufficient to constitute involuntary intoxication.<sup>69</sup>

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143 A.2d 70 (1958); *State v. Rippey*, 104 N.C. 752, 10 S.E. 259 (1889); *Dubs v. State*, 2 Md. Ap. 524, 235 A.2d 764 (1967); *State v. Bunn*, 283 N.C. 444, 196 S.E.2d 777 (1973).

<sup>62</sup> Lafave, *supra* note 8, §4.10(f) at 394. See Levine, *supra* note 29, at 78, which defines pathological intoxication as “a temporary psychotic reaction, often manifested by violence, which is triggered by consumption of alcohol by a person with a pre-disposing mental or physical condition.” There has been a great deal of debate within the medical community over whether pathological intoxication exists as a distinct clinical entity. See Model Penal Code §2.08 comment 7 at 12 (Tent. Draft No. 9, 1959). For a discussion of the subject, see L. Tiffany & M. Tiffany, “Nosologic Objections to the Criminal Defense of Pathological Intoxication: What do the Doubters Doubt?” 13 Int’l J. L. Psych. 49-75 (1990).

<sup>63</sup> See 21 Am. Jur. 2d *Criminal Law* §156. Involuntary intoxication includes intoxication resulting from drugs taken or administered for medicinal purposes and “pathological intoxication”. *Id.* Model Penal Code §2.08(5)(c). See *State v. Matthews*, 20 Or. App. 466, 532 P.2d 250 (1975) (psychiatrist’s testimony that defendant suffered from “organic brain disease” which made his excessive drinking of alcoholic beverages an “automatic” an involuntary process” sufficient to support finding that defendant was involuntarily intoxicated.)

<sup>64</sup> Watterson, *supra* note 4, at 283 and n. 59; see 21 Am. Jur. 2d *Criminal Law* §156. The influence inducing an accused to become intoxicated “must be such as to preclude his exercise of independent judgment and volition.” 22 C.J.S. §111 at 141, citing *Johnson v. Commonwealth*, 135 Va. 524, 115 S.E. 673 (1923).

<sup>65</sup> *Kane v. United States*, 399 F.2d 730, 736 (9th Cir. 1968), cert. denied, 393 U.S. 1057, 89 S. Ct. 698 (1969); (Where defendant is aware of his weakness or susceptibility, deemed voluntary intoxication); *Commonwealth v. Herd*, 413 Mass. 834, 604 N.E.2d 1294 (1992) (In prosecution for beating death, no defense if Commonwealth proved defendant knew or had reason to know that his consumption of cocaine would activate a mental disease or defect since, even though there was evidence defendant suffered from cocaine paranoid delusion, he has stated to witnesses that he knew he engaged in beatings while high on cocaine); *Commonwealth v. Sheehan*, 376 Mass. 765, 383 N.E. 2d 1115 (1978), finding of lack of criminal responsibility not warranted where defendant voluntarily consumes drugs knowing consumption will cause mental disease or defect).

<sup>66</sup> See Watterson, *supra* note 4, at 282-83; 21 Am. Jur. 2d *Criminal Law* §156.

<sup>67</sup> See e.g., *Evans v. State*, 645 P.2d 155 (Alaska 1982); *State v. Palacio*, 221 Kan. 394, 559 P.2d 804 (1977). But see *State v. Plummer*, 117 N.H. 3220, 374 A.2d 431 (1977) (chronic alcoholism a defense if it produces insanity in the form of dipsomania). See generally, Watterson, *supra* note 4, at 284-86 (discussing whether chronic alcoholism constitutes involuntary intoxication).

<sup>68</sup> “Evidence of mere narcotics addiction standing alone and without other physiological involvement, raises no issue of such mental defect or disease as can serve as basis for insanity defense.” 21 Am. Jur. 2d *Criminal Law* §55 (1998 supp.), citing *United States v. Lyons*, 731 F.2d 243 (5th Cir. 1984) cert. denied 469 U.S. 930, 105 S. Ct. 323 (1984), overruling *United States v. Bass*, 490 F.2d 846 (5th Cir. 1974). Voluntary use of drugs is not a defense to a crime; and drug addiction, standing alone, does not qualify as a mental disease or defect that would

## The Doctrine of Settled Insanity

### *Insanity is Insanity*

A majority view in American jurisprudence holds that insanity is insanity regardless of the underlying cause of the insanity. It has been said that:

Insanity at the time of an alleged criminal act generally constitutes a defense, regardless of how the condition may have come about. Under this view, if the defendant is in fact insane at the time of the act charged, it makes no difference that his condition was brought on by his own wrongful and unlawful acts.<sup>70</sup>

In some instances, the habitual, long-term use of drugs or alcohol can result in permanent mental disorders that are symptomatically and organically similar to mental disorders caused by brain disease.<sup>71</sup> According to authorities, among the courts that have considered the issue,<sup>72</sup> the nearly unanimous rule is that a mental or brain disease or defect caused by the long-term effects of intoxicants constitutes a mental state that warrants an insanity defense rather than an intoxication defense.<sup>73</sup> As the court in *United States v. Lyons* stated:

[M]ere narcotics addiction raises no issue of mental disease or defect such as would support an insanity defense, but it is otherwise as to evidence that the addiction has

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support a finding of lack of criminal responsibility, unless a causal connection exists between drug addiction and a mental disease or defect of the accused. 22 C.J.S. §113 (at 142). *See e.g.*, *United States v. Freeman*, 357 F.2d 606 (2<sup>nd</sup> Cir. 1965); *Commonwealth v. Blake*, 409 Mass. 146, 564 N.E.2d 1006 (1991); *Commonwealth v. Sheehan*, 376 Mass. 765, 383 N.E. 2d 1115 (1978); *State v. Bishop*, 632 S.W. 2d 255 (Mo. 1982). *See also* *Commonwealth v. Tate*, 893 S.W.2d 368 (Ky. 1995) overruling *Prather v. Commonwealth*, 215 Ky. 714, 287 S.W. 559 (1926). The court in *Prather* had held that a person who is a drug addict and thus unable to resist the craving for the drug cannot be said to be acting voluntarily with respect to its use. In *Tate*, the court ruled that drug addiction, by itself, is not a disease constituting or leading to mental illness for purposes of the criminal responsibility statute.

<sup>69</sup> *See* *Tacorante v. People*, 624 P.2d 1324 (Colo. 1981); *State v. Boone*, 307 N.C. 198, 297 S.E.2d 585 (1982); *Lafave, supra* note 8, §4.10(f) at 394; 21 Am. Jur. 2d *Criminal Law* §55; 22 C.J.S. §113. *But see*, *Robinson v. California*, 370 U.S. 660, 82 S. Ct. 1417 (1962), in which the Supreme Court, relying upon cruel and unusual punishment grounds, held unconstitutional a statute making it a criminal offense for a person to be “addicted to the use of narcotics.” However, the Court gave *Robinson* a narrow reading in *Powell v. Texas*, 392 U.S. 514, 88 S. Ct. 2145 (1968), as only barring punishment of status of being an addict. *See* *Lafave, supra* note 8, §4.10(h) at 396.

<sup>70</sup> 21 Am. Jur. 2d *Criminal Law* §54, citing *State v. Porter*, 213 Mo. 43, 111 S.W. 529 (1908).

<sup>71</sup> *Levine, supra* note 29, at 78 and 86-87. *Accord*, *Johnson, supra* note 12, at 259 (can cause permanent damage to the brain, resulting in insanity), citing *Dressler, supra* note 6, at 283 (such condition is often called “organic brain syndrome” or “organic mental disorder.”). *See also* *Hewitt v. State*, 575 So. 2d 273 (Fla. App. 1991) (error to refuse to instruct jury that excessive and continuous use of intoxicants can induce insanity).

<sup>72</sup> According to *Levine*, the courts in twenty-nine states and the District of Columbia have recognized the settled insanity defense; one state has rejected it; and twenty states have not addressed the issue. *Levine, supra* note 6, at 87-88. *But see* notes 99-104 and accompanying text *infra* (two of the twenty states have statutorily rejected doctrine of settled insanity).

<sup>73</sup> *Johnson, supra* note 12, at 259-260, citing *Dressler, supra* note 6, at 284 and *State v. Harden*, 260 Kan. 365, 375, 480 P.2d 53, 61 (1971) (quoting *State v. Rumble*, 81 Kan. 16, 105 P. 1 (1909)). *See* *Greider v. Duckworth*, 701 F.2d 1228 (7th Cir. 1983); *People v. Griggs*, 17 Cal. 2d 621, 110 P.2d 1031 (1941); *People v. Toner*, 217 Mich. 640, 187 N.W. 386 (1922). *See also*, 22 C.J.S. §113.

caused physiological damage to the defendant's brain which has caused him to lack substantial capacity to conform his conduct to the requirements of law.<sup>74</sup>

Consequently, while the general rule is that a voluntary state of intoxication cannot cause the type of insanity that would exculpate or excuse one from criminal responsibility, courts have recognized an exception where the voluntary, continuing use has resulted in what has been labeled as a "fixed" or "settled" condition of insanity.<sup>75</sup> Thus, in a majority of jurisdictions, a person whose mental disease or disorder has been caused by the use of intoxicants may rely upon settled insanity as a complete defense, provided that the person can meet the jurisdiction's definition of insanity.<sup>76</sup> Accordingly, these jurisdictions treat settled or fixed insanity, even though caused by long-continued voluntary<sup>77</sup> alcoholic indulgence or narcotic use, the same as insanity arising from any other cause.<sup>78</sup>

### *Settled Insanity Brought on by Long-term Drug or Alcohol Use*

The doctrine of settled insanity relates to both insanity and voluntary intoxication: the difficulty lies in determining the point at which the mental disorder caused by the voluntary intoxication becomes insanity. In considering the issue, courts have frequently held that the use of intoxicants must produce a "permanent and settled insanity" that is distinct from the compulsion to abuse alcohol or drugs.<sup>79</sup> However, a few authorities state that the insanity need

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<sup>74</sup> 731 F.2d 243 (5th Cir. 1984).

<sup>75</sup> 22 C.J.S. §112 (long continued habits of intemperance producing permanent mental disease amounting to insanity ... relieves [one] from responsibility under the law, the same as insanity arising from other causes). *Accord*, State v. Maik, 287 A.2d 715, 722 (N.J. 1972) (holding that psychosis caused by voluntary drug use met the test for insanity, reasoning that the cause behind the insanity—voluntary intoxication – was irrelevant). *See* Meloy, *supra* note 3, for discussion of the history of the doctrine of settled insanity in California.

<sup>76</sup> *See* Lafave, *supra* note 8, §44.10(g), at 395 (insanity defense successful in circumstances where the disease or defect of mind was caused by the defendant's use of drugs or alcohol).

<sup>77</sup> Johnson, *supra* note 12, at 260, citing Dressler, *supra* note 6, at 284. (Thus, if the consumption of drugs causes a mental disease or defect, apart from drug addiction itself, the defendant generally may rely upon that mental disease or defect in support of his assertion of lack of criminal responsibility, even if his drug consumption was voluntary.) *See* Commonwealth v. Sheehan, 376 Mass. 765, 383 N.E. 2d 1115 (1978). *Accord*, U.S. v. Garcia, 94 F.3d 57 (Conn. 1996) (where a severe mental disease or defect is found, voluntary substance abuse will not defeat an insanity defense); Couch v. State (Okla. Crim.) 375 P.2d 978 (1962) (If defendant's reason is perverted or destroyed by a fixed disease, even though brought on by his own vices, the law holds him not accountable).

<sup>78</sup> 21 Am. Jur. 2d *Criminal Law* §54, citing People v. Cochran, 313 Ill. 508, 145 N.E. 207 (1924); State v. Rippy, 104 N.C. 752, 10 S.E. 259 (1889). *See also* Bidwell, *supra* note 15, at 28 (long-term drug or alcohol use is allowable as a cause of the defendant's mental "disease or defect" when the end result is a state known as delirium tremens).

<sup>79</sup> *See* Watterson, *supra* note 4, at 286; *accord*, 22 C.J.S. §113 (insanity caused by drugs must be permanent and fixed in character). *See generally* People v. McCarthy, 110 Cal. App. 3d 296, 167 Cal. Rptr. 772 (1980) (with respect to establishing insanity due to alcohol, it must be shown that there exists a "settled insanity" and not the type of a temporary mental condition produced by current use of alcohol); People v. Wagoner, 89 Cal. App. 3d 605, 152 Cal. Rptr. 639 (1979) (insanity produced by voluntary intoxication must be of a "settled nature" to constitute a complete defense to general intent crime); People v. Free, 94 Ill.2d 378, 69 Ill. Dec. 1, 447 N.E.2d 218 (1983) ("voluntary intoxication or voluntary drugged condition precludes the use of the insanity defense *unless* the mental disease or defect is traceable to the habitual or chronic use of drugs or alcohol ... and such use results in a 'settled' or 'fixed' permanent type of insanity"); State v. Hall, 214 N.W.2d 205 (Iowa 1947) (must be "settled or established" insanity); State v. Wicks, 98 Wn.2d 620, 657 P.2d 781 (1983) (must be evidence of permanent impairment of the mind, a psychotic disorder of a settled nature, such as delirium tremens).

not be permanent.<sup>80</sup> The terms “fixed” or “settled” are intended to describe a mental disorder that “exists prior to and after any single bout of intoxication.”<sup>81</sup> In an attempt to clarify the doctrine of settled insanity, the court in *People v. Skinner*<sup>82</sup> identified four criteria for defining the “settled” nature of an insanity defense.<sup>83</sup> The disorder must:

- (1) Be fixed and stable;
- (2) Last for a reasonable duration of time;
- (3) Not be solely dependent upon the ingestion and duration of the drug; and
- (4) Meet the jurisdiction’s legal definition of insanity.<sup>84</sup>

The United States Court of Appeals in both the Ninth Circuit and the Second Circuit has considered whether voluntary intoxication in combination with a mental disease can support an

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<sup>80</sup> See Meloy, *supra* note 3, at 443 (notion of permanency violates rule that temporary insanity as defense is as fully recognized by law as permanent insanity). *Accord*, *People v. Kelly*, 10 Cal.3d 565, 111 Cal. Rptr. 171, 516 P.2d 875 (1973) (insanity complete defense where condition brought about by repeated use of intoxicants or drugs, even though such use was voluntary and even though the psychosis was temporary; provided the condition in question was not limited merely to periods of intoxication). See also *Britts v. State*, 158 Fla. 839, 30 So.2d 363 (1947); *State v. Kraemer*, 49 La. Ann. 766, 22 So. 254 (1897); *Evers v. State*, 31 Tex. Crim. 318, 20 S.W. 744 (1892); *State v. Kidwell*, 62 W. Va. 466, 59 S.E. 494 (1907).

<sup>81</sup> Dressler, *supra* note 6, at 283; *accord*, *Levine, supra* note 29, at 78 (disorder remains even though the person is not under the influence of intoxicants); *Johnson, supra* note 12, at 259 (“exists independent of any single bout of intoxication.”); *cf. Evans v. State*, 645 P.2d 155 (Alaska 1982) (“mental disease or defect ... must be severe enough to constitute an insanity defense by itself without regard to the intoxicated state of the accused”); *People v. McCarthy*, 110 Cal. App.3d 296, 167 Cal. Rptr. 772 (1980) (to establish insanity due to alcohol, “settled insanity” must be shown to exist, not the type of temporary mental condition produced by current use of alcohol); *State v. Kolisnitschenko*, 84 Wis.2d 492, 267 N.W.2d 321 (1978) (temporary psychotic state that lasts only for period of intoxication and is brought into existence by the interaction of a stormy personality and voluntary intoxication held not to constitute a mental disease – no defense). Indeed, it has been said that the settled insanity defense is available only to those alcoholics who, when sober, are insane and, in judging their insanity while sober, their inability to restrain themselves from taking a drink may not be considered. 22 C.J.S. §112 n. 9, citing *Evans v. State*, 645 P.2d 155 (Alaska 1982). For example, delirium tremens brought on by withdrawal from intoxicant is a complete defense. 22 C.J.S. §112.

<sup>82</sup> 185 Cal. App.3d 1050 (1986).

<sup>83</sup> According to one legal authority, other courts have relied upon the following tests to determine whether insanity of a “fixed or permanent character” brought on by use of intoxicants may effectively negate a person’s responsibility for criminal acts: whether the effect of the substance is such as to overcome the accused’s mental processes to the extent that the accused no longer possesses the capacity to think and plan (21 Am. Jur. 2d *Criminal Law* §55, citing *State v. Scales*, 28 N.C. App. 509, 221 S.E.2d 898 (1976), cert. denied, 289 N.C. 619, 223 S.E.2d 395 (1976); and whether the offense is shown to be a product of an abnormal condition that substantially affects mental or emotional processes and substantially impairs behavior controls. 21 Am. Jur. 2d *Criminal Law* §55, citing *Watson v. United States*, 141 App. D.C. 335, 439 F.2d 442 (1970).

<sup>84</sup> Meloy, *supra* note 3, at 448. See *Levine, supra* note 29, at 88. The court in *Skinner* stated: “It appears logical that settled must mean fixed and stable for a reasonable duration and not solely dependent on the recent injection or ingestion and duration of the effects of the drug.... The onset of the psychosis ... was a result of the ingestion of the free base cocaine and the duration was transitory and related to the cessation to the drug’s influence although it may have extended slightly beyond that influence for from five to seven days.” 185 Cal. App.3d at 1063. Meloy notes that the court in *Skinner* attempted to define the ambiguous term “settled” by using “two further semantically ambiguous and clinically meaningless terms, ‘fixed’ and ‘stable.’” Meloy, *supra* note 3, at 448.

insanity defense.<sup>85</sup> In *United States v. Knott*,<sup>86</sup> the Court of Appeals for the Ninth Circuit held that:

[V]oluntary intoxication combined with a mental disease will not support an insanity defense under the IDRA [Insanity Defense Reform Act].<sup>87</sup> A mental disease or defect must be beyond the control of the defendant if it is to vitiate his responsibility for the crime committed. *Insanity that is any part due to a defendant's voluntary intoxication is not beyond his control.*<sup>88</sup>

In *Knott*, the court also approved and reiterated its ruling in *United States v. Burnium*<sup>89</sup> that the court, when considering an insanity defense, must disregard whatever incapacitating effects were attributable to the voluntary ingestion of intoxicants.<sup>90</sup>

In *United States v. Garcia*,<sup>91</sup> the Court of Appeals for the Second Circuit held that, for purposes of an insanity defense, a person's voluntary intoxication may not be taken into account in determining whether a severe mental disease or defect exists in the first instance. The court cited *Knott* with approval, noting the factual similarity between the two cases. In addition, the court reviewed the legislative history behind the IDRA and cited the following statement of congressional intent:

[V]oluntary use of alcohol or drugs, even if they render the defendant unable to appreciate the nature and quality of his acts, does not constitute insanity or any other species of legally valid affirmative defense.<sup>92</sup>

The court noted its agreement with the government's argument that:

Combining a mental disease or defect that is itself-insufficient under the IDRA, with the impermissible consideration of voluntary substance abuse, to result in a valid defense of insanity under the IDRA, is wholly illogical. This would constitute nothing short of regarding the voluntary abuse of drugs and alcohol in direct contradiction of the intent of Congress in passing the IDRA.<sup>93</sup>

Several state courts, including Hawaii, have similarly ruled that, for purposes of the insanity defense, a defendant's mental disorder must exist independent of any intoxication.<sup>94</sup> The court in *Garcia* indicated that, once the existence of a person's mental disease or defect has been established, the person's intoxication at the time of the commission of the offense would

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<sup>85</sup> *United States v. Garcia*, 94 F.3d 57 (2nd Cir. 1996); *United States v. Knott*, 894 F.2d 1119 (9th Cir. 1990), cert. denied, 111 S. Ct. 197 (1990); *United States v. Burnim*, 576 F.2d 236, 237 (9th Cir. 1978); *Kane v. United States*, 399 F.2d 730 (9th Cir. 1969), cert. denied, 393 U.S. 1057, 89 S. Ct. 698 (1969).

<sup>86</sup> 894 F.2d 1119 (9th Cir. 1990), cert. denied, 111 S. Ct. 197 (1990).

<sup>87</sup> See discussion of federal act at notes 54-57 and accompanying text in Chapter 2.

<sup>88</sup> 894 F.2d at 1122 (emphasis added).

<sup>89</sup> 576 F.2d 236, 237 (9th Cir. 1978) (decided before passage of the Insanity Defense Reform Act).

<sup>90</sup> 894 F.2d at 1122.

<sup>91</sup> 94 F.3d 57 (2nd Cir. 1996).

<sup>92</sup> *Id.* at 61-62 (citation omitted) (noting that statements of congressional intent are rarely so clear).

<sup>93</sup> *Id.* at 62.

<sup>94</sup> See *State v. Freitas*, 62 Haw. 17, 608 P.2d 408 (1980). See discussion of case at notes 25-38 and accompanying text in Chapter 4.

not otherwise defeat a settled insanity defense.<sup>95</sup> Accordingly, one authority has stated the rule as follows:

If the test of criminal responsibility locally applied is met, a settled or fixed insanity is a defense, even though it may have had its origin in long-continued voluntary intoxication, and regardless of whether defendant was under the influence of liquor at the time of the particular act.<sup>96</sup>

Given the unsympathetic attitude of common law jurists toward intoxicated criminal conduct, one legal commentator has called the settled insanity doctrine “surprising,” considering that courts could have denied “abusers of intoxicants the right to claim insanity on the theory that the ‘madness was contracted by the vice and will of the party.’”<sup>97</sup> One appellate state court appears to have rejected the settled insanity defense on just such a basis.<sup>98</sup>

On the other hand, twenty-nine states and the District of Columbia, by court decision, reportedly have recognized the doctrine of settled insanity.<sup>99</sup> However, as discussed previously, two of these states, Idaho and Montana, have statutorily abolished the traditional, affirmative insanity defense.<sup>100</sup> Consequently, the Montana Supreme Court has indicated it now considers the settled insanity defense limited to the same extent the insanity defense is presently limited.<sup>101</sup> The Idaho Supreme Court has not had occasion to consider what effects the present Idaho statute will have on the settled insanity defense.<sup>102</sup> One commentator reports that twenty states, including Hawaii, have not addressed the issue of settled insanity.<sup>103</sup> However, two of these twenty, Connecticut and Delaware, have enacted similar statutes that preclude the insanity defense if the mental disease or defect “was proximately caused by the voluntary ingestion, inhalation or injection of intoxicating liquor or any drug or substance” or combination thereof, unless prescribed by a licensed medical practitioner and used in accordance with such prescription.<sup>104</sup> (See Appendices B and C for complete text of statutes.) Thus, these states have apparently joined Colorado in rejecting the settled insanity defense.

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<sup>95</sup> United States v. Garcia, 94 F.3d 57 (Conn. 1996) (where a severe mental disease or defect is found, voluntary substance abuse will not defeat an insanity defense); see Dressler, *supra* note 6, at 284; 21 Am. Jur. 2d *Criminal Law* §55, citing Edwards v. State, 38 Tex. 386, 43 S.W. 112 (1897). However, evidence of intoxication has been held to be fatal to a delerium tremens defense. See Boettcher, *supra* note 31, at 36.

<sup>96</sup> 21 Am. Jur. 2d *Criminal Law* §54. See Parker v. State, 7 Md. App. 167, 254 A.2d 381 (1969), cert. denied, 402 U.S. 984, 91 S. Ct. 1670 (1971); Collier v. State, 17 Okla. Crim. 139, 186 P. 963 (1990); State v. Kidwell, 62 W. Va. 466, 59 S.E. 494 (1907).

<sup>97</sup> Dressler, *supra* note 6, at 284.

<sup>98</sup> Bieber v. People, 856 P.2d 811 (Colo. 1993), cert. denied, 114 S. Ct. 716 (1994).

<sup>99</sup> Levine, *supra* note 29, at 87 n. 81.

<sup>100</sup> See discussion at note 60 in Chapter 2.

<sup>101</sup> Levine, *supra* note 29, at 87 n.81.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 88 and n. 82. According to Levine, the states are Connecticut, Delaware, Hawaii, Kentucky, Maine, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Oregon, Pennsylvania, Rhode Island, Utah, Vermont, West Virginia, Wisconsin, and Wyoming. *But see* note 104 and accompanying text *infra*.

<sup>104</sup> Conn. Gen. Stat. §53a-13(b) (1997); Del. Code tit. Crimes & Crim. Proc., §401(c) (1997).

***Bieber v. People: Rejection of Settled Insanity***

In *Bieber v. People*,<sup>105</sup> the Colorado Supreme Court, in a case of first impression, held that, as a matter of public policy, it would not excuse a person's criminal actions resulting from a mental illness caused by the person's active and voluntary use of intoxicants.<sup>106</sup> The court stated:

As a matter of public policy, therefore, 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 contacted.<sup>107</sup>

The court also held that the doctrine of settled insanity did not fit into Colorado's statutory scheme. The court found that the doctrine of settled insanity, "while ostensibly falling under the insanity statute, also invokes the question of intoxication," because its origin is the prolonged use of intoxicants.<sup>108</sup> The court concluded that Colorado's General Assembly had "definitively addressed the issue of intoxication as a defense" and that a "straight-forward reading" of the intoxication statute indicated that settled insanity could not be maintained as a defense.<sup>109</sup> Furthermore, the court found that there were no "qualitative differences" between the person who occasionally ingests intoxicants, knowing the person will become temporarily mentally defective as an immediate result, and the person who habitually uses intoxicants, knowing the person may be mentally defective as an eventual, long-term result.<sup>110</sup>

The court also discussed states with intoxication statutes similar to Colorado's and indicated that, of these, three including Hawaii had not yet addressed the issue of settled insanity.<sup>111</sup> The court emphasized that, although the remaining states with similar intoxication statutes had found settled insanity to be a "viable defense," they had done so "well before they enacted their present criminal codes."<sup>112</sup> Consequently, the court reasoned that, for these states, "by virtue of their settled case law, their interpretation of their statute was already moulded. We are not in such a position, but must approach our statute from its plain meaning."<sup>113</sup>

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<sup>105</sup> 856 P.2d 811 (Colo. 1993), cert. denied, 114 S. Ct. 716 (1994).

<sup>106</sup> *Id.* at 817-18.

<sup>107</sup> *Id.* at 817.

<sup>108</sup> *Id.* at 816.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 816. The court reasoned that the person, in both situations, is aware of the potential consequences of the person's actions and is morally culpable for making the choice to ingest the intoxicant and for creating the resulting condition. The court stated that such knowledge of the potential consequences should not be excused "simply because the resulting affliction is more severe" in the latter instance. *Id.* The dissent in the *Bieber* case disagreed with this reasoning and argued that there is a distinction between an intoxicated condition caused by voluntary drug use immediately before the commission of the offense (which is voluntary intoxication) and a mental condition that exists independently of the current drug use but that is the result of previous, chronic use of intoxicants (settled insanity). *Id.* at 819 (Lohr, J., dissenting).

<sup>111</sup> *Id.* The court noted that the similarity between Colorado's intoxication statute and those in Alabama, Arkansas, Connecticut, Hawaii, Maine, New Jersey, and Tennessee was probably due to the fact that they were all based, in part, upon the Model Penal Code, adopted by the American Law Institute in 1961.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

One legal commentator has observed that the particular mental disorder at issue in the *Bieber* case, amphetamine delusional disorder (ADD), was critical to the court's analysis.<sup>114</sup> ADD is a mental disorder involving paranoia and delusional thinking that occurs as a result of chronic amphetamine use. The disorder typically diminishes within a few days or weeks after use of the drug and thus is similar to temporary insanity, which is not a defense in Colorado.<sup>115</sup> The court concluded, therefore, that it would be "inconsistent and erroneous" to allow settled insanity as a defense, because it encompasses many of the same principles as temporary insanity.<sup>116</sup>

### *Is There Justification for Bieber?*

The *Bieber* case raises an issue similar to that presented by the Hawaii State Legislature in Senate Concurrent Resolution No. 132, S.D. 1, that is, where should society draw the line in deciding when to hold persons accountable for their choice to voluntarily ingest intoxicants? Is it too late to hold them blameworthy, and thus responsible for their criminal actions, once they have developed a mental or physical disease or disorder as a result of prolonged, repeated use of intoxicants?

The settled insanity doctrine is sometimes defended on the theory that the task of tracing the chain of causation from the criminal act back to the offender's original misconduct of indulging in intoxicants would be overwhelming.<sup>117</sup> However, others maintain the more likely rationale supporting the doctrine is that it recognizes that a person's earlier, voluntary choice to ingest intoxicants is too "morally remote" to hold the person accountable for later acts committed in a permanently impaired condition.<sup>118</sup> As one commentator has phrased it: "One should not be blamed for every harmful act ... that can be linked to an earlier moral transgression. At some point we must conclude that 'enough is enough.'"<sup>119</sup>

On the other hand, the settled insanity doctrine has been criticized for permitting discrepancies where identical criminal activity might result in different outcomes. For example, if the actor in one instance had developed a mental disease or disorder as a result of chronic drug abuse, the actor, in a majority of jurisdictions, would be acquitted on the basis of settled insanity; whereas in the other instance, the actor whose occasional drug use did not result in a mental disease or disorder would be convicted. As one commentator has observed: the "message is clear – under the criminal law, it is better to be a chronic drug abuser than an occasional one."<sup>120</sup> Under the *Bieber* ruling, no such discrepancy would exist. The person who chooses to abuse drugs and commit crimes is held accountable for those crimes, regardless of whether the person suffers mental defectiveness as a temporary, immediate result of the drug (intoxication) or as a gradual, long-term effect (settled insanity). In each instance, the person is aware or should be

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<sup>114</sup> Johnson, *supra* note 12, at 267.

<sup>115</sup> *Id.* See *People v. Low*, 732 P.2d 622, 632 (Colo. 1987) (temporary insanity is not part of the statutory framework for resolving a defendant's nonresponsibility for a criminal act).

<sup>116</sup> Johnson, *supra* note 12, at 267, citing *Bieber*, 856 P.2d at 817.

<sup>117</sup> See Dressler, *supra* note 6, at 284 n. 13 and accompanying text. It has been suggested that how one views causation is a major factor in deciding this issue. Johnson, *supra* note 12, at 270.

<sup>118</sup> See Dressler, *supra* note 6, at 284; Johnson, *supra* note 12, at 260.

<sup>119</sup> Dressler, *supra* note 6, at 284.

<sup>120</sup> Johnson, *supra* note 12, at 270.

aware of the possible consequences of the person's actions and voluntarily chooses to ingest intoxicants.<sup>121</sup>

One commentator contends that the “whole process begins with a conscious choice by the individual to use drugs. The chain of causation traces back to that initial decision. Following the theory underlying criminal law, this person is morally culpable or blameworthy for having exercised free will in a manner that leads to negative consequences for society.”<sup>122</sup> The court in *Bieber* expressed a similar viewpoint:

Self-induced intoxication, therefore, by its very nature involves a degree of moral culpability. The moral blameworthiness lies in the voluntary impairment of one's mental faculties with knowledge that the resulting condition is a source of potential danger to others ....<sup>123</sup>

In a similar vein, another critic of the doctrine of settled insanity argues that the:

[P]ossible effects of substance abuse are well-known, and courts should not excuse presently insane actors merely because their afflictions are more severe than those who are only temporarily impaired by alcohol. Thus, if anything, moral culpability for long term abuse should be greater than culpability committed while intoxicated.<sup>124</sup>

Relying upon an analysis similar to that employed by the United States Supreme Court in *Montana v. Egelhoff*,<sup>125</sup> one commentator maintains that the settled insanity doctrine is not a fundamental principle of justice and that its denial does not violate the Due Process Clause of the Fourteenth Amendment.<sup>126</sup> In applying each of the five *Egelhoff* considerations independently to the settled insanity doctrine, the commentator concludes that:

- (1) The doctrine has not reached “considerable acceptance” under the *Egelhoff* standard because it is accepted law in only 29 out of 50 states, or 58% of all states;<sup>127</sup>
- (2) The doctrine was “neither widely accepted nor deeply rooted” in the American jurisprudence at the time the Fourteenth Amendment was enacted and thus “is of too recent vintage”;<sup>128</sup>

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<sup>121</sup> *Id.* at 270-71.

<sup>122</sup> *Id.* at 271; *accord*, Levine, *supra* note 29, at 100 (intoxication that ultimately leads to legal insanity is self-induced and therefore triggers moral culpability).

<sup>123</sup> 856 P.2d at 817.

<sup>124</sup> Levine, *supra* note 29, at 100-101.

<sup>125</sup> 116 S. Ct. 2013 (1996). The Court identified five factors as relevant in determining the fundamental nature of a defense: whether a defense (1) has gained “considerable acceptance,” (2) is of “recent vintage,” (3) has “received sufficiently uniform and permanent allegiance to qualify as a fundamental right,” (4) has a “lengthy common-law tradition,” and (5) “remains supported by valid justifications today.” *See* Levine, *supra* note 29, at 92-93. *See* discussion of case at notes 52-53 *supra* and accompanying text.

<sup>126</sup> Levine, *supra* note 29, at 102.

<sup>127</sup> *Id.* at 97-98.

<sup>128</sup> *Id.* at 98.

- (3) The doctrine does not have sufficient uniformity and permanency to qualify for fundamental rights status;<sup>129</sup>
- (4) The doctrine does not qualify as a lengthy common law tradition, because the doctrine was first recognized only eighteen years before the enactment of the Fourteenth Amendment and was recognized by only a handful of courts at the time the Fourteenth Amendment was enacted;<sup>130</sup> and
- (5) Any present day justifications behind the doctrine are outweighed by the moral culpability of long-term intoxicant abuse and society's interest in deterring criminal behavior.<sup>131</sup>

With respect to this latter point, the commentator points to a number of sources noting a significant relationship between crime and drug and alcohol abuse.<sup>132</sup> The positive and substantial correlation between drug abuse and crime is borne out in a number of studies.<sup>133</sup>

In addition to the foregoing analysis, the commentator noted as significant that the United States Supreme Court had the opportunity to rule on the constitutionality of the settled insanity defense in the *Bieber* case, but refrained from doing so.<sup>134</sup> Accordingly, the commentator urged that:

Courts and legislatures should follow Colorado's lead and refuse to excuse those who voluntarily impair their judgment and cognitive abilities.... Denying the settled insanity defense is another important step in eradicating the "single most important problem associated with criminal behavior ... in the United States. [S]ettled insanity should remain only in the realm of psychiatry."<sup>135</sup>

## Conclusion

It is a well-settled rule that voluntary intoxication generally affords no defense to a criminal offense. However, a majority of jurisdictions allow evidence of voluntary intoxication in determining whether a person possesses the requisite specific intent as an element to an offense. Therefore, although evidence of voluntary intoxication generally does not eliminate

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<sup>129</sup> *Id.* at 98-99 (notes that in *Egelhoff*, the Supreme Court found that "'uniform and permanent allegiance' required something more than the adoption and continuous recognition of a criminal defense by forty states," or 80% of all states).

<sup>130</sup> *Id.* at 99 (doctrine first recognized in *Haile v. State*, 30 Tenn. (11Hum.) 154, 157 (1850)).

<sup>131</sup> *Id.* at 99-101.

<sup>132</sup> See *id.* at 101 n. 181 and 76 nn. 1-5 for examples of strong correlation between intoxicant abuse and crime.

<sup>133</sup> A 1991 study indicated that, depending upon the location in the United States, 23% to 74% of all males arrested for serious nondrug crimes tested positive for drug use; the percentage of female arrestees for serious nondrug crimes who tested positive was 38% to 84%. Johnson, *supra* note 12, at 272 & n. 126. See also Watterson, *supra* note 4, at 277.

<sup>134</sup> Levine, *supra* note 29, at 78 n. 24, citing *Bieber v. Colorado*, 510 U.S. 1954 (1994) (mem.), denying cert. to 856 P.2d 811 (Colo. 1993).

<sup>135</sup> Levine, *supra* note 29, at 103.

culpability entirely, it may be used to mitigate the severity or reduce the degree of the crime charged.<sup>136</sup> However, Hawaii, together with nine other states, prohibits evidence of voluntary intoxication to negate the specific intent element of a criminal offense. In upholding a Montana statute to this effect, the United States Supreme Court, in a plurality decision, has refused to extend fundamental right status to the voluntary intoxication defense. Involuntary intoxication, while a complete defense, is recognized in only limited factual situations, and generally has been held not to apply to alcoholics or drug addicts.

In some states, voluntary intoxication that produces a fixed or settled insanity that exists independent of the period of intoxication will be accepted as an excuse.<sup>137</sup> This settled insanity doctrine has been recognized by courts in the District of Columbia and twenty-nine states out of thirty that have considered the issue; however, one has since strictly limited the doctrine.<sup>138</sup> One state high court and two state legislatures have rejected the defense, and eighteen states, including Hawaii, have not considered the issue.<sup>139</sup> The United States Supreme Court has refrained from ruling on whether the settled insanity doctrine is constitutionally required, but one legal commentator, relying upon the fundamental principle test set out in *Montana v. Egelhoff*, maintains that it is not a fundamental principle of justice and its denial does not violate the United States Constitution.<sup>140</sup>

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<sup>136</sup> See e.g., Lafave, *supra* note 8, §4.10 (a) at 388-89; Goldstein, *supra* note 41, at 27; Watterson, *supra* note 4, at 278; 21 Am. Jur. 2d *Criminal Law* §155; 22 C.J.S. §110(a).

<sup>137</sup> 21 Am. Jur. 2d *Criminal Law* §155 (notes omitted). *Accord*, Dressler, *supra* note 6, at 277.

<sup>138</sup> See notes 99-102 *supra* and accompanying text.

<sup>139</sup> See notes 98 & 103-104 *supra* and accompanying text.

<sup>140</sup> See notes 125-134 *supra* and accompanying text.

## Chapter 4

### RELEVANT HAWAII LAW ON PENAL RESPONSIBILITY

Hawaii is one of ten states that does not allow evidence of voluntary intoxication to negate a defendant's state of mind and one of eighteen states that has yet to consider the doctrine of settled insanity.<sup>1</sup> This chapter will examine relevant Hawaii statutory and case law in more detail.

#### Voluntary Acts and Intoxication

As discussed in Chapter 2, it is a fundamental concept of American jurisprudence that only the morally culpable or blameworthy should be criminally punished. It follows, therefore, that one who does not act voluntarily is not blameworthy and should not be punished for an involuntary act or the involuntary omission to act. On the other hand, voluntary actions that are the result of a rational choice provide the moral basis for imposing penal responsibility.

#### *Voluntary Acts*

Similar to other jurisdictions, Hawaii law provides that it is a defense to criminal prosecution if the alleged conduct, act or omission to perform an act was not voluntary.<sup>2</sup> This general rule is stated in section 702-200(1), Hawaii Revised Statutes, which provides, in pertinent part, that "it is a defense that the conduct alleged does not include a voluntary act or the voluntary omission to perform an act of which the defendant is physically capable." Section 702-201, Hawaii Revised Statutes, defines "voluntary act" to mean "a bodily movement performed consciously or habitually as the result of effort or determination of the defendant."

Section 702-200(2) clarifies that when a defense is based upon a physical or mental disease, disorder or defect that precludes or impairs a voluntary act or voluntary omission, the appropriate defense is insanity under chapter 704. If, however, the defense is pathological intoxication or involuntary intoxication, it falls under chapter 702, relating to principles of penal responsibility.

The Commentary to section 702-200 indicates that the section is intended to permit liability in cases where the liability is predicated not only upon a voluntary act or omission, but also upon a *course of conduct initiated by a voluntary act*.<sup>3</sup> The Commentary cites a scenario in which a driver of a motor vehicle suddenly loses consciousness and kills a pedestrian. Under this scenario, the driver has not performed a voluntary act giving rise to liability. The Commentary suggests, however, that, if the driver had disregarded a known risk that

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<sup>1</sup> See discussion in Chapter 3, at notes 48-53 and 103-104 and accompanying text.

<sup>2</sup> Haw. Rev. Stat. §702-200(1) (1993). By making the issue of involuntariness a defense, the Penal Code puts the burden on the defendant to raise the issue. Once the issue is raised, however, the prosecution must prove voluntariness beyond a reasonable doubt. See Commentary to §702-200.

<sup>3</sup> See Commentary to Haw. Rev. Stat. §702-200 (1993).

consciousness might be lost and had commenced or continued driving, such conduct might be sufficient to impose penal liability.<sup>4</sup> Following this reasoning, one could argue that the voluntary act of repeatedly ingesting intoxicants involves disregarding a known risk that such course of conduct might lead to brain damage and, therefore, such conduct should be sufficient to impose penal responsibility.

### ***Intoxication***

***Voluntary, or self-induced, intoxication.*** As noted, Hawaii is one of ten states that does not allow evidence of voluntary, or self-induced, intoxication to negate a defendant's state of mind. Prior to 1986, Hawaii law permitted evidence of intoxication to prove or negate conduct or state of mind sufficient to establish an element of an offense. Act 325, Session Laws of Hawaii, 1986 amended section 702-230, Hawaii Revised Statutes, to prohibit evidence of intoxication to negative state of mind. The express purpose of the amendment was to prohibit a person from using self-induced intoxication as a defense to a criminal offense, except under very limited instances.<sup>5</sup> The legislative history reveals that the Legislature intended that persons acting under self-induced intoxication "should remain ultimately responsible for [their] actions."<sup>6</sup>

As presently written, section 702-230(1), Hawaii Revised Statutes, states the general rule that self-induced intoxication is prohibited as a defense to any offense, unless specifically provided for in the section. Section 702-230(2) permits evidence of a defendant's involuntary or pathological intoxication to prove or negate alleged conduct or state of mind sufficient to establish an element of the offense. However, the rule is different with respect to self-induced intoxication. Evidence of a defendant's self-induced intoxication is permitted to prove or negate conduct or to *prove a state of mind* sufficient to establish an element of the offense; but it is *not admissible to negate a state of mind* that is necessary to establish an element of the offense. Section 702-230(3) clarifies that intoxication, in itself, is not a physical or mental disease, disorder or defect as contemplated by section 704-400, Hawaii Revised Statutes (see discussion of insanity defense statute below).

***Involuntary and pathological intoxication.*** Section 702-230(4) recognizes the defense of involuntary intoxication or pathological intoxication in situations where, because of such intoxication, the defendant, at the time of the defendant's conduct, "lacks substantial capacity either to appreciate its wrongfulness or to conform the defendant's conduct to the requirements of the law." Although the language is similar to that for the insanity defense under section 704-400(1), Hawaii Revised Statutes, section 702-200(2) has made it clear that the defense of involuntary intoxication or pathological intoxication is not considered part of the insanity defense.

"Pathological intoxication" is defined in section 702-230(5) as "intoxication grossly excessive in degree, given the amount of the intoxicant, to which the defendant does not know

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<sup>4</sup> *Id.*

<sup>5</sup> Conference Committee Report No. 36-86 on House Bill No. 2376-86, Journal of the House of Representatives of the Thirteenth Legislature (1986) at 928.

<sup>6</sup> *Id.* The Conference Committee went on to state: "Your committee further believes that criminal acts committed while a person is voluntarily intoxicated should not be excused by the application of a defense which would negate the offender's state of mind."

the defendant is susceptible and which results from a physical abnormality of the defendant.” The Commentary to section 702-230 notes that “pathological intoxication” is intended to “provide a defense in a few, extremely rare, cases in which an intoxicating substance is knowingly taken into the body and, because of a bodily abnormality, intoxication of an extreme and unusual [and unforeseen] degree results.”<sup>7</sup>

Section 702-230(5) defines “self-induced intoxication” as “intoxication caused by substances which the defendant knowingly introduces into the defendant’s body, the tendency of which to cause intoxication the defendant knows or ought to know, unless the defendant introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of a penal offense.” Finally section 702-230(5) defines “intoxication,” to mean “a disturbance of mental or physical capacities resulting from the introduction of substances into the body.” According to the Commentary, the term “intoxication” also is intended to include drugs and other intoxicants in addition to alcohol.<sup>8</sup>

Section 702-230 does not directly address the issue of settled insanity caused by voluntary or self-induced intoxication. However, the Commentary notes that, prior to the adoption of the Hawaii Penal Code, Hawaii law provided that if a “‘person voluntarily or heedlessly induce[d] ... mental derangement by intoxication’ the person would not be held irresponsible because of such intoxication.” The Commentary further noted that although dictum in the case *In re the “Mary Bell Roberts,”*<sup>9</sup> suggested that “‘real insanity’ resulting from excessive drinking might afford a defense, ... this [would seem] inconsistent with more recent cases which have limited a defense based on mental disease to pathological conditions of the brain.”<sup>10</sup>

### ***Case Law Relating to Intoxication Issues***

The Hawaii Supreme Court has had several occasions to consider the constitutionality of section 702-230, Hawaii Revised Statutes. In *State v. Birdsall*,<sup>11</sup> the appellant argued that section 702-230 is an evidentiary provision and, therefore, unconstitutional as applied because it prohibited the introduction of evidence that he was voluntarily intoxicated to negative his state of mind for the offense charged. The court had previously considered and rejected the same argument in *State v. Souza*.<sup>12</sup> The appellant in *Birdsall* urged the court to overturn its holding in *Souza*<sup>13</sup> in light of a dissenting opinion in *Montana v. Egelhoff*,<sup>14</sup> which had characterized a

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<sup>7</sup> Commentary to Haw. Rev. Stat. §702-230 (1993) quoting M.P.C., Tentative Draft No. 9, comments at 11-12 (1959).

<sup>8</sup> Commentary to Haw. Rev. Stat. §702-230 (1993).

<sup>9</sup> 3 Haw. 823 (1877).

<sup>10</sup> Commentary to Haw. Rev. Stat. §702-230 (1993), citing *Territory v. Alcosiba*, 36 Haw. 231 (1942); *State v. Foster*, 44 Haw. 403, 354 P.2d 960 (1960).

<sup>11</sup> Slip. Op. No. 20382 (Haw. June 29, 1998) (defendant had been drinking heavily).

<sup>12</sup> 72 Haw. 246, 813 P.2d 1384 (1991) (defendant was a crystal methamphetamine (ice) user). The appellant had contended that the trial court’s jury instruction on self-induced intoxication, which recited a portion of §702-230, Haw. Rev. Stat., was unconstitutional in that it deprived him of his right to present a complete defense by preventing the jury from considering relevant evidence relating to his mental state at the time of the offense. *Id.* at 248.

<sup>13</sup> The court held in *Souza*:

similar Montana statute as an evidentiary provision excluding relevant exculpatory evidence.<sup>15</sup> The Hawaii Supreme Court rejected the appellant’s contention, stating its belief that *Egelhoff* “supports rather than erodes the holding in *Souza*” for the following reasons:

- (1) As *Egelhoff* affirmed, states may exclude exculpatory evidence if there exists a valid reason for doing so, such as the belief that “one who has voluntarily impaired his own faculties should be responsible for the consequences.”<sup>16</sup> The Hawaii court noted that the legislative history of section 702-230, Hawaii Revised Statutes, “reflects exactly this concept.”<sup>17</sup>
- (2) The burden of proof is not shifted under section 702-230; the prosecution must still prove every element of the offense, including mental state, beyond a reasonable doubt. Moreover, the court noted, as it had in *Souza*, that “section 702-230 ‘does not deprive a defendant of the opportunity to present evidence to rebut the *mens rea* element of the crime. The statute merely prohibits the jury from considering self-induced intoxication to negate the defendant’s state of mind.’”<sup>18</sup>
- (3) The Hawaii court in *Souza* has specifically found valid legislative reasons for excluding self-induced intoxication as exculpatory evidence and has held that section 702-230 is a penal, rather than an evidentiary, statutory provision.<sup>19</sup>

Quoting from its earlier decision in *Souza*, the court in *Birdsall* stated:

The legislature, in amending §702-230, clearly indicated that the purpose of the statute as amended is to prevent defendants who willingly become intoxicated and then commit crimes from using self-induced intoxication as a defense.

....

Furthermore, we find that voluntary intoxication is a gratuitous defense and not a constitutionally protected defense to criminal conduct.

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[W]e find that voluntary intoxication is a ‘gratuitous’ defense and not a constitutionally protected defense to criminal conduct. Voluntary intoxication does not result from a disease or defect of the mind, but rather from a state that is voluntarily self-induced. Therefore, the legislature’s decision to prohibit the use of self-induced intoxication as a defense does not implicate any recognizable constitutional rights.

*Id.* at 249 (citations omitted).

<sup>14</sup> 116 S. Ct. 2013 (1996) (plurality decision). See discussion of case in Chapter 3, at notes 52-53 and accompanying text.

<sup>15</sup> It was noted that the Montana Supreme Court had so characterized its statute. *State v. Birdsall*, Slip. Op. No. 20382, at 10, citing *Egelhoff*, 116 S. Ct. at 2020 n.4.

<sup>16</sup> *State v. Birdsall*, Slip. Op. No. 20382, at 17, quoting *Egelhoff*, 116 S. Ct. at 2020.

<sup>17</sup> *State v. Birdsall*, Slip. Op. No. 20382, at 17. The court quoted the legislative history of §702-230: “Your Committee believes that when a person chooses to drink, that person should remain ultimately responsible for his or her actions. Your Committee further believes that criminal acts committed while a person is voluntarily intoxicated should not be excused by the application of a defense which would negate the offender’s state of mind.” Quoting Conference Committee Report No. 36-86 in 1986 House Journal at 928.

<sup>18</sup> *State v. Birdsall*, Slip. Op. No. 20382, at 18, quoting *Souza*, 72 Haw. at 249.

<sup>19</sup> *State v. Birdsall*, Slip. Op. No. 20382, at 17-18.

The legislature was entitled to redefine the mens rea element of crimes and to exclude evidence of voluntary intoxication to negate state of mind.<sup>20</sup>

In affirming its earlier decision in *Souza*, the Hawaii court in *Birdsall* observed that a jury instruction, similar to that issued by the trial court, that self-induced intoxication could not be used to negate state of mind sufficient to establish the *mens rea* element of the offense has been found to be constitutional by both the United States Supreme Court in *Egelhoff* and by the Hawaii court in *Souza*.

## Insanity Law

Hawaii's test for insanity follows that of the Model Penal Code and is codified in section 704-400, Hawaii Revised Statutes. The section does not actually employ the term "insanity." Instead, it refers to a "physical or mental disease, disorder, or defect excluding penal responsibility." Nevertheless, for simplicity sake, this study will use the term "insanity." The insanity provision has remained substantially unchanged since its adoption as part of the original Hawaii Penal Code in 1972.<sup>21</sup> The language in section 704-400 is nearly identical to the Model Penal Code insanity test, except that it includes the words "physical" and "disorder." The word "physical" was added to avoid "arbitrary, meaningless and strained distinctions which have been made between excusing conditions which have been labeled 'mental' and those which have been labeled 'physical.' Chapter 704 provides for a unified treatment of diseases, disorders, and defects which constitute an excusing condition."<sup>22</sup> Consequently, under Hawaii law, the standard for determining whether a person's condition will relieve the person of responsibility for the person's criminal actions is the same, regardless of whether the person's condition is labeled "mental" or "physical."<sup>23</sup> The reference to "disorder" is included in an attempt to ensure that all conditions that impair capacity under the stated test will be included, notwithstanding any technical distinctions that may be made as a result of medical usage of the relevant terms.<sup>24</sup>

Section 704-400, Hawaii Revised Statutes, reads in its entirety:

**§704-400 Physical or mental disease, disorder, or defect excluding penal responsibility.** (1) A person is not responsible, under this Code, for conduct if at the time of the conduct as a result of physical or mental disease, disorder, or defect the person lacks substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform the person's conduct to the requirements of law.

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<sup>20</sup> State v. Birdsall, Slip. Op. No. 20382, at 18-19, quoting *Souza* at 72 Haw. at 248-49. In *Souza*, the court further stated: "We conclude that our legislature is entitled to determine that the goals of Hawaii's penal code would be better achieved by prohibiting voluntary intoxication from negating a defendant's state of mind. Accordingly, we find §702-230 constitutional." *Id.* at 250.

<sup>21</sup> The Hawaii Penal Code was enacted by Act 9, Session Laws of Hawaii, 1972. Technical, nonsubstantive changes were made to the section in 1993 by the Revisor of Statutes to reflect gender neutral language. See Haw. Rev. Stat. §23G-15(8) (1993). Prior to 1972, the insanity defense was codified in §703-4, Haw. Rev. Stat., which was essentially the M'Naghten rule.

<sup>22</sup> Commentary to Haw. Rev. Stat. §704-400 (1993); *accord*, State v. Nuetzel, 61 Haw. 531, 538 n. 6 (1980).

<sup>23</sup> Commentary to Haw. Rev. Stat. §704-400 (1993).

<sup>24</sup> *Id.*

(2) As used in this chapter, the terms "physical or mental disease, disorder, or defect" do not include an abnormality manifested only by repeated penal or otherwise anti-social conduct.

Other relevant provisions of the Hawaii Revised Statutes for purposes of this discussion include:

- (1) Section 704-402(1), Hawaii Revised Statutes, which provides that a physical or mental disease, disorder, or defect excluding responsibility is an affirmative defense;
- (2) Section 704-403, Hawaii Revised Statutes, which prohibits proceedings against a defendant who lacks capacity to understand the proceedings or assist in the defense; and
- (3) Section 704-411, Hawaii Revised Statutes, which provides post acquittal procedures and authorizes the court to commit, conditionally release or discharge a defendant acquitted under section 704-400.

Hawaii's statutory insanity provisions do not directly address the issue of settled insanity. As already noted, the Hawaii Supreme Court has never ruled on the doctrine of settled insanity. Indeed, the court has had only a handful of occasions to address the insanity law under Hawaii's penal code; and only a few of these have involved the issues of intoxication and the insanity defense.

### ***Case Law Relating to Insanity and Intoxication Issues***

*State v. Freitas*,<sup>25</sup> is the Hawaii appellate case most relevant to this discussion. In *Freitas*, the Hawaii Supreme Court considered the issue of self-induced intoxication within the context of the insanity defense. Prior to defendant's murder trial, a three-member sanity commission had unanimously found that the defendant's capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law was substantially impaired at the time of the conduct alleged. This finding was based upon the following factors:

- (1) Non-psychotic brain syndrome;
- (2) Antisocial personality; and
- (3) Habitual excessive drinking.

At a pre-trial hearing on a motion for judgment of acquittal,<sup>26</sup> one of the panel members testified that these three factors comprising the commission's diagnosis were "necessarily interrelated and collectively created the mental condition that rendered the defendant substantially incapable of

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<sup>25</sup> 62 Haw. 17, 608 P.2d 408 (1980)

<sup>26</sup> Under prior law, the issue of a defendant's sanity was decided by the court, prior to trial, on the basis of the sanity commission's report. Act 222, Session Laws of Hawaii, 1980 (after *Freitas*) eliminated this bifurcated procedure and provided that all factual issues, including insanity, would be heard at one trial.

appreciating the wrongfulness of his conduct or of conforming his conduct to the requirements of the law.”<sup>27</sup> The panel member emphasized the three factors were “indispensable to each other and could not be separately examined and weighted for their individual effect upon the defendant’s state of mind at the time of the commission of the offense.”<sup>28</sup> The two other members of the panel concurred with this witness. The trial court denied the motion, and the defendant was found to be legally responsible for his conduct and was convicted of manslaughter by a jury.

On appeal, the issue was whether the trial court erred in denying the motion for judgment of acquittal. Noting that the trial court, in denying the defendant’s motion, was “apparently disturbed by the inclusion of excessive drinking as a factor in the commission’s determination,” the Hawaii Supreme Court stated: “We think the trial court was properly concerned. What constitutes a mental disorder or defect for psychiatric-psychological treatment purposes is not necessarily the same as a disorder or defect for the jury’s purposes in determining criminal responsibility.”<sup>29</sup> Quoting section 702-230(2), Hawaii Revised Statutes, the court further stated that self-induced intoxication “does not, in itself, constitute a physical or mental disease, disorder, or defect within the meaning of section 704-400.”<sup>30</sup> The court acknowledged that, while it may be a symptom of such a disease, disorder or defect or a catalyst that could trigger a person’s latent antisocial tendencies,

[Self-induced intoxication] is not the exculpatory physical or mental condition contemplated by the statute. Neither should it be considered a substantial factor in determining legal competency, for a mental disability excusing criminal responsibility must be the product of circumstances beyond the control of the defendant. Self-induced intoxication is not such a disability.”<sup>31</sup>

In its decision in *Freitas*, the Hawaii court relied upon the rulings of the United States Court of Appeals for the Ninth Circuit in *Kane v. United States*<sup>32</sup> and *United States v. Burnim*.<sup>33</sup> The court cited the facts in *Burnim* at some length. The trial court in *Burnim* had found, based upon expert medical testimony, that both an organic brain defect and the large amount of alcohol the defendant had voluntarily consumed prior to the offense had combined to render the defendant incapable of appreciating the wrongfulness of his conduct and of conforming his conduct to the requirements of the law. However, when the trial court eliminated the effects of alcohol as a factor, it found that the brain defect alone was insufficient to exclude penal responsibility.<sup>34</sup> The United States Court of Appeals for the Ninth Circuit affirmed the trial court’s ruling, observing that:

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<sup>27</sup> 62 Haw. at 19.

<sup>28</sup> *Id.* at 19.

<sup>29</sup> *Id.* at 19, citing *State v. Nuetzel*, 61 Haw. 531, 606 P.2d 920 (1980).

<sup>30</sup> *Id.* at 20.

<sup>31</sup> *Id.* at 20, relying on *Kane v. United States*, 399 F.2d 730 (9<sup>th</sup> Cir. 1968), cert. denied, 393 U.S. 1057 (1969); *United States v. Burnim*, 576 F.2d 236 (9<sup>th</sup> Cir. 1978).

<sup>32</sup> 399 F.2d 730 (9<sup>th</sup> Cir. 1968), cert. denied, 393 U.S. 1057 (1969). See discussion in Chapter 3, at note 85 and accompanying text.

<sup>33</sup> 576 F.2d 236 (9<sup>th</sup> Cir. 1978). See discussion in Chapter 3, at notes 89-90 and accompanying text.

<sup>34</sup> 62 Haw. at 20-21, citing *Burnim*, 576 F.2d at 237.

[I]t was obligatory upon the trial court to disregard whatever incapacitating effects were attributable to the defendant's voluntary ingestion of alcohol in determining whether, at the time of the conduct charged, the accused was suffering from a disability that would excuse his criminal conduct.<sup>35</sup>

The Hawaii court in *Freitas* concluded that:

Since the inseparability and the interdependency of the three components of [the sanity commission's] diagnosis were central to their ultimate conclusion that the defendant was not responsible for his conduct, the medical experts were unable to say with any reasonable degree of certainty to what extent the defendant's capacity would have been impaired at the time of the commission of the offense, if the fact of alcohol ingestion were excluded from their consideration.<sup>36</sup>

In ruling that the trial court in *Freitas* had properly denied the motion for judgment of acquittal, the court observed:

Given the existence of a physical or mental disability, the crucial factual issue becomes whether and to what extent the defendant's cognitive or volitional capacity was impaired by reason of the disease, disorder, or defect. If the impairment was substantial, the jury must return a verdict of not guilty by reason of insanity. If there was no impairment, or if the impairment was not substantial, a fair-minded jury would find the defendant sane beyond a reasonable doubt. It was precisely this factual issue which ... the trial court could not remove from the jury's consideration.<sup>37</sup>

The court also noted that, although the phrase "lacks substantial capacity" is incapable of precise definition," the court in an earlier case had "not found the following [jury] instruction to be objectionable: The phrase lack of substantial capacity does not mean a total lack of capacity. It means capacity which has been impaired to such a degree that only an extremely limited amount remains."<sup>38</sup>

A few other Hawaii appellate cases have dealt with the interrelationship of intoxication and insanity in only a peripheral way that constituted dicta and therefore not considered binding in subsequent cases. In a 1877 civil case, *In re the "Mary Bell Roberts,"*<sup>39</sup> the Hawaii Supreme Court posited that real insanity originating from excessive drinking might relieve a person of criminal responsibility.<sup>40</sup>

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<sup>35</sup> 62 Haw. at 21. The court in *Burnim* reiterated that the "mental disability, however defined, must have been brought about by circumstances beyond the control of the actor." 576 F.2d at 238; *accord*, *Kane v. United States*, 399 F.2d 730 (9<sup>th</sup> Cir. 1968), cert. denied, 393 U.S. 1057 (1969).

<sup>36</sup> 62 Haw. at 22-23.

<sup>37</sup> *Id.* at 24.

<sup>38</sup> *Id.* at 23 n. 5, citing *State v. Neutzel* 61 Haw. 531, 606 P.2d 920 (1980).

<sup>39</sup> 3 Haw. 823 (1877).

<sup>40</sup> *Id.* at 828. *But see* Commentary to Haw. Rev. Stat. §702-230 (1993) and notes 9-10 *supra* and accompanying text.

*State v. Hall*<sup>41</sup> was an interlocutory appeal involving, among other issues, whether the trial court had erred in ruling the appellant would be barred from presenting at trial the issue of nonresponsibility based upon the insanity defense. The trial court had concluded that the appellant's insanity defense based upon evidence of voluntary ingestion of wine was inappropriate as a matter of law and excluded the issue from the jury. On appeal, the State had argued that the appellant's evidence "went only to issue of his state of mind based upon pathological intoxication under [the then existing] section 702-230, Hawaii Revised Statutes, and that, as a matter of law, penal non-responsibility under chapter 704, Hawaii Revised Statutes, can never result from the voluntary ingestion of intoxicants."<sup>42</sup> The appellant's position was that his "alleged extreme physical susceptibility to the alcohol or other components in the wine ... could be the basis of a physical or mental disease, disorder or defect, excluding penal responsibility under section 704-400, Hawaii Revised Statutes, as well as the basis for a contention that there was a lack of intent to commit the offense under section 702-230, Hawaii Revised Statutes."<sup>43</sup> The Hawaii Supreme Court reversed the trial court's order with respect to excluding the issue of nonresponsibility under section 704-400, stating that, in doing so, the court did not expressly adopt either of these arguments. In view of the interlocutory nature of the appeal, the court further stated:

If and when we are called upon to decide between those two contentions, we prefer to do so after a trial when all of the evidence on each side has been presented so that we have a full record before us. Our ruling today is not to be understood as diminishing in any way the authority of *State v. Freitas*. It is simply that there may be, when all the evidence is presented, a different factual situation in this case."<sup>44</sup>

*Garringer v. State*,<sup>45</sup> involved an appeal from a circuit court denial of a petition for post-conviction relief. The Hawaii Supreme Court ruled that the appellant should have been permitted to clarify his petition by amending it to include specific factual allegations relevant to his claim of ineffective assistance of counsel concerning the defense of temporary insanity or pathological intoxication.<sup>46</sup> In a footnote to the opinion, the court observed that, with respect to the issue of whether the appellant's chronic use of crystal methamphetamine could support a pathological intoxication defense, at least one defendant, at trial, has successfully asserted a "defense of pathological intoxication based on mental illness induced or exacerbated by chronic use of 'ice' or crystal methamphetamine."<sup>47</sup>

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<sup>41</sup> 66 Haw. 300 (1983).

<sup>42</sup> *Id.* at 303. See discussion of prior law under §702-230, Haw. Rev. Stat., at notes 5-6 *supra* and accompanying text.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 303-04.

<sup>45</sup> 80 Haw. 327 (1996).

<sup>46</sup> *Id.* at 335-36.

<sup>47</sup> *Id.* at 336 n. 16, citing *State v. Kuhia*, Cr. No. 93-0158 (1<sup>st</sup> Cir. Haw., Sept. 29, 1994). Despite the Court's characterization of *Kuhia*'s defense as one of pathological intoxication, no evidence appears in the records of the case as to this issue. *Kuhia* relied upon the insanity defense under §704-400, Haw. Rev. Stat. (1993). See discussion of case *infra* at notes 50-55 and accompanying text.

### ***Trial Court Cases Relating to “Settled Insanity”***

One of the underlying premises of Senate Concurrent Resolution No. 132, S.D. 1, is that, as drug use and criminal acts of violence resulting from drug use increase, there will be a corresponding increase in the number of insanity defense trials and a concomittant increase in acquittals. To date, there does not appear to be an increase in insanity trials or acquittals due to this issue. The Bureau sent letters to the prosecuting attorney for each county, the attorney general and the state public defender requesting assistance in identifying insanity defense cases on the trial court level in which the defendant’s physical or mental disease, defect or disorder has been caused, in whole or in part, from self-induced intoxication. Except for the response from one county prosecutor, the responses generally were informal and anecdotal, with most offices indicating they were unaware of any such cases from their offices having gone to trial.<sup>48</sup> One respondent offered anecdotal information on two cases but suggested that many cases in which the issue might be raised may be being diverted from trial, because the defendant is being found unfit to proceed under section 704-403, Hawaii Revised Statutes.<sup>49</sup> Another respondent indicated that a high percentage of insanity cases involve some type of intoxication, either alcohol, drugs or some combination of the two, which is factored into a claim of mental illness. According to the respondent, a review of the sanity examiners’ reports reveal that the issue of substantial impairment as a result of intoxicants is frequently raised, but does not rise to the level of acquittal. In a typical scenario, one sanity examiner may conclude the defendant is substantially impaired, but because the other two examiners disagree, the case never reaches the acquittal stage. The respondent reiterated the concern of the law enforcement community that the rise in crystal methamphetamine is contributing to the increase in these cases.

A third respondent observed that, although there may be a high incidence of insanity cases involving intoxication, as a practical matter, if the panel of sanity examiners cannot separate out the effect of the intoxication pursuant to law, as required by *Freitas*, then the panel generally will not find an independent mental disorder. A fourth respondent indicated that few of these cases make it to trial on the issue because it is very difficult to prove substantial incapacity, independent of the intoxication.

The Department of the Prosecuting Attorney for the City and County of Honolulu identified three First Circuit Court cases involving settled insanity and submitted court documents. A brief summary of these cases follows:

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<sup>48</sup> Most responses were made directly to the Bureau. In the case of the Office of the Prosecuting Attorney for Kauai and Hawaii counties, however, the responses were transmitted to the Bureau through a staff member from the Department of the Prosecuting Attorney for Honolulu after the issue was discussed at a meeting of county prosecutors.

<sup>49</sup> The staff member indicated he had identified two cases, within the last ten years, in which the facts might have fit a settled insanity defense. However, in the first of these cases, the defendant was allowed to plead to a lesser offense because of the difficulty in proving the case, and thus, the case never went to trial. In the second case, the prosecutor submitted and the judge approved the standard jury instruction that evidence of self-induced intoxication may not be used to negative state of mind. The jury found the defendant guilty of a lesser offense. The case files on these cases were not available.

*State v. Kuhia*.<sup>50</sup> This was a jury-waived trial in which the defendant raised the insanity defense to a charge of murder in the second degree. The circuit court, in a written opinion, observed that the case raised an issue of first impression in Hawaii, that being “whether drug induced or exacerbated mental illness can ever justify a defense to a criminal charge.”<sup>51</sup> The court reviewed the applicable law. With respect to section 704-400, Hawaii Revised Statutes, the court stated:

In adopting one of the broadest or most comprehensive statutes in the country, [the legislature made] no exception ... for a mental disease, disorder or defect resulting from earlier drug usage or addiction so long as the person was *not* under the influence at the time the crime was committed. Further there need only be *substantial* impairment and not *total* impairment. Finally, the person is excluded from criminal responsibility if based on the physical or mental disease, disorder or defect, he cannot (1) appreciate the wrongfulness of his conduct ... *or* (2) conform is (sic) conduct to the requirements of the law ....<sup>52</sup>

The court also noted that raising an affirmative defense required the defendant to prove by a preponderance of the evidence facts that negate his penal liability. The court acknowledged that voluntary intoxication cannot be considered as a defense or excuse under state law. However, the court stated that:

[I]f earlier drug or alcohol use has created a disease, disorder or defect, the mental illness can be considered as falling within the exclusion from penal responsibility assuming it is proven by competent evidence.<sup>53</sup>

The court found that the credible evidence showed that the defendant suffered from a mental disease or disorder that was either induced or exacerbated by earlier drug use. The court appeared particularly persuaded by evidence corroborating the defendant’s mental illness.<sup>54</sup> Furthermore, although there was some evidence to the contrary, the court found that the defendant *was not intoxicated* at the time of the offense, thus distinguishing the facts from the situation in *State v. Freitas*.<sup>55</sup> The court concluded that the defendant had proven by a preponderance of the evidence that his ability to conform his conduct to the requirements of the law was substantially impaired as a result of his mental illness and therefore was entitled to an acquittal under section 704-400.

*State v. Young*.<sup>56</sup> In the *Young* case, the defendant walked up to an innocent bystander, in front of the Burger King on University Avenue, and beat him to death with a hammer. The

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<sup>50</sup> Cr. No. 93-0158, Amended Decision (1<sup>st</sup> Cir. Haw., Sept. 29, 1994).

<sup>51</sup> *Id.* at 1. The court elaborated that the more precise question was whether a defendant whose ability to conform conduct to the requirements of the law is substantially impaired because of a mental illness that is induced, in whole or in part, by chronic drug abuse can mount an insanity defense. *Id.* at 1 n.1.

<sup>52</sup> *Id.* at 6.

<sup>53</sup> *Id.* at 7.

<sup>54</sup> *Id.* at 8.

<sup>55</sup> *Id.* For evidence relating to the intoxication issue, see State’s Trial Memorandum on Defendant’s Claim of Insanity; Defense Rebuttal to State’s Trial Memorandum. See also discussion of *Freitas* at notes 25-38 *supra* and accompanying text.

<sup>56</sup> Cr. No. 97-1194 (1<sup>st</sup> Cir. Haw., May 7, 1998).

defendant relied upon the insanity defense in a jury-waived trial. The court, in finding the defendant guilty of murder in the second degree, made extensive findings of fact and conclusions of law, including the following:<sup>57</sup>

- (1) The defendant had no family history of mental health problems;
- (2) The defendant had a history of poly-substance abuse and of crystal methamphetamine abuse;
- (3) The State proved, beyond a reasonable doubt, that the defendant knowingly and voluntarily took a variety of illegal drugs and alcohol both over a prolonged period of time and in the weeks immediately preceding the date of the offense;
- (4) The State's medical experts were credible and persuasive;
- (5) The defendant's medical experts lacked complete information at the time they rendered their conclusions about the defendant's mental condition and at the time they testified in court;
- (6) Methamphetamine psychosis can last months after a user has stopped using the drug and can be triggered or caused by use of drugs other than methamphetamine, including alcohol, marijuana, and cocaine;
- (7) The defendant suffered from a mental disease, disorder or defect at the time of the offense;
- (8) The defendant's mental disease, disorder or defect, at the time of the offense, was caused by his knowing and voluntary use of drugs and/or alcohol over a prolonged period of time and in the weeks immediately preceding the offense;
- (9) The defendant's mental disease, disorder or defect did not cause him to lack the substantial capacity to either appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law, at the time of the offense;
- (10) The lack of substantial capacity as set forth in section 704-400, Hawaii Revised Statutes, means capacity that has been impaired to such a degree that only an extremely limited amount remains;<sup>58</sup>
- (11) The defendant failed to prove by a preponderance of the evidence that he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to conform his requirements to the law;
- (12) Self-induced intoxication is prohibited as a defense to any criminal offense;

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<sup>57</sup> See generally *id.* at 33-36.

<sup>58</sup> *Id.* at 35, citing *State v. Nuetzel*, 61 Haw. 531, 550-51 (1980). See also note 38 *supra* and accompanying text.

- (13) Intoxication does not, in itself, constitute a physical or mental disease, disorder or defect within the meaning of section 704-400;
- (14) Self-induced intoxication is not the exculpatory physical or mental condition contemplated by section 704-400, Hawaii Revised Statutes. A mental disease excusing criminal responsibility must be the product of circumstances beyond the control of the defendant.<sup>59</sup>

An appeal has been filed in the *Young* case and briefings will be due at the end of January 1999.<sup>60</sup>

*State v. Tome*.<sup>61</sup> The defendant was charged with having committed the offenses of Place to Keep Pistol or Revolver and Promoting a Dangerous Drug in the Third Degree. At a jury-waived trial she relied upon the insanity defense. After making findings of fact, the court acquitted the defendant, based upon the following alternative conclusions of law:<sup>62</sup>

- (1) The defendant proved by a preponderance of the evidence that, at the time of the offenses, she suffered from schizophrenia, exacerbated by her chronic use of methamphetamine, or that she suffered from a methamphetamine-induced psychotic disorder, both of which are physical or mental diseases, disorders or defects, which caused her to lack substantial capacity to either appreciate the wrongfulness of her conduct or conform her conduct to the requirements of the law;
- (2) The State failed to prove beyond a reasonable doubt that, at the time of the offense, the defendant was in fact intoxicated or otherwise substantially impaired as a direct result of being intoxicated;
- (3) The Hawaii Revised Statutes section 702-230's "bar to the assertion of a defense based upon self-induced intoxication must be understood and interpreted in a manner consistent with [its] intent and in harmony with other criminal statutes penalizing behaviors caused by or related to the consumption of and resulting impairment from drugs and alcohol...";
- (4) A substance-induced psychotic disorder, by definition, involves the pathological effects of a drug or substance upon a person's physical, mental or emotional condition;
- (5) (In the alternative) If the defendant was acting under the direct influence of, or was intoxicated by, crystal methamphetamine, she lacked substantial capacity to either appreciate the wrongfulness of her conduct or conform her conduct to the

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<sup>59</sup> Cr.No. 97-1194 at 36, citing *State v. Freitas*, 62 Haw. 17, 20 (1980).

<sup>60</sup> *Young v. State*, Sup. Ct. Docket No. 21911 (Oct. 28, 1998).

<sup>61</sup> Cr. No. 96-1451, (1<sup>st</sup> Cir. Haw., June 26, 1998).

<sup>62</sup> *See id.* at 10-12.

requirements of the law due to a pathological intoxication resulting from an enhanced sensitivity to the drug;<sup>63</sup>

- (6) (In the alternative) The defendant's intoxication was not self-induced because she suffered from a physical or mental disease, disorder or defect, which caused her to lack substantial capacity to knowingly introduce the drug into her body.

## Conclusion

The Hawaii Revised Statutes do not directly address the issue of settled insanity nor has the Hawaii Supreme Court ruled on the doctrine of settled insanity. Indeed, the court has had little occasion to consider the issue of voluntary intoxication as it relates to the insanity defense. In *State v. Freitas*, the court ruled that the mental disability excusing criminal responsibility must be the product of circumstances beyond the control of the defendant; therefore, the incapacitating effects of self-induced intoxication must be eliminated as a factor in determining legal competency. The dicta on the issue give no clear hint as to how the court might rule on such an issue in the future. Thus far, it does not appear that the number of trials, or acquittals, based on the defense of settled insanity are experiencing a substantial increase. There have been at least three recent circuit court cases involving the issue of settled insanity. Although the outcomes in these cases have turned on the varying facts of the individual cases, the courts have split on the issue, with two courts acquitting the defendant and one finding the defendant guilty. Nevertheless, the decisions in these lower court cases have no legal precedence.

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<sup>63</sup> The court appeared to rely heavily upon the testimony of the defendant's medical expert concerning pathological intoxication. *See id.* at 6-7. Medical pathological intoxication is not the same as legal pathological intoxication sufficient to constitute a defense under §702-230, Haw. Rev. Stat. (1993). The Hawaii Supreme Court has never ruled on the issue of pathological intoxication. However, in view of the discussion in Chapter 3 with respect to pathological intoxication, it is questionable whether courts in other jurisdictions would agree with the trial court in the *Tome* case with respect to a finding of pathological intoxication. *See* discussion in Chapter 3, at notes 62-69 and accompanying text. Moreover, the Commentary to the Hawaii penal code makes clear that pathological intoxication was intended to serve as a defense "in a few, extremely rare, cases in which an intoxicating substance is knowingly taken into the body and, because of a bodily abnormality, intoxication of an extreme and unusual [and unforeseen] degree results." *See* Commentary to Haw. Rev. Stat. §702-230 (1993), quoting M.P.C., Tentative Draft No. 9, comments at 11-12 (1959).

## Chapter 5

### FINDINGS AND CONCLUSIONS

The critical issue presented in this study concerns whether a person who voluntarily ingests drugs or alcohol to the point that the person suffers from a physical or mental disease, disorder or defect may then rely upon the insanity defense to escape responsibility for criminal acts committed by the person while suffering from such disability. Senate Concurrent Resolution No. 132, S.D. 1, requested the Bureau to:

1. Identify relevant Hawaii statutory and case law;
2. Examine how selected states may have addressed the issue;
3. Review relevant literature and research on the subject; and
4. Submit findings and conclusions.

#### Findings

1. A basic assumption of Anglo-American criminal law is that each person has the ability to distinguish and choose between lawful and unlawful conduct. It is the very capacity to distinguish and the freedom to choose that provides the moral basis for holding a person criminally responsible for the person's actions.
2. This absence of the ability to distinguish rationally between lawful and unlawful conduct and make voluntary choices is considered to eliminate the moral authority for imposing criminal sanctions. The law does not impose punishment where it cannot impose blame.
3. The insanity defense recognizes that some individuals, as a result of a mental disease or defect, may lack even a minimal capacity to make rational and voluntary choices and thus are not morally blameworthy.
4. In the case of a person who is deemed legally insane, the person will be completely excused from responsibility for the person's criminal actions and thus spared punishment under the criminal law.
5. Jurisdictions have adopted a variety of standards or tests to determine whether a person is legally insane and therefore not responsible for criminal actions.
6. Regardless of the insanity test used, a person must first establish the existence of a mental disease or defect. However, what constitutes a mental disease or defect for psychiatric-psychological treatment purposes is not necessarily the same as what

constitutes a disorder or defect under the law for purposes of determining criminal responsibility.<sup>1</sup> Once a sufficient mental disease or defect is shown, the defense thereafter, must establish that the mental disease or defect meets the relevant jurisdiction's insanity standard or test.

7. In the early 1980's, many jurisdictions, reacting to an anti-insanity defense movement, enacted a variety of reforms limiting the scope of the insanity defense.
8. A person who is intoxicated is not insane, because insanity requires a disease of the mind or a mental disease or defect. Thus, an intoxication defense is distinct from a typical insanity defense; however, a defense based upon a fixed or settled insanity caused by voluntary intoxication, or "settled insanity" as it is termed, is a "slightly different animal" from the typical insanity defense.
9. Insanity is generally viewed as an involuntary condition that one would not willingly contract. Consequently, it is the exercise of free will or personal choice in ingesting intoxicants to the point of causing a mental disease or defect that is troubling when one considers the doctrine of settled insanity.
10. The element of personal choice has led to the development of special rules with respect to intoxication that distinguish between voluntary and involuntary intoxication.
11. Voluntary intoxication at the time of a criminal offense generally will not relieve a person of criminal responsibility.
12. This rule has been modified in a majority of jurisdictions to allow evidence of voluntary intoxication to show that the defendant did not have the specific intent that is a necessary element of the offense.
13. Hawaii, together with nine other states, has not adopted this modification and continues to prohibit any evidence of voluntary intoxication to negate the specific intent element of a criminal offense.
14. Involuntary intoxication is considered a complete defense to a criminal offense. The test is whether there is an "absence of an exercise of independent judgment and volition on the part of the accused in taking the intoxicant."<sup>2</sup> Consequently, courts have rejected the involuntary intoxication defense in cases in which a defendant knew or had reason to know of the effect that the intoxicant was likely to have upon the defendant.
15. Although involuntary intoxication cases are fairly infrequent,<sup>3</sup> courts have found intoxication to be involuntary when intoxication is the result of: an innocent

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<sup>1</sup> State v. Freitas, 62 Haw. 17, 19, (1980) citing State v. Nuetzel, 61 Haw. 531 (1980).

<sup>2</sup> See notes 64 and accompanying text in Chapter 3.

<sup>3</sup> See notes 55-56 and accompanying text in Chapter 3.

mistake, fraud, duress, or coercion; a substance administered for medicinal purposes or taken pursuant to medical advice; or pathological intoxication.

16. Section 702-230 (5)(c), Hawaii Revised Statutes, defines pathological intoxication as “intoxication grossly excessive in degree, given the amount of the intoxicant, to which the defendant does not know the defendant is susceptible and which results from a physical abnormality of the defendant.”
17. Furthermore, the Commentary to section 702-230, quoting the Model Penal Code comments, emphasizes that pathological intoxication is intended to “provide a defense in a *few, extremely rare*, cases in which an intoxicating substance is knowingly taken into the body and, because of a bodily abnormality, intoxication of an *extreme and unusual [and unforeseen] degree results.*”<sup>4</sup>
18. An overwhelming majority of courts have held that the mere fact that a defendant is an alcoholic or an addict is insufficient to constitute involuntary intoxication.<sup>5</sup>
19. There is substantial evidence of a significant correlation between crime and substance abuse.<sup>6</sup>
20. A majority of jurisdictions in the United States have recognized a defense to criminal acts where long-term, voluntary use of an intoxicant has caused a fixed or “settled insanity” that is distinct from and independent of the period of intoxication.
21. Courts in twenty-nine states and the District of Columbia have recognized this doctrine of “settled insanity,” although one of these states has since abolished the traditional affirmative insanity defense (thus limiting the doctrine of settled insanity as well). Three states, Colorado, Connecticut and Delaware, have rejected the defense; and the remaining eighteen states, including Hawaii, have not considered the doctrine.
22. Relying upon the fundamental principle test set out in *Montana v. Egelhoff*, one legal commentator contends that the settled insanity doctrine is not a fundamental principle of justice and, consequently, its denial does not violate the United States Constitution. He also notes that the United States Supreme Court has refrained from ruling on whether the doctrine is constitutionally required.
23. The Hawaii Supreme Court has not ruled on the doctrine of settled insanity. In *State v. Freitas*, one of the few Hawaii cases to address the issue of voluntary intoxication as it relates to the insanity defense, the court ruled that the mental disability sufficient to excuse criminal responsibility under the insanity defense must be the product of circumstances *beyond the control of the defendant*. Because voluntary intoxication is not beyond the control of the defendant, the court held that

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<sup>4</sup> Commentary to Haw. Rev. Stat. §702-230 (5)(c) (1993) (emphasis added).

<sup>5</sup> See notes 67-69 and accompanying text in Chapter 3.

<sup>6</sup> See notes 132-33 and accompanying text in Chapter 3.

any incapacitating effects of self-induced intoxication must be eliminated as a factor in determining a defendant's legal mental competency.

24. There has been considerable concern on the part of the law enforcement community and others that, as the drug problem in Hawaii rises, more defendants may successfully rely upon settled insanity to escape criminal responsibility.
25. Although present caseloads do not appear to reflect this, the future is far from certain. Furthermore, the defense has been successful in two out of three identified circuit court cases that involved settled insanity.<sup>7</sup> Moreover, it may be that cases in which such a defense would be raised at trial are being diverted from the courts because the defendant is found unfit to proceed to trial.<sup>8</sup>
26. Despite a public perception that the insanity defense is used frequently and successfully by violent criminal defendants, the evidence shows that the defense is raised in less than 2% of all cases that go to trial and that it is successful in less than 10% of those cases.

## Available Options

1. Take no action at the present time, given the apparently limited number of affected cases.

One of the underlying premises of Senate Concurrent Resolution No. 132, S.D. 1, is that, as drug use and criminal acts of violence resulting from drug use increase, there will be a concomitant increase in the number of defendants escaping responsibility by way of the insanity defense. The Bureau requested assistance from the prosecuting attorney for each county, the Attorney General and the state Public Defender in identifying any trial court cases involving the issue of settled insanity. The Department of the Prosecuting Attorney for the City and County of Honolulu identified and submitted court documents for three relatively recent trials involving the issue of settled insanity.<sup>9</sup> The Office of the Prosecuting Attorney, County of Maui, offered anecdotal information on two cases, only one of which proceeded to trial.<sup>10</sup> Other offices indicated that they were unaware of any such cases having been tried in recent memory. One respondent noted that, because of the high percentage of insanity cases that also involve substance abuse, the issue is frequently raised in the sanity examiners' reports, but rarely rises to the level of an acquittal. Other respondents observed that the defense is difficult to prove, given Hawaii's requirement that the incapacitating effects of self-induced intoxication be eliminated as a factor in determining legal mental competency. Given the apparently limited number of trials

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<sup>7</sup> In one of these two cases, the court, making alternate rulings, found in the alternative that the defendant had proven pathological intoxication; and in the other, the Hawaii Supreme Court, in a footnote reference, apparently mistakenly characterized the case as one of pathological intoxication. See discussion at notes 46 and 62 and accompanying text in Chapter 4.

<sup>8</sup> See Haw. Rev. Stat. §§704-403 and 704-406 (1993) and (1998 Supp.).

<sup>9</sup> See notes 50-63 and accompanying text in Chapter 4.

<sup>10</sup> See note 49 and accompanying text in Chapter 4.

involving the issue of settled insanity, one could reasonably conclude that this is not a significant problem area and, therefore, it would be premature to amend the law for the atypical case. On the other hand, it may be that there would be more cases in which such a defense would be raised at trial, but these cases never reach trial because the defendant is found unfit to proceed.

Nevertheless, in view of the seemingly limited number of trials involved thus far, it may be argued that the Legislature should take no action at this point in time. This option would, of course, leave the Hawaii Supreme Court free to adopt or reject the doctrine of settled insanity, should an appropriate case come before the court. The Bureau notes that the court has accepted an appeal in *Young v. State* and may well decide the issue in the near future.<sup>11</sup> As has been observed, it is uncertain how the Hawaii Supreme Court would rule on the issue. Accordingly, if the Legislature believes defendants should be precluded from relying upon the settled insanity defense, it should disregard this option in favor of more decisive action.

2. Enact a statute to reject the doctrine of settled insanity.

The Legislature's choice at the other end of the spectrum is to reject the doctrine of settled insanity. The Colorado Supreme Court rejected the doctrine of settled insanity in *Bieber v. People*,<sup>12</sup> stating that, as a matter of public policy, it would not excuse a person's criminal actions "which endanger others in his or her community, based upon a mental disturbance or illness that he or she actively and voluntarily contacted."<sup>13</sup> The Colorado court also found that Colorado's statute prohibiting self-induced intoxication as a defense precluded the doctrine of settled insanity.<sup>14</sup> With respect to whether denying the defense of settled insanity is unconstitutional, one legal commentator, applying the fundamental principle test set out in *Montana v. Egelhoff*,<sup>15</sup> makes a credible argument that the settled insanity doctrine is not a fundamental principle of justice and its denial does not violate the United States Constitution.<sup>16</sup> The commentator further notes that the United States Supreme Court denied an appeal from the Colorado Supreme Court's ruling in *Bieber*.

In the aftermath of *Bieber*, the Colorado legislature amended the Colorado insanity defense statute to define "mental disease or defect" to exclude a condition that is attributable to the voluntary ingestion of alcohol or any other psychoactive substance.<sup>17</sup> Apparently, Connecticut and Delaware also have statutorily rejected the settled insanity defense, by precluding the insanity defense if the mental disease or defect "was proximately caused" by the voluntary ingestion, inhalation or injection of intoxicating liquor or any drug or substance or combination thereof, unless prescribed by a licensed medical practitioner.<sup>18</sup> (See Appendices B and C for text of statutes.)

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<sup>11</sup> See note 60 and accompanying text in Chapter 4.

<sup>12</sup> 856 P.2d 811 (Colo. 1993), cert. denied, 114 S. Ct. 716 (1994). See discussion of case at notes 105-116 and accompanying text in Chapter 3.

<sup>13</sup> 856 P.2d at 817.

<sup>14</sup> *Id.* at 816.

<sup>15</sup> 116 S. Ct. 2013 (1996).

<sup>16</sup> See notes 125-135 and accompanying text in Chapter 3.

<sup>17</sup> Colo. Rev. Stat. §16-8-101.5(2)(b) (1997).

<sup>18</sup> Conn. Gen. Stat. §53a-13(b) (1997); Del. Code tit. Crimes & Crim. Proc., §401(c) (1997).

There arguably is some basis in Hawaii law to support similar action by the Hawaii Legislature. The Commentary to section 702-200, Hawaii Revised Statutes, suggests that where a course of conduct involves a voluntary act in which a person disregards a known risk, such conduct should be sufficient to impose penal responsibility.<sup>19</sup> Thus, one could argue that the voluntary act of repeatedly, and over a prolonged period, ingesting intoxicants, especially illegal drugs, involves recklessly disregarding a known risk (or a risk of which a reasonable person should know) that such course of conduct might lead to brain damage. Therefore, any criminal act occurring while the person suffered from a mental disorder that results from the voluntary use of intoxicants is traced back to the earlier voluntary act of ingesting intoxicants and recklessly disregarding the known risk. Consequently, the moral culpability justifying the imposition of penal responsibility upon the person, despite the subsequent mental disability, “lies in the voluntary impairment of one’s mental faculties with knowledge that the resulting condition is a source of potential danger to others.”<sup>20</sup> Moreover, as the Hawaii Supreme Court recently affirmed in *State v. Birdsall*, states may exclude exculpatory evidence if there is a valid reason for doing so, such as the belief that “one who has voluntarily impaired his own faculties should be responsible for the consequences.”<sup>21</sup> Furthermore, the Hawaii Supreme Court has stated that the legislative history of section 702-230, Hawaii Revised Statutes, “reflects exactly this concept.”<sup>22</sup>

There are a number of means by which the Legislature could accomplish this alternative. The Legislature could enact a provision similar to Colorado law that, for purposes of the insanity defense, defines “mental disease or defect” to exclude a condition that is attributable to the voluntary ingestion of alcohol or any other psychoactive substance. Section 16-8-101.5 of the Colorado Revised Statutes reads in pertinent part:

Mental disease or defect includes only those severely abnormal mental conditions that grossly and demonstrably impair a person’s perception or understanding of reality and that are not attributable to the voluntary ingestion of alcohol or any other psychoactive substance but does not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

(See Appendix D for complete text of Colorado Statute.)

On the other hand, the Legislature could enact a provision patterned after either Connecticut’s or Delaware’s statute. As noted previously, see Appendices B and C for text of these statutes. The language in these statutes is similar to that proposed in S.B. No. 2701, Regular Session of 1998. This Bill would have precluded the application of the insanity defense (section 704-400, Hawaii Revised Statutes) to any physical or mental disease, disorder, or defect

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<sup>19</sup> See notes 3-4 and accompanying text in Chapter 4.

<sup>20</sup> *Bieber v. People*, 856 P.2d 811, 817 (Colo. 1993).

<sup>21</sup> Slip Op. No. 20382, at 17 (June 29, 1998), quoting *Montana v. Egelhoff* 116 S. Ct. 2013, 2020 (1996).

<sup>22</sup> *State v. Birdsall*, No. 20382, slip op. at 17 (June 29, 1998). The court quoted the legislative history of §702-230, Haw. Rev. Stat.: “Your Committee believes that when a person chooses to drink, that person should remain ultimately responsible for his or her actions. Your Committee further believes that criminal acts committed while a person is voluntarily intoxicated should not be excused by the application of a defense which would negate the offender’s state of mind.” Quoting Conference Committee Report No. 36-86 in 1986 House Journal at 928.

caused or triggered by the voluntary ingestion or use of any intoxicating liquor or controlled substance, as defined in section 329-1, unless prescribed by a licensed individual for medical purposes. (See Appendix E for full text of bill.)

There has been some suggestion that this provision might raise an equal protection argument.<sup>23</sup> As mentioned previously, there is a credible argument that the doctrine of settled insanity is not a fundamental constitutional right. This distinction is important because, if a fundamental constitutional right is involved, the State has a higher burden to overcome in justifying a statutory provision. In such instance, the test that must be met to overcome an equal protection argument is whether the action is necessary to accomplish a compelling state interest. It may be that a successful compelling state interest argument can be made for protecting society by holding a person, who voluntarily caused the person's own physical or mental disease, disorder, or defect, responsible for the person's criminal actions. Nevertheless, if the doctrine of settled insanity is not deemed a fundamental constitutional right, then the State need only show that the statute bears a rational relationship to a permissible governmental purpose. Thus, if the State can meet this lower burden, the statute does not violate equal protection considerations.

It has been further suggested that if statutory language restricting the settled insanity defense focuses on a person's voluntary illegal acts, it may strengthen a compelling state interest argument. For example, statutory language could state that the insanity defense (section 704-400, Hawaii Revised Statutes) would not apply to any person whose physical or mental disease, disorder, or defect was caused or triggered by any voluntary, illegal act on the part of the person. This would prevent persons who ingest illegal drugs, alone or in combination with alcohol, from taking advantage of the insanity defense. It also would provide equal treatment to other scenarios involving a self-inflicted defect as a result of an illegal act not involving illegal drugs.<sup>24</sup> Although this statutory language would not encompass those who abuse alcohol alone, it seems probable that this scenario may not occur as frequently as one involving drugs alone or drugs in combination with alcohol.<sup>25</sup>

3. Enact a statute that adopts a stricter insanity test.

It may be further argued that the Legislature should amend the present insanity law by adopting a stricter insanity test, using language similar to the federal insanity statute or the M'Naghten rule. As discussed in Chapter 2, for a successful insanity defense, a person first must show the existence of a mental disease, defect or disorder and then must establish that this

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<sup>23</sup> The issue was alluded to before the Senate Committee on the Judiciary in testimony by the Office of the Public Defender on S.B. No. 2701, Regular Session of 1998. The issue was also raised in discussions between Bureau staff and Ms. Virginia Hench, Assistant Professor of criminal law, William S. Richardson School of Law, University of Hawaii. The Bureau notes, however, there does not appear to have been a great deal of litigation over the Connecticut or Delaware statutes.

<sup>24</sup> For example, a less likely, but quite possible, scenario that could arise is where a person sustains a gunshot wound to the brain in a robbery attempt and, as a result, develops a brain defect. Later, the person attempts to claim the insanity defense to avoid penal responsibility for a subsequent criminal act. The suggested language would bar this person from relying upon the insanity defense.

<sup>25</sup> Although not necessarily a prediction of future cases, none of the three circuit court cases discussed in Chapter 4 involved only alcohol. See discussion of cases at notes 50-63 and accompanying text in Chapter 4.

disease, defect or disorder meets the relevant insanity test. Both the federal insanity statute and the M’Naghten rule recognize only cognitive disability (i.e., being unable, at the time of the act and as a result of the mental disorder, to appreciate either the nature and quality of an act or the wrongfulness of an act.). Substantial incapacity to conform the person’s conduct to the requirements of the law (volitional prong) is not a defense under these insanity tests.

Although this option would not directly address the issue of settled insanity, it obviously would restrict the situations in which the insanity defense would apply and, depending upon the facts of the case, may well operate to deny the defense to defendants who caused their own mental disorder as a result of voluntary intoxication.<sup>26</sup> However, it should be noted that eliminating the volitional prong of Hawaii’s present insanity defense would operate to deny the insanity defense to other defendants as well. As Chapter 2 reflects, there are arguments both supportive and critical of the volitional prong, as well as criticisms of the restrictive M’Naghten rule. If the Legislature is committed to the volitional prong of Hawaii’s insanity defense, this alternative would not be attractive. Moreover, given this study’s narrow focus on the issue of settled insanity, rather than the broader issue of the efficacy of Hawaii’s insanity law in general, the instant study could not fairly be cited as support for such action. Nevertheless, the Bureau believes it is a viable option worthy of discussion.

#### 4. Examine Hawaii’s post acquittal commitment procedures.

Related to the premise underlying Senate Concurrent Resolution No. 132, S.D. 1 that increasing drug use is resulting in an increase in violent criminal acts by persons who may escape responsibility and prison on the basis of settled insanity, is the concern that these persons will be set free to continue to commit violent criminal acts. Under present state law,<sup>27</sup> a person who is acquitted, but who presents a risk of danger to the person or to society and who is not a proper subject for conditional release, is committed to an appropriate health care institution for custody, care and treatment. However, if the person can be controlled adequately and given proper care, supervision, and treatment, *even if the person presents such a risk of danger*, the person is given a conditional release. Finally, if the person no longer suffers from the disability or no longer presents a risk of danger, the person is discharged from custody. The issue of post acquittal commitment procedures is beyond the scope of this study. However, the Bureau notes that, if the Legislature’s primary concern is that persons who pose a risk of danger to themselves or to society may be set free to commit future crimes, perhaps Hawaii’s post acquittal commitment procedures should be examined to determine whether they should be amended to ensure the continued commitment of any acquitted person who poses a risk of danger.<sup>28</sup>

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<sup>26</sup> Cf. T. Myers, “Halcion Made Me Do It: New Liability and a New Defense – Fear and Loathing in the Halcion Paper Chase,” 62 U. Cin. L. Rev. 603, 631 (Fall 1993) (law remains unclear whether drug-induced psychosis could ever reach the level of M’Naghten’s standard because of the lack of clear definition of the scope of mental disease or defect); M. Bidwell & D. Katz, “Injecting New Life into an Old Defense,” 7 U. Miami Ent. & Sports L. Rev. 1, 27 (1989) (the “paucity of guidance in the law leaves one with a perplexing puzzle when trying to determine whether a drug-induced psychosis may satisfy [M’Naghten’s requirement of mental disease or defect].”).

<sup>27</sup> See Haw. Rev. Stat. §704-411 (1993) and (1998 Supp.).

<sup>28</sup> Several states, including Oregon, Connecticut and Utah, apparently have established quasi-judicial boards (known in Oregon as the Psychiatric Security Review Board) to retain jurisdiction over the acquittee, to determine whether the person continues to present a danger to society and to grant or revoke conditional release or

5. Enact a statute to limit the pathological intoxication defense to alcohol and legal drugs and to exclude illegal drugs.

In the three identified circuit court trials involving the issue of settled insanity, the courts split, with one court finding the defendant guilty and two acquitting the defendant. Of these latter cases, the court, in *State v. Tome*, made alternate findings and relied, in part, upon the doctrine of pathological intoxication to acquit the defendant.<sup>29</sup> The Hawaii Supreme Court, apparently erroneously, cited the other case, *State v. Kuhia*, in dictum in an unrelated case, as having raised a successful defense of pathological intoxication.<sup>30</sup> This may signal that there exists some misunderstanding with respect to the nature of pathological intoxication. According to Hawaii law, pathological intoxication is defined as “intoxication grossly excessive in degree, given the amount of the intoxicant, to which the defendant *does not know* the defendant is susceptible and which results from a *physical abnormality* of the defendant.”<sup>31</sup> Moreover, the Commentary to the Hawaii Revised Statutes, quoting comments to the Model Penal Code, emphasizes that pathological intoxication is intended to “provide a defense in a *few, extremely rare*, cases in which an intoxicating substance is knowingly taken into the body and, because of a bodily abnormality, intoxication of an *extreme and unusual [and unforeseen] degree results*.”<sup>32</sup> The statutory and commentary language indicates a clear intent that the defense of pathological intoxication be limited to those very few, extreme circumstances where an unforeseen degree of intoxication results because of a physical abnormality. Commentators have cited such underlying conditions as temporal lobe epilepsy, traumatic brain damage, hypoglycemia or exhaustion and great strain as examples of physical abnormalities with which pathological intoxication may be associated.<sup>33</sup>

The court in *Tome* was persuaded by the defendant’s medical expert that the defendant suffered from pathological intoxication because repeated episodes of chronic methamphetamine abuse had eventually sensitized the defendant so that smaller and smaller amounts of the drug could trigger psychotic symptoms.<sup>34</sup> One could argue that this is not what the Legislature intended by the defense of pathological intoxication. Indeed, one could argue that the physical abnormality contemplated by the statute must be preexisting and not caused merely by previous,

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discharge. In Oregon, the acquittee has the burden of proof to show the acquittee no longer poses of risk of danger. Similarly, under the federal Insanity Defense Reform Act, a person acquitted is automatically committed pending a hearing on the person’s present mental status and dangerousness. The burden of proof is on the committed person to prove that the person’s release would not create a substantial risk of injury to the person or property of others. If the offense for which the person was tried involved bodily injury or serious property damage, or a substantial risk thereof, the person must sustain the burden of proof by clear and convincing evidence; otherwise, the person must prove eligibility for release by a preponderance of the evidence.

<sup>29</sup> See note 63 and accompanying text in Chapter 4.

<sup>30</sup> See notes 47 & 50-55 and accompanying text in Chapter 4.

<sup>31</sup> See Haw. Rev. Stat. §702-230(5)(c) (1993) (emphasis added).

<sup>32</sup> Commentary to Haw. Rev. Stat. §702-230 (1993) (emphasis added), quoting M.P.C., Tentative Draft No. 9, comments at 11-12 (1959).

<sup>33</sup> See Lawrence P. Tiffany & Mary Tiffany, “Nosologic Objections to the Criminal Defense of Pathological Intoxication: What do the Doubters Doubt?”, 13 Int’l J. L. Psych. 49, 49-52 (1990).

<sup>34</sup> *State v. Tome*, Cr. No. 96-1451, at 7 (1<sup>st</sup> Cir. Haw., June 26, 1998). The court cited testimony of defendant’s medical witness that this condition constitutes pathological intoxication as a finding of fact. The court also accepted, as a finding of fact, this witness’s testimony that settled insanity is a type of pathological intoxication. *Id.* at 6. See also discussion in Chapter 4 at note 63.

repeated episodes of voluntary intoxication that eventually sensitize the person to the intoxicant. An argument that such a sensitized condition should not constitute pathological intoxication would seem even more persuasive when the condition is self-induced by the use of illegal drugs. Moreover, it could hardly be argued that such a sensitized condition as a result of illegal drug use would be either “extreme,” “unusual” or “unforeseen,” as contemplated by section 702-230, Hawaii Revised Statutes.

Furthermore, the overwhelming majority of pathological intoxication cases discussed by legal authorities appear to involve alcohol, not drugs.<sup>35</sup> For example, commentators have described pathological intoxication as follows:

Pathological intoxication, also called pathological reaction to alcohol, is a temporary psychotic reaction, often manifested by violence, which is triggered by consumption of alcohol by a person with a predisposing mental or physical condition....

*[P]athological alcohol reaction, pathological intoxication.* An extraordinarily severe response to alcohol, especially to small amounts, marked by apparently senseless violent behavior, usually followed by exhaustion, sleep and amnesia for the episode. Intoxication is apparently not always involved, and for this reason *pathological reaction to alcohol* is the preferred term....

The phenomenon [pathological intoxication] is sometimes classed among the alcoholic psychoses. The American Psychiatric Association’s DSM-II (1968) classified it as an “acute brain syndrome manifested by psychosis after minimal alcohol intake,” and in DSM-II (1980) it is named idiosyncratic alcohol intoxication.<sup>36</sup>

Finally, it should be noted that most courts have rejected addiction to drugs or alcohol as a cause of involuntary intoxication, of which pathological intoxication is considered a subset.<sup>37</sup>

Given the foregoing, an argument could be made that pathological intoxication should be limited to situations involving alcohol and legal drugs and should exclude intoxication caused by illegal drugs.

## Recommendations

The Bureau recommends that the Legislature:

1. Adopt a statute similar to Colorado’s rejecting settled insanity.

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<sup>35</sup> See generally, L. Tiffany & M. Tiffany, *The Legal Defense of Pathological Intoxication* (1990); L. Tiffany, “The Drunk, The Insane, and the Criminal Courts: Deciding What to Make of Self-Induced Insanity,” 69 *Wash. U.L.Q.* 221 (1991).

<sup>36</sup> See L. Tiffany & M. Tiffany, “Nosologic Objections to the Criminal Defense of Pathological Intoxication: What do the Doubters Doubt?,” 13 *Int’l J. L. Psych.* 49, 49-52 (1990) (emphasis supplied) (citations omitted).

<sup>37</sup> See notes 62-69 and accompanying text in Chapter 3.

*FINDINGS AND CONCLUSIONS*

2. Amend Hawaii's provision relating to pathological intoxication to limit the defense to alcohol and legal drugs and exclude its operation to illegal drugs.
3. Examine Hawaii's post acquittal laws to determine whether they are sufficient to protect society from persons who may pose a danger to themselves or to society.

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# SENATE CONCURRENT RESOLUTION

, REQUESTING A STUDY RELATING TO PENAL RESPONSIBILITY.

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3 WHEREAS, it appears that criminal acts of violence are  
4 increasingly the result of drug or alcohol induced behavior;  
5 and  
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7 WHEREAS, such violent acts may increase as drug and  
8 alcohol use continues to climb; and  
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10 WHEREAS, under Hawaii law, a person is not criminally  
11 responsible for conduct if, at the time of the conduct, the  
12 person, as a result of physical or mental disease, disorder, or  
13 defect, lacks the substantial capacity either to appreciate the  
14 wrongfulness of the conduct or to conform the person's conduct  
15 to the requirements of the law; and  
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17 WHEREAS, there is concern that defendants accused of  
18 violent criminal acts may be able to avoid criminal  
19 responsibility for their actions as a result of their voluntary  
20 substance abuse; and  
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22 WHEREAS the Legislature believes that, when incapacity is  
23 the result of voluntary actions, persons should be held  
24 responsible for their conduct; now, therefore,  
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26 BE IT RESOLVED by the Senate of the Nineteenth Legislature  
27 of the State of Hawaii, Regular Session of 1998, the House of  
28 Representatives concurring, that the Legislative Reference  
29 Bureau is requested to study the issue of penal responsibility,  
30 including, but not limited to instances where a person's lack  
31 of substantial capacity is triggered by the voluntary ingestion  
32 of intoxicating liquor or a controlled substance and cases  
33 where the voluntary ingestion of these substances cause a  
34 physical or mental disease, disorder, or defect excluding penal  
35 responsibility under section 704-400, Hawaii Revised Statutes;  
36 and  
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38 BE IT FURTHER RESOLVED that the study is requested to  
39 include but is not limited to:  
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- (1) An identification of relevant Hawaii statutory and case law;
- (2) An examination of how selected states may have addressed this issue; and
- (3) A review and discussion of relevant literature and research on the subject;

and

BE IT FURTHER RESOLVED that the Attorney General, the county prosecutors, the Public Defender, and the University of Hawaii Richardson School of Law are requested to provide assistance to the Bureau on this matter; and

BE IT FURTHER RESOLVED that the Bureau is requested to submit its findings and conclusions, including proposed legislation, if any, to the Legislature no later than twenty days before the convening of the Regular Session of 1999; and

BE IT FURTHER RESOLVED that certified copies of this Concurrent Resolution be transmitted to the Acting Director of the Legislative Reference Bureau, the county prosecutors, the Public Defender, and the dean of the University of Hawaii Richardson School of Law.

## Appendix B

### “Connecticut General Statutes” §53(a)-13 (1997)

#### **Sec. 53a-13. Lack of capacity due to mental disease or defect as affirmative defense.**

(a) In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law.

(b) It shall not be a defense under this section if such mental disease or defect was proximately caused by the voluntary ingestion, inhalation or injection of intoxicating liquor or any drug or substance, or any combination thereof, unless such drug was prescribed for the defendant by a prescribing practitioner, as defined in subdivision (22) of section 20-571, and was used in accordance with the directions of such prescription.

(c) As used in this section, the terms mental disease or defect do not include (1) an abnormality manifested only by repeated criminal or otherwise antisocial conduct or (2) pathological or compulsive gambling.

## Appendix C

**“Delaware Code Annotated”  
Crimes and Criminal Procedure  
§401 (1997)**

**§ 401. Mental illness or psychiatric disorder.** (a) In any prosecution for an offense, it is an affirmative defense that, at the time of the conduct charged, as a result of mental illness or mental defect, the accused lacked substantial capacity to appreciate the wrongfulness of the accused's conduct. If the defendant prevails in establishing the affirmative defense provided in this subsection, the trier of fact shall return a verdict of "not guilty by reason of insanity."

(b) Where the trier of fact determines that, at the time of the conduct charged, a defendant suffered from a psychiatric disorder which substantially disturbed such person's thinking, feeling or behavior and/or that such psychiatric disorder left such person with insufficient willpower to choose whether the person would do the act or refrain from doing it, although physically capable, the trier of fact shall return a verdict of "guilty, but mentally ill."

(c) It shall not be a defense under this section if the alleged insanity or mental illness was proximately caused by the voluntary ingestion, inhalation or injection of intoxicating liquor, any drug or other mentally debilitating substance, or any combination thereof, unless such substance was prescribed for the defendant by a licensed health care practitioner and was used in accordance with the directions of such prescription. As used in this chapter, the terms "insanity" or "mental illness" do not include an abnormality manifested only by repeated criminal or other nonsocial conduct.