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Involuntary Intoxication Is a Defense in Texas

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sites to give effect to the intent of Title VII merit application of equitable tolling in this case. *Chappell* represents a rather stiff application of filing technicalities that promotes unfairness and confusion in the jurisdictional prerequisite debate and should, therefore, be reconsidered.

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CRIMINAL LAW—Defenses—Involuntary Intoxication Is a Defense in Texas

Torres v. State,
585 S.W.2d 746 (Tex. Crim. App. 1979).

Helen Torres and Robert Miranda broke into a home and forced the owner, Margaret Garcia, at gunpoint to load everything of value into her car. She was then ordered to cash two checks at her bank. When the drive-in teller refused to cash the checks for lack of identification, Mrs. Garcia was allowed to go inside the bank to cash the checks. Once inside the bank Mrs. Garcia notified the police, and Torres and Miranda were arrested within a short time. Torres was charged with aggravated robbery, and at the trial her accomplice, Miranda, was the sole defense witness. He testified that a few hours prior to the robbery he gave Torres a drink containing water, Alka-Seltzer, and four or five 250 mg. Thorazine[1] tablets. Torres was unaware of the Thorazine in the drink. The victim testified both Torres and Miranda appeared to be drugged at the time of the robbery, and other testimony indicated Torres was found asleep in the victim's car when police arrived on the scene. A jury charge based on the defense of involuntary intoxication was requested by Torres but was refused by the trial court.[2] Torres was convicted and appealed to the Court of Criminal Appeals. Held—*Reversed and remanded.* Involuntary intoxication is a defense in Texas.[3]

Intoxication[4] has never been a favored defense in the common law.[5] A

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1. Thorazine is a brand name for the generic drug chlorpromazine. It is used as a tranquilizer and sedative. Normal adult dosage levels are between 10 and 50 mgs., although for acutely agitated psychiatric patients dosages of 1000 mgs. per day may be used. PHYSICIAN'S DESK REFERENCE 1632-34 (33d ed. 1979).

2. Torres v. State, 585 S.W.2d 746, 748 (Tex. Crim. App. 1979). The requested charge directed an acquittal if the jury found defendant was involuntarily intoxicated and as a result of such intoxication did not act voluntarily in committing the crime. *Id.* at 748.

3. *Id.* at 749.

4. *See* TEX. PENAL CODE ANN. § 8.04(d) (Vernon 1974). Section 8.04(d) defines intoxication as a "disturbance of mental or physical capacity resulting from the introduction of any substance into the body." *Id.; see Ex parte* Ross, 522 S.W.2d 214, 218 (Tex. Crim. App.

few early trial courts even considered intoxication as an aggravating factor enhancing criminal liability, but such findings were held to be improper on appeal.[6] Most courts, relying on moral and practical arguments,[7] followed the general rule that intoxication was no defense.[8] Society was unwilling to permit a condition that most people considered a crime,[9] a sin,[10] or at best a personal weakness,[11] to serve as an excuse for the commission of criminal acts.[12] As a practical matter, since intoxication was an easily acquired condition, allowing it as a defense would only increase its prevalence.[13]

In limited circumstances, however, intoxication has been recognized as

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1975).

5. *See, e.g.*, State v. Sopher, 30 N.W. 917, 918 (Iowa 1886) (intoxication looked upon with disfavor by court); Johnson v. Commonwealth, 115 S.E. 673, 677 (Va. 1923) (intoxication as defense is dangerous, subject to abuse, and must be carefully guarded); State v. Mriglot, 550 P.2d 17, 18 (Wash. Ct. App. 1976) (intoxication an unfavored defense). "This vice doth deprive men of the use of reason, and puts many men into a perfect, but temporary, phrensy; . . . such a person shall have no privilege by his voluntary contracted madness, but shall have the same judgment as if he were in his right senses." Colbath v. State, 4 Jackson & J. 76, 78 (Tex. Ct. App. 1878) (quoting 1 HALE, HISTORY OF THE PLEAS OF THE CROWN (1778)).

6. *See, e.g.*, McIntyre v. People, 38 Ill. 514, 520-21 (1865); People v. Rogers, 18 N.Y. 9, 12, 20-21 (1858); Ferrell v. State, 43 Tex. 503, 507-08 (1875). Courts reasoned it was bad enough to commit a crime, but worse for a person to voluntarily put himself in a mental state that made commission of a crime more likely. *See* People v. Rogers, 18 N.Y. 9, 18 (1858); Carter v. State, 12 Tex. 500, 506 (1854).

7. *See* Kendall v. State, 145 So. 2d 924, 925 (Miss. 1962); Colbath v. State, 4 Jackson & J. 76, 78 (Tex. Ct. App. 1878).

8. *See, e.g.*, People v. Murray, 56 Cal. Rptr. 21, 23 (Ct. App. 1967) (voluntary intoxication no defense); State v. Harden, 480 P.2d 53, 60-61 (Kan. 1971) ("temporary loss of one's physical and mental faculties due to voluntary intoxication is not equivalent to an excuse for criminal liability"); City of Minneapolis v. Altimus, 283 N.W.2d 851, 855 (Minn. 1976) (voluntary intoxication never a defense at common law).

9. *See* State v. Brown, 16 P. 259, 259 (Kan. 1888) (drunkenness a misdemeanor); People v. Townsend, 183 N.W. 177, 179 (Mich. 1921) (by statute, drunkards are disorderly persons).

10. *See* State v. Sopher, 30 N.W. 917, 918 (Iowa 1886) (actions forbidden by the laws of God); Kendall v. State, 145 So. 2d 924, 925 (Miss. 1962) (moral duty to abstain from becoming intoxicated).

11. *See* People v. Rogers, 18 N.Y. 9, 18 (1858) (a vice that compromises man's duty to society); Colbath v. State, 4 Jackson & J. 76, 78-79 (Tex. Ct. App. 1878) (intoxication was defendant's "own act and folly" and "his own gross vice and misconduct").

12. *See* Johnson v. Commonwealth, 115 S.E. 673, 676-77 (Va. 1923).

13. *See* Burrows v. State, 297 P. 1029, 1035 (Ariz. 1931) (doctrine of intoxication as a defense is dangerous and liable to be abused). "There would be no security for life or property if men could commit crimes with impunity, provided they would first make themselves drunk enough to cease to be reasonable beings." Carter v. State, 12 Tex. 500, 506 (1854); *accord*, State v. Arsenault, 124 A.2d 741, 746 (Me. 1956); Kendall v. State, 145 So. 2d 924, 925 (Miss. 1962).

indirectly removing criminal responsibility.[14] If chronic intoxication produces a long term mental disease or dysfunction, a defendant can plead the defense of insanity.[15] The general rule against intoxication as a defense is not contradicted, but rather avoided since the critical factor is mental disease, not intoxication.[16] As an ameliorating condition intoxication is treated in two ways.[17] For crimes requiring a culpable mental state or specific intent, intoxication can be used to show the defendant was incapable of forming the requisite mental state.[18] Courts also can treat intoxication as having no effect on the guilt or innocence of the accused but as a mitigating factor in the sentencing phase of the trial.[19]

Involuntary intoxication is the one recognized exception to the general rule that intoxication is no defense.[20] The defense of involuntary intoxication, however, is looked upon with suspicion.[21] As a result, many jurisdic-

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14. *See, e.g.*, Parker v. State, 241 A.2d 185, 188 (Md. Ct. Spec. App. 1968); Commonwealth v. McAlister, 313 N.E.2d 113, 119 (Mass. 1974); State v. Salmon, 226 N.E.2d 784, 787 (Ohio Ct. App. 1967).

15. *See, e.g.*, Easter v. District of Columbia, 209 A.2d 625, 627 (D.C. 1965) (permanent mental disease resulting from extended habit of intemperance treated same as other types of insanity); State v. Booth, 169 N.W.2d 869, 873 (Iowa 1969) (brain damage from extensive use of alcohol treated as insanity); State v. Plummer, 374 A.2d 431, 436 (N.H. 1977) (chronic alcoholism resulting in mental disease is grounds for insanity defense).

16. *See* State v. Booth, 169 N.W.2d 869, 873 (Iowa, 1969); State v. Plummer, 374 A.2d 431, 435-36 (N.H. 1977).

17. *Compare* State v. Seely, 510 P.2d 115, 121-22 (Kan. 1973) (intoxication may be a defense to crimes requiring specific intent) *with* Hart v. State, 537 S.W.2d 21, 24 (Tex. Crim. App. 1976) (intoxication may mitigate penalty).

18. *See, e.g.*, State v. Lentz, 306 So. 2d 683, 685 (La. 1975) (burglary: unauthorized entering of premises with intent to commit a felony or theft); State v. Rice, 379 A.2d 140, 143 n.1 (Me. 1977) (robbery: must find intent to deprive victim permanently of his property); Perryman v. State, 159 P. 937, 938 (Okla. Crim. App. 1916) (murder: must find capability of forming and entertaining premeditated design). A defendant could still be convicted of a lesser offense that did not require specific intent. *See* State v. Bunn, 196 S.E.2d 777, 786 (N.C. 1973) (murder charge reduced from first to second degree); Ameen v. State, 186 N.W.2d 206, 212 (Wis. 1971) (lacking specific intent, first degree murder reduced to second degree murder).

19. *See* Hanks v. State, 542 S.W.2d 413, 416 (Tex. Crim. App. 1976); TEX. PENAL CODE ANN. § 8.04(b) (Vernon 1974). In Texas the defendant must prove the intoxication resulted in temporary insanity under section 8.01 of the Penal Code in order to get a jury charge on mitigation of punishment. Hart v. State, 537 S.W.2d 21, 24 (Tex. Crim. App. 1976).

20. *See, e.g.*, State v. Rice, 379 A.2d 140, 145 (Me. 1977); Colbath v. State, 4 Jackson & J. 76, 78 (Tex. Ct. App. 1878); Johnson v. Commonwealth, 115 S.E. 673, 676 (Va. 1923). "[I]f a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrenzy, . . . this puts him into the same condition, in reference to crimes, as any other phrenzy, and equally excuseth him." City of Minneapolis v. Altimus, 238 N.W.2d 851, 855 (Minn. 1976) (quoting 1 HALE, HISTORY OF THE PLEAS OF THE CROWN 32 (1778)).

21. *See, e.g.*, Burrows v. State, 297 P. 1029, 1035 (Ariz. 1931) (defense is dangerous and

tions recognizing the defense have expressly or implicitly made involuntary intoxication an affirmative defense[22] requiring the defendant to assume the burden of raising the issue and of proving it.[23] There are two elements to the defense of involuntary intoxication, involuntariness[24] and a resultant mental condition equivalent to insanity at the time of the criminal act.[25] Involuntariness in early common law was considered a lack of knowledge on the part of the person taking the intoxicant.[26] Early decisions in this country continued this emphasis, but also referred to force and coercion as factors showing involuntariness.[27] Under the broad head-

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likely to be abused); City of Minneapolis v. Altimus, 238 N.W.2d 851, 858 (Minn. 1976) (an unusual condition that will rarely be appropriate as a defense); Johnson v. Commonwealth, 115 S.E. 673, 676 (Va. 1923) (defense rarely allowed and under strict limitations).

22. An affirmative defense imposes a heavier burden of proof on the defendant than does a defense. In Texas the defendant must prove an affirmative defense by a preponderance of evidence, but need only raise a reasonable doubt as to a defense. *See* TEX. PENAL CODE ANN. §§ 2.03(d), 2.04(d) (Vernon 1974).

23. *See* City of Minneapolis v. Altimus, 238 N.W.2d 851, 858 (Minn. 1976) (defendant must establish the defense); Staples v. State, 245 N.W.2d 679, 684 (Wis. 1976) (defendant has burden of proof on both involuntariness and state of mind); ILL. ANN. STAT. ch. 38, §§ 6-3(b), 6-4 (Smith-Hurd 1972). *But see* State v. Rice, 379 A.2d 140, 145 (Me. 1977) ("the State must prove beyond a reasonable doubt the absence of involuntary intoxication"). The United States Supreme Court has held that placing the burden of proving a defense on a defendant, whether the test is beyond a reasonable doubt or a preponderance of the evidence, does not violate the constitutional right of due process. *See* Leland v. Oregon, 343 U.S. 790, 798-99 (1952).

24. *See, e.g.*, Easter v. District of Columbia, 209 A.2d 625, 627 (D.C. 1965) (intoxication without person's consent); State v. Rice, 379 A.2d 140, 145 (Me. 1977) (intoxication not self-induced); Hanks v. State, 542 S.W.2d 413, 416 (Tex. Crim. App. 1976) (no independent judgment or volition in taking the intoxicant).

25. *See, e.g.*, Burrows v. State, 297 P. 1029, 1035 (Ariz. 1931) (defendant "does not understand and appreciate the nature and consequences of his act"); State v. Mriglot, 550 P.2d 17, 18 (Wash. Ct. App. 1976) (defendant unable to perceive the "nature and quality of the act"); Staples v. State, 245 N.W.2d 679, 683 (Wis. 1976) (defendant "incapable of distinguishing between right and wrong").

26. *See, e.g.*, McCook v. State, 17 S.E. 1019, 1019 (Ga. 1893) (intoxication by fraud, artifice, or contrivance); Choate v. State, 197 P. 1060, 1063 (Okla. Crim. App. 1921) (involuntary intoxication means by design, fraud, or artifice of another); Pearson's Case, 168 Eng. Rep. 1108, 1108 (1835) (involuntary if by strategem or fraud of another). In some cases, the defendant drank something without knowing someone else had put an intoxicant in the drink. *See* Pribble v. People, 112 P. 220, 221 (Colo. 1910) (drug administered without the knowledge of defendant); State v. Rice, 379 A.2d 140, 147-48 (Me. 1977) (LSD put in defendant's beer). In other cases the person took something knowing what it was but being unaware the substance had intoxicating properties. *See, e.g.*, Burnett v. Commonwealth, 284 S.W.2d 654, 658 (Ky. 1955) (intoxication from medical treatment by physician); City of Minneapolis v. Altimus, 238 N.W.2d 851, 856-57 (Minn. 1976) (unusual and unexpected reaction to prescription drug); People v. Koch, 294 N.Y.S. 987, 989 (App. Div. 1937) (inadvertent overdose of prescribed drug).

27. *See, e.g.*, Burrows v. State, 297 P. 1029, 1035 (Ariz. 1931) (duress or fraud); Barthol-

ing of lack of knowledge, several specific types of involuntariness have been recognized.[28] Taking an intoxicant due to the fraud or deception of another person has invariably been considered involuntary.[29] Likewise, intoxication resulting from a medically prescribed drug has been held involuntary.[30] The Model Penal Code includes pathological intoxication as an affirmative defense,[31] but courts have been reluctant to adopt such a provision.[32].

Although force and duress are widely recognized as examples of involuntariness,[33] courts and writers have been unable to cite any decision holding the evidence sufficient to support acquittal based on involuntary intoxication by force.[34] Coercion is frequently raised by defendants who contend they had no intention of drinking but drank at another's invitation because they feared the consequences of refusing the invitation.[35]

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omew v. People, 104 Ill. 601, 606 (1882) (fraud, contrivance, or force); Perryman v. State, 159 P. 937, 937-38 (Okla. Crim. App. 1916) (lack of knowledge or coercion).

28. *See* City of Minneapolis v. Altimus, 238 N.W.2d 851, 856 (Minn. 1976).

29. *See* Pribble v. People, 112 P. 220, 221 (Colo. 1910) (drug administered without defendant's knowledge); People v. Penman, 110 N.E. 894, 900 (Ill. 1915) (defendant took cocaine tablet when told it was a breath freshener); *cf.* Hanks v. State, 542 S.W.2d 413, 416 (Tex. Crim. App. 1976) (when defendant suspected drug had been placed in his drink but drank it anyway, held not involuntary).

30. *See, e.g.*, Burnett v. Commonwealth, 284 S.W.2d 654, 658 (Ky. 1955) (involuntary when caused by medical treatment of physician); City of Minneapolis v. Altimus, 238 N.W.2d 851, 858 (Minn. 1976) (unexpected reaction to drug prescribed by physician); People v. Koch, 294 N.Y.S. 987, 989 (App. Div. 1937) (inadvertent overdose of drug prescribed by physician). To apply the defense of involuntary intoxication, the defendant must not have had knowledge of the drug's potential for causing intoxication. *See* Burnett v. Commonwealth, 284 S.W.2d 654, 658-59 (Ky. 1955); City of Minneapolis v. Altimus, 238 N.W.2d 851, 857 (Minn. 1976).

31. MODEL PENAL CODE § 2.08(4), (5)(c) (Proposed Official Draft, 1962). Pathological intoxication is defined as "intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible." *Id.*

32. *See, e.g.*, Kane v. United States, 399 F.2d 730, 736-37 (9th Cir. 1968) (pathological intoxication not recognized), *cert. denied*, 393 U.S. 1057 (1969); Martinez v. People, 235 P.2d 810, 815 (Colo. 1951) (court would allow defense only if plead as insanity); Thomas v. State, 125 S.E.2d 679, 682 (Ga. Ct. App. 1962) (decreased tolerance to alcohol does not decrease responsibility for criminal acts). *But see* People v. Castillo, 449 P.2d 449, 452, 74 Cal. Rptr. 385, 388 (1969) (evidence of diminished capacity due to pathological intoxication should be submitted to jury); City of Minneapolis v. Altimus, 238 N.W.2d 851, 858 (Minn. 1976) (unusual and unexpected reaction to drugs can be defense).

33. *See, e.g.*, Easter v. District of Columbia, 209 A.2d 625, 627 (D.C. 1965); State v. Plummer, 374 A.2d 431, 435 (N.H. 1977); State v. Bunn, 196 S.E.2d 777, 786 (N.C. 1973).

34. *See, e.g.*, City of Minneapolis v. Altimus, 238 N.W.2d 851, 856 (Minn. 1976); State v. Bunn, 196 S.E.2d 777, 786 (N.C. 1973); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 539-40 (2d ed. 1960); R. PERKINS, CRIMINAL LAW 895-96 (2d ed. 1969). *See generally* Annot., 73 A.L.R.3d 195, 205-08 (1976).

35. *See, e.g.*, Burrows v. State, 297 P. 1029, 1035 (Ariz. 1931); Borland v. State, 249

Courts have regularly found insufficient duress in this situation to justify a claim of involuntariness.[36] The use of actual force undoubtedly constitutes involuntariness if the evidence is sufficient to support the claim.[37]

Alcoholism and drug addiction are not considered involuntary states of intoxication.[38] While alcoholism or drug addiction may support a successful insanity defense,[39] an irresistible impulse or compulsion to drink or take drugs is insufficient to demonstrate a lack of volition;[40] as a result, courts have not allowed the defense of involuntary intoxication based on alcoholism or addiction.[41]

The Texas Court of Criminal Appeals has defined the test for involuntariness as an "absence of an exercise of independent judgment and volition on the part of the accused in taking the intoxicant."[42] In stating this definition, the court did not define independent judgment and volition or discuss what fact situations might meet such a definition.[43] The court's holding was limited to a finding that knowingly taking an intoxicant did not meet the test for involuntariness.[44]

In addition to involuntariness, a defendant must also prove the intoxi-

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S.W. 591, 594 (Ark. 1923); McCook v. State, 17 S.E. 1019, 1019 (Ga. 1893).

36. *See, e.g.*, Burrows v. State, 297 P. 1029, 1035 (Ariz. 1931) (amount of influence must amount to duress); Borland v. State, 249 S.W. 591, 594 (Ark. 1923) (drinking at another's request not coercion); Perryman v. State, 159 P. 937, 937-38 (Okla. Crim. App. 1916) (drinking liquor given by another not coercion).

37. *See, e.g.*, Borland v. State, 249 S.W. 591, 594 (Ark. 1923); City of Minneapolis v. Altimus, 238 N.W.2d 851, 856 (Minn. 1976); State v. Bunn, 196 S.E.2d 777, 786 (N.C. 1973).

38. *See, e.g.*, People v. Morrow, 74 Cal. Rptr. 551, 558 (Ct. App. 1969) (when alcoholic's first drink is by choice, intoxication is voluntary); State v. Palacio, 559 P.2d 804, 806 (Kan. 1977) (chronic alcoholism is not involuntary intoxication); State v. Crayton, 354 S.W.2d 834, 836-37 (Mo. 1962) (drug addiction not involuntary). *But see* Staples v. State, 245 N.W.2d 679, 683-84 (Wis. 1976) (alcoholism may raise issue of involuntary intoxication if proved by expert medical testimony).

39. *See, e.g.*, People v.Murray, 56 Cal. Rptr. 21, 23 (Ct. App. 1967); Easter v. District of Columbia, 209 A.2d 625, 627 (D.C. 1965); Colbath v. State, 4 Jackson & J. 76, 79 (Tex. Ct. App. 1878). Drug addiction may also support an insanity plea. *See* Brand v. State, 180 S.E.2d 579, 580 (Ga. Ct. App. 1971); State v. Crayton, 354 S.W.2d 834, 837 (Mo. 1962).

40. *See, e.g.*, People v. Morrow, 74 Cal. Rptr. 551, 555-56 (Ct. App. 1969); Easter v. District of Columbia, 209 A.2d 625, 627 (D.C. 1965); State v. Palacio, 559 P.2d 804, 806 (Kan. 1977).

41. *See, e.g.*, People v. Morrow, 74 Cal. Rptr. 551, 555-56 (Ct. App. 1969); State v. Palacio, 559 P.2d 804, 806 (Kan. 1977); State v. Crayton, 354 S.W.2d 834, 837 (Mo. 1962).

42. Hanks v. State, 542 S.W.2d 413, 416 (Tex. Crim. App. 1976).

43. *Id.* at 416. Two other jurisdictions have used this definition but have also failed to define the terms. *See* State v. Plummer, 374 A.2d 431, 435 (N.H. 1977); Johnson v. Comonwealth, 115 S.E. 673, 677 (Va. 1923). Independent judgment and volition could be paraphrased as comparing alternative courses of action and choosing one free of the influence of someone else. *See* WEBSTER'S NEW INTERNATIONAL DICTIONARY 1148, 1223, 2562 (3d ed. 1963).

44. Hanks v. State, 542 S.W.2d 413, 416 (Tex. Crim. App. 1976).

cation resulted in a mental dysfunction equivalent to temporary insanity at the time of the criminal act.[45] Since the insanity defense is recognized in all jurisdictions, many of the courts recognizing involuntary intoxication have simply adopted the same mental dysfunction test already used for insanity.[46] In most jurisdictions this is the *M'Naghten* test,[47] which requires the defendant to prove, as a result of mental disease, an inability at the time of the criminal act to know the nature of the act or to know the act was wrong.[48] The cause of the mental dysfunction is the only definitional difference between the defenses of insanity and involuntary intoxication.[49] For the former, a mental disease or defect is required;[50] for the latter, involuntarily caused intoxication.[51]

In *Torres v. State*[52] the Texas Court of Criminal Appeals had to determine if involuntary intoxication was a defense in Texas, what the applicable test should be if it was a defense, and if the evidence presented sufficiently raised the issue of involuntary intoxication.[53] In holding involuntary intoxication to be a valid defense, the court found the defense was recognized at common law and was consistent with the Texas statutory defense of insanity.[54] Relying on recent decisions from other ju-

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45. *See, e.g.*, City of Minneapolis v. Altimus, 238 N.W.2d 851, 857 (Minn. 1976) (defendant must be temporarily insane due to involuntary intoxication); State v. Mriglot, 550 P.2d 17, 18 (Wash. Ct. App. 1976) (defense if temporary insanity is caused by truly involuntary intoxication); Staples v. State, 245 N.W.2d 679, 683 (Wis. 1976) (degree of intoxication must be such that defendant could not tell right from wrong).

46. *See, e.g.*, People v. Murray, 56 Cal. Rptr. 21, 23 (Ct. App. 1967); City of Minneapolis v. Altimus, 238 N.W.2d 851, 857 (Minn. 1976); State v. Mriglot, 550 P.2d 17, 18 (Wash. Ct. App. 1976).

47. *See, e.g.*, Burrows v. State, 297 P. 1029, 1035 (Ariz. 1931) (defendant does not "understand and appreciate the nature and consequences of his act"); State v. Mriglot, 550 P.2d 17, 18 (Wash. Ct. App. 1976) (defendant must be unable to "perceive the nature and quality of the act"); Staples v. State, 245 N.W.2d 679, 683 (Wis. 1976) (defendant must be incapable of distinguishing right from wrong). In Texas a modification of *M'Naghten* is used to determine insanity: either the defendant did not know his conduct was wrong or he was incapable of conforming his conduct to the law. *See* TEX. PENAL CODE ANN. § 8.01(a), comment (Vernon 1974).

48. M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843). *See generally* R. PERKINS, CRIMINAL LAW 858-63 (2d ed. 1969).

49. *See* State v. Rice, 379 A.2d 140, 146 (Me. 1977); City of Minneapolis v. Altimus, 238 N.W.2d 851, 857 (Minn. 1976).

50. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 6-2(a) (Smith-Hurd 1972); LA. REV. STAT. ANN. § 14.14 (West 1974); WIS. STAT. ANN. § 971.15(1) (West 1971).

51. *See, e.g.*, ILL. ANN. STAT. ch. 38, § 6-3(b) (Smith-Hurd 1972); KAN. STAT. ANN. § 21-3208(1) (1974); WIS. STAT. ANN. § 939.42(1) (West 1958).

52. 585 S.W.2d 746 (Tex. Crim. App. 1979).

53. *Id.* at 748-49.

54. *Id.* at 748-49. The court reasoned that if, under section 8.01(a) of the Texas Penal Code, a mental disease or defect could remove criminal responsibility, involuntary intoxica-

risdictions,[55] the *Torres* court concluded evidence of both involuntariness and a resulting mental dysfunction must be affirmatively raised by the defendant.[56] The definition of involuntariness set out in *Hanks v. State*,[57] requiring an absence of independent judgment and volition, was followed in *Torres*.[58] The statutory test for mental dysfunction required for the insanity defense was found equally applicable to involuntary intoxication.[59] The court of criminal appeals determined the evidence put forward by the defendant in *Torres* was sufficient to raise the two issues of involuntariness and subsequent mental dysfunction.[60] Even though Torres voluntarily drank the mixture, there was evidence she had no knowledge of its intoxicating contents and thus exercised no independent judgment in taking the intoxicant.[61] Although the evidence of defendant's state of

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tion causing a similar mental state should also be a defense. *Id.* at 748-49. The court thus recognized a condition that previous decisions and the Penal Code only implicitly acknowledged as a possible excuse from criminal liability. *See* Colbath v. State, 4 Jackson & J. 76, 78 (Tex. Ct. App. 1878) (quoted Hale's statement that intoxication not the fault of the accused is exception to the general rule that intoxication is no defense); TEX. PENAL CODE ANN. § 8.04(a) (Vernon 1974). By stating voluntary intoxication is no defense, section 8.04(a) implies involuntary intoxication may be a defense. *See* Bubany, *The Texas Penal Code of 1974*, 28 Sw. L.J. 292, 317-18 (1974).

55. *See, e.g.*, People v. Murray, 56 Cal. Rptr. 21, 23 (Ct. App. 1967); City of Minneapolis v. Altimus, 238 N.W.2d 851, 857 (Minn. 1976); State v. Mriglot, 550 P.2d 17, 18 (Wash. Ct. App. 1976).

56. Torres v. State, 585 S.W. 2d 746, 749 (Tex. Crim. App. 1979). The language used in *Torres* may cause some confusion. The court uses the terms defense and affirmative defense interchangeably in discussing involuntary intoxication. *Id.* at 748-50. Affirmative defense as used in *Torres* does not refer to an affirmative defense as defined in section 2.04 of the Texas Penal Code. Section 2.04 is a legislative designation applying only to defenses expressly labeled affirmative defenses in the Penal Code, and involuntary intoxication is not even mentioned in the Penal Code. Thus, *Torres* should be interpreted as holding involuntary intoxication is a defensive issue that must be affirmatively raised by the defendant. *See* Wilson v. State, 581 S.W.2d 661, 665, 668, 670-71 (Tex. Crim. App. 1979) (example of the confusion that can result from indiscriminate use of the term affirmative defense).

57. 542 S.W.2d 413, 416 (Tex. Crim. App. 1976).

58. Torres v. State, 585 S.W.2d 746, 748 (Tex. Crim. App. 1979).

59. *Id.* at 749. Unlike some other jurisdictions, the Texas court in *Torres* does not require a finding of insanity. Insanity, as defined in section 8.01(a) of the Texas Penal Code, must be caused by a mental disease or defect. The *Torres* decision does require a degree of mental dysfunction equivalent to insanity and adopts the same test to measure this degree of mental dysfunction. Therefore, while a defendant claiming involuntary intoxication must present evidence showing the required degree of mental dysfunction, he does not have to show insanity which, as an affirmative defense in the Penal Code, requires proof by a preponderance of the evidence. *Compare* Torres v. State, 585 S.W.2d 746, 748-49 (Tex. Crim. App. 1979) *with* City of Minneapolis v. Altimus, 238 N.W.2d 851, 857 (Minn. 1976) *and* State v. Mriglot, 550 P.2d 17, 18 (Wash. Ct. App. 1976).

60. Torres v. State, 585 S.W.2d 746, 748-49 (Tex. Crim. App. 1979).

61. *Id.* at 748.

mind was minimal, it was found sufficient to have entitled her to a jury charge on involuntary intoxication.[62]

The holding in *Torres* creates a new criminal defense in Texas, but because the court's discussion was limited to the facts of the instant case, the applicability of the defense to other fact situations is uncertain.[63] The finding of involuntariness in *Torres* is based solely on the defendant's lack of knowledge of the drug, and the court gives no indication of what other circumstances might fit within the definition of involuntariness.[64] Intoxication resulting from taking medically prescribed drugs will meet the test if the individual had no knowledge of possible intoxicating side effects of the drug, since independent judgment is exercised in taking the drug as medicine, not as an intoxicant.[65] Pathological intoxication does not meet the *Torres* test for involuntariness.[66] The intoxicant is taken voluntarily with knowledge of its intoxicating property; only the increased degree of intoxication is unexpected.[67] Direct force presumably will suffice to show involuntariness regardless of the defendant's knowledge of the intoxicant since no independent judgment is exercised when an intoxicant is forcibly introduced into a person's body.[68] A threat of force, however, will not necessarily show involuntariness if the test set out in *Torres* is strictly followed. A person taking an intoxicant under threat of force exercises some independent judgment in deciding between taking the intoxicant or risking the threatened action.[69]

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62. *Id.* at 749. The only evidence was the victim's testimony the defendant appeared drugged and police testimony that defendant was asleep in the victim's car when arrested. *Id.* at 749.

63. *Id.* at 748-49.

64. *Id.* at 748.

65. *See* Perkins v. United States, 228 F. 408, 415-16 (4th Cir. 1915) (person is not presumed to know of possible intoxicating effects of drugs, but notice of such a possibility from physician or drug label may be considered by the court in determining involuntariness); City of Minneapolis v. Altimus, 238 N.W.2d 851, 856-57 (Minn. 1976) (if defendant knows, or has reason to know, of prescription drug's intoxicating effect, intoxication is voluntary).

66. *See* Torres v. State, 585 S.W.2d 746, 749 (Tex. Crim. App. 1979). The test requires no independent judgment in taking the intoxicant. The key factor is knowledge that the substance is an intoxicant, not knowledge of the degree of intoxication that may result from its use. *Id.* at 748-49.

67. *See, e.g.*, Kane v. United States, 399 F.2d 730, 736 (9th Cir. 1968) (defense would require defendant not know of his susceptibility to grossly excessive degree of intoxication), *cert. denied*, 393 U.S. 1057 (1969); Martinez v. People, 235 P.2d 810, 815 (Colo. 1951) ("acute mental disturbance due to large and sometimes small amounts of alcohol"); MODEL PENAL CODE § 2.08 (4)(a), (5)(c) (Proposed Official Draft, 1962).

68. *See* State v. Plummer, 374 A.2d 431, 435 (N.H. 1977); Johnson v. Commonwealth, 115 S.E. 673, 676 (Va. 1923). *See generally* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 539-40 (2d ed. 1960).

69. *See* Burrows v. State, 297 P. 1029, 1035-36 (Ariz. 1931). In determining if threat of force would ever constitute involuntariness, the definition of compulsion in the Texas Penal

The Texas court, in determining the required mental state, followed other jurisdictions recently addressing the issue of equating involuntary intoxication with insanity.[70] According to *Torres* the mental dysfunction test should be the same for the involuntary intoxication defense and the insanity defense.[71] This direct adoption of the insanity mental dysfunction test for involuntary intoxication fails to reflect at least three important differences: the transitory nature of intoxication,[72] the practical impossibility of using experts to show the requisite cause of the mental dysfunction,[73] and the post-acquittal disposition of defendants.[74] These differences justify a different test for involuntary intoxication, but a more practical solution is to impose a lesser burden of proof on the defendant claiming involuntary intoxication.[75]

The difficulty of proving the necessary degree of mental dysfunction will be greater for the defense of involuntary intoxication because both the dysfunction and its cause are transitory.[76] With an insanity defense, the defendant's mental dysfunction may be temporary, but the mental disease or defect causing it is unlikely to be of short duration.[77] A defen-

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Code should prove helpful. Threat of force is compulsion only if such threat "would render a person of reasonable firmness incapable of resisting the pressure." TEX. PENAL CODE ANN. § 8.05(c) (Vernon 1974); *accord*, MODEL PENAL CODE § 2.08(5)(b), Comment (Proposed Official Draft, 1962) (corresponding language). The comments accompanying section 2.08 indicate the Model Penal Code's test for duress, which is similar to section 8.05(c) of the Texas Penal Code, is also applicable for determining involuntary intoxication. MODEL PENAL CODE § 2.08 (Proposed Official Draft, 1962). *See generally* R. PERKINS, CRIMINAL LAW 895-96 (2d ed. 1969).

70. *See, e.g.*, State v. Bunn, 196 S.E.2d 777, 786 (N.C. 1973); State v. Mriglot, 550 P.2d 17, 18 (Wash. Ct. App. 1976); Staples v. State, 245 N.W.2d 679, 683 (Wis. 1976).

71. Torres v. State, 585 S.W.2d 746, 749 (Tex. Crim. App. 1979). The court stated there were no reasons to differentiate the two defenses in terms of the level of mental dysfunction sufficient to remove criminal responsibility; accordingly, the modified *M'Naghten* Rule of section 8.01 was applied to the involuntary intoxication defense. *Id.* at 749; *see* TEX. PENAL CODE ANN. § 8.01 (Vernon 1974).

72. *See, e.g.*, People v. King, 510 P.2d 333, 334-35 (Colo. 1973); People v. Spencer, 178 N.W.2d 130, 131-32 (Mich. Ct. App. 1970); State v. Maik, 287 A.2d 715, 718-19 (N.J. 1972), *overruled on other grounds*, State v. Krol, 344 A.2d 289, 305 (N.J. 1975).

73. *See, e.g.*, People v. Manier, 518 P.2d 811, 814 (Colo. 1974); State v. Clark, 187 N.W.2d 717, 720-21 (Iowa 1971); St. Pe v. State, 495 S.W.2d 224, 225-26 (Tex. Crim. App. 1973).

74. *See* State v. Rice, 379 A.2d 140, 146 (Me. 1977) (insanity requires civil commitment, involuntary intoxication does not); City of Minneapolis v. Altimus, 238 N.W.2d 851, 859-60 (Minn. 1976) (Rogosheske, J., concurring) (mental state caused by involuntary intoxication not equivalent to insanity).

75. *See* State v. Rice, 379 A.2d 140, 146 (Me. 1977).

76. *See* Martinez v. People, 235 P.2d 810, 814-17 (Colo. 1951); State v. Bunn, 196 S.E.2d 777, 785 (N.C. 1973).

77. *See* Graham v. State, 566 S.W.2d 941, 951 (Tex. Crim. App. 1978); McGee v. State, 155 Tex. 639, 643-44, 238 S.W.2d 707, 710-11 (1950).

dant claiming insanity as a defense can be examined by expert witnesses prior to trial for evidence of the required mental disease or defect and its manifestations.[78] Although lay testimony of witnesses to the criminal act is competent to show mental dysfunction, expert testimony is a standard method of proving insanity.[79] Examination of a defendant claiming involuntary intoxication is unlikely to be informative due to the transitory nature of the condition.[80] Excepting some stronger hallucinogenic drugs,[81] most intoxicants wear off in a few hours or a few days, and expert testimony will be limited to hypothetical questions.[82] In *Torres* the only evidence available to show the defendant's mental state at the time of the crime was the victim's testimony the defendant appeared drugged plus the police testimony defendant was asleep in the victim's car when arrested.[83] As the court stated, the evidence was meager.[84]

Another difference between insanity and intoxication involves proving the requisite cause of the mental dysfunction.[85] Expert witnesses can testify a defendant had a mental defect or disease before and after the criminal act and about the likelihood it was the cause of the mental dysfunction at the time of the act.[86] No similar expert testimony is available to a defendant claiming intoxication.[87] Without corroborating witnesses, as in *Torres*, to testify to the existence of an intoxicant and to the defendant's

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78. *See* Graham v. State, 566 S.W.2d 941, 950-51 (Tex. Crim. App. 1978). *See generally* TEX. CODE CRIM. PRO. ANN. art. 46.03, § 3(a) (Vernon 1979); W. LAFAVE & A. SCOTT, CRIMINAL LAW § 40, at 304 (1972).

79. *See* Kane v. United States, 399 F.2d 730, 734 (9th Cir. 1968), *cert. denied*, 393 U.S. 1057 (1969); Graham v. State, 566 S.W.2d 941, 950-51 (Tex. Crim. App. 1978). In *Graham* the court stated the insanity issue is not strictly medical but recognized the medical expert does have a significant role in determining a defendant's sanity. Graham v. State, 566 S.W.2d 941, 949-50 (Tex. Crim. App. 1978). *See generally* Huckabee, *Resolving the Problem of Dominance of Psychiatrists in Criminal Responsibility Decisions: A Proposal*, 27 SW. L.J. 790 (1973).

80. *See, e.g.*, Martinez v. People, 235 P.2d 810, 816-17 (Colo. 1951); Saldiveri v. State, 143 A.2d 70, 75-76 (Md. 1958); State v. Bunn, 196 S.E.2d 777, 784-85 (N.C. 1973).

81. *See* State v. Maik, 287 A.2d 715, 719 (N.J. 1972), *overruled on other grounds*, State v. Krol, 344 A.2d 289, 305 (N.J. 1975).

82. *See, e.g.*, People v. Murray, 56 Cal. Rptr. 21, 26°(Ct. App. 1967); State v. Seely, 510 P.2d 115, 118-19 (Kan. 1973); State v. Rice, 379 A.2d 140, 148 (Me. 1977).

83. Torres v. State, 585 S.W.2d 746, 749 (Tex. Crim. App. 1979).

84. *Id.* at 749.

85. *Compare* Graham v. State, 566 S.W.2d 941, 948-50 (Tex. Crim. App. 1978) (insanity) *with* People v. Manier, 518 P.2d 811, 814 (Colo. 1974) (intoxication) *and* St. Pe v. State, 495 S.W.2d 224, 225-26 (Tex. Crim. App. 1973) (intoxication).

86. *See* Kane v. United States, 399 F.2d 730, 734 (9th Cir. 1968), *cert. denied*, 393 U.S. 1057 (1969); Graham v. State, 566 S.W.2d 941, 946-48 (Tex. Crim. App. 1978); TEX. CODE CRIM. PRO. ANN. art. 46.03, § 3(a) (Vernon 1979).

87. *See* People v. King, 510 P.2d 333, 335 (Colo. 1973); State v. Maik, 287 A.2d 715, 719 (N.J. 1972), *overruled on other grounds*, State v. Krol, 344 A.2d 289, 305 (N.J. 1975).

taking the intoxicant unknowingly, a defendant will have little chance of producing evidence sufficient to raise a fact question for the jury.[88]

A third difference is the disposition of a defendant after a finding of not guilty by reason of insanity or of involuntary intoxication.[89] Section 4(a) of article 46.03 of the Texas Code of Criminal Procedure requires the trial court, upon a finding of not guilty by reason of insanity, to determine if there is evidence to support a finding the defendant is mentally ill or mentally retarded.[90] If such evidence is found, the court must transfer the defendant to the appropriate court for civil commitment proceedings.[91] There is no requirement for such a determination or for commitment proceedings after a finding of not guilty by reason of involuntary intoxication; the defendant, when found not guilty, is freed at once.[92] At least one jurisdiction has recognized this distinction,[93] reasoning that the severity of the consequences of a successful defense of insanity justified a heavier burden of proof.[94] Insanity must be proved by a prepondernace of the evidence, but involuntary intoxication need be raised only by reasonable doubt.[95]

Involuntary intoxication is a new defense in Texas, and until additional cases are decided the parameters of the defense must come from *Torres*.[96] A literal interpretation of the court's treatment of insanity and involuntary intoxication as analogous defenses and the court's use of the term

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88. *Compare* State v. Rice, 379 A.2d 140, 146-48 (Me. 1977) (corroboration) *and* City of Minneapolis v. Altimus, 238 N.W.2d 851, 854 (Minn. 1976) (corroboration) *with* People v. Murray, 56 Cal. Rptr. 21, 23-25 (Ct. App. 1967) (no corroboration) *and* Commonwealth v. McAlister, 313 N.E.2d 113, 119 (Mass. 1974) (no corroboration).

89. *See* State v. Rice, 379 A.2d 140, 146 (Me. 1977) (court found crucial difference in consequences of exoneration). *See generally* W. LAFAVE & A. SCOTT, CRIMINAL LAW § 36, at 269-70, § 40, at 304-05 (1972). *See also* TEX. CODE CRIM. PRO. ANN. art. 46.03, § 4(a) (Vernon 1979).

90. TEX. CODE CRIM. PRO. ANN. art. 46.03, § 4(a) (Vernon 1979).

91. *Id.* The court may also order the defendant kept in custody until the civil commitment proceedings. *Id.*

92. *See* State v. Rice, 379 A.2d 140, 146 (Me. 1977). Article 46.03 of the Texas Code of Criminal Procedure relates only to the insanity defense. TEX. CODE CRIM. PRO. ANN. art. 46.03 (Vernon 1979).

93. *See* State v. Rice, 379 A.2d 140, 146 (Me. 1977).

94. *Id.* at 146.

95. *Id.* at 146. A majority of jurisdictions require defendants to raise only a reasonable doubt to establish an insanity defense. *See, e.g.*, State v. Schantz, 403 P.2d 521, 525 (Ariz. 1965); State v. Moeller, 433 P.2d 136, 143 (Hawaii 1967); Commonwealth v. McHoul, 226 N.E.2d 556, 558 (Mass. 1967). If the Texas courts want to equate insanity and involuntary intoxication, they should follow the majority rule rather than the Texas insanity statute. *See generally* Hester, *Law in Evolution - Chapter 8 of the Texas New Penal Code*, 37 TEX. B.J. 1065, 1067 (1974).

96. *See* Torres v. State, 585 S.W.2d 746, 748 (Tex. Crim. App. 1979) (no independent judgment and mental state equivalent to insanity).

affirmative defense may lead some courts to conclude the burden of proof is on the defendant to show involuntary intoxication by a preponderance of the evidence.[97] Such a conclusion is not warranted by the *Torres* decision and should not be reached if involuntary intoxication is to be a viable defense in Texas. The differences between insanity and involuntary intoxication are sufficient to justify treating them differently as defenses. The court of criminal appeals in *Torres* neither places the burden of proof by a preponderance of the evidence on the defendant[98] nor requires a finding of insanity under section 8.01(a) of the Penal Code.[99] Involuntary intoxication is a defensive issue, and the defendant need only raise affirmatively the two aspects of the defense, involuntariness and mental dysfunction.[100] The burden of proof remains on the state to overcome this defensive issue beyond a reasonable doubt.[101] If the Texas courts choose to follow a literal interpretation of *Torres*, involuntary intoxication is unlikely to be frequently pled and even less likely to be successful. If, however, the *Torres* decision is recognized as being independent of the Penal Code and the insanity defense, involuntary intoxication will be accepted as a valid defense to criminal responsibility in Texas.

Lewis Buttles

JUDGMENTS—Tolling Limitations—Reasonable Diligence By a Judgment Creditor to Discover a Debtor's Fraudulent Concealment of Assets Avoids Limitations Governing Issuance of Executions and Revival of Judgments

Estate of Stonecipher v. Estate of Butts,
591 S.W.2d 806 (Tex. 1979).

L. W. Stonecipher recovered a money judgment against Thomas Butts and his wife Irene in 1950.[1] Executions issued thereon in May of that year

97. *Id.* at 740-50.

98. *Id.* at 749-50. The court fails to discuss burden of proof at all. Since defensive issues generally need only be affirmatively raised by the defendant, the same requirement should apply to involuntary intoxication, absent express language to the contrary. *See* Wilson v. State, 581 S.W.2d 661, 670-71 (Tex. Crim. App. 1979) (on State's motion for rehearing) (Clinton, J., dissenting).

99. *See* Torres v. State, 585 S.W.2d 746, 749 (Tex. Crim. App. 1979).

100. *See, e.g.*, Wilson v. State, 581 S.W.2d 661, 670-71 (Tex. Crim. App. 1979); Day v. State, 532 S.W.2d 302, 306 (Tex. Crim. App. 1976); Gavia v. State, 488 S.W.2d 420, 421 (Tex. Crim. App. 1972).

101. Wilson v. State, 581 S.W.2d 661, 670-71 (Tex. Crim. App. 1979).

1. In the original suit the Yellow Cab Company, a partnership wholly owned by the