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Pathological Intoxication and the Model Penal Code

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Lawrence P. Tiffany**

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I. INTRODUCTION

The law has traditionally drawn a distinction between voluntary and involuntary intoxication. However, what the courts mean when they use the expression “involuntary intoxication” is not as intelligible as one might assume. Involuntary intoxication is an exception to the law of voluntary intoxication which is itself, or can be viewed as, an exception to the usual rule that mental aberrations that are the fault of the actor may not completely exculpate. In other words, mistake (the absence of mens rea) is not a defense if caused by intoxication unless the intoxication is involuntary. That means involuntary intoxication should be purely a mens rea defense although the Model Penal Code makes it an affirmative defense. The prevailing rule holds that involuntary intoxication can be an absolute defense to any type of charge so long as the degree of intoxication is sufficient to satisfy the test of legal insanity in a given jurisdiction. This is true even though it is clearly only a temporary mental incapacity. The primary

* This work was initially undertaken for L. TIFFANY & M. TIFFANY, THE LEGAL DEFENSE OF PATHOLOGICAL INTOXICATION WITH RELATED ISSUES OF TEMPORARY AND SELF-INFICTED INSANITY (Quorum Books, a division of Greenwood Press, Inc., Westport, CT, 1990). Copyright by Lawrence P. Tiffany and Mary Tiffany.
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2. This is true at common law and in most states today, but some tampering with those rules can produce a somewhat different conclusion. For example, Missouri has amended its involuntary intoxication statute so that it provides no defense on the basis of impairment of control. MO. ANN. STAT. § 562.076(1)(Vernon Cum. Supp. 1989). The previous insanity statute did provide for such a defense. MO. ANN. STAT. § 562.086(1)(Vernon 1979). Thus, under this statute there is no longer a correspondence between the meaning of “insanity” (mental incapacity) based
question posed here is whether involuntary intoxication is an appropriate defense to encompass pathological intoxication as proposed by the American Law Institute in the Model Penal Code.

Here is the general legal defensive structure. Pathological intoxication should fall under the defense of insanity if the preexisting, underlying cause precipitated by alcohol consumption is deemed a mental disease or defect. It should fall under the automatism defense if the pathological reaction to alcohol is based on something other than a mental disease such as a blow to the head or a hypoglycemic condition due to an overdose of insulin. Whether there is any nexus at all between involuntary and pathological intoxication is a point of further definition but there is no intrinsic necessity to associate coerced drinking or alcohol sensitivity or surprise intoxication with pathological intoxication. Evidently based on a limited understanding of the phenomenon of pathological intoxication, that is what the Model Penal Code may have done.

II. THE MODEL PENAL CODE

The Model Penal Code’s treatment of the various issues can be discussed with less difficulty if the entire section is reproduced.

Section 2.08. Intoxication.

(1) Except as provided in Subsection (4) of this Section, intoxication of the actor is not a defense unless it negatives an element of the offense.

(2) When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial.

(3) Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01 [the insanity rules].

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

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

(a) “intoxication” means a disturbance of mental or physical capacities resulting from the introduction of substances into the body;

(b) “self-induced intoxication” means intoxication caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know, unless he introduces them pursuant to medical advice or under such circumstances as would afford a defense to a charge of crime;

(c) “pathological intoxication” means intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.3

Section (1) states the usual no-defense rule to the effect that ordi-
nary intoxication is not an affirmative defense, limiting its defensive utility to a negation of the *mens rea* involved in the definition of the crime. It is like the "defense" of mistake in that intoxication is no more relevant than the charge makes it.

Section (2) adopts what is referred to as the "special rule" of intoxication: not only is intoxication narrowed to an elemental defense, it will not even be permitted to negate *mens rea* except above the level of "general intent" crimes, which is to say that intoxication can be a defense only to specific intent crimes. The commentaries make it clear that the Model Penal Code meant to include within the compass of specific intent crimes those which require a culpability level of either intent or knowledge. Some states changed this rule to assimilate knowledge-based crimes to "general intent" rather than "specific intent" to further limit the utility of voluntary intoxication as a defense. Thus, while the construct of the Model Penal Code eliminates reliance on the specific intent/general intent distinction, functionally it merely assimilates knowledge as an element of the offense charged to intent and permits evidence of intoxication to be adduced when either of them is involved in the charge. Others assimilate knowledge to recklessness.

The Code, following American common law, adopted the rule that intoxication "ought to be accorded a significance that is entirely coextensive with its relevance to disprove purpose [intent] or knowledge, when they are the requisite mental elements of a specific crime." The drafters noted that the prevailing attitude was toward a special rule of intoxication, a rule which confines its defensive effects to offenses which require a culpability degree greater than recklessness.

Beyond this, there is the fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispersed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk. Becoming so drunk as to destroy temporarily the actor's powers of perception and of judgment is conduct which plainly has no affirmative social value to counterbalance the potential danger. The actor's moral culpability lies in engaging in such conduct.

Based on this rationale, the Code adopted the generally prevailing rule that voluntary or self-induced intoxication was sufficient reck-

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lessness in itself to warrant denial of its use as a defense in any crime which requires no higher level of culpability.

Section (3) is important to understanding the Code's treatment of pathological intoxication because it makes clear that the Code adopts the usual rule that ordinary intoxication is not per se a mental disease.

Section (4) recognizes two exceptions to the special rule of intoxication that equates drunkenness with recklessness by providing that two classes of intoxication cases are affirmative defenses, and hence are available to the defendant even against charges based only on recklessness or even lesser requirements of culpability. These two are cases of intoxication which are not self-induced and pathological intoxication. By this first term the drafters tried to improve upon the common law practice of referring to intoxication as "voluntary" or "involuntary" with the implication that duress or coercion was all that could be involved. "Self-induced" (voluntary) intoxication is defined in section (5)(b) to require knowledge that the actor is ingesting something, but only negligence ("ought to know") as to the resulting intoxication. Whether the term "self-induced" in lieu of "voluntary" adequately draws attention to the fact that what is involved is the degree of culpability in getting drunk, rather than the actor's ability to avoid that result, is open to question, but that was the drafters' intent and the provision has had substantial effect in state re-codification efforts.

III. PATHOLOGICAL INTOXICATION UNDER THE MODEL PENAL CODE

Pathological intoxication, which is dealt with in section 2.08(5)(c), is of principal interest here, although it has been adopted by only a few states. However, it is first necessary to consider the Code's treatment of involuntary intoxication. It is the relationship of the two that is crucial to understanding the Code's treatment of pathological intoxication. The Model Penal Code distinguishes between pathological

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9. We follow the convention of equating drunkenness with alcohol intoxication although we are aware that there are both subjective and physiological determinants of behavior under each of these conditions. See, e.g., Rix, 'Alcohol Intoxication' or 'Drunkenness': Is There a Difference?, 29 MED., SCI. & L. 100 (1989). There is, of course, a large component of subjectivity in experiencing intoxication.

10. 1 MODEL PENAL CODE AND COMMENTARIES § 2.08 comment 3 at 363 n.40 (1985).

11. Thirteen states' revised codes and seven proposals parallel these proposed provisions relating to "self-induced" intoxication. Id. at 363.

12. 1 MODEL PENAL CODE AND COMMENTARIES § 2.08 comment 4 at 366 n.49 (1985) mentions HAW. REV. STAT. § 702-230(5)(c)(Supp. 1989)(based on MODEL PENAL CODE § 2.08 (Tent. Draft No. 9, 1959) which had limited pathological intoxication to those cases "caused by an abnormal bodily condition." The Hawaii version reads "which results from a physical abnormality of the defendant."). See also N.J. STAT. ANN. § 2C:2-8(e)(3)(West 1982).
PATHOLOGICAL INTOXICATION

PATHOLOGICAL INTOXICATION

cal intoxication and involuntary intoxication (referred to as intoxication which is “not self-induced”), although both are given the same defensive status. As with involuntary intoxication, pathological intoxication is made an affirmative defense if the resulting intoxication suffices to meet the insanity test of lack of substantial mental capacity on either its cognitive or volitional branches. Neither defense requires the mental disease or defect element which is needed in ordinary insanity cases. Having distinguished involuntary intoxication from pathological intoxication, involuntary intoxication is then recognized as consisting of three categories: nonnegligent mistake as to the tendency of the ingested substance to intoxicate, consumption pursuant to medical advice, and consumption under duress or similar defensive circumstances.

These categories do not apply to pathological intoxication which is defined by the Code as “intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.” Since Krafft-Ebing first identified it as a pathological reaction to alcohol, pathological intoxication has been distinguished from ordinary intoxication on the grounds that it is a qualitatively unique psychological phenomenon. The defendant may have a high or low blood alcohol level and therefore may or may not be intoxicated.

15. Alcohol is never mentioned in the intoxication statute.
16. The Model Penal Code provision is not clear whether the doctor’s advice cases are examples of nonnegligent consumption of intoxicating substances or an independent basis of exculpation. Robinson, Cause the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine, 71 VA. L. REV. 1 (1985). DEL. CODE ANN. tit. 11 (1987) does not contain a provision on pathological intoxication, but DEL. CRIM. CODE COMMENTARY on § 423 at 90 (Proposed 1973), in reference to the section which was adopted on involuntary intoxication, lists as one type of “involuntary intoxication,” “an abnormal reaction to a drug prescribed by a physician.” The Delaware commentary lends support to the view that the “doctor’s advice” cases are based on lack of negligence, not necessity. On the other hand, if the reaction to a drug is abnormal, is it relevant that it was taken on a doctor’s advice?


17. Defenses such as duress or necessity are apparently the referents of the phrase “circumstances as would afford a defense to a charge of crime” used in MODEL PENAL CODE § 2.08(5)(b)(Proposed Official Draft 1962).
by physiological definition, but he clearly is not “intoxicated” in any behavioral sense. His behavior is atypical for an intoxicated person. As thus conceived, pathological intoxication involves alcohol, but it does not involve ordinary intoxication. However, the Model Penal Code regards it merely as a form of intoxication, qualitatively indistinguishable, or distinguishable only in degree, from ordinary involuntary intoxication.

The involuntary intoxication defense presupposes actual intoxication (“a disturbance of mental or physical capacities resulting from the introduction of substances into the body”)\(^20\) as a condition of the defense. The only difference between the Model Penal Code’s treatment of pathological intoxication and involuntary intoxication is that pathological intoxication covers the situation in which the actor may know that alcohol or other drugs are being consumed, but is not aware of the degree of its intoxicating effects. Involuntary intoxication covers those cases in which the actor is not aware and has no reason to be aware that he or she is consuming something intoxicating at all. The Model Penal Code’s version of pathological intoxication allows for interactive effects of known intoxicants. Therefore, cases of drug interaction ought to be classed as pathological intoxication under the Model Penal Code.

As a matter of drafting technique, it would appear that the Model Penal Code could have included pathological intoxication as a fourth type of involuntary intoxication. This could be accomplished by extending the first type of involuntary intoxication to consist of nonnegligent mistake or lack of awareness as to the tendency of the ingested substance to intoxicate or to intoxicate to the extent it did. The federal drafters came to the same conclusion and it is reflected in their draft:

Intoxication which (a) is not self-induced, or (b) if self-induced, is grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible, is a defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality or to conform his conduct to the requirements of law.\(^21\)

In reference to the Tentative Draft’s inclusion of pathological intoxication, the authors state:

The draft also treats “pathological” intoxication as not being self induced. This phrase is sometimes used medically to refer to an outburst of irrational, combative, destructive behavior after consumption of small quantities of alcohol. Sometimes it is termed an “acute alcoholic paranoid state.” There is dispute among medical authorities as to whether such a syndrome exists. Critical data supporting or disproving pathological intoxication apparently are unavailable. It is a rare occurrence, at the most, and, in spite of reservations of the writer in creating lacunae in the law, it was thought desirable to include

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The term “paradoxical rage reaction” is used by some writers to describe the behavior associated with what is basically a toxic reaction to psychotropic medication or nonprescribed psychoactive illegal drugs. The name evidently derives from the fact that the medication typically is given for its sedative effects or to reduce anxiety but instead it may cause aggressive, violent behavior as a “side effect.”

“The term ‘paradoxical rage reaction’ has been used in association with reactions to certain pharmacologic agents of the benzodiazepine class, notably chlor Diazepoxide and diazepam.”

An example is Valium. Some researchers view pathological intoxication as a subclass of paradoxical rage reaction in which the sedative drug is alcohol.

Noting that the literature discussed rage and violence in connection with the combined use of benzodiazepines other than alprazolam and alcohol, one physician detailed the report of a patient who developed severe behavioral dyscontrol for the first time after exposure to a combination of alprazolam and alcohol:

Ms. A experienced an episode of severe behavioral dyscontrol and amnesia.

An hour after drinking approximately 3 oz. of 80-proof whiskey (her usual daily consumption over the past several years), she broke into a neighbor's house and “smashed everything in sight,” destroying approximately $50,000 worth of property and inadvertently sustaining lacerations of both wrists from broken glass. Afterward, she returned to her house, fell asleep, and upon awakening had an incomplete recollection of the event, recalling only vague.


The FINAL REPORT OF THE NATIONAL COMM’N ON REFORM OF FEDERAL CRIMINAL LAWS § 502(3) (1971) provides that intoxication resulting in satisfaction of the insanity test is a defense when “if self-induced, is grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible. . . .”

Some of the drafters who did not propose adoption of the Model Penal Code’s pathological intoxication section have made comments on their decision. In the commentary to ALA. CODE § 13A-3-2 (1982) it is stated that “[w]hile some proposed codes have recognized ‘pathological intoxication’ as a possible defense, it has been omitted here, as the medical authorities do not agree whether such a syndrome exists.” Much of the disagreement is actually based on nosologic concerns which are of no significance to the legal questions. See Tiffany & Tiffany, Nosologic Objections to the Criminal Defense of Pathological Intoxication: What Do the Doubters Doubt?, 13 INT’L J. L. & PSYCHIATRY 49 (1990).


25. Id. at 538.
images and sounds of breaking glass. She then surrendered herself to the police and was admitted to a psychiatric unit. . . . Ms. A had not evinced clinically significant behavioral dyscontrol after exposure to either alcohol or alprazolam alone and developed her destructive rage only while taking a combination of the two.26

Is this a case of pathological intoxication or involuntary intoxication? A case such as this goes beyond mere intoxication even though the matter could sensibly be dealt with as involuntary intoxication under existing classification schemes as well as the one proposed by the Model Penal Code. However, the case seems more appropriately labelled temporary insanity or automatism occasioned through no fault of the actor.

The Model Penal Code is the only source of any significance that categorizes pathological intoxication largely as simple intoxication aggravated beyond what the actor expected. Medical concepts of pathological intoxication have postulated that there is some underlying cause for the behavioral reaction to alcohol; that drinking triggered an effect of some underlying condition. Some authorities divide underlying causes into either those which are considered “mental disease” befitting a defense of legal insanity or those like brain damage which are more accurately assimilated to automatism.27

In what may be the quintessential case assumed by the Model Penal Code, a drug might potentiate the effects of alcohol and make the actor surprisingly intoxicated given the known amount consumed. The precision of the trichotomy dissipates, but only to a slight extent, when it is realized that a drug can cause a temporary aberrational condition of the mind, and then cause a reaction to alcohol or other drug. Such a case can be seen as either involuntary intoxication or pathological intoxication, as was the case involving Ms. A above.

What mainly divides the Model Penal Code's pathological intoxication from others, then, is that it includes merely transient irregular conditions of the brain which can cause an abnormal reaction to alcohol or other drugs. Classical pathological intoxication posited a more permanent underlying cause of the reaction. For this reason the Model Penal Code version can be viewed as merely involuntary intoxication.

The Code's treatment of pathological intoxication includes cases in which there is absolutely nothing wrong with the actor and encompasses the pure drug/drug cases as well as the LSD-in-the-punch-bowl cases. It is a transient reaction to a transient condition. This is significant because in these cases there will be no serious questions regard-

ing disposition because there is no argument that there is anything medically wrong with the defendant. Conviction will be based on the level of fault involved, if any, in becoming intoxicated. In cases of classical pathological intoxication the added dimension of the underlying cause is present. Thus, the need for an additional appraisal regarding disposition arises because the underlying condition still remains. Yet, so does the opportunity to mix drugs. Should Ms. A be in a hospital?

The Model Penal Code’s sense of pathological intoxication as only quantitatively distinguishable from ordinary intoxication is fundamentally at variance with virtually all of the legal and medical literature on the subject. Because of this, conceivably the most felicitous way to deal with the Code approach would be to classify it as a third, distinct view of pathological intoxication, in terms of etiology, symptomatology, and legal consequences. It would be viewed as an augmentation of the established categories of mental disease-based pathological intoxication which is best suited to the insanity defense, and non-mental disease-based pathological intoxication which is within the purview of the traditional involuntary act defense, automatism in particular.

The pathological intoxication defense drafted by the American Law Institute is more akin to what is usually called alcohol sensitivity. This describes a situation in which a person becomes more intoxicated, not psychotic or unconscious, but drunker, than the amount of substance consumed normally would betoken.28 For example, liver function impairment from a variety of causes can result in a person becoming more intoxicated on less alcohol than a healthy person. In addition, the degree of intoxication, measured by the behavioral impact of the alcohol, may vary within the same person with respect to such factors as food in the stomach, fatigue, ambient temperature, and emotional state. The important point is that these differences relate to relatively narrow quantitative variations in the rapidity of onset or the degree of resulting intoxication. But there is no question in such cases that we are talking about drunkenness, all within relatively narrow limits of variance.

An example of greater consequence for the individual arises in those cases in which alcohol and other drugs, or two prescription drugs (or more) interact with each other in such a way that the effect of one or the other is greatly intensified or their combined power is more than additive. In these cases the reaction could be variable with that person in the sense that his or her reaction to drinking six beers will be vastly different from the reaction to the same amount after

28. *Id.* See also Bowman & Jellinek, *Alcoholic Mental Disorders*, 2 Q. J. STUD. ALCOHOL 312 (1941).
taking certain controlled or uncontrolled drugs.\textsuperscript{29} Even if the reaction is extreme and even if the actor unquestionably should be excused for resulting conduct, the situation still is one of involuntary intoxication, rather than pathological intoxication in the classical sense. This is so because the reaction is entirely attributable to external causes and not to any underlying condition of the actor.

It has been repeatedly emphasized in the literature that pathological intoxication or pathological reaction to alcohol is a qualitatively different phenomenon from ordinary intoxication, even exaggerated intoxication.\textsuperscript{30} "This warning is especially important since some textbooks, in the endeavor to make concise statements, have defined [pathological reaction to alcohol] . . . as intoxication following the ingestion of small quantities of alcohol."\textsuperscript{31} Alcohol sensitivity, meaning an abnormally strong influence on a person of a given amount of alcohol, may be either permanent or temporary. Permanent alcohol sensitivity can be hereditary\textsuperscript{32} or acquired. For example, it can even result from brain injury, as can pathological intoxication. Temporary intolerance, or potentiation, may result from very short term effects of drug-alcohol combinations\textsuperscript{33} or even just from hunger or physical exhaustion. It can be of more lengthy duration as, for example, when moving to a higher altitude. The oxygen deprivation (hypoxia) experienced with high altitude, it is thought, may increase the degree of intoxication in the same person for the same amount of alcohol.\textsuperscript{34}

\begin{enumerate}
\item Multiple drug cases show up with some frequency in the case law. Most of them involve illegal "street" drugs but some are prescription. For example, in State v. Davis, 653 S.W.2d 167 (Mo. 1983) a murder conviction was attacked on evidence sufficiency grounds under an insanity plea. The defendant shot and killed a police officer with a shotgun. He had been a chronic alcoholic for over twenty years, had been taking prescription drugs, including Valium, Librium, Dilantin, and "Antibus" [sic], probably had been drinking, displayed evidence of prior head injuries and had been under psychiatric care. "Experts testified that appellant suffered from a vascular malformation or scar tissue in his brain." \textit{Id.} at 170.
\item Bowman & Jellinek, \textit{supra} note 28, at 323.
\item Id. at 322.
\item One explanation may be the variability of the permeability of the blood-brain barrier which may be affected by drugs. See, e.g., Bloom, \textit{Neurohumoral Transmission and the Central Nervous System} in GOODMAN & GILMAN'S, THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 236, 245 (A. Gilman, L. Goodman, T. Rall & F. Murad eds. 7th ed. 1985).
\item \textit{But see} Collins & Mertens, \textit{Age, Alcohol, and Simulated Altitude: Effects on Per-
still other cases its etiology is never diagnosed. Additionally, it has been said that “[i]n practical terms . . . a woman will be less likely than a man to predict accurately the effect of a given amount of alcohol consumed.” A major reason for this is the hypoglycemia associated with premenstrual syndrome.

In many of these alcohol sensitivity cases the usual symptoms of intoxication such as motor incoordination and slurred speech are present. This distinguishes these cases from pathological intoxication, in the sense we have used it, but we are in no position to say that some of these cases have not resulted in temporary insanity rather than merely exaggerated intoxication. That has been one of the principal objections to the term “pathological intoxication.” It does not result in drunkenness at all; it results in a temporary psychosis or automatism. This is one of the reasons that some believe the better term, used orig-


35. J. ANDENÆS, THE GENERAL PART OF THE CRIMINAL LAW OF NORWAY § 30 (T. Ogle trans. 1965)(citing G. Rylander & E. Bendz, RÅTTSFYKIAITRI 67 (1947)) relates a Swedish case which provides an example of an offense committed during pathological intoxication which had no known origin but which presumably would fall within the loose category of “alcohol intolerance:"

A twenty-five-year-old man had been with his wife and small son at a Christmas dinner with relatives and had taken a few drinks. He became brutal and unpleasant to his wife on the way home. Weeping, she begged him to desist until after they had come home and put the boy to bed. When they arrived at home, the man grabbed his wife by the throat with one hand and seized a big butcher knife with the other. The wife tore herself free and ran out of the house, screaming for help. Before the neighbors could come to her aid, the man had killed his son with the knife, and had jumped out of the window, inflicting serious injuries on himself.

It was later learned that when the man was about eighteen, he drank a few glasses of wine at a family party and suddenly became rebellious and acted indecently. After that, he abstained from alcohol until the fatal day when he made this one exception. He had then been married for a few years. The marriage was a happy one, the husband enjoyed his home life, and the little boy was the apple of his eye. Afterwards, he became deeply depressed over his conduct, which he could not explain, and he contemplated suicide. On the way home that fatal night an enormous rage had overcome him. “It was as if everything became red in front of my eyes.” He could not remember what had happened from that moment on until he jumped out of the window. He hazily recalled the sound of the broken glass and the stinging pains from the glass splinters.


37. We mean to be cautious on the subject of PMS as well as the other conditions so as not to be understood as suggesting that alcohol sensitivity is the limit of the role played by alcohol in these cases, especially in cases of PMS; we do not know whether it plays more of a role than has as yet come to our attention. Our assertion in the text is that alcohol may cause a magnified level of ordinary intoxication in these instances. Whether it is capable of causing a psychotic reaction in some of these instances is not known to us.
inally by Krafft-Ebing, is pathological reaction to alcohol.\textsuperscript{38} Banay's article, relied upon in the commentary to this Model Penal Code section, is entitled "Pathologic Reaction to Alcohol."\textsuperscript{39} It is doubtful that the latter term could be used exclusively to designate cases of insanity and automatism while reserving the term pathological intoxication for the event described by the Model Penal Code, exaggerated and surprise intoxication. Besides, the term pathological intoxication is needed to cover "pathological reaction to alcohol" when the triggering agent is not alcohol. It would serve as well to acknowledge that the term pathological intoxication is used in three, somewhat overlapping, ways: (1) a psychotic-type reaction to an ingested substance based on an underlying mental disease; (2) a psychotic reaction to an ingested substance due to an abnormal bodily condition not considered a mental disease or defect; and (3) an unanticipated, high level of intoxication due to some interaction between the substance and some transient condition of the actor, or another substance taken by the actor.

It is evident that the Code is referring to alcohol sensitivity, which results in common intoxication whether or not the actor is ignorant of the susceptibility. The referent case is one of alcohol potentiation, such as when alcohol is mixed with certain other drugs and the person very quickly becomes extraordinarily drunk on ordinary amounts of alcohol, or when preexisting bodily conditions such as fatigue or hypoglycemia cause the same effect. Given this limited notion of pathological intoxication found in the Code, it could have simply been included within the scope of involuntary intoxication. Historically, these cases have usually been treated as instances of involuntary intoxication because most of the courts have understood that the term "involuntary" in this context includes lack of awareness of the fact or degree of intoxicating effects as well as instances of duress.

What, then, distinguishes the Code's definitions of involuntary intoxication and pathological intoxication? One reading of the drafters' proposal is, if the actor did not know someone put LSD in the punch it is a case of involuntary intoxication because he did not know the punch was intoxicating at all. Alternatively, if the actor did not know that his prescription drug would cause an adverse reaction if combined with another drug like alcohol, it is a case of pathological intoxication because although he knew the drugs were intoxicating he did not know intoxicating. If that is all the draft means, then its rejection by most of the states leaving the issue of unexpected intoxication to the involuntary intoxication defense and pathological intoxication cases to the law of insanity or automatism seems well considered.\textsuperscript{40}

\textsuperscript{38} Krafft-Ebing, \textit{supra} note 19.

\textsuperscript{39} Banay, \textit{Pathologic Reaction to Alcohol}, 4 Q. J. STUD. ALCOHOL 580 (1944) \textit{cited in} 1 \textit{MODEL PENAL CODE COMMENTARIES} § 2.08 at 364 n.45 (1985).

\textsuperscript{40} There is also some indication that some other countries also classify this type of
Importantly, however, that is not what pathological intoxication meant prior to this draft. Without the Model Penal Code, the case of drug/drug combination would be treated as involuntary intoxication and if the effects were unanticipated and so severe the actor was unconscious as a result, the matter would be dealt with as one of automatism. If instead, the reaction was caused by an underlying mental condition, such as psychomotor epilepsy, some courts would treat it as insanity and others as automatism. The difference would often be explained in terms of whether psychomotor epilepsy was thought to be a mental disease, although the actual ground of decision would probably be the disposition of the actor. In effect, with the inclusion of the Model Penal Code's interpretation, we now have three kinds of pathological intoxication, both factually and legally. However, it is not at all clear what the Model Penal Code provisions add to the present situation. At best, the Code provisions on pathological intoxication and the defense of involuntary intoxication are probably redundant. Several states see it this way. At worst, the Code treatment undermines recognition of pathological intoxication as involuntary intoxication. The Scandinavian countries of Denmark, Norway and Sweden “recognize that so-called pathologic intoxication is an involuntary intoxication. Cases where a relatively small amount of alcohol or drugs have a completely abnormal effect are examples of pathological intoxication.” *Hearings on Reform of the Federal Criminal Laws, Before the Subcomm. on Criminal Laws & Procedures of the Senate Judiciary Comm.,* 92nd Cong., 2d Sess., pt. 3, subpt. C, at 2551 (1972).

41. L. TIFFANY & M. TIFFANY, PATHOLOGICAL INTOXICATION, supra note 27.

42. Some drafts contain language substantially comparable to the Model Penal Code but do not label it pathological intoxication, classifying it instead as another instance of involuntary intoxication. For example, *STATE OF MARYLAND, COMM’N ON CRIM. LAW, 1 PROPOSED CRIM. CODE § 15.25 (1972)* provided that one species of involuntary intoxication “means intoxication caused without the negligence or fault of the defendant by ... substances introduced in quantities which produce intoxication grossly excessive in degree, considering the amount of the intoxicant, to which the defendant does not know that he is unusually susceptible.” It is noted that *MODEL PENAL CODE § 2.08* was “redrafted to avoid use of the new concepts of ‘self-induced intoxication’ and ‘pathological intoxication’ in favor of the traditional ‘involuntary intoxication.’” *Id.*

Similarly, *LEGISLATIVE SERV. COMM’N, PROPOSED OHIO CRIM. CODE § 2901.35* at 55 (1971) defined involuntary intoxication to include intoxication “which is grossly excessive considering the nature and amount of the intoxicating substance involved, and which is caused either by an abnormal bodily condition, or by an unexpected reaction with other substances in the body.” The statutes do not use the term “pathological intoxication” and so are often omitted when states are listed as having recognized the concept by statute. Indeed, the commentaries to the Ohio Code make reference to Leggett v. State, 21 Tex. App. 382, 17 S.W. 159 (1886), as within the purview of this provision, a case in which “the defendant was held to be involuntarily intoxicated when his condition was caused in part by a blow on the head after his having taken an amount of liquor insufficient to make him drink [sic] under normal circumstances.” *PROPOSED OHIO CRIM. CODE* at 55.

While the present Arizona statutes use the term voluntary intoxication, they do not attempt to define involuntary intoxication. *ARIZONA REV. STAT. ANN. § 13-503* (Supp. 1988). However, the *ARIZ. CRIM. CODE COMM’N, ARIZ. REV. CRIM.
ognition of pathological intoxication based on insanity and automatism defenses. Perhaps no harm is done if this species of pathological intoxication is subsumed under the heading of involuntary intoxication and if it continues to be recognized that the definition used by the Model Penal Code is not exclusive of the other two forms of pathological intoxication which are insanity and automatism.

The Model Penal Code is directed only to the actor who suffers no more than surprise drunkenness. While that surely should be a defense in the proper circumstances, it is not the quintessence of pathological intoxication. Further, that situation is already embraced by traditional common law and Code formulations of the involuntary intoxication defense. In the cases contemplated by the Model Penal Code, the dominant agent of the dangerous behavior is alcohol intoxication. That is not the case in pathological intoxication in which the actor is not intoxicated at all in the sense of drunkenness. To the Model Penal Code, intoxication which is not self-induced is merely accidental intoxication and pathological intoxication is getting drunker than might have been expected under the known circumstances. While this interpretation cannot be rejected as wholly incorrect, it is largely inconsistent with the historical definition of pathological intoxication. It is also worth emphasizing again that the drafters’ main work on this part of the Model Penal Code was published in 1959.

The Model Penal Code misdescribed the clinical phenomenon of pathological intoxication in a way that is likely to lead to serious misinterpretation if it is taken to be exclusive. The provision has gained some acceptance in the new criminal codes although some recognize it for what it is. The drafter of one version of the proposed California Penal Code, for example, says the section seems “akin to accidental intoxication.”

The Model Penal Code § 502 at 73 (1975), had included a section on involuntary intoxication which was not adopted and its commentary noted that involuntary intoxication “applies in four situations: first, intoxicants taken under duress; second, intoxication caused by a genuine mistake as to the character of the substance taken; third, intoxication unexpectedly occurring from prescribed medication; and, fourth, intoxication from a weakness unknown to the defendant and grossly excessive to [sic] the amount of stimulant taken.” Id. at 74. This fourth category reflects the Model Penal Code’s view of pathological intoxication. The Arizona language acknowledges Kentucky as the source of its language and substantially identical language is found in KY. CRIM. COMM’N, KY. PENAL CODE § 235, commentary at 24-25 (Final Draft 1971). Kentucky’s provision appears in turn to be based on State v. Altimus, 306 Minn. 462, 238 N.W.2d 851 (1976), and Altimus seems to have gotten the fourth provision from the Model Penal Code’s provision on pathological intoxication.

CAL. PENAL CODE § 510 at 37 (Tent. Draft No. 1 1967): “The Model Penal Code’s further proviso that intoxication is not a mental disease is a self-evident proposition. Its concept of ‘pathological intoxication’ seems akin to accidental intoxication and is also unnecessary if evidence of intoxication is made generally admissible with respect to any culpable mental state.” This proposal would also
by the previous section dealing with intoxication which is not knowingly or negligently self-induced, had that section included mistake as to resulting intoxication as well as the circumstance of what was consumed.

Confusion with the Model Penal Code version will continue for three reasons. First, by including a separate section on pathological intoxication there is still an indication that the drafters were trying to enunciate an additional rule. Second, the statute itself nevertheless appears to be largely redundant with the defense of involuntary intoxication. Third, the content of the commentaries which accompany the draft go well beyond the statute and tie in to the more medically accurate comprehension of pathological intoxication.

The most important clinical criticism is that the Model Penal Code's statutory characterization of pathological intoxication is framed in quantitative rather than qualitative terms. The reference is to the "degree" of "intoxication", which must be "gross", "given the amount of the intoxicant. . . ." This strongly denotes two points both of which are wrong or misleading. It strongly suggests a requirement of a relatively small amount of intoxicant; and second, it is almost certainly going to be taken as a reference to drunkenness because of the repetitive use of the term intoxication. The defense of pathological intoxication is, after all, described in section 2.08 which is entitled "Intoxication." Thus, a strictly textual analysis will indicate to the reader that there is little doubt that the Model Penal Code is talking about drunkenness which happens to result because of alcohol sensitivity, caused by drug potentiation of the alcohol or otherwise, not pathological reaction to alcohol in the sense of alcohol aggravating a preexisting affliction of the actor.44

This equation has already been made by some courts45 and by

44. In P. Low, J. Jeffries & R. Bonnie, Criminal Law: Cases and Materials (2d ed. 1986), the authors, some of whom were also involved in updating and rewriting the American Law Institute's commentaries to the Model Penal Code, appear to believe that pathological intoxication as formulated by the Model Penal Code addresses both brain pathology and alcohol sensitivity. They state: "[t]his response, which may appear to involve loss of contact with reality, is a direct effect of the intoxication itself; the person will return to normal as the blood alcohol level falls. The disorder is thought to be associated with predisposing brain pathology as a result of which the individual may lose 'tolerance' for alcohol." Id. at 731. They also make the observation that the condition "has arisen in litigation only a handful of times." Id.

45. In United States v. Gertson, 15 M.J. 990 (1983), a conviction for assault was af-
prominent writers. For example, Professor LaFave in the principal criminal law treatise used by the courts relies upon this Model Penal Code taxonomy and discusses pathological intoxication in the context of the intoxication defense but not in the context of the defenses of insanity or automatism. He says "the intoxication is involuntary only if the defendant was unaware that he is susceptible to an atypical reaction to the substance taken."46 One could hardly argue with his interpretation of the Model Penal Code; that is what the statute unfortunately says. And while he includes in his treatise a section which discusses the relationship between automatism (including epilepsy) and insanity,47 pathological intoxication is not discussed in connection with either insanity or automatism, at least not in those terms.48

Because of the Model Penal Code's handling of the subject, Professor Robinson understandably makes the assumption that pathological intoxication refers to getting unusually drunk on small amounts of alcohol. "An actor who becomes grossly intoxicated upon drinking two cans of beer after a three day fast and who does not know that he will be susceptible to such gross intoxication under such circumstances may be pathologically intoxicated."49 That image and that understanding will be the legacy of the Model Penal Code. That excerpt does not describe a pre-Model Penal Code pathological reaction to alcohol.50

Another reason for supposing the Model Penal Code meant only alcohol sensitivity or potentiation is that there is no justification for selecting one particular psychopathological mental condition known to afflict humans and to single it out in the Model Penal Code without mentioning all or even any of the rest (e.g., schizophrenia), particularly in the middle of a statute on intoxication as a defense.

The Model Penal Code is all the more surprising because a reading of the comments to the original draft, published in 1959, suggests that the drafters meant to describe pre-Model Penal Code pathological intoxication or something akin to it. The failure appears to be in the language of the draft. What they describe in the statute is involuntary...
intoxication; what they describe in the commentary to that statute is pathological intoxication as it has been known in the medical literature. The commentary states that the pathological intoxication section is:

designed 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 degree results. Such cases involve a short, atypical reaction to alcohol. It may be violent and may occur after small amounts of alcohol.51

But there is no known link between surprise intoxication and violence. Why would the subject of violence even be brought up unless the drafters were talking about a qualitatively different reaction to alcohol? Perhaps they were in the comments, but not in the statute they ultimately proposed. People who get very drunk and are caught off guard do not turn violent just because of their surprise drunkenness. There has to be more than that involved.

The Model Penal Code commentary cites the Banay article,52 describing it as “a review of the literature and case reports on pathological intoxication.” The language just quoted is undoubtedly based on the article. It is important to remember that while this draft was developed after Banay had written his summary of the then existing clinical psychiatric literature, the subsequent EEG-based studies and the clear link to pre-existing conditions such as temporal lobe lesions and brain damage had not yet been reported. Those became evident in the early 1960s.53 However, even at the time of Banay’s article, and in that article, the phenomenon is referred to as a psychotic condition, not drunkenness. Banay was unquestionably of the opinion that clinically, “pathologic reaction to alcohol is clearly differentiated from acute alcoholic intoxication.”54

Next, however, the comments quote another case report by Podolsky55 of a homicide committed while the actor was suffering from hypoglycemia.56 That is followed by still another reported instance involving hypoglycemia.57 Selection of these illustrations indicates

51. MODEL PENAL CODE § 2.08 comment 7 at 11 (Tent. Draft No. 9, 1959).
52. Banay, supra note 39, at 580.
54. Banay, supra note 39, at 580.
56. The blood sugar level is reported there as “below 100 mgm.” Id. It would have to be a good deal lower than that to be hypoglycemic.
57. Reported in a “London Letter,” 122 J. A.M.A. 190 (1943), cited in MODEL PENAL CODE § 2.08 comment at 12 n.29 (Tent. Draft No. 9, 1959). In the latter instance it
confusion over what the drafters are trying to describe because in Podolsky’s article the emphasis is on hypoglycemia per se, not on hypoglycemia aggravated by alcohol. Most of the cases he discussed do not involve alcohol at all but are cited as instances of spontaneous attacks attributable to hypoglycemia. Hypoglycemia is a candidate for traditional notions of pathological intoxication because it is an underlying condition which can be aggravated by alcohol. But how does the Model Penal Code intend to handle those cases in which the attack is spontaneous? If they are to be treated as cases of insanity when alcohol is not involved, then why would the same reaction when triggered by alcohol not qualify as insanity as well (if the actor was unaware of the potential, as indeed he must be for the pathological intoxication defense)? And if insanity covers these situations, then why have a separate statute on it, and why in the intoxication defense section? In our view, the hypoglycemia cases belong under either insanity or automatism depending upon one’s view of the mental disease issue, and that remains true whether the attack was triggered by alcohol or was spontaneous. Instead, the Model Penal Code apparently wants these cases treated as drunkenness in which the actor was taken by surprise.

Banay did include one 1933 summary, compiled by Seelert, which associated pathological intoxication and hypoglycemia, but the Banay article is essentially a description of many of the previously reported discussions of pathological intoxication. The one article summarized was the first one to report a link between pathological intoxication and hypoglycemic conditions. Seelert certainly did not think that he was describing surprise intoxication. The point here is not to dispute that hypoglycemia belongs on the list of underlying conditions which, when combined with alcohol, can cause pathological intoxication, for clearly it does. What is disputed is whether the resulting condition belongs in the category of involuntary intoxication or something comparable to it.

In Regina v. Quick, which discusses the English position on automatism, the court confronted the question of whether hypoglycemia in combination with alcohol could be raised under a defense of automatism or must be raised in connection with the insanity defense only.

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Whatever the view, *Quick* was most certainly not taken by the English court as a case of involuntary intoxication. Quick was not drunk — surprised, foreseen, should have foreseen, due to abnormal bodily condition, or otherwise. What was at issue was whether the defendant should be required to plead the case as one of insanity or permitted to go to the jury on the automatism defense alone. The issue in the case was correctly characterized, in contrast to a third possibility of involuntary intoxication, introduced implicitly in the Model Penal Code draft.

Because of some of the language, partly because of the citation to Banay and use of the term pathological intoxication, the impression remains that the Model Penal Code drafters meant to recognize a more medically sanctioned concept of pathological intoxication and to assimilate one unusual kind of "intoxication" to the exculpatory law of insanity. I rhetorically asked earlier why they included this statute at all. Here is their answer:

[A] provision is required because of a concern that bizarre behavior, caused in part by an abnormal bodily condition (in some cases, in others the atypical intoxication can be related to mental disturbance), would not seem to result from "mental disease" and thus would not fall under Section 4.01 [the insanity defense]. There is substantial dispute among physicians whether "pathological intoxication" is a distinct clinical entity. Yet the term seems the best to employ for legal purposes in describing a grossly abnormal reaction to alcohol, without respect to the medical reason for the reaction.60

If the insanity defense would be appropriate when the reaction was due to a "mental disturbance," what would prevent the case from being tried under the insanity defense and if not that, then as automatism? The Model Penal Code also approvingly cites *Martinez v. People*61 where the court denied an instruction on pathological intoxication because the defendant had failed to plead insanity.62 But under the Model Penal Code, that would not be the correct ruling. The drafters have suggested by its placement and language that pathological intoxication is not aimed at mental disease but targets only unusual and unexpected intoxication. Thus, the defendant in *Martinez* should, under the position of the Model Penal Code drafters, have gotten his instruction on pathological intoxication without a special plea.

Pathological intoxication was not a "distinct clinical entity" prior to this draft, although it most certainly was a recognized "clinical entity." As a result of this draft it is possible that pathological intoxication is even less distinct now. Prior to the Model Penal Code formulation it was not a distinct entity because the resulting unconsciousness or insanity could have a variety of causes. Some of the causes were mental diseases, some were mental defects, some were

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arguably either, such as temporal lobe epilepsy, and some were brain
damage as from trauma or temporary malfunctioning of the brain due
to biochemical imbalances. Still other causes, despite manifest clinical
signs of pathological intoxication, would never be known.

As originally drafted, pathological intoxication meant "intoxication
grossly excessive in degree, given the amount of the intoxicant, which
is caused by an abnormal bodily condition not known to the actor."63
Two changes were made in the final version. The first dropped the
restriction of "bodily condition"64 and the second was to include lan-
guage to the effect "that the actor must not know of his susceptibility
to the excessive reaction. With this change, there seems no reason to
require that the reaction be 'caused by an abnormal bodily condition,'
"as provided by the former draft."65 With the bodily condition limi-
tation, the defenses of pathological intoxication and automatism would
overlap if the condition was extreme enough to result in unconscio-
ness. But when the bodily condition element was removed, it is not
clear how pathological intoxication differs from automatism or in-
sanity since the cause of the reaction can now be a mental condition as
well as a bodily condition.

In State v. Holzman66 the conviction of the defendant for simple
assault was upheld by the Superior Court of New Jersey on a de novo
review of the lower court record. The defense was that the defendant
had mixed a small amount of alcohol and a prescribed sedative. The
court reasoned that simple assault could be predicated on a mens rea
of recklessness. The New Jersey criminal code provides that "[w]hen
recklessness establishes an element of the offense, if the actor, due to
self-induced intoxication, is unaware of a risk of which he would have
been aware had he been sober, such unawareness is immaterial."67
This is the "special rule of intoxication" which applies only to volun-
tary or self-induced intoxication. The question reduced to the mean-
ing of self-induced which the New Jersey code defined as:
"Intoxication caused by substances which the actor knowingly in-
troduces into his body, the tendency of which to cause intoxication he
knows or ought to know, unless he introduces them pursuant to medi-

64. Some states retain the 1959 Model Penal Code draft language referring to "which
results from physical abnormality." Hawaii provides "which results from a physi-
cal advice or under such circumstances as would afford a defense to the charge of crime.”

The Holzman court concluded that the intoxication of the defendant was self-induced under this standard. Notice that when the statutes which are patterned on the Model Penal Code are taken together, they permit a finding of recklessness under the first section quoted based on a negligence standard set out in the second section with respect to the likely effect of alcohol consumption. In combined effect, “self-induced” intoxication can be found on the basis of negligence as to the effect of the substance consumed despite the fact that the first statute quoted seems, on the contrary, to require recklessness as to the intoxication. In addition, the court does not discuss the language of the second section quoted regarding the meaning of the “unless” clause relating to prescribed medicine.

This interpretation, then, left the question of pathological intoxication. The state code had also adopted the Model Penal Code language defining pathological intoxication as “intoxication grossly excessive in degree, given the amount of the intoxicant, to which the actor does not know he is susceptible.” To the contention that the defendant fell within the purview of this affirmative defense, the court said that pathological intoxication applied only to instances “which happened because of some underlying organic condition.” The statute, of course, says no such thing and while the first draft of the Model Penal Code on pathological intoxication had included the requirement that the reaction be “caused by an abnormal bodily condition” this was dropped in the Proposed Official Draft which New Jersey actually adopted. Alluding to the nosologic dispute about whether pathological intoxication is a distinct clinical entity, the commentaries to the Model Penal Code draft took the position that “the term seems the best to employ for legal purposes in describing a grossly abnormal reaction to alcohol, without respect to the medical reason for the reaction.”

Deletion of the “bodily condition” limitation in the final version was designed to reflect the view just quoted that the abnormal reaction could as well be due to abnormal mental conditions as to bodily conditions. It is also interesting to note the insistence on a legal framework free to disregard psychiatric nosologic considerations: “without respect to the medical reason for the reaction.”

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70. State v. Holzman, 424 A.2d 454, 456 (N.J. Super. 1980). The court also said that the “word ‘pathological’ itself means diseased or due to a disease.” Id. at 456.
70. State v. Holzman, 424 A.2d 454, 456 (N.J. Super. 1980). The court also said that the “word ‘pathological’ itself means diseased or due to a disease.” Id. at 456.
73. MODEL PENAL CODE § 2.08 comment at 12 (Tent. Draft No. 9, 1959).
less, the revised commentaries on the Model Penal Code describe the defense as though the qualification were still present.\textsuperscript{75} Further, the later commentaries do not otherwise clarify the sense of the drafters' conception of pathological intoxication; the original commentary is essentially repeated.

Recall that section (3) provides that intoxication is not a disease. Since the insanity defense will require proof of a mental disease or defect, cases of pathological intoxication are not eligible if they are perceived to be only special cases of intoxication. That is exactly the way the Model Penal Code sees the situation, or at least drafted on the situation. The drafters have not just singled out a special case of insanity and described it as involuntary intoxication. Rather, they have created the impression that they excluded pathological intoxication from the insanity defense, and have forced it to be tried as involuntary intoxication even when an underlying abnormal mental condition is involved. This, of course, means that if the defendant wins under the pathological intoxication section, he is free to walk from the courtroom whereas treatment would have been an alternative had this section not been included and the matter more clearly left to the law of insanity. If, to use their primary example, a person suffers from a spontaneous attack of hypoglycemia he may be committed for treatment (or at least education regarding medical means of prevention or management) if he wins on the insanity defense, which he surely could do in some courts. However, if the defendant, by drinking, triggered the reaction himself, albeit inadvertently, and therefore falls within the ambit of the Model Penal Code's version of pathological intoxication, he may not be subject to any further state action. If successful, his disposition will be an outright acquittal as it would also be if he had defended on the grounds of automatism. The same will be true if the actor suffered from underlying conditions which are more clearly in the category of "mental disease."

The Model Penal Code seems to have made a special case of pathological intoxication in order to take it out of insanity and deliberately to put it under intoxication where it could be called involuntary or voluntary depending upon the actor's state of mind at the time of drinking. Pathological intoxication would be recognized as part of the law of insanity or automatism without this section, as the case law overwhelmingy shows. Why the drafters selected one medical category of mental disease and turned it alone into a singular legal defense is something of a mystery, but we can at least explore it a bit. There are two ways to state the "mystery": (1) Why did the drafters not leave their formulation of pathological intoxication to the law relating

\textsuperscript{75} 1 Model Penal Code and Commentaries § 2.08 at 364 (1985).
to involuntary acts, i.e., put it under automatism? (2) Why did they not leave pathological intoxication to the law of insanity?

Pathological intoxication might be handled as the defense of automatism or involuntary act under the Model Penal Code. Section 2.01 restates the normal rules that require each crime be based on conduct which includes a voluntary act. Reflexes, convulsions, movements while unconscious or asleep, hypnotically suggested movements, and any other act not the product of effort or determination are listed and excluded from the ambit of the concept of voluntary act. "People whose involuntary movements threaten harm to others may present a public health or safety problem, calling for therapy or even for custodial commitment; they do not present a problem of correction." The revised commentaries do suggest that there is no reason that even ordinary intoxication cases could not be so extreme as to fall under the defense of involuntary act. "So long as liability can be premised on culpable voluntary behavior prior to unconsciousness, there appears no sound reason to preclude the possibility that intoxication may be so extreme that one is unconscious and incapable of voluntary action." One assumes this would be equally true of pathological intoxication and in those cases there is a real possibility that liability could not be premised on culpable voluntary behavior prior to unconsciousness." The following passage exhausts what the Model Penal Code has to say about automatism:

Any definition must exclude a reflex or convulsion. The case of unconsciousness is equally clear when unconsciousness implies collapse or coma, as perhaps it does in ordinary usage of the term. There are, however, states of physical activity where self-awareness is grossly impaired or even absent, as in epileptic fugue, amnesia, extreme confusion and equivalent conditions. How far these active states of automatism should be assimilated to coma for this legal purpose presents a difficult issue.

There is judicial authority supporting the assimilation. An alternative approach, however, is to view these cases as appropriate for exculpation on the ground of mental disease or defect excluding responsibility. This view has also had support in the decisions. It offers the advantage that it may facilitate commitment when the individual is dangerous to the community because the condition is recurrent. By the same token, however, it bears harshly on the

77. 1 MODEL PENAL CODE AND COMMENTARIES § 2.01 at 215 (1985)(citations omitted).
78. 1 MODEL PENAL CODE AND COMMENTARIES § 2.08 at 353 (1985).
individual whose condition is nonrecurrent, as in the case where an extraordinary reaction follows the administration of a therapeutic drug. And there may be a difficulty in regarding some of these conditions as a "mental disease or defect" within the meaning of Section 4.01 or other tests, although cognition is sufficiently impaired to satisfy that aspect of the test.

The provision does not define "unconsciousness" and thus does not attempt a legislative resolution of the issue. It employs the term that has had standing in the statutory law of many states, leaving the problem of interpretation, as it has previously rested, with the courts.80

There are two possibilities as to why pathological intoxication was not left to the law of insanity. The first, which also applies to automatism, is that it was felt pathological intoxication required special treatment because the drafters wanted to place a fault limitation on the use of the pathological intoxication defense and restrict its use to non-fault situations. They did not want to place a similarly explicit fault limiter on the insanity defense or on the involuntary act defense, although it is not clear why either of these would be so. It would, of course, be novel in both cases. In the case of involuntary act, the drafters have already created a fault limitation by approval of the decision in Decina,81 which found a culpable voluntary act in getting into an automobile to drive while aware of a possible blackout.

The idea of placing a fault limitation on defenses is certainly not novel, but the idea of doing so is not ordinarily associated with the defense of insanity whereas fault has long been the distinguishing feature between voluntary and involuntary intoxication. The belief might have been that because the reaction could be triggered by the actor through his or her own conduct, a form of self-inflicted insanity, there was a need for an explicit fault limitation to be built into such a

80. 1 Model Penal Code and Commentaries § 2.01 at 219-220 (1985)(citations omitted).

Evidently only one legislative body has accepted the invitation to resolve the last question. Hawaii required that when an involuntary act defense “is based on a physical or mental disease, disorder, or defect which precludes or impairs a voluntary act or a voluntary omission, the defense shall be treated exclusively according to the provisions...” of the insanity defense. Haw. Rev. Stat. § 702-200(2)(1985). The commentary to § 702-201 explains that [the Code attempts to provide “therapy or... custodial commitment” for those dangerous individuals who are unable to conform their conduct to the requirements of the law because of some condition which would be difficult to regard as a “mental disease or defect” under orthodox treatment of penal irresponsibility. At the same time, because treatment is flexible and tailored to the condition in question, it does not bear “harshly on the individual whose condition is nonrecurrent.”]

However, in 1986, this statute was amended to provide in addition that “a defense based on intoxication which is pathological or not self-induced which precludes or impairs a voluntary act or a voluntary omission shall be treated exclusively according to this chapter,” i.e., the chapter which includes the provision relating to involuntary acts. Haw. Rev. Stat. § 702-200(2)(Supp. 1989).

defense. Thus, the decision was made to move the defense to the involuntary intoxication section where such a limitation would not be unusual. No other psychiatric phenomenon is singled out for special treatment, other than psychopathy which is denied any status. Pathological intoxication is the only temporary psychosis which is explicitly recognized. The reason for doing so may only have been to place a fault limitation on its invocation.

Under the Model Penal Code, involuntary intoxication, pathological intoxication, and involuntary act are actually all examples of mental incapacity that are not disease-based. It is unfortunate that the fault idea was executed in such a circumscribed fashion. The concept of fault as a limitation on defenses is more fundamental than the Model Penal Code's treatment of it. The relevant category is nondisease-based nonculpability. It is difficult to believe that the drafters thought an exculatory mental condition could only be brought about by either (1) mental disease or defect; or (2) ingested substances. All such conditions, including simple mistake, could have been treated comparably. In that unitary approach the drafters could also have included standards for determination of when fault on the part of the actor would limit the availability of the defense.

One reason the Model Penal Code had to build a fault limitation into the pathological intoxication defense is that the Code does not provide for any requirement of "mental disease or defect" which might otherwise have provided the necessary functional analogue to a fault limitation. Conversely, the fact that the drafters had to put in an explicit fault limitation expressed in terms of the actor's awareness of the likely outcome of drinking while they have no explicit fault limitation at all in the insanity defense, indicates that they believe the concept of disease serves that purpose under insanity law. Here the defense is written as applicable when the condition occurs "by reason of intoxication" while under the insanity defense it must arise "by reason of disease or defect."

This structure also indicates that the drafters did not believe that pathological intoxication was a mental disease or defect and that suggests a second possible explanation. The drafters assumed that pathological intoxication might otherwise not be recognized as appropriately treated under insanity law because they believed that mental disease or defect was not involved. In fact, that is the reservation they expressed in the quoted material above. Yet, their own citation of medical authority partially contradicts that conclusion. The comments say that intoxication which is not self-induced may provide an excuse "only if the resulting incapacitation is as extreme as that which would establish irresponsibility had it resulted from mental disease." Thus, mental disease cases are clearly meant to be excluded from the Model Penal Code's concept of pathological intoxication.
Yet, historically, mental disease cases were at the core of the concept of pathological intoxication. Unless the Model Penal Code drafters mean to undo or ignore all that, they must expect those cases of pathological intoxication to be tried as insanity cases.

Another problem presented by the Model Penal Code's definition of pathological intoxication is that the notice provision confuses responsibility questions with the medical definition of the condition. However, that seems to be exactly what the drafters meant to do. Professor Paulsen was a special consultant to the Model Penal Code's provision on intoxication (section 2.08) and he subsequently described pathological intoxication in these terms:

> In situations of pathological intoxication, the violent and abnormal effects of drinking are completely surprising to the drinker, without warning in experience or education. In these rare cases the consequences of even a single drink may, in reality, be more lurid than the fertile imagination of the most dedicated prohibitionist.  

The Model Penal Code would permit negation of the existence of the condition by proof of the defendant's awareness of the condition. That is nonsensical if the drafters are indeed attempting to describe a medical reality, although it is not if they mean to describe only involuntary intoxication. The medical reality is that the actor is or is not susceptible to pathological reaction to alcohol and the person's awareness is irrelevant to that fact. The actor's awareness is relevant only to criminal liability and the two points ought to be kept separate for they are quite distinct matters.

The fact that pathological intoxication is defined as non-existent if the actor is aware that his condition might lead to such a reaction is only a matter of aesthetics. The Model Penal Code can define pathological intoxication in terms of the actor's lack of awareness of the condition precisely because the Model Penal Code is not defining a medical condition; it is defining a legal condition of exculpation. Were pathological intoxication given its medical interpretation, the draft would be patently absurd for it would then say that the defendant did not have psychomotor epilepsy if he knew he had it. What is meant then is that the defense of pathological intoxication does not exist.


83. When *Model Penal Code* § 2.08(5)(c)(Tent. Draft No. 9, 1959) contained the provision limiting the defense to reactions caused by an abnormal bodily condition, the phrase was never defined. Does it include fatigue, drugs in the body or latent psychosis? Does this include mental conditions as well? Does it include brain damage that contributes to mental illness? These, of course, are the same problems courts have in trying to distinguish automatism from insanity in pathological intoxication cases and otherwise. The English distinction between sane and insane automatism may turn on the same distinction, although it would seem those courts are beginning to take a more pragmatic view influenced heavily by the differing dispositions involved. These matters have been addressed in *L. TIFFANY & M. TIFFANY, PATHOLOGICAL INTOXICATION* Ch. 7, *supra* note 27.
when culpable awareness exists. But handling the fault issue in this manner leaves the obvious problem that pathological intoxication is not intoxication in the ordinary sense at all.

IV. CONCLUSION

The effect of the Model Penal Code draft, given the influence it has had and will continue to have, is that we must now recognize still a third category of pathological intoxication. The first two consisted of a temporary psychotic condition brought on by a triggering effect of alcohol on an underlying mental disease or defect that legally assimilates to temporary insanity. The second type, which was also stressed by the early clinicians, was closely related but the underlying cause could not fairly be said to be attributable to a condition that would fall within the legal idea of mental disease or defect under insanity laws, though the effect of the alcohol on the actor was the same as if it were. These are the automatism cases. The third type now introduced by the Model Penal Code despite the best efforts of everyone else to distinguish it, is surprise intoxication, where the unforeseen aspect is the resulting degree of intoxication, but it is intoxication nevertheless. It is distinguishable from involuntary intoxication only in that the mistake by the actor is with respect to the resulting intoxication rather than the existing circumstance of the nature of the intoxicant consumed. This is basically pathological intoxication as a species of involuntary intoxication, to be distinguished from the legal insanity type and the automatism or involuntary act type.

Most jurisdictions have not adopted the Model Penal Code provision on pathological intoxication. More states have adopted the Model Penal Code's provision regarding involuntary intoxication than have adopted the section on pathological intoxication. Presumably in those states, defense counsel must choose how the case is to be tried, or the courts will have to give some indication as to when and why one defense category is more appropriate or required. Whether the defense of pathological intoxication is more germane to the defense of insanity, involuntary act, or involuntary intoxication depends largely on the type of pathological intoxication involved. There will still be the possibility of overlapping defenses in a case of pathological intoxication in which the defendant acted in an unconscious state due to mental disease or defect. In that case, the facts will fit both insanity and automatism. While only a few states adopted the provision on pathological intoxication, it is not at all uncommon for the Model Penal Code to have influence in the courts, including the federal courts, well beyond the sway it may have in the legislative branch.

84. L. TIFFANY & M. TIFFANY, PATHOLOGICAL INTOXICATION, supra note 27.
85. See, e.g., Kane v. United States, 399 F.2d 730 (9th Cir. 1968).
may be important, then, to understand just how poorly drafted the pathological intoxication section actually is and that is the issue this Article addresses.

As the law continues to struggle with pathological intoxication, an aesthetically appealing trichotomy emerges in light of the Model Penal Code’s proposal. Pathological intoxication would be conceived of as (1) mental disease based, ideally dealt with under insanity law; (2) physical disease or trauma based, presumably belonging to the defense of involuntary act or automatism; and (3) exaggerated and surprise intoxication, to be handled as the defense of involuntary intoxication.

This view is sufficiently problematical that it is difficult to endorse it enthusiastically. The concept of mental disease is all that practically separates insanity and automatism and that is perhaps too ephemeral a foundation upon which to build. All that separates involuntary intoxication from insanity is the same concept and insanity is largely a legal conclusion, not an objective, identifiable fact. Further, if the actor is rendered unconscious, there may be no difference between involuntary intoxication and automatism or involuntary act. If one could count on a reliable factual distinction between the categories of defenses, it would be important to make those distinctions. However, the important matters actually are the nature of the disposition of the defendant when the case is resolved, fault on the part of the actor, and notions of what legally constitutes “mental disease or defect.” The distinction between mental disease and other causes is not a distinction that would be expected to endure. Still, such a trichotomy is probably better than the level of understanding presently exhibited in a variety of contexts; it provides a framework of explanation.