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EXISTING MIND DRUGS AND THE NEGATION OF MENS REA

In the following analysis, I focus on the *mens rea* component of criminal acts, and how that component might be affected by involuntary or unknowing intoxication via existing “mind drugs”. Mind drugs, for the purposes of this paper, include anything that disturbs a mental or physical capacity, as discussed *infra*. The same framework can be used to analyze criminal conduct attributed to mind drugs not currently on the open market.

Introduction

Under United States law, a criminal offense will typically have two elements: the *actus reus* and the *mens rea*.¹ *Actus reus* is Latin for “guilty act”, and refers to the forbidden act committed by the defendant.² *Mens rea* is Latin for “guilty mind”, and refers to the state of mind of the defendant when committing the crime.³ Sometimes described as the “mental element”, “criminal intent” or “guilty mind”, the *mens rea* is expressed in one of two forms: recklessness or negligence.⁴ To be sure, there are crimes which do not require the mental element. So-called “strict liability” crimes are generally disfavored because they ignore what the Supreme Court has called “moral culpability”.⁵

¹ *U. S. v. Apfelbaum*, 445 U.S. 115, 131 (1980).

² BLACK’S LAW DICTIONARY ONLINE (8th ed. 2004).

³ *Id.*

⁴ Josh Dressler, *Understanding Criminal Law* §10.02 (4th ed. 2006).

⁵ *Morissette v. United States*, 342 U.S. 246, 250 (1952).

The Ephemeral Mens Rea

While the *actus reus* is a relatively simple concept, the *mens rea* is fact-specific and “chameleon-like ... [taking] on different colors in different surroundings.”⁶ Indeed, Professor George Fletcher observed that “there is no term fraught with greater ambiguity than that ... phrase that haunts American law: *mens rea*.”⁷ For the purposes of this paper, assume that the meaning and scope of *mens rea* does not extend beyond the elemental definition described in the Introduction.

Intoxication defenses vary depending on whether the offense in question is classified as “general intent” or “specific intent” crime. General intent offenses are those which only require a culpable state of mind.⁸ Specific intent offenses require proof of the offender’s conscious objective during the course of the crime (e.g., assault with intent to rape).⁹ This distinction will prove important later in the analysis.

Voluntary Intoxication and the Law

The Model Penal Code (MPC), developed by the American Legal Institute and adopted in whole or in part by at least two-thirds of the states¹⁰, defines “intoxication” as “a disturbance of mental or physical capacities resulting from the introduction of any substance into the body.”¹¹ Furthermore, intoxication is considered voluntary if the bad actor is responsible for his intoxication. Culpability exists if the actor knowingly ingests a substance that he knows, or

⁶ Francis Bowes Sayre, *The Present Signification of Mens Rea in the Criminal Law*, in HARVARD LEGAL ESSAYS 399, 402 (1934).

⁷ George Fletcher, *Rethinking Criminal Law* 398 (1978).

⁸ *Commonwealth v. Sibinich*, 598 N.E.2d 673, 675 (1992).

⁹ *United States v. Bailey*, 444 U.S. 394, 405 (1980).

¹⁰ Paul H. Robinson, *Criminal Law: Cases and Controversies*, 39 (2005).

¹¹ *People v. Low*, 732 P.2d 622, 627 (Colo. 1987).

should know, causes intoxication.¹² As this definition suggests, the law makes no distinction between alcohol, illicit drugs or supplements.¹³

The general rule in California and in most jurisdictions, with very limited exculpatory exceptions, is that voluntary intoxication never *completely* excuses criminal conduct.¹⁴ As a matter of thoroughness, it should be noted that California courts allow the trier of fact to consider voluntary intoxication as evidence of diminished capacity. This may negate certain elements of specific intent crimes, but would not eliminate criminal liability completely.¹⁵

As an example of the general rule, in *People v. Velez*, the defendant Velez knowingly smoked part of a marijuana cigarette. Unknown to Velez, the marijuana contained therein was laced with phencyclidine (PCP), a known hallucinogen. Subsequently, Velez assaulted a partygoer with a deadly weapon. The California Court of Appeals held that Velez was voluntarily intoxicated because it was “common knowledge that unlawful street drugs do not come with warranties of purity or quality associated with lawfully acquired drugs...”¹⁶

Essentially, voluntary intoxication *is* the culpable state of mind necessary for general intent crimes, because the bad actor has willfully distorted his perception of reality prior to the commission of a crime. In these cases, the voluntary intoxication **is** the *mens rea*. For specific intent crimes, the inquiry is difficult and fact specific, as indicated by Professor Fletcher, *supra*.

Involuntary Intoxication and the Law

As one can imagine, cases involving voluntary intoxication are fairly common. Cases involving a successful defense of involuntary intoxication, however, are rare enough to prompt

¹² *The People v. Alfredo Eddie Velez*, 175 Cal.App.3d 785 (1985).

¹³ Dressler at §24.01.

¹⁴ *People v. Murray*, 247 Cal.App.2d 730, 731 (1967).

¹⁵ *People v. Spaniel*, 262 Cal.App.2d 878 (1969).

¹⁶ *Velez* at 795.

one scholar to describe them as “simply and completely nonexistent.”¹⁷ Although this is hyperbole, it puts the number of viable involuntary intoxication cases in perspective.

In general, the courts consider one to be involuntarily intoxicated when he has become intoxicated “through the fault of another, by accident, inadvertence, or mistake on his own part, or because of a physiological or psychological condition beyond his control.”¹⁸

People v. Scott is a California case that demonstrates involuntary intoxication through the fault of another. The defendant attended a family reunion, at which the majority of partygoers were imbibing from a bowl of punch. Defendant drank from the punch, and subsequently he, and other attendees who drank the punch, began acting erratically. Defendant eventually commandeered another’s vehicle and was arrested. The Court ruled:

The evidence establishes that defendant unknowingly and therefore involuntarily ingested some kind of hallucinogen which caused him to act in a bizarre and irrational manner and that, acting under the delusion that he was a secret agent and that he was acting to save his own life or possibly that of the President, defendant attempted to “take” vehicles belonging to others without their consent. The only question is whether or not a crime has been committed. Under the circumstances we believe not.¹⁹

The defense of involuntary intoxication by mistake has a long history, as illustrated by *State v. Brown*. The defendant was arrested for being drunk in public, after being furnished alcohol by an unknown party. The defendant claimed that he was unaware that the liquid was alcohol, and he was further unaware that alcohol had intoxicating effects. The court ruled that the intoxication was involuntary, saying:

[A]re idiots, insane persons, children under seven years of age, babes, and persons who have been made drunk by force or fraud, and carried into a public place, to be punished under the statute? And if not, why not? And, if these are not to be

¹⁷ Jerome Hall, *General Principles of Criminal Law* 539 (2d ed. 1960).

¹⁸ 73 A.L.R.3d 195 (2009).

¹⁹ *People v Scott*, 146 Cal. App. 3d 823, 832 (1983).

punished, then no sufficient reason can be given for punishing those who have become drunk through unavoidable accident, or through an honest mistake.²⁰

Finally, an illustration of involuntary intoxication due to a psychological problem is *Driver v. Hinnant*. The defendant in this case was convicted of public drunkenness, and he appealed. The Fourth Circuit overturned the conviction saying:

It is well within the State's power and right to deter and punish public drunkenness, especially to secure others against its annoyances and intrusions. To this end any intoxicated person found in the street or other public areas may be taken into custody for inquiry or prosecution. But the Constitution intercedes when on arraignment the accused's helplessness comes to light. Then it is that no criminal conviction may follow ... The upshot of our decision is that the State cannot stamp an unpretending chronic alcoholic as a criminal if his drunken public display is involuntary as the result of disease.

There is little case law on successful involuntary intoxication defenses, so it is difficult to gauge the likely outcome for the offender. Typically, the person who is involuntarily intoxicated will be acquitted of all crimes for which voluntary intoxication would be a defense, and also any general intent crime.²¹ *Mens rea*, therefore, would be negated.

Prescription Drugs / Mind Drugs

Prescription drugs, the category containing mind drugs, is unique. The courts approach prescription drugs from a hybrid perspective of voluntary and involuntary intoxication. Ritalin (methylphenidate), Adderall (dextroamphetamine), Aricept (donepezil), Ambien (zolpidem) and Provigil (modafinil) all have clinical uses approved by the Food and Drug Administration.²² However, once a mind drug is approved by the FDA, it can legally be prescribed for any number of “off-label” uses.²³

²⁰ *State v. Brown*, 38 Kan. 390, 391 (1888).

²¹ Dressler at §20.06.

²² Jeremy Laurance, *Mind-enhancing drugs: Are they a no-brainer?*, THE INDEPENDENT, (June 2009), <http://www.independent.co.uk/news/science/mindenancing-drugs-are-they-a-nobrainier-1708988.html>.

²³ Randall S. Stafford, M.D., Ph.D., *Regulating Off-Label Drug Use — Rethinking the Role of the FDA*, THE NEW ENGLAND JOURNAL OF MEDICINE, Volume 358:1427-1429 (April 2008), <http://content.nejm.org/cgi/content/full/358/14/1427>.

Generally, if a person does not know, and has no reason to know, that his prescribed drug is likely to have intoxicating effects, then any intoxication would be involuntary.²⁴ On the other hand, if he purposely takes the prescribed medication in excess (e.g., to commit suicide), the intoxication may be ruled voluntary.²⁵ In either case, the *mens rea* would be evaluated as described in the Voluntary and Involuntary sections, *supra*.

As an example of the kinds of cases one can expect, we look to *Branciaccio v. State*.²⁶ The defendant in *Branciaccio* was taking Zoloft, a depression and anxiety medication known to have “infrequent” side effects including aggressive reactions and hallucinations. The defendant got into an argument with a neighbor and killed her. He was convicted of first degree murder, but the verdict was reversed and remanded at the appellate level for failure to give the jury instructions on the defendant’s only defense, involuntary intoxication by Zoloft.

The defense submitted several different forms of jury instructions on involuntary intoxication, and there was extensive discussion on whether the instruction should be given; however, the court concluded that the standard instruction on insanity was sufficient, and rejected the involuntary intoxication instructions. It is unfortunate that the State did not recognize that involuntary intoxication is a defense in the trial court, as it now recognizes on appeal, because if it had agreed that the instruction should be given, we would not have to reverse this otherwise well-trying case for a new trial.²⁷

On remand, and with the proper jury instructions, the defendant was once again convicted. Even so, one can see how the defense and *mens rea* issues work in this context.

Conclusion

There are few cases published in this area, as prescription mind drugs are relatively new (at least in comparison to the most popular mind-altering drug, alcohol) and their long-term effects have yet to be fully understood.

²⁴ *Minneapolis v. Altimus*, 238 N.W.2d 851, 856 (Minn. 1976).

²⁵ *People v. Chaffey*, 25 Cal.App. 4th 852 (1994).

²⁶ *Branciaccio v State*, 698 So.2d 597 (Fla.App. D4 1997).

²⁷ *Id.* at 600.

Even so, as new drugs come to market, or as new side-effects are discovered, criminal acts committed by actors under the influence of these drugs will have to be evaluated under the above-referenced standards.