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When God Spikes Your Drink: Guilty Without *Mens Rea*

Fredrick E. Vars*

INTRODUCTION

Two men walk into a bar. An hour later, one man shoots dead the other. The charge is first-degree murder, which requires a specific intent to kill. The shooter was unable to form that intent. In many states, if the source of incapacity was intoxication, then he will be acquitted. But if the two men were drinking water, the shooter had schizophrenia, and the source of incapacity was a paranoid delusion, then the lack of intent is no defense. This is a bad joke.

In *Metrish v. Lancaster*, the United States Supreme Court unanimously reaffirmed this absurd proposition.¹ Burt Lancaster was convicted on retrial in a Michigan court of first-degree murder.² Despite a “long history of severe mental-health problems,”³ Lancaster was not allowed to introduce that evidence to negate *mens rea* at his retrial.⁴ After the crime but before the retrial, the Michigan Supreme Court had rejected the so-called “diminished capacity” defense, which had allowed legally sane defendants to present evidence of mental illness to negate the specific intent required to commit a

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1. 133 S. Ct. 1781 (2013).

2. *Id.* at 1785.

3. *Id.*

4. *Id.*

particular crime.⁵ In May 2013, the United States Supreme Court unanimously reversed a Sixth Circuit decision granting federal habeas relief to Lancaster, reasoning that the “diminished capacity” defense could be eliminated retroactively because doing so was foreseeable and defensible.⁶ The Court was wrong on both counts.

Lancaster compounds a fundamental error: In several states (including Michigan), mental illness evidence on *mens rea* is excluded, whereas evidence of intoxication is sometimes allowed.⁷ Had Lancaster been unknowingly drugged instead of being mentally ill, he might well have been acquitted of first-degree murder. Evidence of an inability to formulate the requisite intent to commit a crime should be equally relevant whatever the source of the impairment, at least when the impairment is involuntary.

This Essay has three parts. In the first, I show that *Lancaster* was wrong on its own terms. The Michigan Supreme Court’s elimination of the diminished capacity defense was not foreseeable and not defensible, so it was unconstitutional to apply that rule retroactively. Part II argues that mental illness should be treated at least on the same terms as intoxication. None of the rationales adopted for channeling mental illness evidence into the insanity defense distinguishes intoxication. The final part considers whether mental illness is more analogous to involuntary intoxication or merely voluntary intoxication. This matters because many jurisdictions consider involuntary intoxication more favorably. I conclude that usually, but not always, incapacity due to mental illness is involuntary—it is as if God spiked your drink.

I.

LANCASTER WAS WRONGLY DECIDED

To obtain habeas, Lancaster had to establish that the Michigan court in applying its new rule retroactively “unreasonably applied federal law clearly established in [the Court’s] decisions.”⁸ In *Bouie v. City of Columbia*, the Court held that a criminal defendant could not be convicted for actions that became criminal only by unreasonable judicial interpretation after the alleged crime.⁹ Unreasonable here means “unexpected and indefensible.”¹⁰ In *Lancaster*, retroactive elimination of the diminished capacity defense was both unexpected and indefensible.

The *Lancaster* Court attempted to distinguish *Bouie* on the ground that the Michigan Supreme Court had not previously addressed directly the question of

5. *Id.*

6. *Id.* at 1792.

7. The other states include at least Arizona, Indiana, Louisiana, Minnesota, and Virginia. *See infra* notes 18–22 and accompanying text; Brief for the United States as Amicus Curiae Supporting Respondent at 22, *Clark v. Arizona*, 548 U.S. 735 (2006) (No. 05-5966), 2006 WL 542415, at *22 n.13.

8. *Lancaster*, 133 S. Ct. at 1786.

9. 378 U.S. 347 (1964).

10. *Lancaster*, 133 S. Ct. at 1792 (quoting *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001)).

whether the diminished capacity defense was valid and that the Michigan Supreme Court overturned lower court decisions based on a reasonable interpretation of the insanity defense statute.¹¹ In other words, barring mental illness evidence was not an “unreasonable” judicial interpretation because it could have been anticipated and was defensible.

However, neither predicate is valid. Just two years before reversing course, the Michigan Supreme Court held in a *per curiam* opinion that it was “entirely reasonable” for a defense attorney to pursue a diminished capacity defense and suggested that such a defense could have worked.¹² Lower Michigan courts had overwhelmingly recognized the defense.¹³ The decision jettisoning the defense was unexpected.

More fundamentally, the Michigan Supreme Court’s elimination of the diminished capacity defense was not based on a reasonable reading of the relevant statute—it was “indefensible.” The court concluded that the diminished capacity defense was inconsistent with the statutory insanity defense scheme.¹⁴ But the plain language of the statute belies this conclusion. After outlining the definition of legal insanity, the key section concludes: “Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity.”¹⁵ Contrary to clear rules of statutory construction,¹⁶ the Michigan Supreme Court’s reading pretends that the last three words of this sentence do not exist. The legislature expressly defined exclusivity and left open the possibility that other defenses, like diminished capacity, might rest on mental conditions.¹⁷ If the legislature actually wanted to eliminate the diminished capacity defense, it could have done so simply by omitting the words “of legal insanity.” That would have expressly channeled all mental illness evidence into the insanity defense.

The Michigan Supreme Court’s elimination of the diminished capacity defense was both unexpected and indefensible, and thus it could not be applied retroactively under *Bouie*. The unfairness to a defendant like Lancaster is palpable. Moreover, disallowing mental illness evidence on the issue of intent is indefensible because, in many jurisdictions, it penalizes the sick but not the drunk.

11. *Id.*

12. *People v. Lloyd*, 590 N.W.2d 738, 745 (1999) (*per curiam*).

13. *Lancaster v. Metrish*, 683 F.3d 740, 745–46 (6th Cir. 2012) (citing eleven Michigan Court of Appeals cases).

14. *People v. Carpenter*, 627 N.W.2d 276 (Mich. 2001).

15. MICH. COMP. LAWS ANN. § 768.21a(1) (2013) (emphasis added).

16. *See State Farm Fire & Cas. Co. v. Old Republic Ins. Co.*, 644 N.W.2d 715, 717 (Mich. 2002) (“Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.”).

17. *Cf. MICH. COMP. LAW. ANN. § 768.21a(2)*.

II.

MENTAL ILLNESS IS ANALOGOUS TO INTOXICATION

Prohibiting mental illness evidence on *mens rea* is indefensible for another reason: Intoxication evidence on *mens rea* is often allowed. Several states mandate acquittal for involuntary intoxication negating specific intent, with the ultimate burden of proof on the state beyond a reasonable doubt.¹⁸ Michigan folds involuntary intoxication into insanity.¹⁹ Voluntary intoxication is not a defense in Michigan unless the defendant “voluntarily” ingested a substance not knowing it would cause intoxication.²⁰ Truly voluntary intoxication was a defense in Michigan before 2002,²¹ and remains a defense in other states.²² It is absurd to acquit someone who voluntarily got drunk while convicting an individual in the same mental state due to an illness outside her control.²³

The Michigan Supreme Court in its opinion eliminating the diminished capacity defense expressly declined to discuss intoxication.²⁴ It relied instead entirely on its misreading of the insanity defense statute. The United States Supreme Court in *Lancaster* similarly sidestepped the intoxication analogy and, indeed, any justification for barring mental illness evidence on the issue of intent.²⁵ The Court had already upheld the bar on mental illness evidence in *Clark v. Arizona*, which *Lancaster* did not challenge.²⁶

Clark subdivided mental illness evidence into two relevant categories: mental-disease evidence and capacity evidence.²⁷ “The defendant suffers from schizophrenia, one symptom of which is delusions,” would be mental-disease evidence. “The defendant lacked the ability to form an intent to kill,” would be capacity evidence. *Clark* identified three reasons for barring evidence of both mental-disease and capacity on *mens rea*: (1) “the controversial character of some categories of mental disease”; (2) “the potential of mental-disease evidence to mislead”; and (3) “the danger of according greater certainty to

18. *E.g.*, *State v. Edmisten*, 207 P.3d 770, 774 (Ariz. App. 2009); *State v. Davis*, 637 So. 2d 1012 (La. 1994). Indiana puts the burden on the defendant. IND. CODE § 35-41-3-5 (2013); *Melendez v. State*, 511 N.E.2d 454, 457-58 (Ind. 1987).

19. *People v. Wilkins*, 459 N.W.2d 57 (Mich. App. 1990).

20. MICH. COMP. LAWS ANN. § 768.37.

21. *People v. Lakeman*, 353 N.W.2d 493, 495 (Mich. App. 1984).

22. *See, e.g.*, *Weaver v. State*, 627 N.E.2d 1311 (Ind. App. 1994), *aff'd in part, vacated in part*, 643 N.E.2d 342 (Ind. 1994); *State v. Kjeldahl*, 278 N.W.2d 58, 61 (Minn. 1979); *Giarratano v. Commonwealth*, 266 S.E.2d 94, 99 (Va. 1980).

23. *E.g.*, *People v. Carpenter* 627 N.W.2d 276, 292 n.23 (Mich. 2001) (Kelly, J., dissenting) (“Given that this Court recognizes evidence of voluntary intoxication to negate specific intent, the majority’s rejection of mental abnormality evidence, used for the very same purpose, defies explanation.”); *State v. Simmons*, 309 S.E.2d 89, 98 (W.V. 1983). *See also* Lucy Inman, *Mental Impairment and Mens Rea: North Carolina Recognizes the Diminished Capacity Defense in State v. Shank and State v. Rose*, 67 N.C. L. REV. 1293 (1989).

24. *Carpenter*, 627 N.W.2d at 284 n.10.

25. 133 S. Ct. at 1787 n.3.

26. 548 U.S. 735 (2006).

27. *Id.* at 758-59.

capacity evidence than experts claim for it.”²⁸

Although commentators have convincingly rebutted these justifications,²⁹ this Essay makes the narrower argument that mental illness should be considered on terms at least equal to intoxication. Intoxication and mental illness are analogous on *Clark*’s very reasons for exclusion: Evidence of intoxication can be subdivided in the same way (e.g., “defendant was drunk” and “defendant lacked capacity”); (1) diagnosing intoxication may be even more difficult than mental illness; (2) intoxication evidence has the same potential to mislead; and (3) the testimony of intoxication experts may similarly receive undue weight.

Diagnosing intoxication may seem straightforward, but frequently it is not. Because intoxication is generally temporary, diagnoses are usually made retrospectively. Blood, urine, or hair samples may be unavailable, leaving self-reported drinking or drug use as the only useful data.³⁰ This can generate at least as much uncertainty as imprecision or controversy in mental illness categories. There are of course exceptions, but psychiatric diagnosis on the whole can be quite accurate.³¹ Even more complex forensic examinations have been shown to be acceptably reliable and valid.³²

Further, intoxication evidence can mislead. With the exception of drunk driving, where the crime is defined by reference to blood alcohol concentration (BAC), there is an imperfect fit between being drunk and being unable to formulate the required intent. One recent review concluded that essentially “[n]o behavioral or physical sign has emerged that is consistently related to a specific level of BAC without large variation among individuals.”³³ In other words, impaired function is not well correlated with blood alcohol concentration. And the functions measured in the reviewed studies were specifically chosen to correlate with blood alcohol level, unlike legal concepts such as intent.³⁴

An expert opinion about incapacity has the same risk of being given too much weight no matter the source of the incapacity. *Clark* correctly observed

28. *Id.* at 774.

29. E.g., Dora Klein, *Rehabilitating Mental Disorder Evidence After Clark v. Arizona: Of Burdens, Presumptions, and the Right To Raise Reasonable Doubt*, 60 CASE W. RES. L. REV. 645 (2010); Stephen J. Morse, *The Uneasy Entente Between Legal Insanity and Mens Rea: Beyond Clark v. Arizona*, 97 J. CRIM. L. & CRIMINOLOGY 1071 (2007); Christopher Slobogin, *The Supreme Court’s Recent Criminal Mental Health Cases*, 22 CRIM. JUSTICE 8 (2007).

30. *C.f.* State v. Schael, 388 N.W.2d 641, 643 (Wis. App. 1986).

31. E.g., Darrel A. Regier et al., *DSM-5 Field Trials in the United States and Canada, Part II: Test-Retest Reliability of Selected Categorical Diagnoses*, 170 AM. J. PSYCHIATRY 59, 63 tbl.2 (2013) (reporting “good” reliability for diagnoses of schizophrenia and schizoaffective and bipolar I disorders); Philip D. Harvey et al., *Diagnosis of Schizophrenia: Consistency Across Information Sources and Stability of the Condition*, 140 SCHIZOPHRENIA RESEARCH 9, 11 (2012).

32. See John V. Jacobi, *Fakers, Nuts, and Federalism: Common Law in the Shadow of the ADA*, 33 U.C. DAVIS L. REV. 95, 123 (1999).

33. Steve Rubenzer, *Judging Intoxication*, 29 BEHAV. SCI. L. 116, 134 (2011).

34. See *id.*

that state of mind at the key moment can be elusive and that the law's categories, like intent, do not match the language of psychology.³⁵ Both observations hold equally for intoxication and mental illness. In the intoxication context, courts recognize that expert testimony on capacity to form intent may lack certainty and therefore exclude it on a case-by-case basis. In *State v. Schael*, for example, the defendant's expert testified: "I do not feel that I can give you an answer consistent with reasonable medical certainty as to his ability to form intent."³⁶ The appellate court affirmed the trial court's exclusion of the testimony on grounds that it was not probative.³⁷

In sum, none of the justifications given for excluding mental illness evidence on *mens rea* supports treating intoxication evidence more favorably.

III.

IS INCAPACITY DUE TO MENTAL ILLNESS VOLUNTARY OR INVOLUNTARY?

The previous section argued that mental illness and intoxication are analogous, but there are actually two different intoxication defenses: voluntary and involuntary. Most jurisdictions consider involuntary intoxication more favorably.³⁸ If you punch someone because someone else spiked your drink, you are generally not criminally liable. If you spike your own drink, then you may be liable for what flows from your decision to spike and drink it. Most commentators assume that mental illness is like involuntary intoxication.³⁹ People don't choose to be mentally ill: rather, God spikes their drink. This section examines whether mental illness should be treated more like voluntary or involuntary intoxication.

Individuals suffering from a first psychotic episode not precipitated through an external intoxicant would seem to be entirely blameless. This holds true for second and later episodes as well if the individual was diligently pursuing reasonable treatment or was unable to obtain treatment. For those individuals, involuntary intoxication is a near perfect analogy: They lost capacity through no fault of their own.

But suppose the episode was triggered by voluntary ingestion of an intoxicant. If a person without mental illness would have suffered the same loss of capacity, then this is simple voluntary intoxication. If, however, the mental illness was also a but-for cause, the case is more difficult. Mental illness could cause the loss of capacity in at least two different ways. First, a mentally ill individual might decide to have a drink for normal social or other reasons

35. See 548 U.S. at 776–778.

36. 388 N.W.2d 641, 644 (Wis. App. 1986).

37. *Id.*

38. Tim Feulner, Note, *The Minotaur Defense: The Myth of the Pathological Intoxication Defense*, 49 AM. CRIM. L. REV. 1969, 1985 & n.145 (2012).

39. E.g., Klein, *supra* note 29; Stephen P. Garvey, *Self-Defense and the Mistaken Racist*, 11 NEW CRIM. L. REV. 119 (2008); see also *State v. Provost*, 490 N.W.2d 93, 99 (Minn. 1992); *State v. Burge*, 487 A.2d 532, 539–40 (Conn. 1985).

totally unrelated to her illness. If incapacity resulted, the question of voluntariness should turn on whether incapacity was foreseeable. Some courts allow the involuntary intoxication defense if the defendant “did not know or have reason to anticipate the drug’s intoxicating effects.”⁴⁰ Other courts, however, are skeptical of the analogy: “[M]ental illness caused by voluntary intoxication is not a defense.”⁴¹

The second causal story is that the mental illness itself caused the person to drink or use drugs. Self-medication with drugs and alcohol is a common phenomenon.⁴² Since the choice to use the intoxicant was tainted by the illness, the resulting intoxication is arguably involuntary. But courts generally agree that alcoholics cannot use their compulsion to drink to argue that intoxication for them was involuntary.⁴³ Substance abuse disorder is recognized by many as a mental illness, so this case law would seem to control. However, some judges would allow the involuntary intoxication defense for alcoholics,⁴⁴ and alcoholics “may fairly be held responsible to a substantial degree for becoming addicted,”⁴⁵ whereas most mentally ill individuals bear no responsibility for their condition.

There is a final, closely related scenario: the loss of capacity foreseeably results from a mentally ill person failing to adhere to prescribed treatment. While on the surface this appears voluntary, treatment refusal may itself be the product of mental illness, not free will. For some people this is almost certainly true: One study found that a majority of patients with schizophrenia did not believe they were ill.⁴⁶ This lack of self-awareness is so common that it has its own medical term: anosognosia.⁴⁷ Clearly, this condition would undermine the “voluntariness” of refusing treatment. At least one court has suggested that a failure to take medication could be deemed “involuntary.”⁴⁸ Lack of treatment compliance may be voluntary or involuntary depending on the facts.

Mental illness evidence should be admissible to negate *mens rea*. At a minimum, it should be admissible on the same terms as evidence of intoxication. Specifically, the inability to formulate intent caused by mental

40. See *People v. Mathson*, 149 Cal. Rptr. 3d 167, 180 (Ct. App. 2012).

41. *State v. Martin*, 591 N.W.2d 481, 486 (Minn. 1999); see also *People v. Gutierrez*, 225 Cal. Rptr. 885 (Ct. App. 1986); *State v. Walker*, 235 P.3d 766, 771 (Utah App. 2010).

42. See generally Edward J. Khantzian, *The Self-Medication Hypothesis of Substance Use Disorders: A Reconsideration and Recent Applications*, 4 HARV. REV. PSYCHIATRY 231 (1997).

43. E.g., *State v. Johnson*, 327 N.W.2d 580 (Minn. 1982); *Commonwealth v. Kuhn*, 475 A.2d 103 (Pa. Super. 1984).

44. *Kuhn*, 475 A.2d at 113 (Spaeth, J., dissenting).

45. Stephen J. Morse, *Addiction, Genetics, and Criminal Responsibility*, 69 LAW & CONTEMP. PROBS. 165, 207 (2006).

46. Jane Mulaik, *Noncompliance with Medication Regimens in Severely and Persistently Mentally Ill Schizophrenic Patients*, 13 ISSUES IN MENTAL HEALTH NURSING 219 (1992).

47. See THE AM. HERITAGE STEDMAN’S MED. DICTIONARY (2002) (defining term as “[r]eal or feigned ignorance of the presence of disease, especially of paralysis”).

48. See *Holmes v. United States*, 615 A.2d 555, 559 n.7 (D.C. 1992); see also *Patterson v. Cockrell*, 2003 WL 21355999, at *10 (5th Cir. May 23, 2003).

illness and by no fault of the defendant should negate *mens rea* in any case where the same inability due to involuntary intoxication would do so. Whether it was God or Larry who spiked your drink should not matter. Where the mentally ill defendant voluntarily used a known intoxicant, any resulting loss of capacity should be considered involuntary only to the extent it was unforeseeable. Evidence regarding both the intoxicant and the mental illness would be relevant to deciding this question. Finally, the government should have the burden of proving beyond a reasonable doubt that a defendant's use of an intoxicant or failure to adhere to prescribed treatment was knowing and voluntary should it seek to analogize to voluntary rather than involuntary intoxication.

CONCLUSION

Prisons have become the new asylums for many reasons.⁴⁹ One factor is bad law made worse by the United States Supreme Court's recent decision in *Metrish v. Lancaster*, where the defendant was prevented from introducing evidence of his mental health to negate intent.⁵⁰ At the time of the alleged offense, this "diminished capacity" defense was well-recognized by Michigan law.⁵¹ The Michigan Supreme Court subsequently eliminated the defense, and the United States Supreme Court upheld retroactive application of the new rule to Lancaster.⁵²

Excluding mental health evidence on intent, even prospectively, is indefensible. The new rule barring such evidence did not really eliminate a "defense"—it effectively created a new set of crimes for the mentally ill that do not require a finding of intent. The unfairness, and indeed illogic, of this new rule is reinforced by the comparison with intoxication, which is still allowed to negate *mens rea* in Michigan. Michigan punishes mental illness even while it excuses drunkenness. This is not to say that mental illness should always be an excuse; only that it should be allowed to negate intent on the same terms as other impairments.

49. See Gary Field & Erica E. Phillips, *The New Asylums: Jails Swell With Mentally Ill*, WALL STREET J., Sept. 25, 2013, at A1.

50. *Metrish v. Lancaster*, 133 S. Ct. 1781, 1785 (2013).

51. See *supra* note 13.

52. *Lancaster*, 133 S. Ct. at 1792.