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Drug Intoxication and Criminal Responsibility: Old Dilemmas and a New Proposal

Ann Fingarette Hasse
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I. INTRODUCTION

Defendant X has been charged with the first degree murder of Y. The facts as proven at trial are the following:

Defendant, while with Y on a camping trip, took an LSD tablet. Shortly after taking the tablet, as X watched his companion sleep, Y made noises which sounded to the defendant like those of a rabid dog which defendant's father had shot when he was a small boy. Defendant took fright and shot his companion.¹

Testimony at trial by a defense expert showed that LSD, like other hallucinogens, can produce a range of mental states, including hallucinations, delusions, and partial amnesia. Effects of the drug may range from a loss of time and space perception to panic, paranoid delusions, and reactions very similar to schizophrenia.² Another defense expert testified that at the time of the act, defendant was not aware of the quality and nature of his act. There was no testimony, however, that defendant had a mental disease or defect, only that he was in a state of intoxication caused by LSD. It was shown that defendant had used LSD on previous occasions.

Defendant X asks the trial judge to instruct the jury that if defendant could not distinguish right from wrong, he is entitled to a verdict of acquittal.³ Alternatively, he requests in-

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*Member of the State Bar of California; Law Clerk to Chief Judge Oliver J. Carter, United States District Court, Northern District of California, 1973-75.

¹. The basic facts in this example are derived from State v. Hall, 214 N.W.2d 205 (Iowa 1974). They have been slightly modified.

This article is part of a comprehensive study in collaboration with Professor Herbert Fingarette of the University of California, Santa Barbara, on the broad theme of mental disability and the law. The thesis presented here is one which is developed in detail in that forthcoming work, tentatively titled Mental Disabilities and Criminal Responsibility [hereinafter cited as Mental Disabilities]. I would like to express my deep appreciation to Professor Fingarette for his practical and spiritual assistance in preparing this article; however, he is not responsible for any of the specific arguments advanced here.

². See note 6 infra.

³. For purposes of this article, I will use the definition of insanity as advanced
structions to the effect that if, due to drug intoxication, defendant did not form any one or more of the specific mental states required as an essential element of the crime of first degree murder, he is not guilty of that crime. How should the judge rule on his requests?

Since the late 1960's, a number of courts have been confronted with defendants who have committed criminal acts while under the influence of voluntarily ingested mind-altering drugs; consequently, judges have been forced to deal with complex and fundamental issues regarding the degree of the defendant's responsibility.

Should a person who, like X, voluntarily takes a drug with knowledge of its potentially disabling and disorienting effects on the mind, be completely acquitted of a crime on the ground of insanity because, at the time of the act, he could not distinguish right from wrong? The prospect of complete acquittal for intoxicated harmdoers, not surprisingly, has met with great resistance. The absence of "mental disease" provides a logical and traditional basis in law for rejecting this defense.

Is it legally or psychologically accurate to say of a person such as X who was deluded or hallucinatory, yet who intended to kill a person whom he perceived as threatening him, that he did not have the required "specific intent" to kill? The usual effect of this defense, when successful, is to reduce the degree of the crime. But, however desirable the result, this defense simply does not fit the facts of most cases involving drug-induced intoxication.

in M'Naghten's Case, 10 Clark & F. 200, 210, 8 Eng. Rep. 718, 722 (H.L. 1843): a defendant is insane if he "was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know he was doing what was wrong." It will be seen that the problems raised are not affected by the variant forms of M'Naghten, or by the addition of a "loss of free-will" clause, Davis v. United States, 165 U.S. 373, 378 (1897); Parsons v. State, 81 Ala. 577, 596-97, 2 So. 854, 866-67 (1887), or by the modernized version of these to be found in the American Law Institute's Model Penal Code insanity test. MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962). All the tests require a finding of "mental disease," and therein lies the crux of the difficulty in ascribing insanity to one who is voluntarily drug-intoxicated. For a general discussion of the insanity tests, see H. Fingarette, THE MEANING OF CRIMINAL INSANITY (1972), and A. Goldstein, THE INSANITY DEFENSE (1967). The criticisms levied against the M'Naghten test are chronicled in Student Symposium on the Proposed California Criminal Code, 19 U.C.L.A.L. Rev. 550, 557-60 (1972).

Should a defendant such as X be held to have no legally acceptable defense, complete or mitigating, because he is not legally insane (that is, he has no "mental disease") and because he did in fact specifically intend to kill? The effect of this approach seems both psychologically unrealistic and morally oppressive.

Until recently there seem to have been only these three alternatives seriously considered. Yet clearly a fourth question remains to be asked: is there another option that both appropriately assesses X's criminal responsibility and also fits readily within the framework of relevant law?

The problem is one which is in urgent need of resolution. In our society there is increasingly common use of hallucinogenic and other types of drugs having consciousness-altering effects significantly different from alcohol.

5. Although the question of a defendant's criminal responsibility when he commits a crime while drug-intoxicated defines a relatively new area of consideration for legal commentators, there is already a certain amount of literature on the subject. Law review writers in general have tended to accept as the only relevant theories the insanity defense and the specific intent exception. Kenneth Baumgartner, in The Effect of Drugs on Criminal Responsibility, Specific Intent and Mental Competency, 8 Am. Crim. L.Q. 118 (1970), concludes that the specific intent exception will be increasingly used in cases when the defendant acted while under the influence of drugs because the exception rests on an established body of law and overcomes the problem of unconditionally releasing defendants. In LSD—Its Effect on Criminal Responsibility, 17 De Paul L. Rev. 365 (1968), Philip Wolin accepts both theories as tenable and argues that the applicability of either defense depends primarily on the facts of the individual case. Gary Lunger in The Effect of Drug-Induced Intoxication on the Issue of Criminal Responsibility, 8 Crim. L. Bull. 731 (1972), approaches the question as one of prosecutorial or defense strategy and suggests what are in essence two opposite views: (1) the prosecutorial view that society could hold criminally responsible anyone who uses drugs; and (2) the defense view that a "toxic psychosis," a psychosis induced by drugs, could result in a successful insanity defense.

Other articles have approached the general question of control of drug abuse from the legislative perspective, e.g., Bartels, Better Living Through Legislation: Control of Mind-Altering Drugs, 21 U. Kans. L. Rev. 439 (1973), or from the medical and sociological points of view, e.g., Contemporary Problems of Drug Abuse: A National Symposium for Law and Medical Students, 18 Vill. L. Rev. 787 (1973).

6. This article is primarily directed to intoxication from those drugs that tend to have effects which are substantially unlike the effects of alcohol. Drugs of major concern in this context can be grouped into two categories: (1) the aminergic agents (commonly termed hallucinogens and psychedelics) whose best known representatives are LSD and mescaline; (2) the amphetamines, including benzedrine, dexedrine and methamphetamine (often referred to as "speed"). Both types of drugs can induce hallucinations and delusions as well as a toxically produced paranoid schizophrenic condition. Of less concern here are euphoria-producing drugs such as marijuana and hashish. M. Gerald, Pharmacology (1974) [hereinafter cited as Pharmacology], particularly Table 17-1. For further analysis of the effects of various drugs, see DeLong, The Drugs and Their Effects, in Dealing with Drug Abuse: A Report to the Ford
this article to display the inherent contradictions of traditional doctrines when applied to the problem of the drug-intoxicated offender; and to propose a new approach which appropriately assesses the criminal responsibility of such an offender. 7

II. TRADITIONAL APPROACHES TO DRUG INTOXICATION: SHORTCOMINGS

A. Specific Intent Exception and the Alcohol Intoxication Analogy

A majority of courts have chosen to analogize the situation of the drug-intoxicated offender to that of the alcohol-intoxicated offender. 8 The classic rule on the inebriated offender is that voluntary intoxication is no defense to a crime; but if the degree of intoxication was sufficient to prevent the defendant from forming the specific mental state required for the charged crime, he cannot be convicted of that crime. 9 This rule is known as the "specific intent exception." General Foundation 62 (Staff Paper No. 1, 1972); Lunter, The Effect of Drug-Induced Intoxication on the Issue of Criminal Responsibility, 8 CRIM. L. BULL. 738-41 (1972).

However, any classification of a drug and its effect should be regarded with some wariness since the effect of any drug on any person is dependent on a number of factors. Among them are purity of the drug, how it is administered, the state of the person's health, his expectations of the drug's effect, and the setting in which the drug is taken.

R. BLUM, D. BOVET, & J. MOORE, CONTROLLING DRUGS: INTERNATIONAL HANDBOOK FOR PSYCHOACTIVE DRUG CLASSIFICATION ch. 1-3 (1974) [hereinafter cited as CONTROLLING DRUGS]. Much discussion assumes a regular and specific effect of a drug, when in reality one must consider a classification as a "probability" or an "estimate." See R. BLUM, SOCIETY AND DRUGS 279 (1970); CONTROLLING DRUGS, supra.

7. The approach offered in this article is substantially that proposed in Mental Disabilities, supra note 1.


Just such an approach is explicitly built into the recently proposed Criminal Justice Reform Act of 1975, S.1, 94th Cong., 1st Sess. § 523(a) [hereinafter cited as S. 1]:

It is a defense to a prosecution under any federal statute that the defendant, as a result of intoxication, lacks the state of mind required to be proved as an element of the offense charged if: (1) intent or knowledge is the state of mind required . . . .

(b)(1) "Intoxication" means a disturbance of a mental or physical capacity resulting from the introduction of alcohol or a drug or other substance into the body . . . .

criminal intent” cannot be negated by evidence of intoxication.10

The intrinsic worth of the specific intent exception—and its usefulness for the area of drug-intoxication—cannot be assessed properly unless one examines the historical development of the exception. Such an examination reveals that, even with reference to the area of alcohol intoxication, the specific intent exception has two serious flaws: first, the technical distinctions upon which the doctrine is based are unsound; and second, the practical results are highly inconsistent.11

Although the “specific intent exception” to the rule that intoxication is no defense began as a straightforward attempt


The provisions of S. 1, supra note 8, seem to differ in this respect. For example, the various relevant provisions of S. 1, when taken together, appear to imply that the intoxication defense as applied to homicide could lead to complete acquittal. Such a result would be contrary to a basic—and desirable—aim of the “specific intent exception”: complete acquittal should not be allowed if intoxication was voluntary. This result could occur under S. 1 in the following way. Section 303(a) requires that “[a] state of mind must be proved with respect to each element of an offense” (with exceptions that do not apply here). Section 301(c) declares that “[t]he states of mind that may be specified are applicable to: (1) conduct either ‘intentional’ or ‘knowing’; . . . .” A person is guilty of the offense of murder, according to the definition in section 1601, if “(1) he engages in conduct that knowingly causes the death of another person; (2) he engages in conduct that causes death of another person under circumstances in fact manifesting extreme indifference to human life . . . .” Since “engaging in conduct” is required in both categories, it is necessary to prove that this must have been either “intentional” or “knowing.” A defendant who had been grossly drunk might be able to show that he was neither. Under S. 1 he therefore could not be found guilty of murder. Moreover, since the definitions of manslaughter (section 1602), negligent homicide (section 1603), and indeed all offenses involving the person (ch. 16) include as an element of the offense that the defendant have engaged in certain conduct (either in that language or equivalent language) leading to a certain result, the grossly drunken harmdoer who did not even know what he was doing would be guilty of no such offense. This anomalous result of S. 1, and the obscurity and arbitrariness of the “specific intent exception,” represent the horns of the dilemma presented by the basic—and flawed—doctrine that both share, and that is a target of the argument of this paper.

11. Jerome Hall concluded after careful examination that, although the goal judges had in mind when creating the specific intent exception was laudatory—to alleviate the criminal responsibility of the inebriate defendant—the actual state of the law is unsatisfactory and confused. Hall, Intoxication and Criminal Responsibility, 57 Harv. L. Rev. 1061 (1944). Another commentator stated that a “scholar in search of logic, consistency and clarity of expression in the law would do well to look elsewhere than in the cases involving intoxication as a defense.” Murphy, The Intoxication Defense: An Introduction to Mr. Smith’s Article, 76 Dick. L. Rev. 16 (1971).

English courts and commentators are of the same opinion: the trial judge in Regina v. Howell, [1974] 2 All E.R. 806, 810, remarked that “it is quite impossible” to deal with the intoxication defense “logically.”
to reduce, without eliminating, the criminal responsibility of the drunken defendant, this laudable objective has become submerged in a morass of meaningless dogma. The “exception,” as originally conceived, was in fact an application of the basic rule that if an element of a crime was absent, whether due to intoxication or otherwise, defendant was not guilty of that crime. However, as courts discovered almost immediately, the result in many cases was not merely mitigation of guilt, but complete exculpation. In order to dam the flood of potential acquittals while retaining the mitigating effect of the exception as first conceived, the phrase “specific intent” was developed into a term of art—unfortunately, a murky and obscure one. It is used to refer to some “special” mental state, as distinguished from “general” criminal intent. How a “specific” intent differs from “general” intent is often unclear to both courts and commentators; the result has been confusion in the

12. English judges in the 1800’s saw the issue very simply as an extension of the basic principle that, in order to convict the defendant of the alleged offense, all elements of a crime must be shown to be present at the time of the act. Regina v. Monkhouse, 4 Cox Crim. Cas. 55 (1849); Regina v. Cruse, 173 Eng. Rep. 610 (1838). As Jerome Hall remarked, “The judges insist straight-facedly that the doctrine is quite consistent with the traditional rule that voluntary drunkenness never excuses; it is simply that an objective material element, ‘intention,’ is lacking in harms committed in gross intoxication.” Hall, Intoxication and Criminal Responsibility, 57 Harv. L. Rev. 1061 (1944).

American judges appear to have had the same principle in mind, although they were already limiting its application by the 1840’s. Pigman v. State, 14 Ohio 555 (1846); Pirtle v. State, 28 Tenn. 663 (1849). For a detailed discussion of the historical development of the specific intent exception and its current status, see Mental Disabilities, supra note 1, and Comment, Rethinking the Specific-General Intent Doctrine in California Criminal Law, 63 Calif. L. Rev. 1352 (1975) [hereinafter cited as Specific-General Intent].

13. In Regina v. Moore, 175 Eng. Rep. 571 (1852), defendant was charged with attempted suicide, claimed she was intoxicated at the time, and was acquitted. In Regina v. Gamlen, 175 Eng. Rep. 639 (1858), the defendant was charged with assault as the result of a fray at a fair; he pleaded intoxication and was acquitted. In Pigman v. State, 14 Ohio 555 (1849), defendant was charged with passing counterfeit bills; the judge instructed the jury that if defendant did not know the bill was a counterfeit due to intoxication, he was not guilty.

American courts attempted almost immediately to circumvent the problem in homicide cases by arbitrarily limiting use of evidence of intoxication so that it could only be used to reduce a first degree murder charge to second degree. Hopt v. People, 104 U.S. 631 (1881); People v. Vincent, 95 Cal. 425, 30 P. 581 (1892); Pirtle v. State, 28 Tenn. 449 (1849).

14. The term “specific intent” was in common use by the turn of the 20th century. Schwabacher v. People, 165 Ill. 618, 46 N.E. 809 (1897); Crosby v. People, 136 Ill. 655, 27 N.E. 49 (1891); Booher v. State, 156 Ind. 435, 60 N.E. 156 (1901).

15. Jerome Hall stated that efforts to differentiate between “general” and “specific” intent are dubious, and he rejected outright any classification of crimes as
application of the rule, and acquittals still occur. Indeed, in recent years, courts occasionally have admitted characterizing an offense as a "specific intent" crime or a "general intent" crime on grounds of "public policy" rather than any inherent logic of the rule, as, for example, the California Supreme Court did in People v. Hood. There, the court held—arbitrarily, it acknowledged—that assault was a "general intent" crime. The court reasoned that because assault is precisely the sort of crime that drunks frequently commit, if it were designated a "specific intent" crime, too many defendants would be acquitted under the specific intent exception. The Hood opinion

"general" or "specific" intent crimes. "Insofar as these terms are used to refer to actual intention, both of them are unfortunate, and the adjectives should be discontinued." J. HALL, GENERAL PRINCIPLES OF LAW 142 (2d ed. 1960). Other commentators have agreed that the difference between specific and general intent is nebulous and difficult to draw. See Annot., 8 A.L.R.3d 1246 n.19 (1966). In his recent voluminous anthology, Brooks stated that "The distinction thus made between 'specific intent' and 'general intent' is quite elusive." A. BROOKS, LAW, PSYCHIATRY, AND THE MENTAL HEALTH SYSTEMS 250 (1975). For a discussion of the problem as it relates to California criminal law, see Specific-General Intent, supra note 12.

English commentators have also castigated as ambiguous and obscure the meaning of the term "specific intent"; the phrase has a parallel usage in English criminal law. See Cross, Specific Intent, 1961 CRIM. L. REV. 510; Orchard, Drunkenness, Drugs and Manslaughter, 1970 CRIM. L. REV. 134; Smith, Drink, Drugs and Criminal Responsibility, 124 NEW L.J. 129 (1974). See also the discussion of the meaning of specific intent in G. WILLIAMS, THE MENTAL ELEMENT IN CRIME 43-47 (1965). A commentator on the case of Bolton v. Crawley stated that "the expression 'specific intent' seems dear to the hearts of judges... but unfortunately they never tell us what it means and any meaning which it may have is shrouded in obscurity." 1972 CRIM. L. REV. 724.

16. For example, if defendant had no specific intent, he is not guilty of larceny, State v. Murphy, 107 R.I. 737, 271 A.2d 310 (1970), or forgery, Andrade v. State, 87 Nev. 744, 483 P.2d 208 (1971).


18. [W]hatever reality the distinction between specific and general intent may have in other contexts, the difference is chimerical in the case of assault with a deadly weapon or simple assault. Since the definitions of both specific intent and general intent cover the requisite intent to commit a battery, the decision whether or not to give effect to evidence of intoxication must rest on other considerations. Id. at 458, 462 P.2d at 378, 82 Cal. Rptr. at 626.

19. Id. at 458, 462 P.2d at 379, 82 Cal. Rptr. at 627. See People v. Kelley, 10 Cal. 3d 565, 516 P.2d 875, 882, 111 Cal. Rptr. 171, 178 (1973), where the court repeated and reconfirmed its stand: because people who are drunk act rashly and unthinkingly, "it would therefore be anomalous to allow evidence of intoxication to relieve a man of responsibility for the crimes of assault with a deadly weapon or simple assault, which are so frequently committed in just such a manner." The "specific intent" concept has also been used by California courts in connection with California's diminished capacity defense; parallel "policy decisions" distinguishing between specific intent and general intent crimes for purposes of applying the diminished capacity defense
reveals clearly that there is no independent meaning to the distinction between "specific" and "general" intent, and that the terms are simply a way of allowing judges to manipulate the law to achieve the desired outcome. Thus the specific intent exception has the dual disadvantage of requiring use of ill-defined terms and failing to serve with any reliability or consistency its ultimate purpose: appropriate mitigation without exculpation.

Without delving further into this murky area of legal theory, it can be said that the specific intent exception has severe theoretical and practical flaws; therefore, courts should seriously question the wisdom of expanding its usage to drug intoxication cases, where the effect on the mind and conduct can be very different from the effect of alcohol, in ways that make the "specific intent" language even less apt than in the case of alcohol intoxication.

Despite its problems, however, most courts regard the specific intent exception as the relevant legal principle to apply in drug intoxication cases. Courts agree that intoxication by drugs should be considered a mitigating factor but should not result in exculpation. Thus, the fact that permitting the intoxication defense often produces a desirable legal outcome has undoubtedly helped suppress disquiet at its blatant inappropriateness as a description of the facts. The factual discrepancy was at first less evident because the drugs involved, until the 1960's, were mainly euphoric and tranquilizing rather than, for example, hallucinatory or excitatory. This resulted in an almost matter-of-fact extension by the courts of the application of the specific intent exception from alcohol to drug cases. The effects of a euphoric or tranquilizing drug were sufficiently similar to the depressant effects of alcohol for the specific intent exception to be reasonably applicable. With hallucinatory drugs, however, the discrepancies are blatant.

In the case of defendant X, if the court were to instruct that voluntary drug intoxication may negate the specific men-

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have been made. E.g., People v. Nance, 25 Cal. App. 3d 925, 102 Cal. Rptr. 266 (1972); see 13 SANTA CLARA LAW. 349 (1972).

20. I have argued elsewhere that the specific intent exception should be completely replaced even in connection with alcohol intoxication because of its serious theoretical and practical defects. See Mental Disabilities, supra note 1.

21. See note 8 supra.

tal states essential to the crime, the jury would have to make a determination as to the presence of deliberation, premi-

ditation, malice, and intent to kill—the four mental states essential for first degree murder—at the time of the act. The jury might well find that all those elements were present; for although X was acting under a delusion, he meant to kill and did so deliberately. Even malice, that notably obscure concept, presumably would apply to these facts under most current law. Mere absence of hatred, ill-will or immoral intent is not sufficient to negate malice, and drug intoxication per se is not an excuse, justification or mitigation. Since all the requisite specific mental states are thus present, under the specific intent doctrine, X's criminal responsibility would in no way be mitigated if the jury correctly applied the law.

In spite of this, realism requires that we recognize that each and every one of those mental states of X were the product of an irrational state of mind: the intent to kill was a mad intent; the deliberation and premeditation were carried out by a mind filled with delusion. Unfortunately for the defendant (and for the cause of justice) the specific intent exception hinges on the absence of a mental state; and in X the relevant states were present, though the mind that generated them was irrational. Thus X cannot, in logic, take advantage of the rule. A jury that applies the law straightforwardly must entirely ignore the evident irrationality of the defendant at the time of the offense. If the judge nevertheless allows the defense to be invoked, the jury may in turn use its common moral sense, ignore the plain meaning of the terms, and find for the defendant, thus distorting the doctrine in order to achieve the desired mitigating effect.

Even in the face of these discrepancies, the specific intent exception in drug intoxication cases has become sufficiently entrenched in the reasoning of most courts to reduce the rule to mere verbal legerdemain. In 1968, a trial court, faced with a glue-sniffing defendant who killed a companion while hallucin-


Despite clear recognition of the non-necessity of any element of hatred, spite, grudge or ill-will, it seems frequently to be assumed that malice, as a jural concept, must involve intent plus some matter of aggravation whereas, in truth, the requirement is fully satisfied by intent minus any matter of exculpation or mitigation. . . . [It is recognized that an intent to cause the particular harm involved in the crime in question, without justification, excuse or mitigation, is sufficient to meet the mens-rea requirements of such offenses as murder.
ating held that instructions on the effects of voluntary intoxication in a drug intoxication case were necessary to carry out the state's duty to "define criminal responsibility in keeping with elementary principles of fairness, justice and order." The United States Court of Appeals for the Tenth Circuit affirmed, reasoning that, although the instruction historically had been concerned with voluntary intoxication from alcohol, there was no constitutional bar to applying it where the intoxication was caused by drugs.

However, the blatant inappropriateness of the use of this doctrine for increasingly numerous drug-intoxication crimes has at last induced a degree of uneasiness. Judges recently have begun to recognize the distortion inherent in equating the effects of drugs, particularly those classified as hallucinatory, with the effects of alcohol:

Our intoxication rationale as applied to alcohol simply does not fit the use of modern hallucinatory drugs; and it was never meant to. . . . they are dissimilar and should be so regarded.

B. The Insanity Defense

An orthodox alternative is the insanity defense. A court faced with defendant X, if it accepted his story as true, would be hard put to deny that at the time of the act, X was, in at least a loose sense of the phrase, "temporarily insane." Similarly bizarre drug intoxication crimes suggest the same conclu-

25. 402 F.2d at 113.
26. "In light of the changing state of medical knowledge regarding hallucinogens, we think the district court may have underestimated the unique and potentially dangerous impact that prolonged use of LSD appears to have on the psychological state and behavioral pattern of some users." Brinkley v. United States, 498 F.2d 505, 511 (8th Cir. 1974). Although the trial judge in Pierce v. Turner, 276 F. Supp. 289 (D. Utah 1967), aff'd, 402 F.2d 109 (10th Cir.), cert. denied, 394 U.S. 950 (1968), admitted that "[t]o intoxication from glue-sniffing may differ from other types of intoxication," he nonetheless equated glue-sniffing with alcohol for legal purposes. 276 F. Supp. at 298. "To treat all [drugs] alike simply because each is classified generally as a drug strikes me as a judicial cop-out which completely disregards the realities of the situation," Judge Le Grand stated in State v. Hall, 214 N.W.2d 205, 213 (Iowa 1973) (dissent).
sion: the defendant who killed his girlfriend thinking she was a nest of snakes; the man who robbed a store, then wandered slowly about, casually trying two locked doors, before finally strolling outside. If the condition had been the result of a mental disease, such persons probably would qualify as legally insane. But in cases of drug intoxication there is, of course, no "mental disease" and hence no legal insanity under the tests currently in force.

The majority of courts that have considered the insanity defense in relation to the drug-intoxicated offender have rejected it, not only because of the absence of mental disease, but for one of two related policy reasons.

First, certain courts have determined that public safety demands rejection of the insanity defense in cases such as X's. Although the voluntary consumption of drugs may lead "to a prostration of [the defendant's] mental facilities . . . [a] condition so induced cannot lead to acquittal, upon the demands of public security." The very fact that a hallucinogenic drug has effects that are "predictably unforeseeable should require courts to decide in the public interest that this is not legally sufficient to completely exculpate a person from murder or any criminal act."

Other courts reject the insanity defense on a second but related ground: precisely because some drugs are known to produce unpredictable and potentially dangerous effects, a person using such drugs is personally culpable. He deliberately takes the risk that as a result of the ingestion of drugs he may commit a serious harm. It is, after all, common knowledge that drugs have a deleterious effect upon the user. In a recent Arizona case, State v. Cooper, the State apparently conceded that defendant was temporarily insane at the time of the act,

30. See note 3 supra.
31. See note 4 supra.
33. Commonwealth v. Campbell, 445 Pa. 487, 495, 284 A.2d 798, 800 (1971). Juries also are reluctant to release defendants who have done serious harm while under the influence of drugs. A defendant who took LSD for the first time and then killed a comparative stranger at a party while hallucinating was found to be sane. "The dilemma facing the jury was that of possibly setting free a person who had committed a serious crime without any sort of punishment or retribution." Barter & Reite, Crime and LSD: The Insanity Plea, 126 AM. J. PSYCHIATRY 536 (1969).
but nevertheless argued that because the condition was voluntarily caused by defendant, the defense of insanity was not available to him. The court agreed.

His subsequent condition [after taking amphetamines for several days], leading to his bizarre actions, was a result of an artificially produced state of mind brought on by his own hand at his own choice. The voluntary actions of the defendant do not provide an excuse in law for his subsequent, irrational conduct.⁴

Our hypothetical defendant X, although temporarily insane at the time he shot Y, should not be allowed to invoke the insanity defense. On the facts he is at least partly culpable: his irrational and hence dangerous condition was voluntarily induced.

C. The Dilemma—and Diminished Capacity

The exclusion of the insanity defense, and the inapposite-ness of the specific intent exception if correctly applied, would appear to leave defendant X with no defense, not even in mitigation. Society has found this outcome morally unacceptable in both alcohol and drug cases ever since the 19th century—and rightly so, if common sense is any guide. A defendant like X who commits an act while in a state of delusion, hallucination, or other gross, chemically-induced derangement of mental faculties is not rational. Whether he means to kill but hallucinates that his victim is a rabid dog; whether he means to kill a human being whom he deludedly believes to be mortally dangerous to him; whether he means to kill but does so only because his ability to assess the act is seriously deranged as a result of massive chemical impact on brain function—whatever the particular facts, the essential fact pattern is the same, and the legal and moral significance ought to be the same. Such a person is not fully responsible for his act.

On the other hand, defendant X voluntarily took LSD, knowing from past experience and from common knowledge that LSD, or consciousness-altering drugs generally, have varying effects on the mind; that they can and usually do result in abnormal perception, sensations, and vision; that, in short, they make the mind irrational. By voluntarily taking LSD, typically with the intention of producing a significantly altered, irrational state of consciousness, defendant X knowingly

36. Id. at ___, 529 P.2d at 233.
and unnecessarily took a risk that he would become disoriented, and hence the risk that he might harm someone or something as a result. For the voluntary risk he assumed, and the harm resulting, he should receive punishment—but less severe punishment than the person who sanely contemplates and commits the same actual harm.

California attorneys in particular may wish to consider the diminished capacity defense as a possible solution to the problem. Unfortunately, the diminished capacity concept, as it has evolved in California case law, has proved a complex and, in this author's opinion, an unsatisfactory alternative.

Generally, the diminished capacity defense is used only in situations where specific intent is a requisite element of the crime charged. The defense proceeds along much the same lines as the more orthodox specific intent exception, and often uses the same terminology: the defendant must prove that his mental state was so impaired at the time the crime was committed that he lacked the required specific intent. Thus diminished capacity defense shares the defects of the traditional specific intent exception with regard to crimes involving drug-induced intoxication.

A successful diminished capacity defense in a homicide case reduces a possible murder conviction to voluntary or involuntary manslaughter. As a consequence, however, the California Supreme courts have saddled themselves with the judicially created concept of non-statutory manslaughter and its attendant problems. It is not yet clear how much significance the source of the impairment (alcohol, drugs, mental disturbance not amounting to insanity) may have on the operation of the defense, nor what degree of impairment must be shown in each case; in addition, there is, inevitably, considerable over-

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38. People v. Nance, 25 Cal. App. 3d 925, 102 Cal. Rptr. 266 (1972); Committee on Standard Jury Instructions of the Superior Court of Los Angeles County, California, California Jury Instructions, Criminal No. 3.35 (1970); 13 Santa Clara Law. 249 (1972).


40. People v. Ray, 14 Cal. 3d 20, 533 P.2d 1017, 120 Cal. Rptr. 377 (1975) (involuntary manslaughter); People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966); Comment, Diminished Capacity: The Middle Ground of Criminal Responsibility, 15 Santa Clara Law. 911 (1975) [hereinafter cited as Middle Ground].

41. See People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966); Middle Ground, supra note 40, at 922-24.
lap and confusion (indeed, possible conflict) with the separate but related defenses of insanity and unconsciousness. The result is that the scope and mechanics of the diminished capacity defense are as yet ill-defined.42

While recent decisions of the California Supreme Court appear to be broadening the concept beyond the relatively rigid framework of the specific intent exception,43 a more straightforward solution would seem preferable to the complicated, piece-meal diminished capacity approach.

The dilemma, then, can be summarized as follows: hypothetical defendant X shot victim Y while in an irrational state of mind. Because the irrationality was the product of a culpable act—use of a hallucinatory drug with knowledge of the risk—he is not entitled to a complete defense. Yet some mitigation is warranted: clearly his criminal guilt is not as great as that of one who commits murder while free from any abnormal mental condition. Can the issues be formulated in such a way that these facts are the focus of the adjudication of guilt? Can the law provide for a realistic assessment of the defendant's criminal responsibility and a punishment commensurate with that responsibility?

III. PROPOSAL: INTOXICATED OFFENDER STATUTES

The suggested approach is to develop statutory crimes in which criminal conduct while in a state of drug (or alcohol) intoxication amounting to irrationality is treated much like criminal recklessness or gross negligence. One analogy is the causing of death or bodily injury by reckless driving.

Specifically, the jury in a criminal case involving self-induced intoxication should be asked to resolve two questions: (1) Was the defendant's mind at the time of the act so disabled that he could not think or act rationally?44 If the jury finds that

42. See People v. Ray, 14 Cal. 3d 20, 533 P.2d 1017, 120 Cal. Rptr. 377 (1975); People v. Mosher, 1 Cal. 3d 379, 461 P.2d 659, 82 Cal. Rptr. 379 (1969); People v. Long, 38 Cal. App. 3d 680, 113 Cal. Rptr. 530 (1974); Mental Disabilities, supra note 1; Comment, Keeping Wolff from the Door, 60 Calif. L. Rev. 1641 (1972); Middle Ground, supra note 40, at 930-37.

43. See People v. Poddar, 10 Cal. 3d 750, 518 P.2d 342, 111 Cal. Rptr. 910 (1974); People v. Sedeno, 10 Cal. 3d 703, 518 P.2d 913, 112 Cal. Rptr. 1 (1974). The court appears to hold in these cases that if a person was irrational at the time of the criminal act he is not fully responsible for that act.

44. The trial judge in Brinkley v. United States, 498 F.2d 505, 513 n.4 (8th Cir. 1974) (emphasis added), gave this charge: "'[f] if the act or acts charged as a crime or as crimes are such acts as to require the acting party to think rationally or to form a
defendant was irrational, defendant is not guilty of the crime charged. However, the jury must then ask (2) Was defendant rational when he voluntarily took the drug, believing it to be a consciousness-altering substance? If so, then he is criminally responsible for the danger he risked and the resulting harm. He should be found guilty of the statutory crime of causing harm while voluntarily irrational, and he should be punished for it, although the penalty should be less severe than for the principal crime.

There is no problem, in principle, in establishing appropriate statutory crimes embodying this concept. Similar proposals have been made in connection with alcohol intoxication.

specific intent, and if his faculties are so impaired by drug use that he cannot think or act rationally . . . then he is not responsible criminally." Those parts of the charge emphasized here capture the essential nature of the proposal made in this article insofar as the concept of irrationality is concerned. However, the present thesis rejects the Brinkley judge's conclusion that if, by reason of drug impairment the defendant was irrational, he should be found totally non-responsible.

It was noted above, see note 6 supra, that the effect of any drug on any person may vary considerably. It is therefore up to the jury to decide whether, in the case before it, the ingestion of a drug resulted in irrationality in that defendant. Even those drugs known as "euphorics" can result in irrationality at times; for example, marijuana, normally an euphoric, can result in acute psychotic reactions characterized by paranoia and hallucinations. Pharmacology, supra note 6, at 348. Therefore, the logic suggested here applies in principle to any drug ingested voluntarily, although irrationality will most commonly occur in conjunction with the hallucinogenic drugs such as LSD and the amphetamines.

This basic concept is developed more fully in Mental Disabilities, supra note 1.

Glanville Williams has proposed as a solution "a new statutory offense of being drunk and dangerous (to person or property); and it should be possible to convict of this offense on any charge of inflicting or attempting to inflict injury to the person or damage to property where the defense is one of drunkenness as negativing mens rea." G. WILLIAMS, THE MENTAL ELEMENT IN CRIME 46 (1965). The proponents of the Model Penal Code have suggested a section somewhat along the lines proposed here: "Recklessly Endangering Another Person: A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury." MODEL PENAL CODE § 211.2 (Proposed Official Draft 1962). The revised New York Penal Law states similarly that a "person is guilty of reckless endangerment in the second degree when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another." N.Y. PENAL LAW § 120.20 (McKinney's 1975).

There is, however, a major difference between the approach taken by the two sections above and the approach proposed here. The basis for creation of a statute under the thesis herein presented is that some harm must have occurred as a result of the "recklessly endangering" situation. Simply being in a condition where one might cause harm is punishable under the New York and Model Penal Code provisions. On the question of whether simple risk-creation, without reference to actual result, should warrant penal sanctions, see S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 821-28 (1969), and Wechsler, The Challenge of a Model Penal Code, 65 HARV. L. REV. 1106-07 (1952).
A public policy similar to the one proposed here would seem to be the guiding philosophy behind statutes specifically formulated to deal with vehicular injury or homicide. A brief examination of this area of the law is revealing. Using California statutes for models, one sees that vehicular manslaughter, although defined as a third category of manslaughter,18 fits the classic definition of involuntary manslaughter. However, when death is caused by an automobile rather than by some other instrumentality, the defendant is punishable by a maximum five-year sentence, as compared with the 15 years prescribed for conduct that falls within the traditional manslaughter categories.19 This marked difference in punishment reflects a policy decision by the legislature that killing unintentionally with a vehicle, although serious, is less heinous than other kinds of manslaughter. The legislature undoubtedly felt that juries would be extremely reluctant to convict a person of manslaughter as the result of a vehicular homicide if the jurors knew that a severe penalty was possible—as they resist convicting an intoxicated offender when they know a heavy penalty is possible.20

Public policy is reflected in another way by the vehicle code section which makes reckless driving that causes bodily injury punishable by a maximum of six months imprisonment.21 This statute appears to provide the prosecutor with a choice: if the injury was not serious but was culpably—that is, recklessly or negligently—caused, or if the injuries resulted in death but were not caused by gross negligence, the lesser penalty under the vehicle code section can be sought. Punishment

48. [Cal. Pen. Code § 192 (West 1970) provides in part:
   Manslaughter is the unlawful killing of a human being, without malice. It is of three kinds:

   2. Involuntary—in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

   3. In the driving of a vehicle—

      (a) In the commission of an unlawful act, not amounting to felony, with gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.

      (b) In the commission of an unlawful act, not amounting to felony, without gross negligence; or in the commission of a lawful act which might produce death, in an unlawful manner, but without gross negligence.


is imposed for the act of driving recklessly and causing harm, but the comparatively light sentence overcomes public resistance to imprisoning a driver for years because he had the misfortune to hit someone while driving carelessly.

The policy effectuated by these two statutes is essentially the same one offered here as the basis for intoxicated offender laws: where there is a risk-taking situation, where a person has acted carelessly, recklessly or with gross negligence, and where harm occurs as a result of that risk-filled behavior, a certain minimal punishment is necessary regardless of the actual state of mind of the defendant at the time the act was committed.51 While society recognizes a moral obligation to judge an offender's conduct in light of his capacity to perceive and comply with his social duty, it should and must exact a penalty from persons who impair that capacity voluntarily and with reckless disregard for possible consequences.

Traditional approaches to the problem of criminal responsibility do not offer an appropriate method for assessing the culpability of the drug-intoxicated offender. The statutory system proposed here would adequately reflect the risks assumed and allow for punishment commensurate with the resulting harm, without requiring judges and juries either to close their eyes to the facts, or to distort legal doctrines that were not designed to deal with the peculiar problems created by consciousness-altering drugs.

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51. There are, of course, rare cases in which the defendant is proved to have intentionally induced the intoxicated state for the purpose of facilitating the very offense charged, as in the case of a person who took a drug to give himself "Dutch courage." In such cases the entire series of events properly has been viewed as a single, continuous act for the purpose of proving the crime charged. Cf., e.g., these English cases: Attorney-General for Northern Ireland v. Gallagher, [1963] A.C. 349 (H.L.); Thabo Meli v. Regina, [1954] 1 All E.R. 373 (P.C.) (Basutoland). See also H. Hart & A. Honore, Causation and the Law 70, 292, 301 (1959).