THE MENTALLY IMPAIRED AND VOLUNTARILY INTOXICATED CRIMINAL OFFENDER

United States v. Jewett, 438 F.2d 495 (8th Cir.), cert. denied, 402 U.S. 947 (1971)

Jewett, an American Indian with an I.Q. of 70,[1] had received extensive treatment for a traumatic brain injury. He was subject to epilectic seizures which were controlled by medication, and he was described as a periodic drinker[2] with an explosive personality. He was sane except during violent psychotic episodes triggered by drinking. During these episodes he was unable to distinguish right from wrong, but he ". . . possessed sufficient awareness, intelligence and mental capacity when he was not drinking to be aware of the effect alcohol . . . [had] . . . on him . . . and he had the ability to exercise a choice as to whether or not to drink alcoholic beverages. . . ."[3] After spending three and one half years in a mental hospital between 1964 and 1969, he was discharged as sane. Six months after his discharge he went to the home of a friend and, without provocation, ordered everyone present to leave. In a psychotic state resulting from drinking, he beat to death the one person who refused to leave.[4] His conviction for murder in the second degree[5] was affirmed by the United States

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1. Based on this I.Q., Jewett would be in a class designated as "borderline mental retardation." *See* DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, AMERICAN PSYCHIATRIC ASSOCIATION 14 (2d ed. 1968).

2. A "periodic drinker" is not a chronic alcoholic by most authorities. *See, e.g.*, F. GRAD, A. GOLDBERG, AND B. SHAPIRO, ALCOHOLISM AND THE LAW 39-46 (1971).

3. United States v. Jewett, 438 F.2d 495, 497 (8th Cir.), *cert. denied*, 402 U.S. 947 (1971).

4. Evidence that Jewett was intoxicated was based upon testimony by four arresting officers that "they smelled liquor on his breath; that defendant staggered; that he was glassy eyed, and that his speech was slurred." *Id.* at 498.

The only psychiatrist to testify was the head of the South Dakota Mental Hospital where Jewett had been hospitalized. He stated that Jewett was unable to distinguish right from wrong at the time of the killing. However, it should be noted that expert opinion as to insanity is not binding on the trier of fact. Dusky v. United States, 295 F.2d 743, 754 (8th Cir. 1961).

5. Jewett was charged with violating 18 U.S.C. § 1111 (1970), which reads:

> Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of will-

Court of Appeals for the Eighth Circuit. *Held*: insanity induced by voluntary intoxication is no defense to a crime requiring a general intent if the defendant is aware of the effect that drinking has on him.[6]

The law does not treat an accused who is insane at the time he commits the *actus reus* of a crime the same as it does one who is voluntarily intoxicated. An accused who is insane is acquitted on the ground that his state of mind precludes the *mens rea* required for guilt.[7] An accused who is voluntarily intoxicated is not relieved of responsibility for his conduct;[8] however, when the existence of a specific purpose or

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ful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree. . . .

Under 18 U.S.C. § 1153 (1970), federal courts are given jurisdiction over certain major crimes committed by Indians in Indian country.

Jewett also appealed the admission of certain evidence to establish the jurisdiction of the federal court and argued that the Indian title to the land upon which the crime was committed had been extinguished. The court held that admission of the realty officer's testimony, which may have been secondary evidence, was within the discretionary limits of the trial judge and was sufficient to establish Indian title to the land. 438 F.2d at 497.

6. 438 F.2d at 499.

The evidence was undisputed that the defendant had the ability to exercise a choice whether to drink, but it is not clear whether this fact is essential to the holding. Had the defendant been a "chronic alcoholic" and therefore unable to exercise a choice, it is probable that the court would have reached the same result. The basis for the same result would be the Supreme Court's rejection of the contention that chronic alcoholism is a disease. *See* Powell v. Texas, 392 U.S. 514 (1968). For a collection of authorities who view alcoholism as a disease, *see* Easter v. District of Columbia, 361 F.2d 50, 56 (D.C. Cir. 1966) (Appendix A).

7. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 449 (2d ed. 1960). Several legal tests exist to measure insanity, and the Eighth Circuit has approved all but the *Durham* rule. Beardslee v. United States, 387 F.2d 280, 295 (8th Cir. 1967). In *Pope v. United States*, the court formulated a test based upon three factors: The defendant's cognition, volition, and capacity to control his behavior. 372 F.2d 710, 734-35 (8th Cir.), *vacated on other grounds*, 392 U.S. 651 (1967).

8. R. PERKINS, CRIMINAL LAW 894 (2d ed. 1969). In Kane v. United States, 399 F.2d 730, 736 n.10 (9th Cir. 1968), *cert. denied*, 393 U.S. 1057 (1969), the court stated:

> We refer to this [the voluntary intoxication rule] as the general rule because it is the settled view of the common law and is articulated in the statutes of some twenty states. See American Law Institute, Model Penal Code, Tentative Draft No. 9, May 8, 1959, Comments following Section 2.08. It is also the rule by judicial decision in the federal courts.

This rule is based upon three considerations: drunkenness can be easily feigned; the drunk is a threat to society; and many crimes are committed by persons under the

intent is necessary for a crime or for a particular degree of a crime, the "exculpatory rule" allows evidence of intoxication to be admitted to vitiate the required special mental element.[9] A state of mind created by voluntary intoxication is not a major mental disorder or disease which amounts to legal insanity, and "the courts . . . have taken little or no notice of modern medical attitudes toward alcoholism as a disease, but have usually assumed that the intoxication must be treated as voluntary for purposes of determining criminal guilt, no matter how compulsive the accused's addiction to alcohol may have been."[10] But many alcoholics and addicts become insane as a result of their long-term over-indulgence. Thus, when drunkenness or addiction merges with insanity, the accused will not be convicted because "the law takes no notice of the cause of insanity."[11]

The "diminished capacity rule" permits a defendant to introduce evidence of an abnormal mental condition, not amounting to legal in-

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influence of alcohol. Note, *Volitional Fault and the Intoxicated Criminal Offender,* 36 U. CIN. L. REV. 258, 268 (1967). *See also* G. WILLIAMS, CRIMINAL LAW 560 (2d ed. 1961); Note, *Mental Disorders and Criminal Responsibility: The Recommendations of the Royal Commission on Capital Punishment,* 33 TEXAS L. REV. 482 (1955).

> [I]t is only where the alcohol is introduced into the accused's system by force majeure that the intoxication would be regarded as involuntary for the purposes of the application of these rules.

438 F.2d at 499, *quoting* Utsler v. State, 84 S.D. 360, 364, 171 N.W.2d 739, 741 (1969), *citing* 8 A.L.R.3d 1236, 1239 (1966).

9. Goings v. United States, 377 F.2d 753, 757 (8th Cir. 1967); *see* Comment, *Intoxication as a Criminal Defense, 55* COLUM. L. REV. 1210 (1955). The exculpatory rule is in effect in all federal courts. Tucker v. United States, 151 U.S. 164, 169 (1894); Hopt v. Utah, 104 U.S. 631, 634 (1894).

The usual effect of the rule in first-degree murder cases is to reduce the offense to second degree murder, which only requires a general intent. A minority of courts, however, have used the exculpatory rule as the basis for reducing first degree murder to the lesser included offense of voluntary manslaughter. *E.g.,* Ray v. State, 257 Ala. 418, 59 So. 2d 582 (1952); State v. Sprouse, 63 Idaho 166, 118 P.2d 378 (1941). This was the effect of the rule at common law where there were no degrees of murder. R. PERKINS, CRIMINAL LAW 70 (2d ed. 1969).

In Section 2.08 of the Model Penal Code, the formulators give recognition to the exculpatory rule, but in the Comment to the section some writers support a minority position on the basis that the distinction between specific and general intent is "obscure and unanalyzed." The minority suggest that the intoxicated offender may be incapable of entertaining the malice aforethought necessary in the general intent crime of second degree murder. MODEL PENAL CODE § 2.08, Comment (Tent. Draft No. 9, 1959). *See* notes 12-14 *infra* and accompanying text.

10. 438 F.2d 499, *citing* Utsler v. State, 84 S.D. 360, 364, 171 N.W.2d 739, 741 (1969). *See also* Annot., 8 A.L.R.3d 1236, 1239 (1966).

11. R. PERKINS, CRIMINAL LAW 906 (2d ed. 1969).

sanity, in order to show that he did not have the special mental element which is required for particular crimes.[12] The distinction between this rule and the exculpatory rule is that evidence other than that of intoxication may be introduced. The purpose of the diminished capacity rule is to reduce the criminal responsibility of those persons who are only partially capable of controlling their behavior.[13] In a prosecution for first degree murder, for example, evidence of diminished capacity, whether caused by trauma, disease, or intoxication, would be admissible to negate the specific intent element of the crime, *i.e.*, premeditation and deliberation. In some jurisdictions, where malice has been recognized as the specific mental state for both degrees of murder, evidence of diminished capacity has been admitted, as a logical extension of the rule, to negate the malice requirement.[14]

There are other situations in which the law has held an accused responsible for his criminal conduct although he did not have control of

12. People v. Wells, 33 Cal. 2d 330, 202 P.2d 53 (1949), *cert. denied*, 338 U.S. 836 (1949); People v. Gorshen, 51 Cal. 2d 716, 336 P.2d 492 (1959). *See* cases collected in Annot., 22 A.L.R. 3d 1228, 1246 (1968).

13. A. GOLDSTEIN, THE INSANITY DEFENSE 195 (1967).

14. California has been the forerunner in this area. In People v. Conley, 64 Cal. 2d 310, 411 P.2d 911, 49 Cal. Rptr. 815 (1966), the defendant was convicted of first degree murder despite evidence of intoxication. Justice Traynor, speaking for the court, held that it was error not to instruct the jury on voluntary manslaughter. He reasoned that the special mental state in murder is malice aforethought and that evidence of intoxication is admissible to show that the defendant did not act with malice. The California Appeals Court later extended the *Conley* holding to second degree murder. In People v. Harris, 7 Cal. App. 3d 922, 87 Cal. Rptr. 46 (1970), the court held that evidence of diminished capacity may be used to show that the defendant did not have the malice aforethought necessary for second degree murder. The significant aspect of California's diminished capacity doctrine is that it recognizes malice aforethought as the distinct mental state which may be negated at the time of the *actus reus*.

The *Conley* case in effect recognizes an additional type of manslaughter not in the statutes. This type may be intentional, voluntary, deliberate, premeditated, and unprovoked, but which differs from murder because the element of malice is rebutted by a showing that the defendant's mental capacity was impaired by intoxication, 3 LOYOLA U. L. REV. (L.A.) 153, 157 (1970). *See also* People v. Moles, 10 Cal. App. 3d 614, 89 Cal. Rptr. 226 (1970) (holding that diminished capacity reduces the crime of murder to manslaughter) and cases cited in Annot., 22 A.L.R. 3d 1228, 1252-53 (1968).

It should be noted that in those jurisdictions which only have one degree of murder, sufficient evidence of diminished capacity will reduce the murder charge to manslaughter. For a general discussion of diminished capacity, *see* Cooper, *Diminished Capacity*, 4 LOYOLA U. L. REV. (L.A.) 308 (1971); Leib, *Diminished Capacity: Its Potential Effect in California*, 3 LOYOLA U. L. REV. (L.A.) 153, 157 (1970); Note, *Punishment Rationale for Diminished Capacity*, 18 U.C.L.A. L. REV. 561 (1971).

his mental faculties at the time of the *actus reus*. *State v. Gooze* involved an automobile accident which resulted in the death of another driver when the defendant was driving with knowledge that he was subject to a sudden blackout at any time.[15] The court found that he had committed an act of "wantonness with a disregard for the rights and safety of others" and affirmed his conviction.[16] Although the defendant in *Gooze* was guilty of "culpable negligence", an important aspect of the case is the court's focus on the defendant's knowledge of his condition. In *Edwards v. State* the defendant, driving while intoxicated, ran over a highway patrolman who was standing on the edge of the highway.[17] The court stated that it was "inconceivable" that a person would drink without realizing he would eventually become intoxicated. Because he drank with the knowledge that he would later drive home and that such conduct would be perilous to human life, the court held it permissible for the jury to imply a "high degree of conscious and wilful recklessness" constituting malice.[18] His conviction for second degree murder was affirmed.

In the principal case Jewett's sole defense was insanity. Over objection by the defense, the jury was instructed on both voluntary intoxication and insanity.[19] Jewett argued that the voluntary intoxication

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15. 14 N.J. Super. 277, 81 A.2d 811 (1951).

16. *Id.*

17. 202 Tenn. 393, 304 S.W.2d 500 (1957).

18. *Id.* at 395, 304 S.W.2d at 503.

The general rule on epileptics is that they are not responsible for their actions when they are experiencing the effects of seizure. *See* People v. Baksys, 26 A.D.2d 648, 272 N.Y.S.2d 488 (1966). However, if they know they have a history of epilepsy and take the risk of driving a car, they are guilty of criminal negligence. *See* People v. Decina, 2 N.Y.2d 133, 138 N.E.2d 799 (1956). If the epileptic has no prior knowledge of his condition, he is acquitted. *See* People v. Freeman, 61 Cal. App. 2d 110, 142 P.2d 435 (1943).

But see Fain v. Commonwealth, 78 Ky. 183, 39 Am. R. 213 (1879). The court held that Fain was not responsible for killing a man because he was unconscious at the time of the crime and therefore had committed no voluntary act. Fain had knowledge that he was a sleepwalker who often became violent when awakened, and, on this occasion, he had gone to sleep in a hotel lobby with two pistols next to him.

19. The court gave the following instruction on voluntary intoxication:

> If you find that the defendant was legally insane at the time the criminal act he is charged with occurred, but you find beyond a reasonable doubt that his mental disability was the result of his voluntarily drinking alcoholic beverages, and if you further find beyond a reasonable doubt that he was aware of the effects of his drinking alcoholic beverages, then the defendant's mental disability does not relieve him of criminal responsibility.

438 F.2d at 497.

The jury was given *M'Naughten* instructions on insanity. *M'Naughten* has been

instruction was inappropriate because his consumption of alcohol was simply one of several causal factors of his insanity. The court of appeals emphasized the psychiatrist's affirmative answer to the question ". . . is the alcohol a necessary and vital ingredient in order for the defendant to become psychotic?"[20] This fact, plus evidence that Jewett could exercise a choice whether to drink and had knowledge of the effect of alcohol on him, was sufficient for the court to affirm the use of the voluntary intoxication instruction.

Under this theory, the malice requirement of second degree murder is implied from the defendant's voluntarily placing himself in a particular condition knowing that he might then become violent and cause great bodily harm.[21] Jewett's position is similar to the person with recurring blackouts in *Gooze* and the intoxicated driver in *Edwards*.[22] There does not appear to be justification for treating the three cases differently; but the person with recurring blackouts was convicted of culpable negligence while the other two were convicted of second degree murder. It has been suggested that "the character and degree of risk distinguishes criminal from non-criminal negligence, whereas awareness of the risk distinguishes murder from manslaughter."[23] The same writers, however, concede that awareness of the risk may be required for manslaughter as well as murder.[24] They conclude that, because of the difficulty in determining degrees of risk, "the jury may be expected in many cases to do no more than ask itself whether the particular behavior should be punished."[25] This conclusion is supported by the three cases discussed because society is likely to attribute less blame to the epileptic subject to blackouts than to the intoxicated offender.

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abandoned in most circuits because the test fails to include "those who to some extent can differentiate between right and wrong, but lack the capacity to control their acts to a substantial degree". Wechsler, *The Criteria of Criminal Responsibility*, 22 U. CHI. L. REV. 367 (1955). However, the issue over the validity of the *M'Naughten* test is moot in this case, because there is little doubt that Jewett would have been legally insane under *any* test.

20. 438 F.2d at 498. It should be noted that one who is described as mentally ill by a psychiatrist will not be necessarily be found legally insane.

21. Deddens, *Volitional Fault and the Intoxicated Criminal Offender*, 36 U. CIN. L. REV. 259, 262 (1967).

22. *See* notes 15 and 18 *supra* and accompanying text.

23. Wechsler and Michael, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 721 (1937).

24. *Id.* at 722.

25. *Id.*

By focusing on the defendant's voluntary intoxication, a court is able to reach a result without considering the defendant's mental problems which fall short of legal insanity. Such a disposition may find the defendant responsible for a more serious crime than his mental state warrants. The advantage of the diminished capacity rule is that it provides for greater flexibility in determining the degree of guilt and, consequently, the sentence.[26] Despite this advantage, the diminished capacity rule would not have changed the result in the principal case unless the Eighth Circuit also recognized malice aforethought as "a special mental element" in second degree murder.[27] The diminished

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26. Professor Hall has attempted to justify the lack of intermediate areas between legal sanity and insanity by stating that the principles of legality—the "rule of law"—is a limitation on penalization by the state's officials, and this limitation may only be effectuated by the prescription and application of specific rules:

> The issue of the rule of law is involved in the criticism of the legal classification of defendants as either "sane or insane." This "black or white" business, say some psychiatrists, files in the face of the known facts—the intermediate grays, the hardly perceptible differences forming an unbroken continum between the ideal extremes. But a legal order, unlike the specific findings of unfettered experts, requires generalizations describing classes of persons, conduct, harms, and sanctions. Given such a class, it follows inexorably that any "item," e.g., a mental condition, falls within the class or it falls outside it, if only by a hair's breadth. The same holds equally for the classes of data defined in any science or discipline, and the difficulties encountered by psychiatrists in reaching agreement on a sound classification of the psychoses aptly illustrate the limitations that are inherent as well in legal systems. These limitations, as regards legal classification, could not be met by adding a class of the "partially responsible," for there would still be intermediate between the three classes. And so it would continue, no matter how many classes were provided.

J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 461 (2d ed. 1960). He has stated, however, that among those who are sane and legally responsible, there are degrees of mental impairment which ought to be accounted for at least in the imposition of sentence. *Id.* at 461-62.

27. *See* note 14 *supra* and accompanying text.

The distinction between general and specific intent, which traditionally forms the boundary lines for both the exculpatory and the diminished capacity rules, is subject to criticism:

> And whatever else may be said about intention, an essential characteristic of it is that it is directed towards a definite end. To assert therefore that an intention is "specific" is to employ a superfluous term just as if one were to speak of a "voluntary act." It follows also that if some intentions are to be distinguished from others, the criteria selected to do that must be coherent with the specificity of all intentions. This provides one guide to a critical reading and improvement of current professional discourse in terms of "general intent" and "specific intent". Insofar as these terms are used to refer to actual intentions, both of them are unfortunate, and the adjectives should be discontinued.

J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 142 (2d ed. 1960).

capacity rule has been criticized because under the rule the mentally deficient, who may be potentially dangerous, is convicted of a lesser crime and is thereby free after a relatively short term to prey again upon society.[28]

The distinction between voluntary intoxication and insanity resulting from a long-continued overindulgence has been criticized because more fault may be found in the "long-continued overindulgence than in a single debauch" and both are the result of voluntary conduct by the actor.[29] Nevertheless, the distinction survives, and its survival may be attributed to the ease with which *mens rea* can be found in the single episode. The application of these rules to the principal case reflects a conflict between the theory and objectives of the criminal justice system and its practice. Perhaps cases such as *Jewett* should focus more on a disposition which is consistent with these objectives. By applying any of the rules available, *Jewett*'s disposition would have resulted in incarceration in a penal or correctional facility, and it is this determination which should be questioned in light of the criminal law's trend toward rehabilitation.[30]

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28. A. GOLDSTEIN, THE INSANITY DEFENSE 199-202 (2d ed. 1970). *See also* Note, *Defense of Insanity: Partial Responsibility: Adequacy of Present Law*, 43 CORNELL L. REV. 283, 286 (1957):

> In such a case (partial responsibility) the punishment prescribed by the Law is inflicted, but the length of the term is greatly cut down. It is because of this feature that there have occurred, and in fact occur every day, instances of homicidal criminals and incendiaries, monomaniacs perhaps, but nevertheless extremely dangerous offenders, escaping with a sentence of a few years prison.

Some writers have answered this concern with the proposal that confinement in a mental institution should follow release from prison. *See, e.g.*, Note, *Volitional Fault and the Criminally Intoxicated Offender*, 36 U. CIN. L. REV. 258, 278 (1967). Justice Marshall points out in Powell v. Texas, 392 U.S. 514, 528 (1968), however, that our public mental institutions are not only terribly overcrowded, but, in many ways, are not too different from prison. *See* note 30 *infra.*

29. R. PERKINS, CRIMINAL LAW 906 (2d ed. 1969).

30. It must be pointed out, however, that the placing of a mentally deficient offender in a mental hospital may do little to solve the offender's problem; in fact, it is likely that he will not fare very differently from the man who is sane and guilty:

> . . . [H]e must weigh those advantages [of the insanity defense] against the fact that his detention is for an entirely indeterminate period; that he may be kept in a hospital as long as or longer than he would have remained in prison; and that being regarded as mentally ill may bring him as much stigma, economic deprivation, family dislocation, and often as little treatment or physical comfort as being a criminal.

A. GOLDSTEIN, THE INSANITY DEFENSE 20 (2d ed. 1970).

When alcoholism is involved, as in the principal case, there is the additional problem

that "there is as yet no known generally effective method for treating the vast number of alcoholics in our society". Powell v. Texas, 392 U.S. 514, 527 (1967).

When one considers the above factors, the whole debate over "what is a proper disposition?" may be viewed as moot. If so, attention should be focused on the efficacy of our correctional and rehabilitative institutions.