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DEATH IN THE DESERT: A NEW LOOK AT THE INVOLUNTARY INTOXICATION DEFENSE IN NEW MEXICO

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In 1999, as many as 287,130,879 individuals visited America's national parks searching for beautiful scenery, majestic wildlife, and an escape from their home surroundings.¹ For one of those visitors, David Coughlin, who intended to camp a single night in New Mexico's Carlsbad Caverns National Park,² his park experience was not a relaxing vacation, but a fatal nightmare. The incredulous circumstances of Coughlin's murder attracted national attention and prompted the trial court to reexamine traditional legal doctrines that determine criminal culpability.

Located in southeastern New Mexico, Carlsbad Caverns National Park features a large underground cave and over thirty-thousand acres of rugged backcountry wilderness.³ Although the park's feature attraction, its underground cave, is accessible by well-marked paved walkways and elevators, the park's vast wilderness area contains undeveloped hiking trails, as well as remote and challenging desert terrain.⁴

One of the most bizarre episodes in the national park system's history began on August 4, 1999, when two young men from the east coast, David Coughlin and Raffi Kodikian, arrived at Carlsbad Caverns. They entered the park in the early evening intending to camp one night and then visit the park's famous cavern the next morning.⁵ Three days after their arrival at the park, Coughlin wrote the following entry in his journal:

Nobody has come. We were planning to die. We mustered all our strength, we had no food or water. Nobody has come. We went back to camp in hopes the St. Nicklas would have fuckin shown up. Nobody had come. No water was left. We thought we had found the way and set off Sat. (today). Wasn't it.⁶

I. INTRODUCTION

One day after that journal entry, on August 8, 1999, a National Park Service volunteer at Carlsbad Caverns discovered a parked car at the Rattlesnake Canyon trailhead in a remote area of the park infrequently visited by tourists. The volunteer

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1. NATIONAL PARK SERVICE, *Info Zone: Frequently Asked Questions About the National Park Service* available at <http://www.nps.gov/html> (last visited Dec. 30, 2000) [hereinafter NPS Website].

2. Carlsbad Caverns National Park is located in the Chihuahuan Desert in southeastern New Mexico. See UNITED STATES DEPT. OF INTERIOR, CARLSBAD CAVERNS BROCHURE.

3. NPS Website, *supra* note 1, *Carlsbad National Park, National Resources: Wilderness: Visit Your Parks*.

4. *Id.*

5. Audio Tape: Testimony of Raffi Kodikian, *State v. Kodikian*, Fifth Judicial District, County of Eddy, No. CR-99-232 WF, Sentencing Hearing (May 9, 2000) (Tape 11 of 18) (on file with author) [hereinafter Kodikian Testimony].

6. Journal of David Coughlin and Raffi Kodikian (Aug. 7, 1999 entry by David Coughlin) (on file with author) [hereinafter Coughlin-Kodikian Journal].

knew that four days previously on August 4, 1999, two men had applied for a one-day backcountry permit⁷ to use that trail.⁸ Sensing trouble, albeit belatedly, the volunteer and a park ranger organized a search down the trail looking for the lost hikers.⁹ Twenty to thirty minutes into the search, the search party found one of the hikers, twenty-five-year-old Raffi Kodikian, lying under a tarp in the hot summer desert sun approximately 100 feet from the trail.¹⁰ When Ranger Lance Matteson approached Kodikian, the first words that Kodikian uttered were, "Tell me that you brought water."¹¹ Kodikian gulped water from the canteen that Matteson gave him but could not hold the water down.¹²

Mere yards from Kodikian's tarp was a rock-covered grave that contained the body of the second hiker, David Coughlin, Kodikian's close friend.¹³ Near the grave were the partially completed letters "S.O.S." spelled out with a constellation of large rocks.¹⁴ Kodikian told Matteson that Coughlin had asked him to kill him because he was in intense pain.¹⁵ On their first night, before they even finished hiking to the campsite, the men consumed one-half of their water supply.¹⁶ Once they arrived at the campsite, Coughlin and Kodikian used another one-fourth of their water supply to cook hotdogs.¹⁷ By the morning of August fifth, they had completely run out of water.¹⁸

Although Kodikian and Coughlin were well-educated college graduates,¹⁹ they had grown up on the east coast and were unfamiliar with the hostile desert terrain

7. The park requires that all individuals hiking or camping in remote areas of the park apply for a permit at the park's visitor center. Visitors are required to return the permit at their trip's completion. See NATIONAL PARK SERVICE, CARLSBAD CAVERNS NATIONAL PARK, BACKCOUNTRY USE POLICY 1 (on file with author) [hereinafter BACKCOUNTRY USE POLICY].

8. Audio Tape: Testimony of John Keebler, State v. Kodikian, Fifth Judicial District, County of Eddy, No. CR-99-232 WF (May 8, 2000) (Tape 3 of 18) (on file with author) [hereinafter Keebler Testimony].

9. Lance Matteson, Ranger, Report: Incident on 8-8-99—Overdue Hikers 1 (Aug. 8, 1999) (on file with author) [hereinafter Matteson Report].

10. The law enforcement officers involved in the investigation could not understand how the two campers could not find the trailhead; however, the park's own literature states, "The maze of canyons found in the park can be very confusing and it is easy to become lost unless you have a topographic map of the area." BACKCOUNTRY USE POLICY, *supra* note 7, at 1.

11. Matteson Report, *supra* note 9, at 1.

12. Audio Tape: Testimony of Lance Matteson, State v. Kodikian, Fifth Judicial District, County of Eddy, No. CR 99-232 WF (May 8, 2000) (Tape 2 of 18) (on file with author) [hereinafter Matteson Testimony].

13. Interview by Special Agent John K. Andrews, Federal Bureau of Investigation, with John Keebler and Lance Matteson, in Carlsbad, New Mexico 4-5 (Aug. 9, 1999) (on file with author) [hereinafter Keebler/Matteson Interview].

14. Eddy County Sheriff's Dept., Captain Eddie Carrasco, Case No. 99-2713, Supplemental Report 3 (Aug. 8, 1999) (on file with author) [hereinafter Carrasco Report].

15. Keebler/Matteson Interview, *supra* note 13, at 9.

I did ask him about the strange lacerations on his wrist and he said him and his buddy, his buddy was in terrible pain, he was just miserable and his buddy asked him to end it. And they got knives [sic] and he said, he looked down at his wrist looking at the lacerations that I identified and he said my knife was duller than his, that is why I'm alive.

Id.

16. Kodikian Testimony, *supra* note 5.

17. *Id.*

18. *Id.*

19. Bill Gifford, *Strange Mercy*, PHILADELPHIA MAG. May 2000, at 88, 89.

that consisted mainly of a rocky landscape²⁰ covered with mesquite, yucca plants, and rattlesnakes.²¹ Driving cross-country in pursuit of adventure, the men were ill prepared to handle the harsh backcountry. The "trails" through the wilderness area were not marked with signs but rather with small piles of stones known as rock cairns.²² The trail that the men decided to follow descended steeply 670 feet into Rattlesnake Canyon and wound through a canyon floor that was surrounded on all sides by steep hills.²³ The young men spent most of the second day and part of the third hiking up and down steep, rocky ridges trying to find a way out.²⁴ It is probable that they walked past the rock cairn that would have led them to the trail at least fifty times.²⁵ During the days that the men spent lost in Rattlesnake Canyon, the temperatures at the park soared over one hundred degrees.²⁶ By the third day in the desert, they no longer possessed the energy or willpower necessary to hike out of the canyon to safety. Coughlin had begun to experience unbearable, excruciating pain.²⁷ Both men had slash marks on their wrists indicating suicide attempts.²⁸

By Saturday morning, August seventh, Kodikian and Coughlin's physical and mental states were critically affected by dehydration.²⁹ As a dehydrated individual's condition worsens, "the general rule is progressive discomfort leading to severe pain and agony."³⁰ On Sunday morning, a few hours after Kodikian responded to Coughlin's pleas by killing him, one of the rangers who rendered first aid to Kodikian verified that Kodikian was severely dehydrated.³¹

20. National Park Service, Carlsbad Caverns National Park, Case No. 99-0212, Investigative Report—Photographs, (on file with author).

21. BACKCOUNTRY USE POLICY, *supra* note 7, Hiker Safety. "Rattlesnakes are commonly seen, especially in warmer months." *Id.* at 1.

22. CARLSBAD CAVERNS NATIONAL PARK, RATTLESNAKE CANYON TRAIL (handout) (on file with author).

23. *Id.*

24. Kodikian Testimony, *supra* note 5.

25. *Id.*

26. Carrasco Report, *supra* note 14.

27. Kodikian testified that Coughlin spent all of Saturday night vomiting and that mucus began to build up in his mouth to the extent that Kodikian had to reach in and clear Coughlin's throat for him so that he could breathe. Coughlin's muscles cramped so severely that he could not sit or lie down. See Kodikian Testimony, *supra* note 5; see also Letter from Robert Moon, Chief, Natural Resources, Research, and Technology, National Park Service, to Capt. Eddie Carrasco 2-3 (Dec. 14, 1999) (on file with author) [hereinafter Moon Letter]. In commenting on his model predicting how dehydrated both men were, Moon stated, "By Friday, August 6, I assumed significant limitations to their abilities to walk due to dehydration levels of seven to nine percent...."

28. Office of the Medical Investigator, University of New Mexico, Health Sciences Center, Autopsy Report: David Coughlin 2-3 (Aug. 10, 1999) [hereinafter OMI Report]; see also, Matteson Testimony, *supra* note 12.

29. See Moon Letter, *supra* note 27, at 3.

The critical question is the dehydration level, and its physical and psychological impacts, by the morning of August 7. According to the models, both individuals would have been suffering from severe levels (12–13%) of dehydration at the time of the stabbing. At these levels, the body is in a profound state of dysfunction and the ability to think clearly can be severely impaired. In fact, even if reduced walking is maintained throughout the entire time span (8/5–7), dehydration levels could still reach ten percent by Sunday morning. Ten percent is still borderline moderate to severe, with substantial potential for physical and psychological impairment.

Id.

30. *Id.* at 1.

31. Matteson Testimony, *supra* note 12.

When Matteson initially assessed Kodikian's medical condition, he discovered that Kodikian's pulse was 125 beats per minute,³² his skin tented,³³ and he appeared to be weak and disoriented—all classic signs of dehydration.³⁴ The ranger radioed for a medic, fellow ranger Mark Maciha. After Maciha arrived at the scene, he administered an intravenous solution to Kodikian and arranged for Kodikian to be airlifted via a military helicopter to a nearby hospital.³⁵

At the hospital, Emergency Room Physician Mark Hopkins diagnosed Kodikian with hypernatremia or severe dehydration.³⁶ The physician continued Kodikian's intravenous therapy and ordered laboratory tests of his blood chemistry profiles.³⁷ Kodikian's blood chemistry indicated a sodium level of 174, which is well out of the normal range.³⁸ In addition, his BUN³⁹ to creatinine⁴⁰ ratio was 23:1.⁴¹ A ratio greater than 10:1 suggests dehydration.⁴² Three hours after the rangers found him, Kodikian's pulse remained elevated at 120 beats per minute and his body temperature was 102.2 degrees Fahrenheit.⁴³ His hematocrit level, which indicates the percentage of red blood cells in the blood plasma, was 56.9 percent.⁴⁴ By comparing Kodikian's normal sodium and hematocrit levels to his dehydrated

32. *Id.*

33. *Id.* As the body begins to lose water, water dissipates from the skin tissue. When the skin on the back of an individual's hand is pinched, it forms a tent-like shape indicating dehydration. *See also* Audio Tape: Testimony of Mark Hopkins, M.D., State v. Kodikian, Fifth Judicial District, County of Eddy, No. CR-99-232 WF (May 8, 2000) (Tape 6 of 18) (on file with author) [hereinafter Hopkins Testimony].

34. *See* Matteson Report, *supra* note 9.

35. Kodikian received 1.5 liters of an IV solution prior to arriving at the hospital. Audio Tape: Testimony of Mark Maciha, State v. Kodikian, Fifth Judicial District, County of Eddy, No. CR-99-232 WF (May 8, 2000) (Tape 4 of 18) (on file with author).

36. "Hypernatremia" is defined as a serum or plasma sodium concentration greater than 145 mEq/liter. Scott R. Votey, M.D., et al., *Disorders of Water Metabolism: Hyponatremia and Hypernatremia* 7 THE EMERGENCY MEDICINE CLINICS OF NORTH AMERICA 749, 760 (Nov. 1989).

37. Carlsbad Medical Center, Mark Hopkins, M.D., Emergency Physician Record—Raffi Kodikian (Aug. 8, 1999) (on file with author) [hereinafter ER Record].

38. The normal range of sodium is 138 to 148 MMOL/L. *See id.*, Lab Report (Aug. 8, 1999). Scientific studies have confirmed brain damage in hypernatremic individuals with plasma sodium levels in the 160 mm to 190 mm range. *See* J. Carlos Ayus, et al., *Effects of Hypernatremia in the Central Nervous System and Its Therapy in Rats and Rabbits*, 492 J. PHYSIOLOGY 243 (1996).

39. The blood urea nitrogen test "measures renal function and hydration. Urea, the end product of protein and amino acid enters the blood and passes to the kidneys for secretion. The blood urea nitrogen (BUN) is, therefore an indicator of both the metabolic function of the liver and the excretory function of the kidney." M.K. GAEDKE, LABORATORY AND DIAGNOSTIC TEST HANDBOOK 708 (Benjamin/Cummings Publishing 1996) [hereinafter LABORATORY HANDBOOK].

40. The blood test for creatinine evaluates renal function:

The continuous breakdown of the high energy compound creatinine-phosphate creates creatinine as a nonprotein waste product in the skeletal muscle. Creatinine is constantly excreted by the kidneys. A significant increase in this value is seen only when a large number of kidney nephrons have been destroyed, resulting in impaired creatinine excretion.

Id. at 230.

41. *See* ER Record, *supra* note 37.

42. Pretrial Memo from Lillian Burke, M.D., to Shawn M. Boyne (Apr. 29, 2000) (discussing dehydration analysis) (on file with author) [hereinafter Burke Memo].

43. ER Record, *supra* note 37.

44. *Id.*; *see also* LABORATORY HANDBOOK, *supra* note 39, at 373:

The hematocrit (Hct) is a measure of the concentration of red blood cells within the blood volume and is expressed as a percentage. Normal values depend on the ratio of two components, the number of red cells present and the plasma volume, so the hematocrit is also a useful tool in evaluating dehydration.

levels, it can be postulated that Kodikian was at least twenty percent dehydrated when the park rangers found him.⁴⁵ Coughlin's autopsy showed that he was moderately to severely dehydrated when he died from two stabs wounds to the chest.⁴⁶

Despite the medical evidence indicating that Kodikian was severely dehydrated on Sunday, August eighth, when he stabbed and killed David Coughlin, the Eddy County Sheriff's Department moved quickly to charge Kodikian with an open count of murder and secured witnesses who challenged just about every aspect of Kodikian's account of what had happened.⁴⁷ The questions ranged from challenging whether or not the two hikers were indeed lost, to suggesting that Kodikian, who was an aspiring writer, had staged the event to create his first big story.⁴⁸ Ranger Mark Maciha even questioned why Kodikian and Coughlin had not eaten a large can of baked beans found at the campsite.⁴⁹ The most critical questions came from local law enforcement officers who did not believe that Coughlin was near death from dehydration when Kodikian stabbed him.⁵⁰

Although the media quickly labeled this incident as a mercy killing, there is no New Mexico law that excuses murder under the theory of a mercy killing.⁵¹ In addition, the defenses of diminished capacity or inability to form specific intent would have only reduced the crime from first-degree to second-degree murder under New Mexico law.⁵² Given the unique circumstances of the case, as well as the fact

45. As the plasma volume decreases in a dehydrated person, the hematocrit (HcT) increases. Kodikian's normal HcT was 43.5. To calculate the percentage of plasma volume that Kodikian had lost, the following formula was used: $43.5/100 = 56.9/x$. X is the plasma volume needed to bring the HcT to its expected value of 43.5. Since the plasma volume is 100 percent, Kodikian would have had to have a plasma volume of 131 percent of his volume in the emergency room to have his expected normal hematocrit. Therefore, $100/130.8 = 76.5\%$. To calculate the percentage of dehydration: $100 - 76.5\% = 23.5\%$. Similarly, the difference between the serum sodium (Na) levels shows a dehydration level of at least 20 percent when he was in the emergency room. His actual dehydration level at the campsite would have been higher since he had received an IV enroute to the hospital. This analysis was performed by defense expert, Lillian Burke, M.D. See Burke Memo, *supra* note 42.

46. OMI Report, *supra* note 28. Coughlin's blood chemistry profiles taken during the autopsy indicated a serum sodium level of 159, VUN (vitreous urea nitrogen) of 110, and creatinine 5.4. Thus his VUN/creatinine ratio exceeded 20:1, suggesting severe dehydration. See Burke Memo, *supra* note 42.

47. See, e.g., Letter from Sherrie Collins, Chief, Branch of Emergency Services, Grand Canyon National Park, to Eddy County Sheriff's Department: *Causation Factors—Carlsbad Caverns National Park, Raffi Kodikian and David Coughlin* (Nov. 12, 1999) (on file with author) [hereinafter Collins Letter]. Collins states:

This is not typical lost person behavior for grown male adults. In researching background information on other desert searches both here at Grand Canyon and other southwest areas, the behavior of these two individuals is not normal lost person behavior...Kodikian was not in a life threatening state of dehydration (not exceeding 11% water loss) [when found by the rangers].

Id.

48. See, e.g., Gifford, *supra* note 19, at 88 (quoting Eddy County Sheriff Chunky Click, "One person could make another person feel like he was doomed.").

49. See *id.* Ranger Mark Maciha questioned why the young men did not eat a can of baked beans found at the campsite. "This wasn't some little old snack-size can of beanie-weenies....This was a *family-size* can. It was an awful lot of food."

50. *Mass. Man's Defense Ruled Invalid*, ALBUQUERQUE J., Apr. 21, 2000, at B1.

51. See N.M. STAT. ANN. §§ 30-2-5 and 30-2-7 (1994) (defining when homicide is excusable and justifiable in New Mexico).

52. See N.M. U.J.I. CRIM. 14-5110, which allows the defendant to use a defense of "diminished responsibility" when the defendant was intoxicated from the use of alcohol or suffering from a mental disease or disorder. The instruction states:

Evidence has been presented that the defendant was [intoxicated from the use of [(alcohol) (drugs)]] [suffering from a mental disease or disorder]. You must determine whether or not the

that Kodikian's actions did not reflect any evil intent,⁵³ Kodikian's counsel sought to present a defense based on the theory of involuntary intoxication to give the jury a legal basis to completely acquit the defendant. Unlike the diminished capacity defense, in New Mexico, a defense based on the theory of involuntary intoxication can be a defense to the crime of first or second-degree murder.⁵⁴ When defense counsel announced its intention to use this defense, the State objected, and the court scheduled a pretrial hearing to determine whether or not the court would permit the defendant to proceed to trial with this defense.

At the pretrial hearing, defense counsel argued that Kodikian had killed his best friend because his mental state had been significantly altered by severe dehydration. According to the defense, the fact that Kodikian had little water to drink for four days had a toxic effect on Kodikian's brain chemistry, thereby altering his mental state. Unfortunately for the defendant, District Court Judge Jay Forbes denied Kodikian the right to present this defense at trial. The court cited two reasons in its decision. First, the court held that the defense of involuntary intoxication did not apply in this case, because the court concluded the defendant was not intoxicated.⁵⁵ The defendant had not ingested a substance that had altered his mental state. Rather, it was the defendant's failure to ingest a substance, namely water, that altered his mental state.⁵⁶ Second, the court concluded that the defendant knew what he was doing at the time of the incident.⁵⁷ The court's pretrial ruling left Kodikian with only one remaining defense—a defense based on diminished capacity. That defense would leave Kodikian guilty of second-degree murder.

After losing the opportunity to proceed to trial on the theory of involuntary intoxication, the defense feared that the court would sentence the defendant to a lengthy period of incarceration. Based on the court's ruling, the most that the defense could accomplish at trial was to reduce the charge of first-degree murder to second-degree murder on the theory that the defendant lacked the ability to form

defendant was [intoxicated from the use of (alcohol) (drugs)] [suffering from a mental disease or disorder] and if so, what effect this had on the defendant's ability to form the deliberate intention to take away the life of another.

The burden is on the state to prove beyond a reasonable doubt that the defendant was capable of forming a deliberate intention to take away the life of another. If you have a reasonable doubt as to whether the defendant was capable of forming such an intention, you must find the defendant not guilty of a first-degree murder by deliberate killing.

(brackets in original).

53. See Audio Tape: Closing Argument of Gary C. Mitchell, *State v. Kodikian*, Fifth Judicial District, County of Eddy, No. CR-99-232 WF (May 10, 2000) (Tape 18 of 18) (on file with author).

54. See N.M. U.J.I. CRIM. 14-5106; see also *State v. Campos*, 122 N.M. 148, 164, 921 P.2d 1266, 1282 (1996) (Franchini, J., dissenting).

55. See Order Relating to Defendant's Memorandum in Support of Pretrial Motion Regarding Treating Temporary Insanity as a Complete Defense, or, in the Alternative, Tendering a Jury Instruction on Negligent Homicide or Involuntary Intoxication 3, *State v. Kodikian*, Fifth Judicial District Court, No. CR-99-232 WF (filed Apr. 19, 2000) [hereinafter Order Relating to Defendant's Pretrial Motion].

56. *Id.*

57. *Id.* at 4. The fact that defense counsel did not present expert testimony at the pre-trial hearing may have undercut the argument in support of this legal theory. The court's pretrial conclusions were directly refuted at the sentencing hearing by the testimony of neuropsychologist Thomas Thompson, M.D. See Audio Tape: Testimony of Thomas Thompson, M.D., *State v. Kodikian*, Fifth Judicial District, County of Eddy, No. CR-99-232 WF (May 9, 1999) (Tapes 13 and 14 of 18) (on file with author) [hereinafter Thompson Testimony].

specific intent at the time of the crime.⁵⁸ Because the court had foreclosed the defendant's only chance to escape a conviction for second-degree murder, the defendant entered a no-contest plea to second-degree murder. Fearing a severe prison sentence, the defense elected to put on its entire case outlining the involuntary intoxication defense at the defendant's sentencing hearing to establish a record for appeal.

II. OVERVIEW

The unique factual circumstances of this case have never been presented in the state of New Mexico. English and American jurists, however, have addressed the specific elements and similar factual scenarios in cases where individuals have committed crimes when their mental states were involuntarily altered.⁵⁹ This Article will examine the history of the defense of involuntary intoxication, analyze the facts and scientific data presented in this case that support this defense, and compare this defense to the theory of temporary insanity. Although the facts of this case are highly unusual, this case challenges the distinctions that courts have drawn between the defenses of involuntary intoxication and temporary insanity. Finally, this case's trajectory and outcome touch core societal values that impact how our legal system determines criminal culpability.

III. HISTORY OF THE INVOLUNTARY INTOXICATION DEFENSE

A. Common Law

Although the common law looked upon the defense of voluntary intoxication suspiciously,⁶⁰ involuntary intoxication has been an exception to the general rule that intoxication is not a defense.⁶¹ Under the common law, involuntary intoxication precluded criminal liability if "it caused the defendant to become temporarily

58. Under New Mexico law, the penalty for first-degree murder is a mandatory thirty-year prison sentence. Murder in the first degree is a capital felony in New Mexico. N.M. STAT. ANN. § 30-2-1 (1994). The penalty for a capital felony is death or a life sentence. N.M. STAT. ANN. § 31-18-14(A) (2000). An inmate serving a life sentence is first eligible for parole after he has served thirty years of his or her life sentence. N.M. STAT. ANN. § 31-21-10(A) (2000). A second-degree murder conviction requires no mandatory time and the sentencing range is from zero to fifteen years of incarceration. N.M. STAT. ANN. § 31-18-15 (2000).

59. See discussion *infra* parts II.B.

60. See Lewis Bittles, Note, *Involuntary Intoxication Is a Defense in Texas*, 12 ST. MARY'S L. J. 232, 233 (1980) (citing *State v. Sopher*, 30 N.W. 917, 918 (Iowa 1886) (courts disfavor the defense of intoxication); *Johnson v. Commonwealth*, 115 S.E. 673 (Va. 1923) (the intoxication defense is dangerous); *Colbath v. State*, 4 Tex. Ct. App. 76 (1878) (quoting 1 HALE, HISTORY OF PLEAS OF THE CROWN (1778), "This vice doth deprive men of the use of reason, and puts many men into a perfect, but temporary, phrensy;... such a person shall have no privilege by his voluntary contracted madness, but shall have the same judgement as if he were in his right senses.")). For a modern treatment of the defense, see, e.g., *Shell v. State*, 512 A.2d 358 (Md. 1986) (stating defendant's voluntary drug intoxication merely negated specific intent). Some of the bias against using intoxication as a defense stemmed from the psychological bias against drinkers. Robert L. Deddens, *Volitional Fault and the Intoxicated Criminal Offender*, 36 U. CINN. L. REV. 258, 268 (1967).

61. See *City of Minneapolis v. Altimus*, 238 N.W.2d 851, 855 (Minn. 1976) (en banc) (quoting 1 HALE, HISTORY OF PLEAS OF THE CROWN 32 (1778), "That if a person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrenzy, as aconitum or nux vomica, this puts him into the same condition, in reference to crimes, as any other phrenzy, and equally excuseth him.").

insane.”⁶² To establish the element of “involuntariness,” the defendant had to show that he did not know he had consumed an intoxicating substance.⁶³ The defense also applied in cases where the defendant consumed a substance without being aware of its intoxicating properties.⁶⁴ However, when a defendant alleged that he had become intoxicated at the hand of fraud or coercion, courts so narrowly construed the defense that it was impossible for the juries to acquit the defendant.⁶⁵

B. Modern Law

1. Elements

To establish the defense of involuntary intoxication today, most states require the defendant to prove two elements: (1) involuntariness and (2) intoxication that caused a mental dysfunction at the time of the criminal act.⁶⁶ Legislatures and courts have devoted significant attention to defining the concepts of intoxication and mental dysfunction. With the increased public awareness and intolerance of the damage caused by impaired drivers, state legislatures have steadily lowered the legal definition of impairment.⁶⁷ Similarly, courts have extensive experience examining the concept of mental dysfunction, because intent is required to establish criminal culpability. Although intoxication and mental dysfunction have been the subject of substantial case law and legislation, the legal system has devoted little attention to the concept of involuntariness as it applies to intoxication and mental dysfunction. Rather, American courts have applied the concept of involuntariness in four different contexts. These definitions include (1) coerced intoxication,⁶⁸ (2) pathological intoxication, (3) intoxication by innocent mistake, and (4) consuming a medically prescribed drug.⁶⁹

62. *Altimus*, 238 N.W.2d at 855.

63. Bittles, *supra* note 60, at 235 (citing *McCook v. State*, 17 S.E. 1019, 1019 (Ga. 1893) (identifying intoxication by fraud, artifice or contrivance); *Choate v. State*, 197 P. 1060, 1063 (Okla. Crim. App. 1921) (meaning of involuntary intoxication is an intoxication by design, fraud, or artifice of another); *Pearson's Case*, 168 Eng. Rep. 1108, 1108 (1835) (stating intoxication is involuntary if by stratagem or fraud of another); *Pribble v. People*, 112 P. 220, 221 (Colo. 1910) (discussing drug administered without the defendant's knowledge)).

64. Bittles, *supra* note 60, at 235 (citing *Burnett v. Commonwealth*, 284 S.W.2d 654, 658 (Ky. 1955) (remanding case to determine if physician caused intoxication); *City of Minneapolis v. Altimus*, 238 N.W.2d 851, 856-57 (Minn. 1976) (discussing involuntary intoxication where there has been unusual and unexpected reaction to prescription drug)).

65. *Deddens*, *supra* note 60, at 276 (citing *Borland v. State*, 249 S.W. 591 (Ark. 1923); *Perryman v. State*, 159 P. 937 (Okla. Crim. App. 1916)).

66. *See, e.g.*, *Staples v. State*, 245 N.W.2d 679, 683 (Wisc. 1976) (finding the intoxication must be severe enough that the defendant could not tell right from wrong).

67. In New Mexico, for example, the current standard for impairment is a Blood Alcohol Concentration Level (BAC) of .08. *See* N.M. STAT. ANN. § 66-8-102 (1998, Supp. 2001).

68. Bittles, *supra* note 60, at 236 (citing *Pribble*, 112 P. at 221 (discussing drug administered without defendant's knowledge); *People v. Penman*, 110 N.E. 894, 900 (Ill. 1915) (discussing that defendant took cocaine when told it was a breath freshener)).

69. Bittles, *supra* note 60, at 236 (citing *People v. Koch*, 294 N.Y.S. 987, 989 (N.Y. App. Div. 1937) (discussing inadvertent overdose of prescription medication)).

a. Involuntariness

There are very few reported cases where an individual has successfully asserted the defense of involuntary intoxication caused by coercion.⁷⁰ One notable case is *Burrows v. State*, in which the court held that, to qualify for the defense, the defendant had to show he was forced to drink against his will and "his reason was destroyed."⁷¹ Because courts consider this defense to be dangerous and subject to abuse, courts have erected such a highly improbable hurdle that this defense is nearly impossible to assert.⁷²

Pathological intoxication rarely appears in the court, as well. Those cases are limited to circumstances where the individual does not know he is susceptible to becoming extremely intoxicated given the amount of intoxicant he has consumed.⁷³ It is defined as "intoxication grossly excessive in degree, given the amount of the intoxicant, which is caused by an abnormal bodily condition not known to the actor."⁷⁴ In these cases, the defendant is absolved of criminal responsibility, because he did not know how his body would react to the substance.⁷⁵ In *People v. Koch*, for example, the intoxication was caused by an inadvertent overdose of a prescribed drug.⁷⁶

A preexisting mental disease may also qualify as an abnormal condition. In *United States v. Henderson*,⁷⁷ the court held that the State had not introduced substantial evidence to show the defendant's alcohol consumption was voluntary where the defendant had previously been diagnosed a paranoid schizophrenic.⁷⁸ Witnesses testified that the defendant acted normal as he boarded a plane but became abusive when he began drinking alcohol on the plane.⁷⁹ Henderson's psychiatrist testified that "a schizophrenic whose ego boundary is slipping responds by either using drugs or alcohol."⁸⁰ Because the state could not show that Henderson was not able to control his desire to drink, Henderson's intoxication was not voluntary.⁸¹

When an individual consumes an intoxicating substance by mistake, he may also qualify for this defense. In *People v. Penman*, an individual killed another individual after taking cocaine tablets that someone told him were breath purifiers.⁸² In that case, the Illinois Supreme Court held that the defendant was entitled to the

70. These four categories are defined and discussed in *City of Minneapolis v. Altimus*, 238 N.W.2d 851, 856 (Minn. 1976) (citing *State v. Bunn*, 196 S.E.2d 777 (N.C. 1973); *Borland v. State*, 249 S.W. 591 (Ark. 1923); *Perryman v. State*, 159 P. 937 (Okla. Crim. App. 1916); *State v. Sopher*, 30 N.W. 917 (Iowa 1886)).

71. 297 P. 1029, 1035 (Ariz. 1931).

72. See *Deddens*, *supra* note 60, at 276.

73. See, e.g., *Perkins v. United States*, 228 F. 408 (4th Cir. 1915) (using defense of insanity caused by use of alcohol and overdose of chloral); see also Comment, *Pathological Intoxication and the Voluntarily Intoxicated Criminal Defendant*, 96 UTAH L. REV. 419 (1969).

74. MODEL PENAL CODE § 2.08(5)(c) (1985).

75. *Altimus*, 238 N.W.2d at 856.

76. 294 N.Y.S. 987, 988-89 (N.Y. App. Div. 1937).

77. 680 F.2d 659 (9th Cir. 1982).

78. *Id.* at 663.

79. *Id.* at 663 n.6.

80. *Id.* at 663 n.5.

81. *Id.* at 664.

82. 110 N.E. 894 (Ill. 1915).

defense of involuntary intoxication if he showed he had been temporarily insane at the time of the crime.

The defense of involuntary intoxication also has been used successfully in cases where the defendant was given "knockout drops"⁸³ and, as a result, committed a crime. In one New York case, an off-duty police officer had consumed a beer that had been spiked with scopolamine while in a bar. After becoming delirious, the officer shot another patron.⁸⁴ The defendant in that case, like most defendants in involuntary intoxication cases, had no prior mental health problems.⁸⁵ Because no tests were made of the defendant's blood at the time of his arrest, the defense rested on the testimony of a psychiatrist who, after reviewing the psychological and physiological symptoms the defendant had displayed, concluded the defendant's confused state of mind was caused by scopolamine intoxication.⁸⁶ The expert's testimony rested on the description of events by witnesses, as well as the defendant's own subjective account.⁸⁷ Based on the expert's testimony, the jury acquitted the police officer.⁸⁸

To qualify for the prescription drug defense, the defendant must have been unaware that the drug could cause intoxication.⁸⁹ In *City of Minneapolis v. Altimus*,⁹⁰ the Minnesota Supreme Court held that an unusual and unexpected reaction to drugs might be a defense where the defendant was prescribed Valium for a back problem.⁹¹ There, the defendant's doctor testified that Valium had a normal side effect of confusion and a possible side effect of hyperexcitability.⁹² When the defendant stood trial for careless driving and hit-and-run, a doctor testified the defendant may have been influenced by the drug's side effects.⁹³ Similarly, in *Boswell v. State*, a Florida court held that a defendant who committed murder after taking Prozac and Xanax was entitled to an involuntary intoxication jury instruction.⁹⁴

Ultimately, the issue of whether or not a defendant became intoxicated voluntarily is an issue for the jury to resolve.⁹⁵ Juries may be more hostile to the use of the involuntary intoxication defense in prescription drug cases when the drug's

83. Knockout drops may consist of chloral hydrate or scopolamine hydrobromide. See Robert Boyd Goldstein, M.D., *The Mickey Finn Defense: Involuntary Intoxication and Insanity*, 20 BULL. AM. ACAD. PSYCHIATRY LAW 27, 28 (1992).

84. *Id.* at 29.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 30.

89. Cf. *Perkins v. United States*, 228 F. 408, 415 (4th Cir. 1915) (stating, "a patient is not presumed to know that a physician's prescription may produce a dangerous frenzy"); see also *Burnett v. Commonwealth*, 284 S.W.2d 654, 658-59 (Ky. 1955); *People v. Low*, 732 P.2d 622 (Colo. 1987) (holding although defendant's excessive use of cough drops caused impairment, he was not entitled to the defense because he failed to plea insanity at arraignment).

90. 238 N.W.2d 851 (Minn. 1976).

91. *Id.* at 854.

92. *Id.*

93. *Id.*

94. 610 So. 2d 670, 672 (Fla. Dist. Ct. App. 1992).

95. See, e.g., *Prather v. Commonwealth*, 287 SW 559 (Ky. Ct. App. 1926) (finding there was sufficient question for the jury on the issue of voluntariness where a defendant acted under the influence of morphine that was prescribed by a doctor), *overruled by Com v. Tate*, 893 S.W.2d 368, 370 (Ky. 1995).

side effects were foreseeable.⁹⁶ For example, when a defendant caused his own intoxication by exceeding the prescribed dose, jurors conclude that the intoxication was foreseeable and, therefore, not involuntary.⁹⁷ Similarly, when a defendant's physician warned him about the drug's potential side effects but the defendant continued to take the drug after the side effects manifested themselves, jurors questioned whether the intoxication was truly voluntary.⁹⁸ In that case, the court held that to claim "involuntariness" a defendant must show that he did not know or have reason to know that a drug could have an intoxicating effect.⁹⁹ The essence of an involuntary intoxication defense in a prescription drug case is that the defendant was not aware of a drug's side effects.¹⁰⁰ The defendant's actions must be both unintentional and non-negligent.¹⁰¹ Thus, it could be argued that under this standard, when a defendant continues to take a prescribed drug after a physician warns the defendant of the drug's side effects and after the defendant begins to experience those side effects, the circumstances constitute negligent behavior that does not negate intentional criminal conduct. The voluntariness issue becomes more complicated if the drug's side effects impair the individual's cognitive ability to perceive the side effects themselves. The less foreseeable it was that the defendant would become intoxicated from the prescription drug, the stronger the defendant's involuntariness claim.¹⁰²

The involuntary intoxication defense may see increasing use by athletes who use anabolic steroids. Users frequently buy steroids on the black market and are not advised of the psychological side effects of excessive use.¹⁰³ Scientific studies only recently have recognized that steroids produce psychotic side effects with "symptoms including auditory hallucinations, paranoid delusions, delusions of reference, and delusions of grandeur."¹⁰⁴ Although steroids have not traditionally been viewed as intoxicating substances, a steroid-induced psychosis fits the Model Penal Code's definition of intoxication as "a disturbance of mental or physical capacities resulting from the introduction of substances into the body...."¹⁰⁵ Because the mind-altering side effects of steroid use have not been predicted by

96. The common law defense of involuntary intoxication required the defendant to show that he was *unaware* and had no reason to be aware of the drug's intoxicating effects. See W. LAFAVE & A. SCOTT, *CRIMINAL LAW* 394 (2d ed. 1986).

97. See *People v. Turner*, 680 P.2d 1290, 1293 (Colo. Ct. App. 1983) ("[A] prescription will serve to place a patient on notice that an excessive dose will impair his faculties...[thus] a trial court would be correct in finding that excessive use of a prescription drug constitute[s] voluntary intoxication.").

98. In *City of Minneapolis v. Altimus*, the court established a test to determine whether or not intoxication caused by prescribed drugs was voluntary. 238 N.W.2d 851 (Minn. 1976).

99. *Id.* at 857.

100. *Id.*

101. *Id.* at 855.

102. The *Altimus* test presumes that a defendant has made a conscious decision to consume the medication after being fully informed of the medication's side effects. See, e.g., *Perkins v. United States*, 228 F. 408, 415 (4th Cir. 1917) (stating that if a defendant has been warned that a drug may produce a frenzy, a jury may find him guilty, but one cannot be held legally responsible for acts committed in a frenzy that one cannot anticipate).

103. Martin J. Bidwill & David L. Katz, *Injecting New Life into an Old Defense: Anabolic Steroid-Induced Psychosis as a Paradigm of Involuntary Intoxication*, 7 U. MIAMI ENT. & SPORTS L. REV. 1 (1989).

104. *Id.* at 22. According to Bidwill and Katz, individuals who experience delusions of reference attribute unrealistic significance to objects, events, or people. Individuals who possess delusions of grandeur believe unrealistically that they possess special abilities.

105. MODEL PENAL CODE, § 2.08(5)(a) (1985).

researchers, defendants may make a strong argument that they had no reason to foresee those side effects.

Steroid users are at a disadvantage in invoking this defense, however, vis-a-vis prescription drug users, if they have purchased the drugs illegally. Jurors may believe that the user of an illicit drug assumes more risks than users of legally prescribed medication. Moreover, individuals who purchase steroids face another hurdle in that, in most cases, the users do not use the drug to treat an illness.¹⁰⁶ They are using the drug to enhance athletic performance by increasing muscle strength.¹⁰⁷

States such as Texas have chosen to straddle the traditional definitions of involuntariness. For example, in *Hanks v. State*, the Texas Court of Criminal Appeals defined involuntariness as the "absence of independent judgement and volition on the part of the accused in taking the intoxicant."¹⁰⁸ Three years after the *Hanks* decision, the same court reversed and remanded a conviction for aggravated robbery, because the trial court had refused to allow the counsel for the defense a jury instruction on involuntary intoxication.¹⁰⁹ There, the defendant participated in a robbery with an accomplice after the accomplice had given the defendant a drink containing Alka-Seltzer, water, and Thorazine without her consent.¹¹⁰

b. Intoxication Resulting in Mental Dysfunction

The definitions of the second element of the defense, intoxication resulting in mental dysfunction, track the numerous legal definitions of insanity.¹¹¹ Most jurisdictions have adopted the M'Naghten test, under which the defendant must prove that, as a result of a mental disease, he did not know the nature of the act or that the act was wrong.¹¹² Thus, under the modern definition of involuntary intoxication, the only difference between the definition of this defense and insanity is the cause of the condition. "For the former, a mental disease or defect is required, for the latter, involuntarily caused intoxication."¹¹³

In *State v. Gardner*, the Utah Supreme Court held that, if a defendant could prove he was so intoxicated during the commission of a crime due to the involuntary ingestion of drugs that he lacked a culpable mental state, the defendant should be acquitted.¹¹⁴ However, in Utah, the defense is incorporated within the mental illness defense in Utah Code Ann. § 76-2-305.¹¹⁵ A number of other jurisdictions have also

106. Bidwill & Katz, *supra* note 103, at 7 (citing Taylor, *Super Athletes Made to Order*, PSYCHOL. TODAY, May 1985, at 64).

107. Bidwill & Katz, *supra* note 106, at 9.

108. 542 S.W.2d 413, 416 (Tex. Crim. App. 1976).

109. *Torres v. State*, 585 S.W.2d 746 (Tex. Crim. App. 1979).

110. *Id.* at 749. Thorazine is an anti-psychotic medication prescribed to control the manic phase of manic-depressive illness and to control symptoms of psychotic disorders such as schizophrenia. *See also*, BILLIE ANN WILSON, ET AL., PRENTICE HALL NURSE'S DRUG GUIDE 302 (Appleton & Lange 2000) [hereinafter NURSE'S DRUG GUIDE].

111. *United States v. F.D.L.*, 836 F.2d 1113, 1116 (8th Cir. 1988).

112. Bittles, *supra* note 60, at 238 (citing M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843)).

113. *Id.*

114. 870 P.2d 900, 902 (Utah 1993).

115. Under Utah's statutory definition, mental illness means a mental disease or defect that substantially impairs a person's mental, emotional, or behavioral functioning. A mental defect may be a congenital condition, the result

determined that the standard for involuntary intoxication is the same as the standard for insanity.¹¹⁶ At least one judge, however, has argued that involuntary intoxication is not a form of insanity and should be defined in terms of the absence of volitional fault.¹¹⁷

2. Degree of Proof

States differ in the degree of proof that they require the defendant to produce to justify a jury instruction on involuntary intoxication. In *Torres v. State*, the Texas Court of Criminal Appeals held the defendant was entitled to the jury instruction, even though the only evidence the defendant produced was the victim's testimony that the defendant appeared drugged and the police officer's testimony that the defendant was asleep when they arrived.¹¹⁸ In *State v. Rice*, the Supreme Judicial Court of Maine held that the defendant has a lower burden of proof with involuntary intoxication than with the insanity defense.¹¹⁹ Although the insanity defense requires expert testimony, the lay testimony of witnesses is often sufficient to establish involuntary intoxication provided those witnesses can establish the existence of an intoxicant and that the defendant consumed the intoxicant unknowingly.¹²⁰ The different level of proof requirements between insanity and involuntary intoxication may be explained by the fact that it is within the experiential understanding of most jurors to understand how intoxication affects one's thinking. However, jurors have less experience with the level of mental illness that satisfies the legal definition of insanity.

Similarly, in *People v. Turner*, the Colorado Court of Appeals held that a defendant who presented "meager" evidence of involuntary intoxication, namely that he was foggy, uncoordinated, and his vision was blurry at the time of the crime, was entitled to this instruction.¹²¹ In *Turner*, the defendant had consumed approximately twenty-five Fiorinal tablets to relieve his migraine headache.¹²² The defendant testified that, when he had taken more than the prescribed dose on previous occasions, the only effect was that it made him slightly drowsy.¹²³ Although the defendant could not show that he had been coerced into taking the drug, he argued that his lack of knowledge of the consequences of an overdose and

of injury, or a residual effect of a physical or mental disease....Mental illness does not mean a personality or character disorder or abnormality manifested only by repeated criminal conduct.

Id. at 901 n.3.

116. See *United States v. F.D.L.*, 836 F.2d 1113, 1116 (8th Cir. 1988); *United States v. Henderson*, 680 F.2d 659, 661 (9th Cir. 1982); *Wooldridge v. State*, 801 P.2d 729, 734 (Okla. Crim. App. 1990) (citing *Jones v. State*, 648 P.2d 1251, 1258 (Okla. Crim. App. 1982)).

117. See *Altimus*, 238 N.W.2d at 859 (Rogosheske, J., concurring).

118. *Torres v. State*, 585 S.W.2d 746, 747 (Tex. Crim. App. 1976).

119. 379 A.2d 140, 146 (Me. 1977).

120. See, e.g., *State v. Rice*, 379 A.2d 140, 146-48 (Me. 1977); see also *Altimus*, 238 N.W.2d at 851.

121. 680 P.2d 1290, 1292 (Colo. Ct. App. 1983).

122. *Id.* at 1291. Fiorinal is a narcotic drug that contains codeine. NURSE'S DRUG GUIDE, *supra* note 110, at 1519.

123. *Turner*, 680 P.2d at 1291.

his doctor's failure to warn him of those consequences entitled him to the defense.¹²⁴ The court agreed.¹²⁵

3. Effect of the Defense

The primary difference between voluntary and involuntary intoxication is the effect of the defense.¹²⁶ When a defendant becomes intoxicated involuntarily and is unable to distinguish right from wrong, the defendant is entitled to a complete defense.¹²⁷ The defendant is absolved of criminal responsibility because he lacks the requisite mental state.¹²⁸ It is a fundamental premise of our system of justice that an individual can only be held legally responsible for his actions if "he knows the difference and has the ability to choose between right and wrong":¹²⁹

The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.¹³⁰

Although we can discuss the various elements of the defense separately from the effect of the defense, the interrelationship between the defense's elements and impact is not static. The fact that involuntary intoxication acts as a complete defense has caused courts to rigorously scrutinize the elements of the defense.¹³¹ Thus, although the epistemological foundation of the involuntary intoxication defense appears to be straightforward, courts have scrutinized the defense in the courtroom, using every opportunity to bar its introduction.

This premise is supported by *United States v. F.D.L.*, in which the court found two juveniles guilty of involuntary manslaughter when they beat the victim and left him in below-zero temperatures.¹³² In that case, the juveniles had smoked marijuana, which, unknown to them, contained the hallucinogenic known as phencyclidine or "PCP."¹³³ Although the court found the juveniles had introduced sufficient evidence to show they had ingested the intoxicant involuntarily, the court held the juveniles failed to appreciate the wrongfulness of their actions.¹³⁴ The two juveniles had gone for a ride with the victim and stepped out of the car to urinate.¹³⁵ When they feared

124. *Id.* at 1293.

125. *Id.* at 1294.

126. *Grayson v. State*, 687 P.2d 747 (Okla. Crim. App. 1984) (stating voluntary intoxication is a more limited defense than involuntary intoxication).

127. *Jones v. State*, 648 P.2d 1251, 1258 (Okla. Crim. App. 1982), *cert. denied*, 459 U.S. 1155 (1983) (holding that the same standard applies in an involuntary intoxication case as an insanity case).

128. *See People v. Low*, 732 P.2d 622, 627 (Colo. 1987) (citing R. PERKINS & R. BOYCE, *CRIMINAL LAW* 1005 (3d ed. 1982) (stating a defendant who is involuntarily intoxicated is not culpable)).

129. *Deddens*, *supra* note 60, at 258.

130. *Id.* (citing *Morissette v. United States*, 342 U.S. 246, 250 (1952)).

131. *See State v. Hutsell*, 845 P.2d 1325, 1329 (1993) (holding courts must narrowly construe the element of involuntariness).

132. 836 F.2d 1113 (8th Cir. 1988).

133. *Id.* at 1117. Toxic effects of PCP use include visual and auditory illusions, hallucinations, muscle rigidity, hyperpyrexia, ataxia, agitation, violence, and convulsions. *See Avran Goldstein & Harold Kalant, Drug Policy: Striking the Right Balance*, 249 *SCIENCE, NEW SERIES* 1513-21 (1990).

134. *F.D.L.*, 836 F.2d at 1117.

135. *Id.* at 1115.

the driver would drive off without them, they beat the driver and left him unconscious in the car overnight.¹³⁶ The court held that the juveniles were not entitled to the defense because, when they assaulted the victim and abandoned him in an intoxicated state in extremely cold weather, the juveniles knew that their conduct threatened the victim's life.¹³⁷ Cases like this demonstrate judicial hostility to the defense of involuntary intoxication.

IV. INVOLUNTARY INTOXICATION IN NEW MEXICO

Although no reported New Mexico decisions address the involuntary intoxication defense,¹³⁸ the New Mexico Supreme Court referred to this defense in a recent dissenting opinion¹³⁹ and there is a uniform jury instruction defining the elements of this defense.¹⁴⁰ A starting point for understanding the potential role that the defense might play in New Mexico is to examine the level of intent required to support the various degrees of homicide in this state and then to identify the role that abnormal mental conditions have on the degree of the crime.

To be convicted of a willful, deliberate, and premeditated killing, a defendant must possess specific intent.¹⁴¹ With regard to first-degree murder, specific intent is equated with "express malice" or the deliberate intent to unlawfully take away another's life.¹⁴² New Mexico courts do not consider second-degree murder to be a specific intent crime. Rather, it is a crime that requires proof of "specific knowledge."¹⁴³ At minimum, to establish second-degree murder, the state must show the defendant knew that his actions created a strong probability of death or great bodily harm.¹⁴⁴ Second-degree murder is a general intent crime that does not require "intent to do a further act or achieve a further consequence."¹⁴⁵ It is a "knowing" killing rather than an "intentional" killing.¹⁴⁶

136. *Id.* at 1115-16.

137. *Id.* at 1118.

138. See N.M. U.J.I. CRIM. 14-5106, Committee Commentary.

139. *State v. Campos*, 122 N.M. 148, 161, 921 P.2d 1266-1279 (1996) (holding voluntary intoxication is not a defense to felony murder) (Franchini, J., dissenting) (arguing that defense of involuntary intoxication has long been recognized in New Mexico because it may negate the malice for murder). *Id.* at 165, 921 P.2d at 1283.

140. See N.M. U.J.I. CRIM. 14-5106.

141. See generally N.M. U.J.I. CRIM. 14-141, Mark B. Thompson III, Addendum 1, *The Lazy Lawyer's Guide to Criminal Intent in New Mexico, NM-UJI Criminal 1.50 [14-141]*, Reporter's Addendum to Commentary.

142. *Id.* N.M. U.J.I. CRIM. 14-201 states:

A deliberate intention refers to the state of mind of the defendant. A deliberate intention may be inferred from all of the facts and circumstances of the killing. The word deliberate means arrived at or determined upon as the result of careful thought and the weighing of the consideration for and against the proposed course of action. A calculated judgment and decision may be arrived at in a short period of time. A mere unconsidered and rash impulse, even though it includes an intent to kill, is not a deliberate intention to kill. To constitute a deliberate killing, the slayer must weigh and consider the question of killing and his reasons for and against such a choice.

143. *Campos*, 122 N.M. at 158, 921 P.2d at 1276.

144. See N.M. U.J.I. CRIM. 14-210.

145. *State v. Beach*, 102 N.M. 642, 645, 699 P.2d 115, 118 (1985) (stating second-degree murder and voluntary manslaughter contain only a knowledge element rather than an element of intent), *overruled*, *State v. Brown*, 122 N.M. 724, 728, 931 P.2d 69, 73 (1996) (holding requisite proof is "objective" rather than "subjective" knowledge of the risk involved).

146. *Beach*, 102 N.M. at 645, 699 P.2d at 118.

Felony-murder, which is a form of first-degree murder, deserves comment. To be convicted of felony-murder, the defendant must act with the mens rea required for second-degree murder; the defendant must have intended to kill, or must have known that his actions created a strong probability of death, or acted in a manner greatly dangerous to another.¹⁴⁷ While the defendant need not possess a deliberate intent to take a life, the underlying felony, which serves the basis for the crime, may be a specific intent crime.¹⁴⁸

Now that we have reviewed the difference between first-degree and second-degree murder in New Mexico, we turn next to the impact that defenses based on theories of impaired mental states have on criminal culpability. These impaired mental states include insanity, inability to form specific intent, and involuntary intoxication.

When an individual commits a crime while suffering from a long-standing "specific disorder of the mind that both substantially affects mental processes and substantially impairs behavior controls," a jury may find the defendant not guilty by reason of insanity.¹⁴⁹ To find that a defendant is insane, the jury must conclude that the defendant's mental disease caused him to (1) not know what he was doing, (2) not understand the consequences of his actions, (3) not know that his act was wrong, or (4) not to be able to prevent himself from committing the act.¹⁵⁰ The insanity defense is a complete defense to all specific and general intent crimes.¹⁵¹ In willful and deliberate murder cases, a defendant may assert a defense based on the theory that he lacked the mental state to deliberately intend to take another's life.¹⁵² This defense is available when the defendant's voluntary alcohol consumption or mental disorder renders him incapable of "forming a deliberate attempt to take the life of another."¹⁵³ Although this defense is analogous to the insanity defense, unlike the insanity defense, it only reduces first-degree murder to second-degree murder.¹⁵⁴

While the disturbed mental state underlying the involuntary intoxication defense is not longstanding, New Mexico treats involuntary intoxication similar to longstanding insanity. The jury instruction defines the elements of the defense as follows:

Evidence has been presented that the defendant was intoxicated but that the intoxication was involuntary. Intoxication is involuntary if:
[a person is forced to become intoxicated against the person's will]

147. *State v. Ortega*, 112 N.M. 554, 563, 817 P.2d 1196, 1235 (1991).

148. *See* N.M. U.J.I. CRIM. 14-202, Committee Commentary.

149. N.M. U.J.I. CRIM. 14-5101.

150. *Id.*

151. *Id.*

152. *See* N.M. U.J.I. CRIM. 14-5110. In non-homicide cases involving specific intent crimes, the defendant may assert a defense based on the theory that he lacked the intent necessary to do a further act or to achieve a further consequence. *See* N.M. U.J.I. CRIM. 14-5111. Although the murder element of felony-murder does not require specific intent, the diminished capacity defense could undermine the specific intent element of the underlying felony and reduce the crime to second-degree murder.

153. N.M. U.J.I. CRIM. 14-5110.

154. *See State v. Lunn*, 88 N.M. 64, 66, 537 P.2d 672, 674 (Ct. App. 1975), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975), *cert. denied*, 423 U.S. 1058 (1976).

[a person becomes intoxicated by using (alcohol)...(drugs) without knowing the intoxicating character of the alcohol)...(drugs) and without willingly assuming the risk of possible intoxication.¹⁵⁵

Unlike the diminished capacity defense, which merely negates specific intent, involuntary intoxication is a complete defense in New Mexico.¹⁵⁶ In addition, if the involuntary intoxication instruction is given, the essential elements instruction for murder must be modified to contain the following language:

The defendant was not involuntarily intoxicated at the time the offense was committed or, if the defendant was involuntarily intoxicated, then the defendant nonetheless:

...knew what he was doing or understood the consequences of his act, knew that his act was wrong and could have prevented himself from committing the act.¹⁵⁷

This language is identical to the language in the jury instruction defining insanity.¹⁵⁸ However, there is no requirement with the involuntary intoxication defense that the disturbed mental state be long-standing. Despite the fact that the disturbed mental state required to establish the involuntary intoxication and inability to form specific intent defenses are both temporary, the results of the defenses differ vastly. While the defendant in an involuntary intoxication case is entitled to a complete acquittal, in a voluntary intoxication or inability to form specific intent case, the defendant has merely negated the specific intent element of the crime and can still be found guilty of the general intent crime. In the case of murder, this merely reduces the crime from first-degree murder to second-degree murder.¹⁵⁹ The effect of a defense based on the theory of voluntary intoxication is to negate only the intent required for a specific intent crime. This approach is followed by approximately one-half of the states that hold voluntary intoxication is not a defense to general intent crimes.¹⁶⁰ The basis for this treatment is that temporary insanity and voluntary intoxication do not negate the knowledge that forms the basis of the required mens rea for second-degree murder. In the case of voluntary intoxication, the policy behind prohibiting the use of the defense as a complete defense was that the individual had *voluntarily* become intoxicated. The policy motivations underlying this disparate treatment of these defenses have interesting implications as we next consider the case of dehydration-induced insanity.

155. N.M. U.J.I. CRIM. 14-5106 (brackets in original).

156. *See id.*

157. *Id.*

158. *See* N.M. U.J.I. CRIM. 14-5101:

The defendant was insane at the time of the commission of the crime if, because of a mental disease, as explained below, the defendant:

[did not know what [he] [she] was doing or understand the consequences of [his] [her] act,] [or]

[did not know that [his] [her] act was wrong,] [or]

[could not prevent [himself] [herself] from committing the act].

(brackets in original).

159. N.M. U.J.I. CRIM. 14-5110.

160. *State v. Campos*, 122 N.M. 148, 161, 921 P.2d 1266, 1279 (1996).

V. DEHYDRATION AND INVOLUNTARY INTOXICATION

To show that the trial court should have allowed Raffi Kodikian to assert an involuntary intoxication defense, the defense had to overcome four hurdles. First, it had to demonstrate that Kodikian became dehydrated involuntarily. Second, given that the Model Penal Code predicates intoxication on the ingestion of a substance, counsel had to show that there was no conceptual difference between the failure to ingest a substance and ingesting a substance. The third hurdle was to prove that dehydration's effect on the body was similar to intoxication. Finally, it had to be shown that Kodikian's dehydration altered his mental state at the time that Kodikian killed Coughlin. This section of the Article demonstrates why the factual circumstances of this case satisfy the elements of the involuntary intoxication defense.

A. *Involuntariness*

The tragic scenario leading to David Coughlin's death was caused by the fact that Coughlin and Kodikian entered Rattlesnake Canyon ignorant of and unfamiliar with the conditions they would encounter in the canyon. They descended into the canyon expecting to find a well-marked trail, rather than one marked by rock cairns.¹⁶¹ They entered the canyon searching for an existing campsite with a place to pitch a tent, not expecting that no such campsites existed.¹⁶² As the sun was falling, they hurried down the trail never stopping to look behind them to see what the trail would look like when they headed back.¹⁶³ Because of this critical error, when they tried to hike out of the canyon the next day, they were unable to find the point at which Rattlesnake Canyon trail intersected with the trail leading out of the canyon.¹⁶⁴ Fatally, by the time the young men pitched their tent on Wednesday night, they had only two liters of water with them—just enough water to satisfy their thirst through the night.¹⁶⁵ The severe dehydration that the hikers were experiencing at the time of the murder on Sunday morning was the product of their lack of knowledge of desert conditions and their overconfidence that they could overcome any problem they might encounter.

Given that Kodikian did not voluntarily become dehydrated, it is first necessary to determine whether the case fits within the parameters of the different constructs of involuntariness used by other courts, namely, coerced intoxication, pathological intoxication, intoxication by innocent mistake, or prescription drug intoxication.¹⁶⁶ For the facts of this case to fit within the ambit of the coerced intoxication defense, someone would have had to force Coughlin and Kodikian to hike to the canyon bottom with little water, knowing that they would become lost. No one forced David Coughlin and Raffi Kodikian to hike to the bottom of Rattlesnake Canyon and camp with little water. Although park rangers may have been negligent in poorly marking

161. Kodikian Testimony, *supra* note 5.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. See *supra* notes 68-110 and accompanying text.

the trails,¹⁶⁷ failing to properly train the volunteer who advised them where to camp,¹⁶⁸ and waiting three days to initiate a search for the missing hikers,¹⁶⁹ the rangers' possible negligent conduct does not rise to the level of force required to show involuntariness based on coercion.¹⁷⁰ Because force did not cause Kodikian's dehydration, this is not a case of coerced intoxication.

To establish a pathological intoxication defense, a defendant must show that his level of intoxication was excessive given the amount of intoxicant consumed and that the defendant did not know that he was susceptible to this level of intoxication.¹⁷¹ There is no mention of this fact in the case; it does not involve any facts that would support Kodikian having an abnormal body condition. However, two issues at play in this case are relevant to this theory of intoxication. First, the night before these young men arrived in Carlsbad, they were drinking alcohol at a bar in Austin, Texas.¹⁷² It is well known that alcohol dehydrates the body.¹⁷³ Thus, when they took their first steps down Rattlesnake Canyon, it is likely that they were already slightly dehydrated.¹⁷⁴ As in most pathological intoxication cases, there was no evidence to suggest Kodikian knew he was entering the canyon in a dehydrated state.¹⁷⁵ Nor is there any evidence to suggest he was aware of the potential consequences of beginning a hike in this compromised state. However, Kodikian's slight preexisting dehydration level was not an abnormal bodily condition that multiplies the effect of an intoxicant as is seen in typical cases of pathological intoxication.

The second issue in this case concerning pathological intoxication is that there was evidence to suggest dehydration was not the sole cause of Coughlin's medical

167. See Kodikian Testimony, *supra* note 5.

168. See *id.*

169. See Keebler Testimony, *supra* note 8. Kodikian wrote in his journal, "We dont know why no one c[a]me, we only had a one night pass for Wed and now its Saturday." Coughlin-Kodikian Journal, *supra* note 6 ("Saturday" entry by Kodikian). At his sentencing hearing, Kodikian testified that they believed that the volunteer who had instructed them to fill out a backcountry permit had misfiled the permit, explaining why they didn't believe that they would be rescued. According to Kodikian, the park service volunteer told them that he did not know what he was doing. See Kodikian Testimony, *supra* note 5.

170. See *supra* notes 70-72 and accompanying text.

171. MODEL PENAL CODE § 2.08(c) (1985). Pathological intoxication is a temporary psychotic reaction typically triggered by alcohol consumption in a person with a preexisting abnormal body condition. Lawrence P. Tiffany & Mary Tiffany, *Nosologic Objections to the Criminal Defense of Pathological Intoxication: What Do the Doubters Do?*, 13 INT'L J.L. & PSYCHIATRY 49, 49 (1999); see, e.g., *Perkins v. United States*, 228 F. 408, 415 (4th Cir. 1917).

172. Kodikian Testimony, *supra* note 5. According to Kodikian, they both had consumed at least five beers and probably more the night before they arrived in Carlsbad.

173. See Burke Memo, *supra* note 42.

174. See *id.*

175. See, e.g., *Perkins*, 228 F. at 415. The court stated:

A patient is not presumed to know that a physician's prescription may produce a dangerous frenzy....If, for example, in this case, the prescription itself or the realized effect of the first dose of chloral, or both together, warned the defendant...that he might be thrown into an uncontrollable frenzy, then he would be guilty of murder or manslaughter according to the view the jury might take of the circumstances. If, on the other hand, the defendant had good reason to infer from the terms of the prescription or the oral instructions of the physician, or from the effect of the first dose, or from all of these together, that he would fall into unconsciousness from a larger dose, then he would not be legally responsible for acts committed in a violent frenzy which he had no reason to anticipate.

Id. at 415-16.

problems at the campsite. According to Kodikian's testimony, Coughlin spent the evening prior to his death in excruciating pain.¹⁷⁶ His muscles froze, and he could not sit or lie down comfortably.¹⁷⁷ Coughlin kept vomiting all night as mucus became caught in his throat.¹⁷⁸ Peter Bigfoot, a survivalist and defense expert, testified that eating prickly pear cactus has caused severe reactions.¹⁷⁹ Therefore, Coughlin might have had a severe reaction to eating the prickly pear. In addition, Coughlin may have been suffering from a condition known as rhabdomyolysis, which can produce severe muscle pain.¹⁸⁰ Because it was Coughlin who experienced these problems and not the defendant, Kodikian could not assert a pathological intoxication defense. However, these considerations may have played an indirect role in the case because pathological intoxication may have altered Coughlin's mental state and caused him to beg Kodikian to kill him.¹⁸¹

The third type of involuntary intoxication that must be considered is intoxication by mistake or accident.¹⁸² There are some similarities between the primary case on point here, *People v. Penman*,¹⁸³ and the *Kodikian* case. In *Penman*, the defendant's problems commenced when he visited the dance room of a house of prostitution.¹⁸⁴ While in the dance room, another man approached the defendant, engaged him in conversation, and gave him some pinkish tablets, the size of cinnamon drops.¹⁸⁵ After consuming the tablets, the defendant became dizzy, weak, nauseated, and parched.¹⁸⁶ Later, when the defendant met with a friend for the purpose of purchasing his car, the defendant "flew all to pieces" and killed his friend.¹⁸⁷ By analyzing the defendant's symptoms and descriptions of his behavior at the time of the murder and in the days thereafter, a defense expert inferred that the defendant had been suffering from cocaine poisoning at the time of the murder.¹⁸⁸

The defendant in *Penman* exhibited poor judgment in consuming pills provided by a stranger in a house of prostitution. Similarly, Kodikian's decision to camp in a primitive wilderness in unfamiliar terrain showed equally poor judgment. Few of us would consider taking unlabeled medication from a stranger. Kodikian's decision

176. Kodikian Testimony, *supra* note 5. See also Coughlin-Kodikian Journal, *supra* note 6 ("Sunday" entry by Kodikian) "I killed and buried my best friend today. Dave had been in pain all night."

177. *Id.*

178. *Id.*

179. See Audio Tape: Testimony of Peter "Bigfoot" Busnack, State v. Kodikian, Fifth Judicial District, Eddy County, No. CR-99-232 WF (May 10, 2000) (Tape 17 of 18) (on file with author). Bigfoot, who himself has suffered extreme dehydration twice, related several experiences in which hiking in the desert he had become sick and suffered excruciating pain from eating prickly pear cactus. In addition, prickly pear cactus is a diuretic. See MICHAEL MOORE, *MEDICINAL PLANTS OF THE DESERT AND CANYON WEST* 89-91 (Museum of New Mexico Press 1989).

180. Defense expert Lillian Burke, M.D., postulated that Coughlin's complaints of pain prior to his death may have indicated that he was suffering from rhabdomyolysis—a skeletal muscle injury that may be accompanied by muscle pain and symptoms of delirium. Burke Memo, *supra* note 42. See also, C.J. Milne, *Rhabdomyolysis, Myoglobinuria and Exercise*, 6 *SPORTS MED.* 93 (1988).

181. Coughlin-Kodikian Journal, *supra* note 6 ("Sunday" entry by Kodikian).

182. See *supra* notes 82-88 and accompanying text.

183. 110 N.E. 894 (Ill. 1915).

184. *Id.* at 898.

185. *Id.*

186. *Id.*

187. *Id.* at 897-98.

188. *Id.* at 898-99.

to head into the wilderness with poor map reading skills, following essentially unmarked trails, is almost equally inexplicable. One difference between the two cases, however, is that Kodikian did not appreciate the full extent of his own ignorance. He underestimated the skills needed to survive in the harsh New Mexico desert and his own knowledge of the environment into which he and Coughlin were headed. Cases involving intoxication by mistake or accident raise the question: "What level of responsibility shall we attribute to individuals in these situations?" Is it fair for the judicial system to absolve Penman of criminal responsibility when he recklessly consumed pills without determining the content of those pills? When a park volunteer handed Kodikian a handout warning hikers that the desert was a hostile environment and that you would need a good topographic map to navigate wilderness trails,¹⁸⁹ was it reckless for Kodikian to hike in the area when he could not read a topographic map? Because Kodikian was unaware of his own limitations, it could be argued that his conduct was more excusable than the defendant in the *Penman* case.¹⁹⁰ Given that the conditions causing Kodikian's dehydration, namely his errors in judgment and the fact that he became lost, lie in the realm of accident or mistake, this case may fit within this category of involuntary intoxication.

The final type of involuntary intoxication to consider is intoxication caused by ignorance of the intoxicating effect of a prescription. For our purposes, we must consider two different lines of cases: those in which individuals consumed a prescribed drug, and those in which defendants combined a prescribed drug with alcohol or had a preexisting mental illness. In the first instance, this defense is only available if the defendant ingested the drug "pursuant to medical advice and without [the] defendant's knowledge of its potentially intoxicating effects."¹⁹¹ Additionally, the prescribed drug must have caused the intoxication.¹⁹² The interplay between alcohol and prescription drugs often raises interesting issues concerning the cause of intoxication, as there can be both voluntary and involuntary elements of the intoxication. In these cases, the defendant must convince a jury that the prescription drug, rather than the alcohol, was the primary factor responsible for the defendant's intoxication. Moreover, if, unbeknownst to the defendant, the prescription drug predisposes an individual to become intoxicated, it raises a hurdle that the state must overcome in showing that an individual's consumption of an intoxicant was voluntary.

Although Kodikian did not become intoxicated because of prescription drugs, many of the facts of this case parallel those of a key prescription drug intoxication case, *Burnett v. Commonwealth*.¹⁹³ In *Burnett*, the defendant, while under the influence of prescription medication, drove his vehicle into a pedestrian, causing serious injury.¹⁹⁴ The defendant's abscessed tooth had been pulled four days before

189. See BACKCOUNTRY USE POLICY, *supra* note 7.

190. See Kodikian Testimony, *supra* note 5. Kodikian testified that he thought the topographic map was useless and inaccurate.

191. *City of Minneapolis v. Altimus*, 238 N.W.2d 851, 857 (Minn. 1976).

192. *Id.*

193. 284 S.W.2d 654 (Ky. 1955).

194. *Id.* at 655.

the incident.¹⁹⁵ During the four-day period between the date of the tooth extraction and the accident, the defendant suffered from intense pain and returned to the hospital for narcotics.¹⁹⁶ Prior to this incident, the defendant had never taken narcotic medication and was unfamiliar with its side effects.¹⁹⁷ At trial, two doctors testified that, if an individual does not fall asleep after taking this medication, "it is highly probable a person taking them will get into a state of mind where he does not remember how many he had taken, and that an excessive dose will produce an intoxicated condition."¹⁹⁸ Ironically, the defendant believed that he could drive his car safely to the hospital, but, after the incident, he could not accurately remember what had happened.¹⁹⁹

Although a prescription drug did not cause Kodikian's intoxication, his lack of knowledge about the risks of bringing too little water into the desert, as well as his ignorance of the camping conditions, parallels Burnett's lack of knowledge about Nembutal's side effects. Both individuals unknowingly put themselves at risk for intoxication, and, in both cases, individuals with superior knowledge could have ensured that Burnett and Kodikian appreciated the risks involved. Burnett's doctor should have educated him about the drug's side effects. The park service volunteer who helped Kodikian complete the backcountry permit should have told Kodikian and Coughlin that there were no fixed camping sites on the trail, the trail was poorly marked, and they would be on their own.

There is another parallel between the two cases—once the intoxication process commenced both individuals appeared powerless to interrupt it. Once he began consuming Nembutal, Burnett could not remember how many pills he had taken and he underestimated his impairment level. During their first two days in the desert, Kodikian and Coughlin walked past the trailhead of the canyon's entrance trail many times, but they were unable to recognize it, causing them to sink further into dehydration.²⁰⁰ As time passed and Kodikian and Coughlin's dehydration worsened, they battled anger and an increasing sense of hopelessness, as well as hallucinations.²⁰¹ On Friday afternoon, while they were hiking down a ridge back towards the campsite, Coughlin thought that he saw jugs of water on a ledge of the wall of an old homestead. Kodikian figured that the rangers had found the campsite and left water for them. As they approached the ruins of the homestead, the jugs disappeared.²⁰²

Later that evening, Kodikian thought he saw people building machines to extract them from the campsite.²⁰³ Despite these events, just as Burnett believed he was competent to drive at the time he struck the pedestrian, Kodikian believed he knew what he was doing when he thrust a knife into his best friend's chest.²⁰⁴ Thus,

195. *Id.* at 657.

196. *Id.* Burnett's doctor prescribed the narcotic drug Nembutal.

197. *Id.*

198. *Id.* at 657-58.

199. *Id.* at 657.

200. Kodikian Testimony, *supra* note 5.

201. *Id.*

202. *Id.*

203. *Id.*

204. *Id.*

although the precise causes of Kodikian's and Burnett's intoxication do not match, the nature of the intoxication's cause and effect bear some resemblance.

The second type of prescription drug case, in which the defendant has combined prescription drugs with alcohol, merits discussion. In *Boswell v. State*, the court held that a defendant was entitled to an involuntary intoxication instruction when he shot and killed an individual.²⁰⁵ Police went to the defendant's home for the purpose of helping Boswell's wife commit him for alcoholism.²⁰⁶ When the police arrived, the defendant was armed. As the police approached the residence, Boswell, believing they had fired a shot at him, fired a shot at the police.²⁰⁷ A defense expert testified that Boswell had toxic levels of Prozac and Xanax in his system and that those toxic levels could have caused Boswell to hallucinate at the time of the shooting.²⁰⁸ Although the defendant had been drinking, the defense argued that Xanax and Prozac were the primary cause of the defendant's intoxication.²⁰⁹ Thus, although the defendant had voluntarily consumed alcohol, the primary cause of the defendant's intoxication was involuntary. Given that the burden is on the state to prove that the sole cause of a defendant's intoxication is voluntary, by demonstrating an involuntary component of the intoxication, a defendant may earn the right to a jury instruction on involuntary intoxication.²¹⁰

Although Kodikian voluntarily entered Rattlesnake Canyon in search of a campsite with less water than he needed to satisfy his body's fluid requirements on an overnight hike in the desert, he did not choose to become lost. Had Kodikian and Coughlin found the trailhead on the first or second morning, they would have experienced slight discomfort but not the serious dehydration that altered their mental states by Saturday morning. Like the defendant in *Boswell*, whose chronic alcohol consumption impaired his body's ability to process the prescription medication, an involuntary factor—namely getting lost—ultimately caused Kodikian's dehydration.

B. Failure to Ingest a Substance and Intoxication

The Model Penal Code defines intoxication as "a disturbance of mental or physical capacities resulting from the introduction of substances into the body."²¹¹ An explanatory note within the Model Penal Code states that the source of the intoxication is not limited to alcohol and drugs.²¹² Thus, the key to intoxication is not what substance is introduced into the body, but rather the substance's impact on an individual's body or mind. For example, although anabolic steroids are not considered to be intoxicants, because they can alter an individual's mental and physical state, in certain circumstances, their use may merit an involuntary intoxication defense. The key to this definition is that the intoxicant can alter one's

205. 610 So. 2d 670, 673 (Fla. Dist. Ct. App. 1992).

206. *Id.* at 671.

207. *Id.*

208. *Id.* at 672.

209. *Id.* at 673.

210. *United States v. Henderson*, 680 F.2d 659, 663 (9th Cir. 1982).

211. MODEL PENAL CODE, § 2.08(5)(a) (1985).

212. *Id.* at 350.

mental *or* physical state. Since, at common law, eating could cause intoxication, it is a small step to argue that the lack of food or water can alter one's mental or physical state.

The leap from using the ingestion of a substance as the basis for intoxication to the failure to ingest a substance is inconsequential.²¹³ Just as the consumption of a substance that the body does not need can alter a mental state, the failure to consume a substance that the body needs, namely water, can disrupt the condition of one's body and mind. Given the advances that have evolved in the past twenty years in using prescribed medication to treat mental illness, it is not difficult to accept the premise that the lack of certain substances in the brain may manifest symptoms of a mental illness. For example, it is now widely accepted that low levels of serotonin in the brain cause depression and many antidepressant medications are designed to address this deficiency.²¹⁴

Perhaps the most effective way to demonstrate that the law should treat the failure to introduce a substance into the body the same as it treats introducing a substance into the body is to compare the consequences of dehydration or hypernatremia²¹⁵ with the introduction of too much water into the body or hyponatremia.²¹⁶ Hypernatremia may be caused by lack of access to fluids, decreased thirst, excessive water loss, or excessive sodium intake.²¹⁷ Conversely, causes of hyponatremia include renal failure, excessive use of diuretics, or the chronic ingestion of large quantities of beer.²¹⁸ Critically, in both hyponatremia and hypernatremia, the balance of sodium and water in the body has been disrupted. As the level of sodium concentration outside the cells changes, the distribution of water within the cells changes.²¹⁹ The mechanism that causes both of these electrolyte disorders is the same—a disproportionate gain or loss of sodium or water in the body.²²⁰ The description below accurately describes this mechanism:

For example, volume depletion associated with vomiting, diarrhea, burns, or hemorrhage typically involves loss of both sodium and water and usually does not produce changes in the serum sodium concentration. Only when the change in either sodium or water is disproportionate to the change in the other component does hypo- or hypernatremia occur.²²¹

These abnormal body conditions are both defined by the relative concentrations of sodium in the body. With hypernatremia, the serum or plasma sodium concentra-

213. District Court Judge Forbes responded to this argument by stating, "The court agrees that the Defendant's argument is a 'leap' and this is a leap, no matter how big or small, that this court is not prepared to recognize." Order Relating to Defendant's Pretrial Motion, *supra* note 55, at 3.

214. PETER D. KRAMER, LISTENING TO PROZAC 52-66 (1997).

215. Hyponatremia is defined as acute water intoxication often caused by sodium depletion and water ingestion. See Allen I. Arieff, *Central Nervous System Manifestations of Disordered Sodium Metabolism*, 13 CLINICS IN ENDOCRINOLOGY AND METABOLISM 269, 271 (1984).

216. Hypernatremia is defined as an electrolyte disturbance associated with high levels of sodium and a loss of intracellular brain water. See Ayus, *supra* note 38, at 243.

217. Votey, *supra* note 36, at 760.

218. *Id.* at 752-55.

219. Maria V. DeVita, M.D., & Michael F. Michelis, M.D., *Perturbations in Sodium Balance*, 13 CLIN. LAB. MED. 135, 136 (1993).

220. Votey, *supra* note 36, at 751.

221. *Id.*

tion exceeds 145 mEq/liter.²²² Hyponatremia is clinically defined as a serum or plasma concentration of less than 135 mEq/liter.²²³ The neurological consequences of hypernatremia are caused by the dehydration of the cells in the brain, which causes cerebral blood vessels to tear and hemorrhage.²²⁴ With hyponatremia, water is drawn into the cells causing cerebral swelling, which later reduces.²²⁵

Despite the biochemical differences between the two disorders, both electrolyte imbalances manifest the same clinical symptoms.²²⁶ Both disorders impact the central nervous system by causing lassitude, confusion, disorientation, agitation, coma, seizures, and delirium.²²⁷ They affect the neuromuscular system by causing muscle cramps and weakness.²²⁸ Their gastrointestinal manifestations both include anorexia, nausea, and vomiting.²²⁹

Though acting through slightly different mechanisms, hypernatremia and hyponatremia impact the body similarly. The rationale behind the involuntary intoxication defense is that an individual should not be criminally liable for an act that he could not intend because his mind was compromised at the time of the crime. Given that hypernatremia and hyponatremia affect the body similarly, it is illogical to restrict the definition of intoxication to cases where a substance has been introduced into the body when the failure to introduce a substance may have an identical effect on the body. That restriction represents a pattern of logic crippled by the triumph of form over substance.

There is a great danger in hamstringing the definition of intoxication. If we do not let the meaning of words develop with our scientific understanding, the legal system's ability to achieve justice can be undermined. As Bertrand Russell stated, "There is an obvious danger in employing words in the absence of exact definitions, but there is another, less obvious, danger in attempting to formulate exact definitions: we may think that we have succeeded."²³⁰

C. Effect of Dehydration on the Body

When considering how dehydration affects the body, one should consider that one of the earliest forms of punishment designed by western civilization was to tie people to a vertical stake and leave them to die from thirst and starvation.²³¹ We can attribute this advancement in capital punishment to the Phoenicians who designed the method of execution known as crucifixion.²³² Dying by dehydration is so cruel that the Romans reserved this method of execution for slaves and the worst

222. *Id.* at 760.

223. *Id.* at 752.

224. *Id.* at 764.

225. DeVita, *supra* note 219, at 141.

226. *Id.* at 139.

227. *Id.*

228. *Id.*

229. *Id.*

230. James M. Dolan, *Death by Deliberate Dehydration and Starvation: Silent Echoes of the Hungerhauser*, 7 ISSUES IN L. & MED. 173, 179 n.20 (1991).

231. *Id.* at 175 (citing C. PANATI, PANATI'S EXTRAORDINARY ENDINGS OF PRACTICALLY EVERYTHING AND EVERYBODY 139 (1989)).

232. Dolan, *supra* note 230, at 175.

criminals.²³³ For those who think that modern civilization would not consider such an atrocity, one only needs to look to the Third Reich. Under the direction of Dr. Hermann Pfannmuller, the Nazis created "hungerhauser," which were initially starvation houses designed to kill children.²³⁴

Although New Mexico law requires that an individual asserting an involuntary intoxication defense demonstrate that alcohol or drugs caused his intoxication, if one can show that dehydration impacts the body and mind similar to intoxication, then the absence of water should be recognized as a potential intoxicant. In performing this analysis, it is important to keep in mind that the Model Penal Code defines intoxication as a "disturbance of mental or physical capacities."²³⁵ To determine whether Kodikian's dehydrated state represented a disturbed bodily condition similar to intoxication, we must evaluate all evidence indicating the degree of that disturbance.

With dehydration, as with intoxication, the level of impairment varies with the condition's severity. To establish a consequential level of impairment, we must show that Kodikian was significantly dehydrated. In cases of alcohol impairment, the standard for measuring impairment is an individual's blood alcohol content or the percentage of alcohol in his or her blood. In New Mexico, the impairment standard is .08 percent.²³⁶ The standard for evaluating dehydration levels is the percent of body weight loss directly attributable to water loss.²³⁷

Based on numerous scientific studies, scientists have been able to construct a continuum of the signs and symptoms of dehydration that correlates with an individual's body water deficit.²³⁸ Those signs and symptoms are detailed in the table below.²³⁹

TABLE I

1-5%	6-10%	11-20%
Thirst	Dizziness	Delirium
Vague discomfort	Headache	Spasticity
Economy of movement	Dyspnea	Swollen tongue
Anorexia	Tingling in limbs	Inability to swallow
Flushed skin	Decreased blood volume	Deafness
Impatience	Increased blood concentration	Dim vision
Sleepiness	Absence of salivation	Shriveled skin
Increased pulse rate	Cyanosis	Painful micturition
Increased rectal temp.	Indistinct speech	Numb skin
Nausea	Inability to walk	Anuria

233. *Id.*

234. *Id.* at 182 n.25.

235. MODEL PENAL CODE, § 2.08(5)(a) (1985).

236. N.M. STAT. ANN. § 66-8-102 (1998, Supp. 2001).

237. Moon Letter, *supra* note 27.

238. See E.F. ADOLPH, PHYSIOLOGY OF MAN IN THE DESERT 240 (1947).

239. *Id.*

The symptoms detailed in this chart range from symptoms that begin in early dehydration to symptoms that do not appear until severe dehydration. The symptoms reported by the medical personnel in this case run the gamut across all three of these categories.²⁴⁰ Kodikian's symptoms in the one to five percent category include an increased pulse rate, as well as increased body temperature. At the time that the park rangers found Kodikian, his pulse rate was 120 to 125 beats per minute.²⁴¹ When Ranger Mark Maciha arrived at the scene, he noted that Kodikian's skin was warm and dry.²⁴² Kodikian's body temperature when he reached the hospital in Carlsbad was 102.2 degrees Fahrenheit.²⁴³

Signs indicating that Kodikian's dehydration level had progressed into the six to ten percent range include the fact that when Ranger Matteson found Kodikian, Kodikian was disoriented.²⁴⁴ When Kodikian arrived at the hospital, Dr. Mark Hopkins, the emergency room physician, noted that he walked with an unnatural gait and exhibited signs of fatigue and weakness.²⁴⁵ When considering the severity of these symptoms, it is important to note that dehydration is unpleasant, even in its earliest stages.²⁴⁶

Finally, there is evidence that shows Kodikian's dehydration level exceeded ten percent. First, Ranger John Keebler reported that Kodikian could not hold any water down when they first offered him a canteen.²⁴⁷ Second, when Matteson pinched the skin on the top of Kodikian's hand, the skin remained in a tent shape indicating that Kodikian was dehydrated.²⁴⁸ Finally, when Kodikian arrived at the hospital, the physician noted that he displayed a flat affect.²⁴⁹

According to defense expert Dr. Spencer Hall, an expert in emergency room medicine, the results of Kodikian's blood work indicated that Kodikian was perhaps dehydrated as much as 17 to 18 percent.²⁵⁰ Dr. Hall testified that Kodikian's flat affect indicated that his oxygen supply to his brain had been compromised.²⁵¹ The fact that Kodikian could not hold down any water showed that there was a problem

240. The categories represent the percent of deficit of body water to body weight.

241. Keebler/Matteson Interview, *supra* note 13.

242. Carlsbad Caverns National Park, Case Incident No. 99-212, Emergency Medical Services Report (May 8, 1999) (on file with author).

243. ER Record, *supra* note 37.

244. Keebler/Matteson Interview, *supra* note 13.

245. ER Record, *supra* note 37.

246. Audio Tape: Testimony of Robert Moon, State v. Kodikian, Fifth Judicial District, County of Eddy, No. CR-99-232 WF (May 8, 2000) (Tape 7 of 18) (on file with author) [hereinafter Moon Testimony].

247. Keebler/Matteson Interview, *supra* note 13.

248. *Id.*

249. Hopkins Testimony, *supra* note 33, at tape 5 of 18.

250. Audio Tape: Testimony of Spencer Hall, M.D., State v. Kodikian, Fifth Judicial District, County of Eddy, No. CR-99-232 WF (May 8, 2000) (Tape 9 of 18) (on file with author) [hereinafter Hall Testimony]. Dr. Hall testified that a flat affect is a condition in which an individual lacks the spontaneity and interpersonal connection that exists in normal conversation between people. This condition is often seen in psychiatric patients who are either medicated or suffering from some organic brain dysfunction. A person suffering from this condition can still be oriented to time and space. *Id.*

251. *Id.*

with the blood flow to the gastrointestinal tract, and Dr. Hill postulated that Kodikian was in the early stages of kidney failure.²⁵²

In contrast to the opinions expressed by Sherrie Collins, an EMT employed by the National Park Service,²⁵³ Dr. Hill stated,

I think it very unlikely that Raffi would have lived out the rest of the day. He was pretty close to entering a significant downward spiral with his medical condition as I understand it from a review of the records and from listening to the other individuals who have testified.... There is a number of data. One is the patient was incredibly dehydrated and I can put some numbers on it but looking at the sodium level, which is higher than I've ever seen, and calculating how much fluid he would have needed to be treated with shows a profound dehydration.²⁵⁴

Using estimates of Kodikian's activity level during the four-day period and the daily temperatures at Carlsbad, the State's expert, Robert Moon, estimated that Kodikian was thirteen percent dehydrated.²⁵⁵ Moon's estimates assume that Kodikian was fully hydrated at the start of the hike and do not account for the fact that Kodikian used much of his water supply to cook hotdogs the first night or that he had been drinking alcohol the night before. Dehydration levels of fifteen percent may be fatal.²⁵⁶ Moon conceded that, even at a dehydration level of ten percent, there is a substantial potential for physical and psychological impairment and, at the twelve to thirteen percent level, the "body is in a profound state [of] dysfunction and the ability to think clearly can be severely impaired."²⁵⁷

Given that Kodikian suffered from extreme dehydration at the time of the incident, there can be no doubt that he experienced a disturbance of mental or physical capacities sufficient to satisfy the Model Penal Code's definition of intoxication. Since Kodikian's dehydration was nearly fatal, the fact that the absence of water, rather than alcohol or drug use, caused the intoxication should not rule out consideration of the effect of dehydration as an intoxicant. The only remaining hurdle to overcome is whether Kodikian's dehydration caused a mental dysfunction that satisfies the legal test of insanity.

D. Mental Dysfunction

Kodikian's cognitive functioning at the time he became lost at Carlsbad Caverns was affected by three separate factors, each of which affected his decision-making capacity. First, according to defense expert Dr. Thomas Thompson, who subjected Kodikian to an extensive battery of psychological tests, Kodikian suffered severe pre-existing deficits, even before becoming dehydrated, in his visual-spatial

252. *Id.*

253. See Collins Letter, *supra* note 47, at 3 (basing opinion that Kodikian was not in life threatening state of dehydration on the EMS run sheet, which indicated he was lucid, answered questions correctly, and was articulate, as well as on the fact that he was able to bury Coughlin in a shallow grave covered with large rocks).

254. Hall Testimony, *supra* note 250.

255. Moon Testimony, *supra* note 246.

256. TOD SCHIMELPFENIG & LINDA LINDSEY, WILDERNESS FIRST AID 308 (National Outdoor Leadership School, 2d ed. 1991).

257. Moon Letter, *supra* note 27.

reasoning, his complex decision-making skills, and in his brain's ability to retrieve material from memory.²⁵⁸ As a result of these cognitive deficits, Kodikian could not read a topographical map, nor could he separate essential details from inessential details when he entered the new and novel situation that presented itself to him at Carlsbad.²⁵⁹ In short, his ability to find his way out of the canyon was limited. Before he entered the canyon, Kodikian also had no reason to suspect that he possessed these deficits—a situation analogous to pathological intoxication cases.²⁶⁰

The second dynamic that influenced Kodikian's brain functioning is that, as he continued to unsuccessfully find his way out of the canyon, a psychological condition known as "learned helplessness" set in.²⁶¹ When the body is subjected to persistent stress, it triggers a series of chemical changes in the brain that alter the character of a person's reasoning.²⁶² This process is similar to the chemical changes associated with depression—namely a deficit in the serotonin level.²⁶³ As a result of this condition, Kodikian experienced a growing sense of hopelessness and desperation about his circumstances and was unable to believe that there was any option but suicide.²⁶⁴

Kodikian's dehydration compounded his preexisting neurological deficits and his sense of hopelessness and made him incapable of rational thought at the time that he killed Coughlin.²⁶⁵ The State's own expert, Robert Moon, believed that at dehydration levels of ten percent "there is substantial potential for physical and psychological impairment."²⁶⁶ Dehydration affects brain functioning because it disrupts the ratio of water to sodium in the brain.²⁶⁷ The equilibrium between sodium and potassium regulates the chemical and electrical impulses that pass through brain cell walls.²⁶⁸ As the relative level of sodium in the brain increases, a person functions as if they have become intoxicated by the body's own sodium.²⁶⁹ The body drains fluid out of the brain cells to compensate for this sodium increase.²⁷⁰ Hypernatremia causes water to leave cells and, as a result, the brain shrinks due to this loss of extracellular fluid.²⁷¹

This loss of fluid volume damages the delicate cerebral blood vessels.²⁷² What happens to brain cells when the body is dehydrated is similar to what happens to cucumbers when they are placed in a salty solution, they become pickled.²⁷³ As the

258. Thompson Testimony, *supra* note 57.

259. *Id.*

260. *Id.*

261. Audio Tape: Testimony of Abraham Fiszbein, M.D., State v. Kodikian, Fifth Judicial District, County of Eddy, No. CR-99-232 WF (May 8, 2000) (Tapes 14 and 15 of 18) [hereinafter Fiszbein Testimony].

262. *Id.*

263. *Id.*

264. *Id.*

265. Thompson Testimony, *supra* note 57.

266. Moon Letter, *supra* note 27.

267. Fiszbein Testimony, *supra* note 261.

268. *Id.*

269. *Id.*

270. E-mail from Lillian P. Burke, M.D., to Shawn Boyne, University of Wisconsin, Fellow, Institute for Legal Studies (May 6, 2000, 04:56 CST) (on file with author).

271. *Id.*

272. Arieff, *supra* note 215, at 286.

273. Hall Testimony, *supra* note 250.

brain shrinks due to cellular dehydration, the brain may hemorrhage.²⁷⁴ The progressive symptoms and signs of hypernatremia in the brain include nausea, vomiting, fever, stupor, hyperreflexia, tremors, seizures, and death.²⁷⁵

According to psychiatrist Dr. Abraham Fiszbein, expert for the defense, Kodikian's thinking was impaired from Friday morning until the time he was rescued on Sunday.²⁷⁶ Given this impairment, Kodikian was unable to resist Coughlin's demand that Kodikian kill him.²⁷⁷ The combination of dehydration with Kodikian's neuropsychological deficits and sense of hopelessness effectively reduced his ability to think rationally to zero.²⁷⁸ Despite the fact that Kodikian thought that he knew what he was doing at the time of the murder, Dr. Thompson testified that Kodikian was not thinking rationally at the time:

There is no possible way. I mean he can sit here in a courtroom or he can sit here in a situation in my office well-hydrated and sort of tell me in retrospect. But you look at his neuropsychological findings, you look at the fact that there would have been a deterioration in the brain perfusion, there would have been significant deficits in relationship to the fact that he would have become hopeless, and, as a result, depressed and depression basically is a change in the neurobiology of the state of the brain and that he basically began to believe that this situation was in fact exactly how he saw it, he would have had no ability to rise above this—to see the situation in any other way and basically his ability to observe himself at that point in time and to even actively report on it is highly suspect. I don't believe he can. When he reports this to me I think in some ways, he fills in the gaps. Because basically what we have is an individual who is not particularly good at or would not have been good at observing himself at that point in time.²⁷⁹

There are no documented studies that specifically measure how hypernatremia impairs cognitive functioning. Nevertheless, Kodikian's inability to discern an alternative course of action parallels the shortsighted information processing that often occurs in cases of alcohol intoxication. Most notably, researchers have shown that alcohol intoxication impairs information processing and reduces an individual's ability to process and extract meaning from incoming information.²⁸⁰ This condition, which is known as alcohol myopia, "makes us the captive of an impoverished version of reality in which the breadth, depth, and timeline of our understanding is constrained...a state in which we can see the tree, albeit more dimly, but miss the forest altogether."²⁸¹ In this case, what Dr. Thompson referred to as "rising above the situation" would have required Kodikian to consider an alternative course of action in response to his friend's request that he commit

274. Ramon Mocharla, Steven M. Scheynyder, & Charles M. Glasier, *Fatal Dehydration*, 27 PEDIATR. RADIOL. 785, 787 (1997).

275. *Id.*

276. Fiszbein Testimony, *supra* note 261.

277. *Id.*

278. Thompson Testimony, *supra* note 57.

279. *Id.*

280. Claude M. Steele & Robert A. Josephs, *Alcohol Myopia: Its Prized and Dangerous Effects*, 45 AM. PSYCHOLOGIST 921, 922 (1990).

281. *Id.* at 923.

murder. In Kodikian's mind, however, no alternative course of action merited strong consideration. In front of Kodikian stood a dimly lit tree and there was no forest in the distance.

There is substantial evidence that suggests Kodikian's thinking was disordered. These facts included (1) making an "SOS" out of rocks and expecting a helicopter to fly overhead,²⁸² (2) starting a fire and expecting someone to come because park policy prohibits fires,²⁸³ and (3) lying under a tarp in the campsite's hottest spot.²⁸⁴ The state of the campsite was in complete disarray.²⁸⁵ In addition, Kodikian testified that they must have hiked past the opening of the trailhead that would have taken them back to their car many times.²⁸⁶

To qualify for an instruction of involuntary intoxication, the defense need only show that the defendant did not know what he was doing, did not understand the consequences of his actions, did not know the act was wrong, or could not have prevented himself from committing the act.²⁸⁷ Since it can be shown that dehydration impairs brain function and that Dr. Thompson testified the defendant did not know what he was doing, the trial court should have permitted Kodikian to assert this defense. The facts presented in this case, namely Kodikian's preexisting neurological impairments, the learned helplessness dynamic, as well as the impact of dehydration, demonstrate that Kodikian's thinking was impaired. Because Kodikian's impairment was not voluntary, he should have been entitled to a defense that is not merely a defense to specific intent crimes, but rather, a defense that precludes all criminal liability. Kodikian's failure to ingest water cannot possibly be construed as an evil motive that forms the basis for criminal liability. Kodikian did not understand what he was doing, nor could he make an alternative decision. Kodikian also lacked the "knowledge" requirement of second-degree murder. This argument is underscored by the fact that his neurological impairments precluded him from seeing the big picture and, in essence, undermined his ability to prepare for and deal with the conditions he encountered in Rattlesnake Canyon.

VII. POLICY CONSIDERATIONS

This case exposes an incongruity in New Mexico's statutory scheme of criminal defenses. As this Article has shown, Kodikian should have been allowed to present a defense based on the theory of involuntary intoxication. However, Kodikian's involuntarily impaired mental state was a temporary condition. With the addition of an intravenous saline solution, Kodikian was quickly restored to sanity. In other words, his insanity was a temporary condition. Although involuntary intoxication is a complete defense in New Mexico, temporary insanity is not. The mere requirement that a substance be ingested separates involuntary intoxication cases from cases of temporary insanity. The distinction between temporary insanity and involuntary intoxication is simply the cause of the disturbed mental condition.

282. Kodikian Testimony, *supra* note 5.

283. *Id.*

284. Thompson Testimony, *supra* note 57.

285. Matteson Report, *supra* note 9.

286. Kodikian Testimony, *supra* note 5.

287. N.M. U.J.I. CRIM. 14-5106.

Perhaps the purpose of this distinction rests with the problem of proof. In cases where the insanity is caused by intoxication, it is relatively easy for jurors to determine what caused the insanity and whether the defendant ingested an intoxicant. Witnesses can testify that they saw the defendant consume the intoxicant, they saw the defendant's behavior change, or they saw the test results of his sodium level. The causes of other forms of temporary insanity are not so clear-cut. Our ability to administer psychological tests after the incident to determine what happened during the period of temporary insanity is limited. In fact, in the Kodikian case, a major purpose of conducting psychological testing was to determine that Kodikian did not suffer from an anti-social personality disorder.²⁸⁸ In other words, the primary purpose of testing was to show that he was sane before and after the incident. Our ability to define clear-cut causes of forms of temporary insanity, which are not based on intoxication, is currently severely limited. As long as those problems exist, it is unlikely that the legislature will endorse temporary insanity as a complete defense.

VIII. CONCLUSION

Although there is no evidence that a court has ever allowed the involuntary intoxication defense in New Mexico, this case would have been, perhaps, the perfect case for its introduction. The fact that Judge Forbes sentenced Raffi Kodikian to only a two-year period of incarceration made it too risky for the defense to pursue an appeal given that, under New Mexico law, Kodikian could not be released while his appeal was pending and it was likely that Kodikian would have served the bulk, if not all, of his sentence before the appeal took its full course. There was no voluntary conduct on the defendant's part that needed to be deterred through a criminal sentence. In addition, the facts of the case are so unusual that the court would not have opened the door to an onslaught of attempts to use the involuntary intoxication defense. Instead, the court merely would have enabled twelve citizens of the State to think deeply about concepts at the heart of a criminal justice system—the concepts of culpability, responsibility, and intent.

The criminal law...is an expression of the moral sense of the community. The fact that the law has...regarded certain wrongdoers as improper subjects for punishment is a testament to the extent to which that moral sense has developed.²⁸⁹

As our understanding of psychological and scientific factors improves, the law must grow with that understanding rather than duck the opportunity to reexamine the central theses of our system of justice. For example, as our understanding of domestic violence and post-traumatic stress disorder grew, the use of battered women's syndrome as a defense was accepted by the courts. The impact of the rising use of anabolic steroids by athletes has been felt in the legal system through

288. Thompson Testimony, *supra* note 57.

289. *United States v. Freeman*, 357 F.2d 606, 615 (2d Cir. 1966).

the increasing use of both the insanity and the involuntary intoxication defenses by steroid users who commit murder.²⁹⁰

Most critically, the strongest policy reason behind allowing the involuntary intoxication defense to be applied to the facts of this case is that Kodikian's actions did not satisfy the definitions of either specific intent or specific knowledge. The fact that Kodikian did not intend to become dehydrated or lost negates the requirement of malice needed for second-degree murder. As a society, we have decided that it is improper to punish an individual who commits murder, if he committed murder as a result of an altered mental state caused by involuntary intoxication. Rather than forging some new theory of the law, permitting the involuntary intoxication defense in this case would have merely honored the current spirit of the law. In addition, the court would have allowed the community, through the voice of the jury, to weigh the facts of the case in accord with their values and common sense. Had the court permitted the involuntary intoxication defense in this case, the court would have allowed modern conceptions of science to merge with traditional legal theories. By barring the defense, the court allowed the State to pin a level of legal culpability on Kodikian that was not justified by the defendant's mental state.

290. For a discussion of crimes caused by steroid-induced psychosis, see Bidwill & Katz, *supra* note 103.