

10-1-1989

Injecting New Life into an Old Defense: Anabolic Steroid-Induced Psychosis as a Paradigm of Involuntary Intoxication

Martin J. Bidwill

David L. Katz M.D.

Follow this and additional works at: <http://repository.law.miami.edu/umeslr>



Part of the [Entertainment and Sports Law Commons](#)

Recommended Citation

Martin J. Bidwill and David L. Katz M.D., *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)

Available at: <http://repository.law.miami.edu/umeslr/vol7/iss1/2>

This Article is brought to you for free and open access by Institutional Repository. It has been accepted for inclusion in University of Miami Entertainment & Sports Law Review by an authorized administrator of Institutional Repository. For more information, please contact library@law.miami.edu.

**UNIVERSITY OF MIAMI
ENTERTAINMENT & SPORTS
LAW REVIEW**

ARTICLES

**INJECTING NEW LIFE INTO AN OLD
DEFENSE: ANABOLIC STEROID-
INDUCED PSYCHOSIS AS A PARADIGM
OF INVOLUNTARY INTOXICATION**

MARTIN J. BIDWILL*
DAVID L. KATZ, M.D.**

I. INTRODUCTION	2
II. ANABOLIC STEROIDS	6
A. <i>What Are They?</i>	6
B. <i>Methods of Use</i>	7
C. <i>Efficacy of Anabolic Steroids</i>	9
D. <i>The Steroid Sources</i>	10
1. <i>Physicians</i>	10
2. <i>The Black Market</i>	12
3. <i>Control Efforts</i>	14
E. <i>Widespread Use</i>	15

* B.A., *cum laude*, 1987, Wittenberg University; J.D. Candidate, 1990, University of Miami School of Law. We would like to extend our sincere appreciation to Professor Bruce J. Winick, Phillip Halpern, and especially Julie M. Levitt for unselfishly commenting on early drafts of this Article. Your comments were challenging and insightful and went a long way towards improving the Article. We are indebted.

** David L. Katz, M.D. is a lecturer on Psychiatry, Harvard Medical School, and a first year student at the Georgetown University Law Center.

1. World Class Athletes and Professionals	15
2. Low Level Amateurs and Youngsters	16
3. Reasons For Steroid Abuse	17
a. Winning Edge	17
b. Pressure	17
c. Fame and Fortune	18
F. Well-Documented Side Effects	19
G. Steroid Induced Psychosis	21
III. APPLICABLE THEORIES OF EXCUSE	25
A. Insanity	26
1. Causation	26
2. Insanity and Drug Use: Legitimate Partners?	27
3. Delirium Tremens	28
4. Temporary Insanity	30
B. Voluntary Intoxication	32
1. Intoxication?	32
2. Evidence of Intoxication and Criminal Intent: A Conundrum For The Law	33
3. Specific Intent and Steroid-Induced Psychosis	36
4. Is It Always Voluntary?	38
C. Involuntary Intoxication	39
1. Involuntary?	40
a. Duress/Coerced	41
b. Pathological	42
c. Medically Prescribed	43
d. Mistake of Fact	47
e. Arguments Against Characterizing the Intoxication as Involuntary	51
i. Is This Really Something New?	52
ii. The Inevitable Analogy To The LSD Cases	52
iii. A User of Black Market Drugs Should Be On Warning	55
iv. Illegal?	55
f. Educate	59
2. State of Mind Must Equate To Legal Insanity	59
3. Procedure	62
IV. CONCLUSION	62

I. INTRODUCTION

On the afternoon of September 7, 1986, in a field west of Boca Raton, Florida, a farm worker stumbled upon a ghastly sight.¹ In the midst of a makeshift junkyard, strung between two poles, he found a naked body.² The hands tied to one pole, the feet to another, the body was bruised so badly that the farmworker was unable to determine the victim's race.³ Two young men, William Whitmore and Horace "Ace" Williams, were arrested and charged with the killing. Shortly before trial, Whitmore pleaded guilty to second

1. Van Meter, *Suspect in Grisly Murder Did "Whatever Ace Did," Witness Says*, Palm Beach Post, May 9, 1988, at 1B, col. 1.

2. *Id.*

3. *Id.*

degree murder;⁴ however, Williams, a twenty-three year old competitive bodybuilder, rejected a similar plea offer and proceeded to trial—ultimately advancing a novel argument for his exculpation.⁵

At trial, Williams's attorney argued that his client was insane on the night he allegedly killed Michael Shane Patterson.⁶ Williams's insanity, his attorney claimed, resulted from Williams's excessive use of anabolic steroids.⁷ Experts for the defense testified that Williams's excessive use of anabolic steroids made him prone to psychotic episodes similar to that which allegedly disabled his mind on the night of the killing.⁸ Moreover, the defense argued

4. Van Meter, *Whitmore Pleads Guilty to Killing Hitchhiker*, Palm Beach Post, May 12, 1988, at 4B, col.1. Whitmore was sentenced to forty years in prison. *Id.*

5. Van Meter & Hatcher, *Body Builder Guilty of Killing, Robbing Drifter*, Palm Beach Post, June 8, 1988, at 1B, 4B, col.2.

6. *Defense in Slaying Case Cites Steroid Addiction*, N.Y. Times, May 30, 1988, at 20, col.5.

7. See Notice of Intent To Rely On Insanity As Defense, *State v. Horace Williams*, No. 86-9275 CF (Fla. 15th Cir. Ct. filed May 2, 1988) ("The nature of the insanity that the defendant expects to prove will be that at the time of the offense the defendant had a mental infirmity, defect, or disease resulting from the use of anabolic steroids . . .").

At the time of the killing Horace Williams was a magnificently built bodybuilder who for the previous 18 months had been on an excessive regimen of both injectable and orally activated anabolic steroids, often stacking the drugs so as to optimize the effects. See Deposition of William M. Taylor, M.D., at 7-8, 24, 80, *State v. Horace Williams*, No. 86-9275 CF (Fla. 15th Cir. Ct. taken May 14, 1988). See *infra* notes 26-30 and accompanying text for an explanation of stacking. The doses Williams ingested reportedly were often 2,000 times the normal clinical dose. O'Meila, *Physician: Accused Killer "Powder Keg"*, Palm Beach Post, June 2, 1988, at 4B, col. 1.

8. *Id.* On the night of the killing, Williams was out for the evening with his best friend, William Whitmore, and another man, Edward Danielson. *Defense In Slaying Case Cites Steroid Addiction*, *supra* note 6, at 20, col. 5. After attending a party the threesome became bored and began looking for something to do. Van Meter, *Steroid Use To Be Used As Murder Trial Defense*, Palm Beach Post, May 5, 1988, at 5B, col. 1. As they cruised in Whitmore's car, Williams became increasingly violent. The violence reached its pre-killing pinnacle when, as the trio stopped at a local convenience store, Williams angrily ripped a pay-phone from its metal stand upon discovering it to be out of order. Burneko, *Murder Defense: Steroids Made Suspect a "Volcano,"* Palm Beach Post, May 28, 1988, at 4B.

Soon after they returned to the road, the trio stopped to pick up a hitchhiker, Michael Shane Patterson. When Patterson entered the car, Williams suddenly said he needed his wallet from a nearby storage area. Complying, Whitmore drove the foursome to a deserted area west of Boca Raton, Florida. After Williams and Patterson exited the car, Williams asked the large, dark haired Patterson for his cash. Replying that he had none, Williams ordered him to strip. *Id.* At that point the violence began.

Danielson claimed Williams began "flipping out" and that Williams beat Patterson with a pipe. Van Meter, *supra* note 1, at 3B. Patterson tried to run, but Williams stopped him. Trying to defend himself, the drifter picked up a board and tried to hit his attacker. Burneko, *supra* at 4B. Williams took the 2 x 8 from Patterson and began using it "like an ax" on Patterson's head. Van Meter, *supra* note 1, at 3B. Allegedly "growling like a bear," Williams shredded Patterson's pants, ripping the belt loops off. Van Meter, *Steroids Dominate Closing Arguments*, Palm Beach Post, June 4, 1988, at 3B, col. 3. Kicking Patterson, Williams tore like a rabid animal through Patterson's backpack, scattering the contents

that Williams's mental health had deteriorated without his knowledge.⁹

Although a criminal defendant had used the defense of steroid-induced insanity to eliminate criminal responsibility on at least one prior occasion,¹⁰ the defense was untested in Florida. Williams's claim would mark the first, albeit unsuccessful, Florida claim. Ultimately, a Palm Beach County, Florida, jury rejected Williams's defense and found him guilty of first degree murder and robbery.¹¹ The court sentenced Williams to life imprisonment for

around the scene. Van Meter, *supra* note 1, at 3B. Pleading for his life, Patterson was strung between two poles, his hands tied to one and his feet to another. *Defense In Slaying Case Cites Steroid Addiction*, *supra* note 6, at 20, col. 5. The assailants then left Patterson to die. Hatcher & Van Meter, *Body-builder Gets 55 Years In Murder*, Palm Beach Post, June 11, 1988, at 2B, col. 4. The farm worker discovered Patterson's body the next day. Van Meter, *Steroid Use To Be Used As Murder Trial Defense*, *supra*, at 5B, col. 1.

9. Burneko, *supra* note 8, at 1B, col. 2.

10. See *State v. Michael David Williams*, No. C-5630/5631/5634 (Circuit Court for St. Mary's County, Md. filed April 3, 1986). Williams was charged with three counts of arson in June of 1985. Williams had been described as an "exemplary" naval seaman with no past criminal record; however, for the 18 months prior to committing the crime, Williams had been on a regimen of excessive steroid use to enhance his ability to compete as a bodybuilder. Opinion and Order, *State v. Michael David Williams*, *supra* (entered March 27, 1986). Williams pleaded insanity as a result of his steroid use. See Pleas, *State v. Michael David Williams*, *supra* (entered October 4, 1985). After a bench trial, the court found Williams guilty but not criminally responsible on all three counts. The court reasoned that Williams "was indeed suffering from an organic personality syndrome caused by the toxic levels of anabolic steroids . . . and that this disorder substantially impaired his ability to appreciate the criminality of his acts and to conform his conduct to the requirements of the law." See Opinion and Order, *State v. Michael David Williams*, *supra*. The court ordered Williams discharged from the jurisdiction of the state twenty-two days later. Order Pursuant To Md. HEALTH-GEN. CODE ANN. sec. 12-117, *State v. Michael David Williams*, *supra* (entered April 18, 1986). It is important to note that Williams was found not criminally responsible under a test which is modeled after the American Law Institute's "substantial capacity" test—the most liberal of the various definitions of insanity. Cf. MODEL PENAL CODE § 4.01 (1985); *infra* notes 114-148 and accompanying text (discussing an anabolic steroid-induced psychosis in the context of the M'Naghten test—universally considered the most stringent of the tests of legal insanity).

See also *Commonwealth v. Boblett*, No. 88000258-F (Circuit Court for the County of Botetourt, Va. sentenced Sept. 22, 1988) (defendant convicted, *inter alia*, of attempted murder after pleading insanity resulting from the excessive use of anabolic steroids); *State v. Woolstrum*, No. 85-672 (Circuit Court for Clackamas County, Oregon) (steroid user convicted of violent attack on woman). Boblett's conviction is currently on appeal to the Court of Appeals of Virginia (#1339-88-3). For an outstanding discussion of the circumstances leading to the conviction of Woolstrum, Horace Williams, and Boblett, including the results of structured psychiatric interviews of each man, see Pope & Katz, *Homicide and Near-homicide by Anabolic Steroid Users*, 51 J. CLINICAL PSYCHIATRY 28 (1990).

11. Van Meter & Hatcher, *supra* note 5, at 1B, col. 2. Williams was convicted of first degree murder pursuant to FLA. STAT. § 782.04 (1987) and robbery with a weapon pursuant to FLA. STAT. § 812.13(2)(a)-(b) (1987). Judgment, *State v. Horace Williams*, No. 86-9257 CF (Fla. 15th Cir. Ct. filed June 7, 1988).

Among others, the defense requested the court give the following instruction to the

the murder and an additional thirty years for the robbery.¹²

Physiological and psychological side effects have long been associated with the use of anabolic steroids.¹³ However, recent research has begun to reveal that there may be psychiatric repercussions of steroid use far beyond the mere increase in aggressiveness commonly reported in the past.¹⁴ Currently, researchers believe that anabolic steroids, when used in large doses,¹⁵ may lead to a severe toxic psychosis.¹⁶ Attorneys representing steroid users charged with crimes have begun to use the psychological state allegedly created by the drugs as a shield against criminal responsibility.

This Article examines whether a steroid-induced psychosis presents a viable tool to eliminate, or alternatively, mitigate criminal responsibility. Section II provides a brief overview of the use

jury: "The defense maintains that as a result of the long-term use of anabolic steroids, HORACE WILLIAMS was insane on the night that Michael Shane Patterson was killed. You are instructed that under certain circumstances drugs can cause insanity as I have previously defined that word to you." Defendant's Requested Jury Instruction No. 5, *State v. Horace Williams*, No. 86-9257 CF (Fla. 15th Cir. Ct. filed June 2, 1988). The trial judge rejected this instruction. In his actual instruction to the jury on insanity the trial judge did not mention anabolic steroids or the potential role of drugs in a determination of insanity. Transcript at 2731-33, *State v. Horace Williams*, No. 86-9275 CF (Fla. 15th Cir. Ct. June 10, 1988). However, he did give an instruction as to the defense of voluntary intoxication. *Id.* at 2733-34.

12. Sentence, *State v. Williams*, No. 86-9257 CF (Fla. 15th Cir. Ct. filed June 10, 1988). Dr. David Katz, co-author of this Article, who had testified at Williams's trial, feels that the trial judge may have spared Williams from the electric chair due to the steroid testimony, even though the jury rejected it as a basis for acquittal. Katz's claim is supported by the judge's refusal to sentence Williams to death despite the judge's comment that it was "one of the most brutal cases in all my years in this business." See *Killer Sentenced*, Miami Herald, June 11, 1988, at 22A, col. 1. Cf. Transcript at 2821, *State v. Horace Williams*, No. 86-9275 CF (Fla. 15th Cir. Ct. June 10, 1988) ("[B]ased on the facts that I know of this case, I am not going to impose the death penalty."). Horace Williams's conviction is currently on appeal to Florida's Fourth District Court of Appeal (No. 88-2094).

13. See *infra* notes 87-92 and accompanying text.

14. See Pope & Katz, *Affective and Psychotic Symptoms Associated With Anabolic Steroid Use*, 145 AM. J. PSYCHIATRY 487 (1988). See also Pope & Katz, *supra* note 10, at 28-31 (describing three anonymous men (actually Woolstrum, Horace Williams, and Boblett), each having no history of violence or antisocial personality disorder, who impulsively committed violent crimes while taking anabolic steroids, and arguing that structured psychiatric interviews of each man indicate that anabolic steroids played an integral role in the etiology of the violent behavior).

15. Modern athletes often engage in sophisticated regimens of steroid use, combining many different steroids for optimal effect. For a more detailed explanation of this practice, generically known as stacking, see *infra* notes 26-30 and accompanying text. These steroids, in most cases, have not been tested together clinically. Consequently, their effect on the user's mental status is undocumented and remains unpredictable. See *infra* notes 36 & 92 and accompanying text.

16. Pope & Katz, *supra* note 14. See *infra* note 108 for a definition of "psychosis."

and effect of anabolic steroids; in addition, the section attempts to illustrate the distinction between the well-documented side effects, both physiological and psychological,¹⁷ and the newly documented side effect of psychosis. Section III then discusses the various theories that a criminal defendant might advance to prevent the prosecution from proving that the defendant possessed the requisite mental state appurtenant to the crime with which the defendant has been charged. Section III specifically considers whether the mental state potentially produced by steroid use is sufficient under Florida law to establish: (1) an insanity defense—this Article concludes that it is not; (2) a voluntary intoxication defense—this Article concludes that it is, but that it will provide a defense only to individuals charged with specific intent crimes and, hence, mitigation, as opposed to complete exculpation, normally will result; (3) an involuntary intoxication defense—this Article finds that, because most users of steroids presently are unaware of the potential for psychiatric repercussions to accompany steroid use, involuntary intoxication will be an effective theory for avoiding criminal responsibility; however, this Article concludes that as users become educated to the drugs' potential for producing psychiatric repercussions, the utility of this defense will diminish. Because it conveniently lacks any statutory or judge-made law either recognizing or rejecting involuntary intoxication as a defense, Florida law will serve as the laboratory for this analysis. Finally, this Article concludes with the authors' admonition to defense counsel, prosecutors, and the bench that they apprise themselves of the potential issues that may arise when the state charges an anabolic steroid user with a crime.

II. ANABOLIC STEROIDS

A. *What Are They?*

Anabolic steroids are synthetic analogues of the male hormone testosterone that closely simulate the effects of natural, or endogenous, testosterone on the human body.¹⁸ The drugs initially were

17. Throughout this Article, the terms "psychological" and "psychiatric" are used interchangeably to indicate specific reference to an individual's mental state—including cognitive and emotional functions.

18. See Haupt & Rovere, *Anabolic Steroids: A Review of the Literature*, 12 AM. J. SPORTS MED. 469 (1984). Synthetically produced steroids are preferable to pure testosterone in that the synthetic analogues "have been modified to prolong their presence in the bloodstream and to minimize their masculinizing (androgenic) effects." *Testimony Before the House Subcomm. on Crime of the House Comm. on the Judiciary*, 100th Cong., 2d Sess. 1

expected to meet a wide spectrum of medical needs;¹⁹ however, today they are rarely used in treating disease or injury.²⁰ Their predominant use is in improving athletic performance.²¹ Specifically, athletes administer these chemical compounds to promote the synthesis of proteins used to build skeletal muscle.²² When used by athletes under optimal conditions, steroids are believed to increase strength and size, while at the same time allowing for a reduction in body fat.²³

B. Methods Of Use

Steroids are administered in one of two ways: they may be injected intramuscularly or taken in tablet form.²⁴ Although the nor-

(July 27, 1988) (statement of Charles E. Yesalis III, Sc. D., Professor of Health and Human Development, The Pennsylvania State University). The brand names of some of the more frequently implemented anabolic steroids are Dianabol, Anavar, Deca-Durabolin, and Winstrol V. For an informative, exhaustive discussion of the specific anabolic steroids implemented today, see D. DUCHAINE, *UNDERGROUND STEROID HANDBOOK II* 27-46 (1989). In addition to anabolic steroids, athletes also are known to implement Human Growth Hormone (HGH) as an anabolic agent. However, the use of HGH currently is limited because it is prohibitively expensive. Curtis, *State of the Art: Drugs*, *MUSCLEMAG*, May 1989, at 117. For extensive discussions of Human Growth Hormone, see W. TAYLOR, *ANABOLIC STEROIDS AND THE ATHLETE* 69-82 (1982) and D. DUCHAINE, *supra*, at 74-76.

19. Taylor, *Super Athletes Made To Order*, *PSYCHOLOGY TODAY*, May 1985, at 64. Researchers originally expected anabolic steroids to accelerate the healing of bone fractures, muscle and tendon injuries, and burns, as well as to facilitate the treatment of such conditions as malnutrition and post-menopausal osteoporosis in women. *Id.* Today, the two widely accepted medical uses of anabolic steroids are for treating certain types of anemia and for replacement therapy in hypogonadal males. Cowart, *Steroids In Sports: After Four Decades Time To Return These Genies To Bottle?*, 257 *J. A.M.A.* 421, 423 (1987). "Today, however, there are only a few approved steroids on the market. For example, nandrolone phenpropionate is available for the treatment of certain types of breast cancer; nandrolone decanoate for anemia caused by renal failure; and oxymetholone for aplastic anemia." Indictment at 2, *United States v. Cambra*, Crim. No. 89-0854K (S.D. Cal. filed August 25, 1989).

20. Taylor, *supra* note 19, at 64.

21. Although the Nazis allegedly used anabolic steroids to increase troop aggressiveness in World War II, see Haupt & Rovere, *supra* note 18, at 469, the drugs were not introduced to the world of sport until the Soviets began experimenting with the drugs in the early 1950's. *Id.* at 469.

22. See Lamb, *Anabolic Steroids*, in *ERGOGENIC AIDS IN SPORT* 164 (M. Williams ed. 1983). The body can build tissue only when in a state called "positive nitrogen balance." See Haupt & Rovere, *supra* note 18, at 474. Although the exact mechanics of their effects are not fully known, it seems that steroids promote protein synthesis by increasing nitrogen retention. See *Recognizing Anabolic Steroid Abuse*, *PATIENT CARE*, Aug. 15, 1985, at 28 (prepared by Janet P. Cranshaw) [hereinafter *PATIENT CARE*]. Some studies have reported that anabolic steroid use stimulates quicker recovery from workouts, allowing athletes to train harder and more frequently. *Id.* at 30.

23. W. TAYLOR, *supra* note 18, at 3.

24. See Lamb, *Anabolic Steroids in Athletics: How Well Do They Work and How Dangerous Are They?*, 12 *AM. J. SPORTS MED.* 31 (1984). For an outstanding discussion of

mal therapeutic dose of steroids typically is 30-60 mg./day, athletes who use steroids far exceed these amounts.²⁵ Moreover, a new, and possibly more dangerous approach to steroid use has emerged recently. This process, called "stacking," commonly is implemented by the athlete in an attempt to maximize the efficacy of the drugs.²⁶ Stacking entails the use of combinations of different steroids, simultaneously and often at high doses, so as to achieve the most beneficial results.²⁷ As stacking becomes more popular, the dangers of steroid use may be increased dramatically. Increased dosages and new, untested steroid combinations push the athlete into an area unexplored by scientists.²⁸ Strength is maximized,²⁹ but significantly, so are the risks of dangerous, unforeseen side effects.³⁰

the mechanics and potential implications of injecting anabolic steroids, see D. DUCHAINE, *supra* note 18, at 69-73. "Ironically, the injected anabolic steroid . . . is considered a much safer drug than its oral derivatives. Injectable steroids are usually less liver toxic than orals." *Id.* at 69. Nonetheless, some may be more toxic to the kidneys. *Id.* at 19.

Although Duchaine argues that modern athletes are "extremely hygienic, selective, actually idiosyncratic about their selection and use of hypodermic needles," and that the "incidence of 'bad' shots or infections is extraordinarily low," an issue remains which the contemporary literature seems not to have addressed. Specifically, it is unclear how many steroid users have contracted the AIDS virus as a result of their hypodermic needle use. As the virus is transferred frequently by intravenous drug users who share needles, the potential exists for the same type of phenomenon to occur within the ranks of anabolic steroid users who ingest steroids by injection.

25. MacDougall, *Anabolic Steroids*, PHYSICIAN & SPORTSMEDICINE, Sept. 1983, at 95, 97. Male athletes have been reported to use 150-200 mg./day, while females reportedly use 50-75 mg./day. *Id.* However, undocumented reports have claimed intake as high as 2000 mg./day. Lamb, *supra* note 24, at 32. These numbers are staggering in light of the human body's natural production of only 1700-3700 mg. of testosterone per year. B. GOLDMAN, P. BUSH & R. KLATZ, *DEATH IN THE LOCKER ROOM* 82 (1984) [hereinafter GOLDMAN].

26. See generally D. DUCHAINE, *supra* note 18, at 49-59 (discussing usage and dosage of anabolic steroids, including an analysis of the efficacy, safety, and legality of certain "stacks"); Curtis, *supra* note 18, at 17 (providing an informative discussion of safe anabolic steroid "stacks").

27. See Lamb, *supra* note 24, at 33. With a pre-competition stack, the athlete progressively decreases his dosage as the competition nears to minimize the risk of detection. *Id.* at 33. See also Smith, *Catch Me If You Can! How the Pros Beat the Drug Test*, MUSCLEMAG, Dec./Jan. 1988-89, at 128 (outlining various detection avoiding techniques); D. DUCHAINE, *supra* note 18, at 80-81 (explaining how to beat a drug test). See generally W. TAYLOR, *supra* note 18, at 27 for a discussion of "stacking."

28. *Id.* at 28.

29. MacDougall, *supra* note 25, at 97 (noting that high doses result in maximal performance).

30. Lamb, *supra* note 24, at 33. It is clear that stacking has created the need for better, more realistic research. See W. TAYLOR, *supra* note 18, at 28.

C. *Efficacy Of Anabolic Steroids*

Whether steroids really do enhance athletic performance has been, not surprisingly, the subject of a great deal of contentious debate. Some studies claim that, at the least, the evidence as to the efficacy of steroid use in enhancing athletic performance is inconclusive, if indeed, the evidence does not indicate that they have no effect at all.³¹ Others claim, more persuasively, that steroid use, when combined with heavy weight training and a particular diet, will result in precipitous increases in size and strength.³² Further, the claimed benefits have not been solely physiological. Steroid use has been documented to enhance athletic performance through its psychological effects, as well.³³

What is the reason for such divergent reports? A number of factors are responsible, especially inconsistent³⁴ and ineffective studies.³⁵ Because the medical profession considers it unethical to

31. See, e.g., Wilson & Griffin, *The Use and Misuse of Androgens*, 29 METABOLISM 1278, 1283-84 (1980); Lamb, *supra* note 22, at 167. See also 1988 PHYSICIAN'S DESK REFERENCE 1976 (E. Barnhart, publisher) [hereinafter PHYSICIAN'S DESK REFERENCE] (including a conspicuous admonition to physicians that "ANABOLIC STEROIDS DO NOT ENHANCE ATHLETIC ABILITY.").

32. E.g., Pope & Katz, *supra* note 14, at 488; W. TAYLOR, *supra* note 18, at 21; MacDougall, *supra* note 25, at 97; Haupt & Rovere, *supra* note 18, at 474. See also Taylor, *Synthetic Anabolic-Androgenic Steroids: A Plea For Controlled Substance Status*, PHYSICIAN & SPORTSMEDICINE, May 1987, at 140, 144 (noting that the American College of Sports Medicine revised its previously incredulous stand on the efficacy of anabolic steroids to concede that "concurrent use of steroids and training with a proper diet may enhance athletic performance."). Pope and Katz report a stunning example:

[A]n 18 year old man, 72 in. tall, reported that before steroid use he weighed 135 lbs. and could perform the squat (a deep knee bend with a barbell supported on the shoulders) for one or two repetitions with 135 lbs. Two years later . . . after four cycles of steroids totalling 55 weeks, he weighed 230 lbs. (with a low percent of body fat) and reported a squat of 655 lbs.

Pope & Katz, *supra* note 14, at 488.

33. See Haupt & Rovere, *supra* note 18, at 475. To support their claim that anabolic steroids may have a psychological effect, Haupt and Rovere referred to a study in which athletes were given a placebo and told it was the anabolic steroid methandrostenolone (dianabol). *Id.* They noted that "[t]aking the placebo and thinking that it was an anabolic steroid supplied the necessary psychological motivation for the athletes to increase their strength over what would have been expected in the absence of an anabolic steroid." *Id.* Well-known psychological side effects also may benefit competitors in certain sports. For example, increased aggression often is mentioned as a side effect of anabolic steroid use. See *infra* note 90 and accompanying text. Interestingly, increased aggression, while labeled an unwanted side effect by some, is potentially a desired effect in the eyes of others. See T. DONOHUE & N. JOHNSON, FOUL PLAY: DRUG ABUSE IN SPORTS 50-51 (1986) ("Clearly some [football players] would use anabolic steroids to increase their bulk but, in view of their suggested effects on aggression, they could also be used for psychological reasons.").

34. See Haupt & Rovere, *supra* note 18, at 476 (noting that "studies with consistent protocols yielded consistent results.").

35. See Lamb, *supra* note 24, at 33-34 (noting that most studies on humans are inef-

administer large doses of anabolic steroids to healthy humans, studies of steroids in athletics have used significantly smaller doses than those actually utilized by modern athletes in the field; consequently, these studies have been unrealistic, necessitating the avoidance of generalization with respect to their results.³⁶

Regardless of these contrasting research results, the athletes themselves are absolutely certain that anabolic steroids aid their performance.³⁷ Consequently, because athletes have used anabolic steroids and seen their precipitous effects, they have come to doubt the veracity of the claims of the physicians and the medical publications that steroids will not enhance athletic performance. This skepticism has had a disconcerting effect: the athletes similarly have doubted and even disregarded the physicians' warnings as to the deleterious side effects which may accompany steroid use.³⁸

D. The Steroid Sources

1. Physicians

Athletes obtain anabolic steroids from a variety of sources. Although athletes primarily obtain steroids in a vast, multifaceted black market, prescribing physicians provide a significant amount of the anabolic steroids used today.³⁹ Steroids can be prescribed legally and some physicians have not been hesitant to do so, even for non-medical purposes.⁴⁰

fective because the lack of a satisfactory placebo makes performing a double blind experiment impossible).

36. See *id.* at 34.

37. See T. DONOHUE & N. JOHNSON, *supra* note 33, at 39.

38. See Haupt & Rovere, *supra* note 18, at 481; Janofsky & Alfano, *Victory At Any Cost: Drug Pressure Growing*, N.Y. Times, Nov. 21, 1988, at 1, 34, col. 1 (quoting a noted sportsmedicine physician: "It may take generations of athletes before they'll believe us again.").

39. See GOLDMAN, *supra* note 25, at 78-82. The percentage of steroids obtained via physicians has been reported to be as high as 35-40%. See, e.g., MacDougall, *supra* note 25, at 96; Strauss, Wright, Finerman & Catlin, *Side Effects of Anabolic Steroids In Weight Trained Men*, PHYSICIAN & SPORTSMEDICINE, Dec. 1983, at 87, 91 [hereinafter Strauss]. However, recent reports have put the number closer to 20%. Cowart, *Some Predict Increased Steroid Use In Sports Despite Drug Testing, Crackdown on Suppliers*, 257 J. A.M.A. 3025 (1987). Cf. D. DUCHAINE, *supra* note 18, at 82 ("It is just about impossible anywhere in America to find an MD or osteopath, young, old, good, bad, or even greedy to write prescriptions for steroids.").

40. See Cowart, *Would Controlled Substance Status Affect Steroid Trafficking?*, PHYSICIAN & SPORTSMEDICINE, May 1987, at 151, 152; W. TAYLOR, *supra* note 18, at 2 ("Since anabolic steroids are prescription drugs, federal law prohibits the dispensing of them without a prescription from a medical doctor."). However, several emerging factors may curtail

Physicians prescribe steroids for various reasons. While some do so purely for monetary gain, others prescribe in order to satisfy a desire to be affiliated with a sports team or a superstar.⁴¹ More commonly, however, physicians will prescribe steroids claiming that to do so is in the best interests of the athletes themselves.⁴² Some physicians reason that because athletes clearly believe in the efficacy of the anabolic steroids and, consequently, will obtain and use the drugs regardless of whether they can do so through a physician, it would be better if they received and used them under medical supervision.⁴³ Although accurate, this reasoning is myopic. For example, such thinking fails to recognize that many athletes who employ clinical regimens from physicians vastly supplement their quantities from black market sources.⁴⁴

the rampant prescription of anabolic steroids for sports purposes. First, there has been legislation enacted at both the state and federal levels that regulates the prescription of anabolic steroids. See *infra* note 216. Second, physicians increasingly are becoming aware of the malpractice implications that arise from the drugs' serious side effects. See Miller, *Athletes and Steroids: Playing A Deadly Game*, FDA CONSUMER, Nov. 1987, at 18. See also Curtis, *supra* note 18, at 17 (reporting that physicians are less willing than ever to prescribe).

41. See Murphy, *Steroids: Not Just For Athletes Anymore*, PHYSICIAN & SPORTSMEDICINE, June 1986, at 48 (quoting a sportsmedicine physician who remarked that "[a] number of physicians will prescribe steroids for monetary gain and because they want to develop an affiliation with a team."); Burns, *Steroids Tied To Runner's Doctor*, N.Y. Times, October 7, 1988, at 1, col. 4 (claiming that Ben Johnson's physician prescribed the steroids which led to Johnson's Olympic disqualification).

42. See Miller, *Anabolic Steroids: An Australian Sports Physician Goes Public*, PHYSICIAN & SPORTSMEDICINE, Nov. 1986, at 167. Since the black market sources may provide drugs which are of dubious content and quality, physicians claim that in prescribing the drugs, and then monitoring their use, the athlete can be protected from the inherent dangers of obtaining the drugs on the black market and of using them without supervision. *Id.* Further, the level of expertise of some who distribute anabolic steroids on the black market is alarmingly low, and, consequently, these dealers provide the user with either poor advice as to proper use or, alternatively, with no advice at all. See S. CHINERY, ANABOLIC STEROIDS AND BODYBUILDING 76 (1983). This proposition, however, necessarily is qualified because the level of expertise of some black market steroid dealers is alarmingly high. Telephone interview with Phillip Halpern, Assistant U.S. Attorney, Southern District of California (Sept. 26, 1989). Halpern's belief is corroborated vividly by noting that Dan Duchaine, author of the insightful UNDERGROUND STEROID HANDBOOK, was himself a steroid dealer. In any case, the black market supply is abundant. In fact, the Department of Justice currently believes that the black market is approximately \$200-400 million per year. Indictment at 3, United States v. Cambra, Crim. No. 89-0854K (S.D. Cal. filed Aug. 25, 1989).

43. See Miller, *supra* note 42, at 167; Duda, *Do Anabolic Steroids Pose An Ethical Dilemma For U.S. Physicians?*, PHYSICIAN & SPORTSMEDICINE, Nov. 1986, at 173.

44. See Miller, *supra* note 42, at 170; Duda, *supra* note 43, at 173. Athletes are forced to the black market for other reasons beyond the inability to obtain prescriptions of sufficient size. For example, some American anabolic steroid users resort to the black market simply because some steroids—like Finaject and Dianabol—are not available by prescription in the United States. Telephone interview with Phillip Halpern, Assistant U.S. Attorney, Southern District of California (Sept. 26, 1989). The FDA withdrew Dianabol (methandrostrenolone), one of the most popular anabolic steroids, from its list of authorized drugs in

Opinions within the medical community also vary. Some physicians claim that steroid use, when closely supervised, is no more dangerous than using other prescription drugs.⁴⁵ Others find that any prescription of anabolic steroids for non-medical purposes is unethical.⁴⁶ In any light, it is obvious that although physicians harbor a wide variety of attitudes and opinions, they remain a potential source for anabolic steroids.⁴⁷

2. The Black Market

The amount of steroids prescribed by physicians is dwarfed by the amount obtained through the black market.⁴⁸ Conservatively reported to be as large as 200-400 million dollars gross per year,⁴⁹ the black market has been credited with contributing as much as eighty percent of the steroids used by American athletes.⁵⁰ Moreover, this black market is as heterogeneous in its makeup as it is overwhelming in its size. Veterinarians, pharmaceutical industry employees, coaches, and athletic trainers all are among those who provide anabolic steroids to the athlete.⁵¹

1985. Indictment at 7, *United States v. Jenkins*, Crim. No. 87-0491-JLI (S.D. Cal. filed May 20, 1987). In fact, today there are very few approved steroids on the market. See *supra* note 19.

45. See W. TAYLOR, *supra* note 18, at 3 ("It can be shown that prescribing anabolic steroids to athletes in a controlled fashion with regular physician follow up visits is less dangerous than prescribing many if not most of the medication currently available.").

46. See Duda, *supra* note 43, at 174 (quoting a prominent sportsmedicine physician: "It is highly unethical for any physician to prescribe steroids The first rule of medicine is to do no harm to the individual and there is no safe way for an individual to use these drugs or for a physician to guarantee the absence of any long-term effects.").

47. Some have claimed that many physicians who do prescribe steroids do so without fully understanding the effects they have on the human body. See, e.g., Duda, *supra* note 43, at 174. See also Janofsky & Alfano, *A Guru Who Spreads the Gospel of Steroids*, N.Y. Times, Nov. 19, 1988, at 30, col.1 (noting that *The Underground Steroid Handbook* suggests to potential users that they look either to amoral "young doctors," or alternatively to the "quack doctor" who routinely and indiscriminately writes prescriptions). However, many physicians who prescribe steroids clearly are not "quacks." See Miller, *supra* note 42, at 168 (noting that one physician who prescribes steroids is a "world renowned pioneer in sports medicine therapy and research with an order of the British Empire awarded by the Queen for recognition of his service to his profession.").

48. See Alfano & Janofsky, *On the Black Market, Drugs Are In Easy Reach Of Public*, N.Y. Times, Nov. 18, 1988, at 1, 48, col. 1; Eisendrath, *Confessions of A Steroid Smuggler*, MUSCLE & FITNESS, Oct. 1988, at 158.

49. Indictment at 3, *United States v. Cambra*, Crim. No. 89-0854K (S.D. Cal. filed August 25, 1989).

50. Cowart, *supra* note 39, at 3025.

51. See Lamb, *supra* note 24, at 32 (veterinarians and pharmaceutical employees); MacDougall, *supra* note 25, at 96 (athletic trainers); Johnson, *Steroids: A Problem of Huge Dimensions*, SPORTS ILLUSTRATED, May 13, 1985, at 40 (coaches). Cf. Phillips, *Final Chance For a Coach*, Miami Herald, Nov. 28, 1989, at 4D, col. 1 (reporting that a high school wres-

Although distributing steroids without a prescription is illegal in the United States,⁵² obtaining the drugs is easy because in many Latin American and Eastern European countries anabolic steroids are available over the counter.⁵³ Since Mexico is among these nations, there consequently has been a direct faucet running from Mexican pharmacies to the gyms and health clubs of the United States.⁵⁴

The presence of such a large, multifaceted black market creates a social crisis. Black marketeers often have no incentive to look out for the athletes' interests and will sell them virtually *anything*.⁵⁵ As a result, users frequently buy steroids unaware of the

ting coach monitored and advised his team members who were using steroids). See also S. CHINERY, *supra* note 42, at 75-76 (claiming that the corner drug hustler also sells steroids); Murphy, *supra* note 41, at 48 (claiming users sell drugs to subsidize their own habits). Moreover, an FDA agent recently claimed that the steroid market has witnessed the influx of a hardened criminal element, supplanting the "good ol' boy" network that previously coordinated traffic in the drugs. Morrison, *Status Report: Steroids In America*, POWERLIFTING USA, Oct. 1989, at 23 (interviewing FDA agent Don Leggett).

52. 21 U.S.C.A. § 333(e)(1) (West Supp. 1989) (imposing criminal liability upon "any person who distributes or possesses with the intent to distribute any anabolic steroid for any use in humans other than the treatment of disease pursuant to the order of a physician . . ."). See also *infra* note 247 (illustrating how the distribution of anabolic steroids without a prescription alternatively is illegal pursuant to 21 U.S.C. § 353(b)(1) (1982)). Mere possession of anabolic steroids, although criminal in some states, is not in violation of federal law. See *infra* note 247.

53. See GOLDMAN, *supra* note 25, at 90-93. Aside from the *dealers* who use foreign countries as a source, many athletes obtain the drugs while competing abroad. See Lamb, *supra* note 24, at 32.

54. See Indictment, *United States v. Jenkins*, Crim. No. 87-0491-JLI (S.D. Cal. filed May 20, 1987) (outlining a large conspiracy which included among its overt acts the importation into the United States of Mexican manufactured anabolic steroids); GOLDMAN, *supra* note 25, at 92-93; Altman, *Concern Grows Over Steroids: Health Dangers Are Cited*, N.Y. Times, Sept. 28, 1988, at D32, col. 1 ("[Steroids] are easily obtained from mail order companies that buy them in Mexico and abroad . . ."). In fact, steroid laboratories in Mexico bottle anabolic steroids with English language labels. Telephone interview with Phillip Halpern, Assistant U.S. Attorney, Southern District of California (Sept. 26, 1989). See also Eisendrath, *supra* note 48, at 249 ("An advertisement in the March 31 issue of the San Diego Reader underscores how readily available they remain. It touts the 'best stocked pharmacy in Tijuana . . . (for) bodybuilders . . . steroids.' A phone number and address are listed and customers are asked to call in advance 'for large orders.'").

55. In fact "[t]he FDA has recently become aware that 'counterfeit' steroids are flooding the black market in response to the growing demand [for the drugs]." Indictment at 3, *United States v. Cambra*, Crim. No. 89-0854K (S.D. Cal. filed Aug. 25, 1989). "These steroids are counterfeit in that they falsely represent, without authorization, they are the products of legitimate drug manufacturers." *Id.* Counterfeit steroids present serious problems because they may be subpotent or superpotent, or even can be mislabeled—for example, nandrolone could appear in a bottle labeled methandrostenolone. Telephone interview with Phillip Halpern, Assistant U.S. Attorney, Southern District of California (Sept. 26, 1989). Moreover, as steroids of questionable cleanliness are available on the black market, there is an increased risk that users may experience anaphylactic shock (septic shock)—an allergic

true nature and quality of the drugs they purchase. Many ignorantly, yet innocently, put their trust, and perhaps their lives, into the hands of the dealers; at the same time, these dealers often have virtually no knowledge of the mechanics of the human body or of the proper use of the chemicals they are peddling.⁵⁶ Worse yet, the users themselves are often unarmed with any medical knowledge and, consequently, they grossly misuse the steroids, maximizing the potential side effects and minimizing the gains.⁵⁷

3. Control Efforts

Attempts to control America's steroid problem have not focused solely on the athletes themselves, but have targeted the supply element as well. Control efforts have been aimed at the black market suppliers,⁵⁸ the physicians who prescribe the drugs for non-

reaction to the ingestion of a certain compound into the human body that may, if severe, result in unconsciousness or even death. D. DUCHAINE, *supra* note 18, at 69. At times, however, counterfeit steroids may be innocuous. For example, some have been found to be merely plain oil. Telephone interview with Phillip Halpern, Assistant U.S. Attorney, Southern District of California (Sept. 26, 1989). See also Neff & Sullivan, *The People Helper*, SPORTS ILLUSTRATED, Dec. 23, 1985, at 26 (documenting a major west coast steroid dealer who sells athletes an androgenic-anabolic steroid called Mibrolone, which is approved for use only by veterinarians to prevent female dogs from going into heat); Alfano & Janofsky, *supra* note 48, at 1, 48 (discussing the serious problem caused by the increased influx of counterfeit steroids into the black market); D. DUCHAINE, *supra* note 18, at 20-21 (providing an excellent discussion of the etiology of the counterfeit steroid phenomenon).

56. One report documents a study in which steroids were purchased from eight black market dealers:

All eight 'prescribed' a different method of taking the drugs . . . Upon talking to each dealer, it was obvious none of them had any idea what anabolic steroids really were. Seven of the eight recommended usage plans which entailed dangerously high dosages. The frightening thing here was the fact that these dealers appeared competent, knowledgeable, and trustworthy to the young naive bodybuilders upon whom they preyed.

S. CHINERY, *supra* note 42, at 75-76.

57. See *id.* at 74-75.

58. State efforts directed at the black market supply have been half-hearted in part because the public believes the dangers of steroids are not as serious as those presented by cocaine or heroin. Johnson, *supra* note 51, at 49-51. However, recently there has been a legitimate effort to eliminate, or at least vastly reduce, the black market. Cowart, *supra* note 39, at 3025 ("A task force was formed [in 1986] by the Justice Department, the Federal Bureau of Investigation, and the Food and Drug Administration to move against suspected dealers. Several convictions have been obtained, and the penalties that can be levied are harsher because of changes in the penalty section of the Comprehensive Crime Control Bill."). Phillip Halpern, an Assistant United States Attorney who has prosecuted numerous individuals for steroid related offenses, approximates that recent federal efforts to eradicate the black market have resulted in about 200 convictions. Telephone interview with Phillip Halpern, Assistant U.S. Attorney, Southern District of California (Sept. 26, 1989). Halpern believes that these recent efforts have resulted in a severe dislocation in the steroid market; importation has been stymied and the market has shifted towards more domestic counter-

medical purposes,⁵⁹ and the users themselves.⁶⁰ While steroids are far from being eliminated, these efforts to reduce availability are very timely for the use and abuse of anabolic steroids is quickly taking its well-deserved place on America's list of social concerns.

E. Widespread Use

1. World Class Athletes and Professionals

The use of anabolic steroids is widespread in modern sports.⁶¹ As one might expect, steroid use permeates sports such as weightlifting, football, and bodybuilding, but surprising to many, some literature now claims that the drugs are used to aid performance in almost every other sport as well, including track and field, swimming, rowing, boxing, cycling, and baseball.⁶² The use is especially evident at the professional and international levels of competition. While the numbers estimating use by all athletes are eye opening,⁶³ the percentage of professional and international athletes who use anabolic steroids is, in some sports, staggering.⁶⁴ Among such com-

feit production. *Id. Cf.* D. DUCHAINE, *supra* note 18, at 83 (noting that the importation of steroids from Mexico currently is unwise due to the effectiveness of recent federal law enforcement efforts).

59. Efforts to limit the prescription of steroids for non-medical purposes have begun to emerge on both the state and federal levels. *See infra* note 216.

60. Attempts to limit demand have appeared in two forms. Most obvious is the increased testing for the use of anabolic steroids that sports leagues and organizations have begun to adopt. *See* Janofsky & Alfano, *System Accused of Failing Test Posed By Drugs*, N.Y. Times, Nov. 17, 1988, at 1, col. 1. Although the intention is good, these methods are costly and are still easy to circumvent. Smith, *supra* note 27, at 128. Thus, since the likelihood of detection is still low for an athlete well-versed in detection avoiding techniques, and since the athletic benefits of steroid use are significant, anabolic steroids continue to be an attractive option for modern athletes. *See* Janofsky & Alfano, *supra* note 38, at 34.

The second method authorities have used in an attempt to limit demand has been to increase the criminal culpability of those who possess the steroids without a prescription. *See, e.g.*, 1987 Fla. Laws 87-243 (amending FLA. STAT. § 893.03 to make anabolic steroids a controlled substance and, as such, subjecting those who unlawfully possess anabolic steroids to criminal sanctions pursuant to FLA. STAT. § 893.13 (Supp. 1988)).

61. Haupt & Rovere, *supra* note 18, at 469; Pope & Katz, *supra* note 14, at 487.

62. PATIENT CARE, *supra* note 22, at 30; Miller, *supra* note 40, at 18 (reporting anabolic steroid use by baseball players).

63. *See* Pope, Katz, & Champoux, *Anabolic-Androgenic Steroid Use Among 1,010 College Men*, PHYSICIAN & SPORTSMEDICINE, July 1988, at 75, 81 ("[T]he total number of men who have used steroids in the United States is in the hundreds of thousands."); Taylor, *supra* note 19, at 64 ("According to my conservative estimate more than a million American athletes and fitness buffs are using anabolic steroids . . .").

64. *See* Lamb, *supra* note 24, at 32 ("[S]ources suggest that anabolic steroids are used by 80-100% of national and international-caliber male bodybuilders, weightlifters and participants in the shot put, discus, hammer and javelin throws . . ."). *See also* Telephone interview with Robert "Tony" Urrutia, member 1988 U.S. Olympic Weightlifting Team (Nov. 14, 1988) (Asked whether steroids were a factor in the 1988 Seoul games, Urrutia

petitors there is little doubt that drug use is a necessary partner to training, diet, and psychological preparation.⁶⁵

2. Low Level Amateurs and Youngsters

Steroid use is not confined, however, to professionals and other athletes of the highest caliber. Steroid use has spread. The glory and money of professional and international competition markedly has increased the incentive for young amateurs to use the drugs.⁶⁶ This incentive has led to steroid use in colleges,⁶⁷ high schools,⁶⁸ and even grade schools.⁶⁹ In fact, one study has suggested that as many as 500,000 adolescents in the United States have used or are currently using anabolic steroids.⁷⁰

responded: "You could see it in the people's attitudes and in their performances. It was obvious that steroids were a factor.")

It must be noted, however, that "the amount and frequency of steroid use has been difficult to detect at all levels of sport . . . because athletes are reluctant to participate in drug use surveys." Duda, *Gauging Steroid Use In High School Kids*, PHYSICIAN & SPORTSMEDICINE, Aug. 1988, at 16-17.

65. See Strauss, *supra* note 39, at 87-88; Johnson, *supra* note 51, at 52 (quoting former NFL lineman Steve Courson as saying: "I know that if I don't use steroids, I won't be the best I can be.")

66. See Johnson, *supra* note 51, at 43-44.

67. See Pope, Katz, & Champoux, *supra* note 63, at 76-77 (reporting that 17% of intercollegiate athletes responding to study admitted using steroids); Dezelzky, Toohey, & Shaw, *Non-Medical Drug Use Behavior At Five United States Universities: A 15 Year Study*, 37 BULL. NARCOTICS 49 (1985) (reporting that 20% of intercollegiate athletes admitted to using steroids). See also *NCAA Does Off-Season Testing For Steroids*, PHYSICIAN & SPORTSMEDICINE, Apr. 1988, at 49 (noting that a 1985 NCAA study revealed that about nine percent of intercollegiate football players had used anabolic steroids, and that the usage rate may be as high as 50% among lineman—positions which require more strength and weight than the so-called "skill" positions).

68. See Murphy, *supra* note 41, at 48 ("[T]he use of anabolic steroids in high schools is becoming epidemic . . ."); Duda, *supra* note 64, at 16-17 ("A recent survey of high school juniors, both athletes and non-athletes, from six Arkansas schools found that 95 of 853 boys (11.1%) had used or were using steroids . . ."). See also Phillips & Lohrer, *High Schools Considering Steroid Tests*, Miami Herald, Jan. 14, 1989, at 1D, col. 1 (reporting that the Florida High School Activities Association is considering the implementation of a steroid testing program); Deters, *Teen Steroid Use*, MUSCLE & FITNESS, May 1988, at 72 (discussing steroid use among youngsters); Yesalis, *Why Children Use Steroids*, N.Y. Times, Dec. 4, 1988, at 25, col. 1 (discussing the possible incentives for young persons to use anabolic steroids).

69. See *Drug Abuse By Athletes*, AMERICAN DRUGGIST, Sept. 1987, at 43; Miller, *supra* note 40, at 17; Lamb, *supra* note 24, at 32.

70. Buckley, Yesalis, Friedl, Anderson, Streit, & Wright, *Estimated Prevalence of Anabolic Steroid Use Among Male High School Seniors*, 260 J. A.M.A. 3441, 3445 (1988). In order to establish the prevalence of anabolic steroid use among male adolescents, researchers conducted a nationwide study of 3,400 12th grade males in 46 private and public schools, from both urban and rural areas of the United States. *Id.* at 3441-42. The results show that 6.6% of 12th grade males either use or have used anabolic steroids, with two-thirds of this user group having begun their use at the age of 16 or younger. *Id.* at 3441. Further, 38.3% of

3. Reasons For Steroid Abuse

Athletes use and abuse anabolic steroids primarily for three overlapping reasons: to obtain a winning edge on their competition; because of pressures to use the drugs; and, finally, because of the great rewards our society bestows upon its successful athletes.

a. The Winning Edge

Ostensibly, modern athletes use steroids in order to obtain the winning edge.⁷¹ In high level competition, where miniscule amounts separate the champions from the also-rans, an artificial aid can be the difference that catapults an athlete to the top. For world class athletes, finding this winning edge may be the difference that allows them to capture goals to which they have dedicated their lives.⁷² Similarly, for the professional, maintaining the winning edge could mean the difference between having a high-paying job and collecting an unemployment check.⁷³

b. Pressure

Steroid use is also a consequence of pressures placed upon athletes. The form in which that pressure appears is usually dependent upon the level of competition. Younger and lower level

the user group began their use at age 15 or younger. *Id.* at 3443. Equally suggestive is that 40% of the users reported five or more cycles of use, 44% responded that they had used more than one drug at a time, and 38.1% had used both oral and injectable steroids. *Id.* at 3443. In addition, 21% of the users cited a health care professional as the primary source of their anabolic steroids. *Id.* at 3441. Obviously, these figures lend credence to the Justice Department's approximation that the black market in anabolic steroids is currently between \$200-400 million. *See supra* note 42.

Moreover, a telling example of the limitless application of the drugs is that many people, especially high school boys, have begun using anabolic steroids for purely aesthetic purposes, far removed from athletic competition. *See* Murphy, *supra* note 41, at 48. In fact, a high school newspaper in Broward County, Florida, conducted an informal survey of 200 students in 1985. The survey indicated that 18% of the male students reported using anabolic steroids, with 45% of the users citing appearance as the primary reason for using the drug. Pope, Katz, & Champoux, *supra* note 63, at 76.

71. Lamb, *supra* note 24, at 31.

72. The desperation of the world class athlete is aptly elucidated by Goldman. He asked 198 world class athletes the following question:

If I had a magic drug that was so fantastic that if you took it once you would win every competition you would enter from the Olympic Decathlon to Mr. Universe, for the next five years, but . . . it would kill you five years after you took it—would you take the drug?

GOLDMAN, *supra* note 25, at 32. 52% said yes. *Id.*

73. *See* Johnson, *supra* note 51, at 52 (quoting Steve Courson, Professional football player and steroid abuser: "[Y]ou do what you have to do, otherwise you don't have your job.").

amateurs are victims of parental⁷⁴ and peer pressure.⁷⁵ Pressure also is created when the average performance level in a given sport has been improved significantly by steroid use so that it is no longer feasible to compete without the drugs.⁷⁶ This latter pressure is the type most likely to influence participants in professional and international competitions where the stakes are much higher:⁷⁷ at stake is not mere participation, but often a job or the end result of a lifetime of effort. Additionally, an international competitor given the opportunity to be the best in the world is burdened with incredible pressures to fulfill that potential.⁷⁸ Moreover, at the professional and international level, pressures often are heightened by an athlete's belief that his competitors are using artificial aids.⁷⁹

c. Fame and Fortune

The pressures to use steroids are more graphically portrayed when considering the last and most significant reason for pervasive steroid use: the fame, glory, and especially the fortune⁸⁰ which American society bestows upon its successful athletes.⁸¹ Lured by

74. See Taylor, *supra* note 19, at 65 (claiming that the author has received calls from parents inquiring as to the use of steroids and human growth hormone to enable average sized children to grow bigger as well as offers of large sums of money to chemically manipulate their children).

75. *Id.* ("Peer pressure could be just as strong a motivator, [to use drugs] especially if young athletes saw themselves being outstripped by the competition. It could become a case of either take the drugs or don't play — you're not big enough.").

76. See Cowart, *Study Proposes To Examine Football Players, Powerlifters For Possible Long-term Sequelae From Anabolic Steroid Use in 1970's Competition*, 257 J. A.M.A. 3021 (1987) (noting the dilemma of one competitive weightlifter who became discouraged and stopped competing because he saw other lifters of comparable ability surpass him when they began taking steroids).

77. See Murray, *Drug Testing and Moral Responsibility*, PHYSICIAN & SPORTSMEDICINE, Nov. 1986, at 47 ("Athletes become trapped in a system in which they must either use drugs . . . or concede an advantage to their competitors.").

78. See Cowart, *Physician-Competitor's Advice To Colleagues: Steroid Users Respond To Education, Rehabilitation*, 257 J. A.M.A. 427, 428 (1987) (quoting a former Olympic athlete turned physician as saying: "Unless you've been in the position of being potentially the best in the world, you can't understand that pressure.").

79. See *id.* at 428 ("An Olympic athlete has one shot at it and if he believes other athletes are taking something . . . he will want it too.").

80. See, e.g., *Marino Tops NFL Salary List With \$1.45 Million in 1988*, Miami Herald, Jan. 14, 1988, at 1D, col.1 (reporting that 13 NFL players made at least \$1 million dollars in 1988); Abrams, *Sports Labor Relations: The Arbitrator's Turn At Bat*, 5 ENT. & SPORTS L.J. 1, 10 (1988) (noting that the current average annual salary for Major League Baseball Players is \$513,730.).

81. See GOLDMAN, *supra* note 25, at 97 (quoting an excerpt from the International Olympic Committee's *Manual On Doping*: "The merciless rigor of modern competitive sport, especially at the international level, the glory of victory, and the growing social and economical reward of sporting success increasingly forces athletes to improve their perform-

the fame and fortune that accompanies success, athletes often turn to steroids to get the small boost without which they might fail.⁸² The handsome monetary rewards bestowed upon successful athletes create visions of grandeur that may affect the decision making ability of the not so successful, in some cases causing them to blindly utilize any means to advance towards their lucrative goal, regardless of the cost.⁸³ Consequently, they fail to recognize, or if aware, concern themselves with, the inherent risks of steroid use.

Although some reports claim steroid use is beginning to slow,⁸⁴ others are not so optimistic.⁸⁵ Despite increased drug testing, athletes still are using steroids in epidemic numbers.⁸⁶ This prevalent steroid use is especially troubling in light of the well-documented side effects attributed to anabolic steroids.

F. Well-Documented Side Effects

The deleterious side effects of anabolic steroid use are well documented.⁸⁷ Most of these side effects are physiological.⁸⁸ How-

ance by any means available."); Taylor, *supra* note 19, at 64-66.

82. See *id.* at 65.

83. See *supra* note 72.

84. See, e.g., Duda, *supra* note 43, at 175; Miller, *supra* note 40, at 21.

85. Some researchers do not foresee any drop off in anabolic steroid use in athletics, but, instead, expect use to increase in the immediate future. Cowart, *supra* note 39, at 3025.

86. See *Senate Panel Told of Steroids in N.F.L.*, N.Y. Times, May 10, 1989, at 50 (testimony before Senate Judiciary Committee reveals steroid use has reached major proportions); *Indictment, United States v. Cambra*, Crim. No. 89-0854K (S.D. Cal. filed August 25, 1989) (noting that "the use of steroids to enhance athletic performance and appearance has reached epidemic proportions among this nation's amateur and professional athletes."); McGough, *Debating The Drug Tests*, MUSCLEMAG, Nov. 1989, at 65 (Mr. Olympia contender Mike Quinn concedes that steroid use is probably at epidemic levels.). In fact, athletes are utilizing incredible new methods to avoid detection. One example is the "urine transfusion" some N.F.L. players allegedly have used recently to avoid a positive test. A technician catheterizes the athlete, drains the steroid-loaded urine out of the athlete's bladder and replaces it with clean urine. The athlete then passes the "clean" urine as his own. Johnson, *Hit For A Loss*, SPORTS ILLUSTRATED, Sept. 19, 1988, at 51.

87. See, e.g., GOLDMAN, *supra* note 25, at 113-129; W. TAYLOR, *supra* note 18, at 62-68. See generally D. DUCHAINE, *supra* note 18, at 60-68 (providing an alphabetical list of steroid side effects, accompanied by a summary of the empirical and anecdotal evidence supporting each one, and discussing the severity, possible avoidance, and potential treatment of each condition).

88. The most serious physiological side effects associated with anabolic steroid use are liver disorders, including liver cancer, and cardiovascular disease, usually in the form of accelerated atherosclerosis. GOLDMAN, *supra* note 25, at 113-129. Anabolic steroids also are known to bring on a number of other less serious side effects which are often gender-isolated. W. TAYLOR, *supra* note 18, at 66-68. For example, women may experience gender-isolated side effects such as alterations in their menstrual cycle, clitoral enlargement, reduction of breast tissue, deepening of the voice, and facial hair growth; men may experience testicular atrophy or gynecomastia (breast enlargement). *Id.* at 67. See also Groves, *The*

ever, some psychological side effects of steroid use also commonly are perceived,⁸⁹ especially the drugs' potential to increase aggressiveness.⁹⁰ However, the psychological effects are, for obvious reasons, hard to identify⁹¹ and, consequently, the research documenting them is neither as developed nor as credible as that dealing with their physiological counterparts. In terms of both body and of mind, much is still unknown about anabolic steroids and their deleterious effects.⁹²

This paucity of information becomes glaring when the knowledge of the user is considered. Athletes, and other users, usually are aware that steroids carry with them *some* danger of side effects.⁹³ However, their information usually is based on rumor.⁹⁴ Simply put, those who use anabolic steroids are either unaware of the full breadth of the possible side effects or are plagued by

Rambo Drug, AM. HEALTH, Sept. 1987, at 43 (documenting the vicissitudes of a former world class, female bodybuilder who abused steroids); Telander & Noden, *The Death of an Athlete*, SPORTS ILLUSTRATED, Feb. 20, 1989, at 68 (reporting that anabolic steroid use allegedly contributed to the death of a high school football player).

89. See Taylor, *supra* note 19, at 64-65. Psychological changes which an athlete may undergo while using anabolic steroids include increases in self-esteem, sex drive, appetite, hostility, mental intensity, energy, tolerance to pain, and a desire to train intensely. *Id.* at 64.

90. Increased aggressiveness frequently is mentioned as a common side effect. See, e.g., *id.* at 65 ("Increased, sometimes uncontrollable, aggression is just one consequence of steroid use."). See also Katz & Pope, *Psychiatric Effects of Anabolic Steroids* in MUSCLE DEVELOPMENT: NUTRITIONAL ALTERNATIVES TO ANABOLIC STEROIDS 41 (W. Garrett & T. Malone, eds. 1988) (Report of the Ross Symposium, Ross Laboratories, Columbus, Ohio) (reporting that "common" lore among athletes recognizes that changes in mood, temperament, and personality are among the drugs' most characteristic effects); D. DUCHAINE, *supra* note 18, at 61 ("Even the most bonehead of steroid users knows that all the really good, effective steroids: Testosterone, Anadrol, Dianabol, will make you more aggressive."). Although the psychological side effects pose a greater problem for the athlete because they are an immediate result of the drug use, normal behavior usually returns after use is ceased. See Taylor, *supra* note 19, at 68. However, some psychological effects such as depression and addiction may set in soon after use has ceased. See GOLDMAN, *supra* note 25, at 136-141; *Steroids & Depression*, MUSCLE & FITNESS, Jan. 1989, at 17 (reporting that a recent study claims to have demonstrated that "steroid overloading corresponds with a depression syndrome commonly found among addicts . . . Severe depression was experienced by all of the athletes using steroids during their off-cycles."). Cf. Chaikin & Telander, *The Nightmare of Steroids*, SPORTS ILLUSTRATED, Oct. 24, 1988, at 82 (graphically recounting how anabolic steroids drove a college football player to the brink of suicide).

91. Often the side effects reported are "subjective" and, as such, cannot be measured. See Haupt & Rovere, *supra* note 18, at 476. Subjective side effects are "those an athlete claimed to have had during the use of anabolic steroids." *Id.* (emphasis added).

92. Many researchers admit that little is known about the effects of anabolic steroids on the human body, especially the mind. See, e.g., MacDougall, *supra* note 25, at 99; Taylor, *supra* note 19, at 64.

93. PATIENT CARE, *supra* note 22, at 36.

94. Wilson & Griffin, *supra* note 31, at 1283.

misconceptions.⁹⁵

An athlete can attribute his lack of information to many things including his mistrust of physicians,⁹⁶ inaccurate sources of information,⁹⁷ and his own experience with the drugs absent any visible effects.⁹⁸ This lack of awareness and understanding concerning steroids becomes an important consideration when attempting to fully assess the social and, as this Article will discuss below, the criminal implications of steroid abuse.⁹⁹

Obviously steroid use carries with it a grave risk of both physiological and psychological harm that is well documented in the literature. However, researchers commonly admit that they know relatively little about the effects of anabolic steroids and that, as a result, there is always the risk that unforeseen side effects will emerge. This disclaimer of modern researchers has proven to have been well-grounded for a dangerous side effect recently has become linked to excessive steroid use. Distinguishable from the frequently noted psychological side effects such as a tendency to increase aggressiveness, new research has brought to light the possibility of an additional, rarely mentioned side effect in the form of a psychosis.¹⁰⁰

G. Steroid-Induced Psychosis

In a recent study, conducted by interviewing a cross section of

95. See Yessis, *Athletes & Drugs In Russia*, MUSCLE & FITNESS, Dec. 1988, at 39, 172. ("American athletes . . . are convinced that steroids will only make them bigger, stronger and able to train harder. Many athletes in the US are either unaware of [the detrimental side effects] or have chosen to ignore them. Thus many . . . athletes are jumping on the steroid bandwagon wearing blinders.")

96. See Cowart, *supra* note 78; at 428; *supra* notes 37-38 and accompanying text (noting physicians' loss of credibility among steroid users).

97. Wilson & Griffin, *supra* note 31, at 1283. In fairness the authors must note that the magazines which cover the "iron games" such as bodybuilding, powerlifting, and olympic lifting all devote a considerable amount of press to the issue of anabolic steroids. Further, informative books written by knowledgeable sources are advertised frequently in these magazines. See, e.g., MUSCLE & FITNESS, Dec. 1983, at 252 (advertising six books which address solely anabolic steroids or growth hormone). Even so, it is still unclear just how much credence the steroid user pays these sources.

98. Johnson, *supra* note 51, at 41. This phenomenon manifests itself when a steroid user looks at a laundry list of side effects known *today* and responds, "Hey I don't have any of those, and therefore I have nothing to worry about." See, e.g., Phillips, *supra* note 51, at 4D (quoting a former steroid user: "They didn't hurt me, so I didn't see any harm in them.")

99. See *infra* notes 114-268 and accompanying text for a discussion of the potential criminal implications of anabolic steroid use.

100. See Pope & Katz, *Affective and Psychotic Symptoms Associated With Anabolic Steroid Use*, *supra* note 14.

anabolic steroid users, the researchers' observations "suggest that marked affective and/or psychotic symptoms may sometimes occur in individuals who are taking anabolic steroids."¹⁰¹ The psychotic symptoms included auditory hallucinations, paranoid delusions, delusions of reference, and delusions of grandeur.¹⁰² The researchers emphasized that this condition was rarely if ever mentioned in the past.¹⁰³ Their statement is strongly supported by examining the great amount of literature that extensively addresses the issue of steroid-induced side effects without mentioning a psychosis.¹⁰⁴

101. *Id.* at 487.

To assess the frequency of affective and psychotic symptoms in athletes taking anabolic steroids, the authors performed structured interviews of 41 bodybuilders and football players who had used steroids. According to DSM-III-R [Diagnostic Statistical Manual, 3d edition, Revised], nine subjects (22%) displayed a full affective syndrome, and five (12%) displayed psychotic symptoms associated with steroid use.

Id. at 487. "All users who experienced psychotic symptoms were 'stacking' between two and four steroids . . ." *Id.* at 489. "[N]o subject had psychotic symptoms during periods of no steroid exposure." *Id.* Although in this study all psychotic symptoms were experienced by persons who were stacking, it is possible that an anabolic steroid user may experience psychotic symptoms when using only one drug.

102. *Id.* A delusion of reference can be defined as a phenomenon where objects, events, or people are given unrealistic significance—e.g., an individual's belief that comments from a radio disc jockey are aimed directly at insulting him. A delusion of grandeur is an unrealistic belief that one has remarkable special ability, e.g., the ability to run the United Nations, or powers, e.g., the strength to lift a truck.

103. *Id.* ("Although some studies have noted euphoria or irritability in association with anabolic steroid use, only four reports, to our knowledge, have described more serious psychiatric syndromes."); Washington Post, Apr. 2, 1988, at D2, col. 2 (quoting Dr. Pope as saying: "There is a far higher incidence of psychiatric symptoms attributable to anabolic steroids than any of us previously thought."). It must be noted, however, that psychotic symptoms associated with corticosteroids have been well documented. Katz & Pope, *supra* note 90, at 43. In contrast to anabolic steroids which are produced synthetically, corticosteroids are steroids which are produced naturally by the adrenal cortex. STEDMAN'S MEDICAL DICTIONARY 328 (5th ed. 1982). See also Lewis & Smith, *Steroid-induced Psychiatric Syndromes*, 5 J. AFFECTIVE DISORDERS 319 (1983) (documenting the psychiatric effects of corticosteroids).

104. See, e.g., PHYSICIAN'S DESK REFERENCE, *supra* note 31, at 1976, 2254-55 (no mention of psychosis in the exhaustive lists of warnings, precautions, and adverse reactions to Anavar and Winstrol); PATIENT CARE, *supra* note 22, at 46-47 (recommended doctor's warnings mention nothing about psychosis); Miller, *supra* note 40, at 18-19 (providing a long list of "side effects and adverse reactions"; psychosis not among them); Macdougall, *supra* note 25, at 97-99 (no mention of psychosis in section entitled "Hazards of Steroid Use"); Haupt & Rovere, *supra* note 18, at 482-83 (no mention of psychosis in extensive list of "The Side Effects of Anabolic Steroids"); S. CHINERY, *supra* note 42, at 59-65 (chapter on side effects gives an exhaustive rundown, but fails to mention psychosis); T. DONOHOE & N. JOHNSON, *supra* note 33, at 61 (extensive rundown on side effects and no mention of psychosis). But see W. TAYLOR, *supra* note 18, at 68 (mentioning psychotic illness as rarely-seen side effect); Lamb, *supra* note 24, at 36 (mentioning "occasional psychotic episodes" as a side effect); D. DUCHAINE, *supra* note 18, at 67 (noting that a psychosis has been alleged to potentially accompany excessive steroid use, but downplaying the significance of such claims). Cf. *id.* at

This phenomenon, they claim, is mainly the result of research that has been both unrealistic and ineffective in gauging psychological effects.¹⁰⁵ Although their study, as they concede, suffered from many of the drawbacks that have limited past research—especially subjectivity—the results were still significant because the subjects reported that during periods of non-exposure to steroids they experienced no psychotic symptoms.¹⁰⁶

Some might argue that the current research is inconclusive as to whether there is a distinction between the well-documented ability of anabolic steroids to increase aggressiveness and this recently documented psychosis. However, when viewed in terms of the Model Penal Code's definition of intoxication the two side effects are clearly distinguishable.¹⁰⁷ A steroid-induced psychosis may manifest itself in the form of delusion, auditory hallucination, or other psychotic behavior, appearing separately or in combination, during which the afflicted individual is removed from cognitive reality.¹⁰⁸ In contrast, aggressiveness, without more, is merely a state where a subject becomes more virile and forceful.¹⁰⁹ An in-

44 (attributing any psychotic behavior that may accompany steroid use to the megadoses of testosterone cypionate implemented by some modern athletes).

105. See Pope & Katz, *supra* note 14, at 490. "The common practice of 'stacking' may lead to psychiatric effects far beyond those previously recorded in research settings." *Id.* at 490. See also *id.* at 488 (Table 1) (comparing the quantity of anabolic steroids ingested in normal clinical studies to the reported use by the subjects in the present study). The report also notes that the wariness of athletes to reveal their steroid use has further limited identification of psychotic symptoms. *Id.* at 490. Further, it must be noted that these newly reported side effects do not occur in all users. In fact, approximately 75% of those studied suffered no diagnosable psychiatric disorder at all, further strengthening the argument that these mental status changes are unforeseeable.

106. See Pope & Katz, *supra* note 14, at 489.

107. The Model Penal Code has defined intoxication as "a disturbance of mental or physical capacities resulting from the introduction of substances into the body." MODEL PENAL CODE § 2.08(5)(a) (1985). See *infra* notes 150-154 and accompanying text (discussing more fully the appropriateness of characterizing an anabolic steroid-induced psychosis as a form of intoxication).

108. In fact, "psychosis" is defined by The American Psychiatric Association as: A major *mental disorder of organic or emotional origin* in which a person's ability to think, respond emotionally, remember, communicate, interpret reality, and behave appropriately is sufficiently impaired so as to interfere grossly with the capacity to meet the ordinary demands of life. [Psychosis] often [is] characterized by *regressive* behavior, inappropriate *mood*, diminished impulse control, and such abnormal mental content as *delusions* and *hallucinations*. The term is applicable to conditions having a wide range of severity and duration.

AMERICAN PSYCHIATRIC ASSOCIATION, A PSYCHIATRIC GLOSSARY 114-115 (5th ed. 1980) (emphasis in original).

109. "Aggression" has been defined as "a form of behavior which leads to self-assertion; it may arise from innate drives and/or a response to frustration; it may be manifested by destructive and attacking behavior, by covert attitudes of hostility and obstructionism, or

crease in "aggressiveness" will not, without more, disturb an individual's cognitive capacities. As the definition of intoxication requires a "disturbance" of mental *capacities*,¹¹⁰ a steroid-induced psychosis clearly satisfies the requirement, but an increase in aggressiveness does not.¹¹¹

There is a corollary to the recent study's argument that steroid use carries with it an adverse psychiatric side effect that was rarely seen by researchers: if psychiatric repercussions have been unforeseen by researchers and physicians, then they were, and arguably remain to be, unforeseen by the individuals who use the drugs.¹¹² Such unassuming use creates a perplexing dilemma for the law. With the advent of this research noting the psychotic repercussions of anabolic steroid use, the implications for criminal responsibility quickly come to the forefront. Psychotic behavior can become criminal behavior.¹¹³ When this occurs, it is difficult, yet necessary, to determine how to apply the theories of criminal responsibility and the appurtenant theories of excuse. This task is especially challenging when the psychotic behavior potentially could occur without the afflicted individual's ever foreseeing it.

by a healthy self expressive drive to mastery." DARLAND'S ILLUSTRATED MEDICAL DICTIONARY 40 (26th ed. 1985). Unlike the definition of "psychosis," the definition of "aggression" does not include a possible removal from cognitive reality.

110. See MODEL PENAL CODE § 2.08(5)(a) (1985). "Disturb" has been defined as "to interfere with." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 661 (1976). "Mental Capacity," albeit in a civil context, has been defined as "sufficient mind and memory to understand the nature and effect of the [act] . . ." Haile v. Holtzclaw, 400 S.W.2d 603, 612-13 (Tex. Civ. App. 1966). The Haile court seems to articulate the meaning of "mental capacity" in terms of cognitive ability. Cf. *infra* note 120 (*M'Naghten* test for insanity requires a complete loss of cognitive ability).

111. However, aggressiveness in the context of psychosis may become exaggerated and seriously dangerous.

112. This statement is of course contingent on the user's not knowingly having experienced psychotic symptoms in the past. See *infra* note 242. Further, as the recent study noting psychiatric symptoms associated with anabolic steroid use has been mentioned in several popular "iron game" magazines, individuals may have personal knowledge of the drugs' potential to induce psychiatric side effects. See, e.g., MUSCLEMAG, Oct. 1988, at 22 (reprinting Pope & Katz, *Affective and Psychotic Symptoms Associated With Anabolic Steroid Use*, *supra* note 14); Olin, *Roid Rage Is Not A Pretty Sight*, FLEX, May 1988, at 70 (noting the psychotic symptoms reported by Pope & Katz); Brainum, *Anabolic Madness*, MUSCLE & FITNESS, Oct. 1987, at 93 (noting the psychotic symptoms reported by Pope & Katz); *Roid 'Noids*, MUSCLE & FITNESS, October 1988, at 264 (summarizing the findings reported by Pope & Katz).

113. See Greenland, *Dangerousness, Mental Disorder, and Politics* in DANGEROUSNESS 35 (C. Webster, M. Ben-Aron, & S. Hucker ed. 1985) (study documenting typology of violent offenders indicates that in a high percentage their "violence is usually associated with an acute psychotic episode with a marked delusional system and/or loss of contact with reality.").

III. APPLICABLE THEORIES OF EXCUSE

The criminal law has recognized a number of qualifications to otherwise proscribed acts so as to eliminate, or at least mitigate, the criminal responsibility and moral blameworthiness of certain individuals.¹¹⁴ An individual who acts without criminal intent or, alternatively, without exercising free will, is not morally blameworthy. To punish such a person as if he freely intended his act would offend the moral norms of a civilized society.¹¹⁵ Hence, the law has created vehicles for eliminating or mitigating criminal responsibility to eradicate the oppressiveness of punishing those who, although they have acted, did so without either free will or criminal intent.¹¹⁶ Some of these theories may be relevant to the offender who claims to have been afflicted with a steroid-induced psychosis.¹¹⁷ Consequently, the subsequent analysis will inspect their applicability to the present issue. As stated earlier, Florida law will

114. See S. KADISH, *BLAME AND PUNISHMENT: ESSAYS IN THE CRIMINAL LAW* 65 (1987).

115. *United States v. Freeman*, 357 F.2d 606, 615 (2d Cir. 1966) ("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."); *Durham v. United States*, 214 F.2d 862, 876 (D.C. Cir. 1954) ("Our traditions also require that where [illegal] acts stem from and are the product of a mental disease or defect . . . moral blame shall not attach, and hence there will not be criminal responsibility.") The Supreme Court of the United States also has noted this basic premise of the criminal law: "Our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice of doing right and doing wrong and choosing freely to do wrong." *Morissette v. United States*, 342 U.S. 246, 250 n.4 (1952) (quoting POUND, *INTRODUCTION TO SAYRE, CASES ON CRIMINAL LAW* (1927)).

116. See *Freeman*, 357 F.2d at 625 ("[T]he defense of lack of responsibility is essentially an acknowledgement on the part of society that because of mental disease or defect certain classes of wrongdoers are not properly the subjects of criminal punishment."). Kadish categorizes criminal defenses in one of two classes: justification or excuse. S. KADISH, *supra* note 114, at 82. Those defenses within the category of *justification* embody the notion that the law will allow what a crime as defined otherwise would prohibit where circumstances, specified elsewhere in the law, make the proscribed act the right thing to do. *Id.* at 82. For example, self-defense and the defense of necessity are classified as justification defenses. Those defenses classified under the umbrella of the doctrine of *excuse* are based on the notion that a defendant is not blameworthy because some disability affecting his freedom to choose right makes it inappropriate to punish him. *Id.* at 82. Insanity and duress are classified as excuse defenses.

117. Before moving into a discussion of the applicability of certain criminal law defenses to a steroid-induced psychotic it is necessary to establish one thing: Much of the law involving the effect of drug use on criminal responsibility naturally is tied up in the general defense of intoxication. The analysis and discussion that follows all will be made on the assumption that this steroid-created psychosis is indeed a form of intoxication. See *infra* notes 150-154 and accompanying text (arguing that an anabolic steroid-induced psychosis falls within the ambit of the definition of intoxication found in section 2.08 of the Model Penal Code).

provide the backdrop for the inquiry.

A. Insanity

The most well-known of the vehicles for avoiding penal blame is the insanity defense.¹¹⁸ Among the various forms of the insanity defense,¹¹⁹ the most common is the *M'Naghten* rule.¹²⁰ The State of Florida has long recognized the famed *M'Naghten* rule as the test of legal insanity.¹²¹ There are three essential requirements that a defendant must meet in order to satisfy *M'Naghten*. The defendant must have: (1) a mental disease or defect; (2) a defect of reason causally related to the disease or defect; and (3) a lack of knowl-

118. R. GERBER, *THE INSANITY DEFENSE* 1 (1984). Professor Kadish explains why the law recognizes the insanity defense:

The justification for the [defense] is that it does in fact exclude from liability a category of persons who by definition could not be deterred by the prospect of punishment, simply because they were incapable of choice, and whom in consequence, it would be futile as well as unjust to punish.

S. KADISH, *supra* note 114, at 67. See also *Bethea v. United States*, 365 A.2d 64, 86 (D.C. 1976) (“[*Mens rea*] refers to the existence in fact of a guilty mind; insanity, on the other hand, connotes a presumption that a particular individual lacks the capacity to possess such a state of mind.”), *cert. denied*, 433 U.S. 911 (1977).

119. As the following discussion notes, the “insanity defense” has existed in five general forms. However, even jurisdictions which adopt the same general form may differ in their exact approach. As such, there is no universally recognized “insanity defense.” For an excellent overview of the five forms in which the test of legal insanity appears, see Keilitz, *Researching and Reforming the Insanity Defense*, 39 *RUTGERS L. REV.* 289 (1987).

120. See W. LAFAVE & A. SCOTT, *CRIMINAL LAW* § 4.2, at 312 (2d ed. 1986) (“The *M'Naghten* test has become the predominant rule in the United States.”). As originally formulated, the *M'Naghten* test would relieve a defendant of criminal blame if:

[A]t the time of the committing of the act, the party accused was labouring under such a defect of reason from disease of the mind, as not to know the nature and the quality of the act he was doing; or if he did know it, that he did not know what he was doing was wrong.

M'Naghten's Case, 8 Eng. Rep. 718, 722 (H.L. 1843). In *Wheeler v. State*, 344 So.2d 244 (Fla. 1977), *cert. denied*, 440 U.S. 924 (1979), the Florida Supreme Court articulated Florida's version of *M'Naghten*:

If at the time of an alleged crime a defendant was by reason of mental infirmity, disease or defect unable to understand the nature and quality of his act or its consequences or, if he did understand it, was incapable of distinguishing that which is right from that which is wrong, he was legally insane and should be found not guilty by reason of insanity.

Id. at 246 n.2. For an excellent summary of the case of Daniel *M'Naghten*, see R. GERBER, *supra* note 118, at 21-27 (1984). See also Wingo, *Squaring M'Naghten With Precedent-An Historical Note*, 26 *S.C.L. REV.* 81 (1974) (putting the *M'Naghten* case into historical context); *infra* note 257 (discussing *M'Naghten's* requirement that the accused's cognitive impairment be complete).

121. The Florida Supreme Court first declared *M'Naghten* the rule in Florida in *Davis v. State*, 44 Fla. 32, 32 So. 822 (1902). The rule has endured. See Comment, *Should Florida Follow The Federal Insanity Defense?*, 15 *FLA. ST. U.L. REV.* 793, 824 (1987).

edge about the consequences of his act or its legality or morality.¹²²

1. Causation

The primary causal query in determining whether a defendant was insane when he committed a criminal act is whether the unlawful conduct he engaged in was the result of a "mental disease or defect."¹²³ However, there is an antecedent legal issue with a steroid-induced psychotic. Before a steroid-induced psychosis can be considered a "mental disease or defect," an initial inquiry must ask whether the "mental disease or defect" required to establish insanity may be the product of drug use.

Florida's version of *M'Naghten* has conformed with the modern evolution of the rule with respect to causation. Although the causative element of the loss of reason was at first limited to a "mental infirmity,"¹²⁴ the test was broadened by the Florida Supreme Court in *Wheeler v. State*¹²⁵ to include a "mental infirmity, disease or defect . . ."¹²⁶ This test remains the pertinent inquiry for causation under Florida law today.¹²⁷ However, there is still no clear definition of "mental infirmity, disease, or defect in the law of Florida."¹²⁸ This paucity of guidance in the law leaves one with a perplexing puzzle when trying to determine whether a drug-induced psychosis may satisfy the necessary mental infirmity, disease, or defect that the definitions of insanity, including *M'Naghten*, universally require.¹²⁹

2. Insanity and Drug Use: Legitimate Partners?

Before a defendant can claim irresponsibility on the grounds of drug-induced insanity, the insanity tests implicitly require him first to establish a causal connection between his drug use and the

122. Keilitz, *supra* note 119, at 294.

123. *Id.* at 295 (defining the causation requirement as the necessity of establishing that the unlawful conduct was the product of mental irregularity).

124. See Comment, *supra* note 121, at 826; FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 2.10(b)-1 (1970).

125. 344 So.2d 244 (Fla. 1977), *cert. denied*, 440 U.S. 924 (1979).

126. *Id.* at 246 n.2 (emphasis added).

127. See FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.04(b) (1986).

128. See Comment, *supra* note 121, at 827.

129. All the definitions of insanity require that the insanity be a product of a "mental disease or defect." See Special Project, *Drugs and Criminal Responsibility*, 33 VAND. L. REV. 1145, 1191 (1980). This requirement stated in terms of the *M'Naghten* test requires the defendant to prove that, at the time of the commission of the crime, an underlying medical disease or defect prevented him from perceiving the nature or the consequences of his action or from distinguishing right from wrong.

requisite causative element of insanity, "mental disease or defect."¹³⁰ Defendants have asserted causation in a variety of circumstances. Most pertinent here are the occasions where an accused argued that his insanity was a consequence of a disease or defect resulting from either long term drug or alcohol use or, alternatively, from gross, albeit temporary, intoxication.¹³¹

3. Delirium Tremens

Insanity has been recognized in some instances where the actual causative factor of the state of mind was the actor's use of drugs or alcohol.¹³² Long term drug or alcohol use is allowable as a causative factor of a "disease or defect" when the end result is a state known as delirium tremens.¹³³ In the eyes of the law, delirium tremens is the end product of long continued intoxication and equates to legal insanity;¹³⁴ however, it is critical to realize that a state of delirium tremens is present only after the effects of the intoxicant have worn off.¹³⁵ It is imperative to distinguish this

130. See Special Project, *supra* note 129, at 1191-92.

131. "The effect of drug . . . addiction on mens rea has led a number of courts and commentators to raise the issue of [its] relation to criminal responsibility." *Id.* at 1190. However, addiction alone would not be sufficient to establish insanity. *United States v. Lyons*, 731 F.2d 243, 245 (5th Cir.) (en banc) ("Today the great weight of legal authority clearly supports the view that evidence of mere narcotics addiction, standing alone and without other physiological or psychological involvement, raises no issue of such a mental defect or disease as can serve as a basis for the insanity defense."), *cert. denied*, 469 U.S. 930 (1984); Bennett, *Drug Addiction And Its Effect On Criminal Responsibility*, 9 WAKE FOREST L. REV. 179, 184 (1973). But, if the nexus between the dependence and a resulting disease or defect could be established, the possibility of using addiction to establish insanity would exist. See Special Project, *supra* note 129, at 1191-92. The opportunity to make this argument would prove advantageous to the steroid abuser who could establish a disease or defect which was the result of dependence. However, because the research alluding to a dependency is still in an embryonic stage, the claim at this point in time is tenuous. See Taylor, *supra* note 32, at 142-143. For that reason, and because of the infinite number of issues such an analysis would raise, a discussion of anabolic steroid addiction as a link to insanity is beyond the scope of this Article. See generally Annotation, *Drug Addiction or Related Mental State as Defense to Criminal Charge*, 73 A.L.R.3d 16 (1976).

132. See W. LAFAYE & A. SCOTT, *supra* note 120, §4.10(g), at 395.

133. See *Cochran v. State*, 65 Fla. 91, 98-99, 61 So. 187, 190 (1913). See also AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 131 (3d ed. rev. 1987) (describing the effects of delirium tremens as: "Vivid hallucinations, which may be visual, auditory, or tactile . . ."). See also Note, *Intoxication as A Criminal Defense*, 55 COLUM. L. REV. 1210, 1219 n.66 (1955) (providing an outstanding description of delirium tremens).

134. Delirium tremens "can result in the inability to realize the quality of one's act or inability to distinguish right from wrong." Boettcher, *Voluntary Intoxication: A Defense To Specific Intent Crimes*, 65 U. DET L. REV. 33, 35 (1987).

135. See *People v. Kelly*, 10 Cal. 3d 565, 576, 516 P.2d 875, 882, 111 Cal. Rptr. 171, 178 (Cal. 1973).

state from "those situations in which the mental impairment does not extend beyond the period of intoxication."¹³⁶

Delirium tremens is recognized as a defense under Florida law.¹³⁷ The Florida Supreme Court in *Cirack v. State* defined it as: "insanity superinduced by the long and continued use of intoxicants so as to produce a fixed and settled frenzy or insanity either permanent or intermittent."¹³⁸ At first glance, a steroid-induced psychosis appears to fall within the scope of this mental state. However, upon closer inspection, a steroid-induced psychosis lacks an element necessary to establish delirium tremens.

Although the two states are similar in that both are brought on by long term use of alcohol or drugs, the similarities stop there. Research has shown that when the afflicted steroid user stops using the drug his mental status returns to normal, either immediately or within a short time.¹³⁹ In contrast, the definition of delirium tremens would require that the mind remain affected well after the drug use has terminated.¹⁴⁰ Further, delirium tremens, as defined by the law, is present only in the absence of the intoxicating influence of the agent.¹⁴¹ A steroid-induced psychosis, in contrast, is present only when the afflicted person actually is using steroids, and for a short time following cessation of use. Thus, unlike delirium tremens, the close temporal presence of the drug is essential to the existence of a steroid-induced psychosis. The psychosis is by nature a purely temporary state, only present during and shortly after the drug has been used. Consequently, a steroid-induced psychosis is not "fixed and settled."¹⁴² Thus, because the condition

136. *Id.* at 575, 516 P.2d at 882, 111 Cal. Rptr. at 178.

137. *E.g.*, *Cochran v. State*, 65 Fla. 91, 61 So. 187 (1913); *Garner v. State*, 28 Fla. 113, 9 So. 835 (1891). *See also* *Cirack v. State*, 201 So.2d 706 (Fla. 1967); *Britts v. State*, 158 Fla. 839, 30 So.2d 363 (1947), *overruled on other grounds in* 73 So.2d 862 (1959); *Crews v. State*, 143 Fla. 263, 196 So. 590 (1940); *Hall v. State*, 78 Fla. 420, 83 So. 513 (1919).

138. *Cirack*, 201 So.2d at 709. *See also* *Preston v. State*, 444 So.2d 939, 944 (Fla. 1984) (qualifying the "fixed and settled" test from *Cirack* by noting that "when a single instance or episode of voluntary intoxication impairs a defendant's judgment and ability to distinguish between right and wrong it will not support the complete defense of insanity.") (emphasis in original).

139. *See* Deposition of Dr. David L. Katz, M.D. at 39-40, *State v. Horace Williams*, No. 86-9257 CF (Fla. 15th Cir. Ct. taken May 9, 1988).

140. *See* Boettcher, *supra* note 134, at 35-36. *Cf.* *Cochran v. State*, 61 So. at 190 ([Delirium tremens] is "not produced by the immediate effects of [intoxicants].").

141. *See* Boettcher, *supra* note 134, at 36 ("Evidence of intoxication will be fatal to [a delirium tremens] claim.").

142. The requirement that a state of delirium tremens be "fixed and settled" seems to connote a sense of permanency. The allusion to "intermittent" in the second portion of the *Cirack* court's definition should not fool the unwary. The condition itself is fixed or settled; however, the effects of the condition can be either permanent or intermittent.

produced is not permanent, a steroid-induced psychosis would not constitute legally recognized insanity resulting from long term drug use.

4. Temporary Insanity

Because a steroid-induced psychosis is not "fixed and settled," the inquiry must turn to whether this psychosis, temporary as it may be, still might warrant exculpation on the grounds of *temporary* insanity.¹⁴³ Again the inquiry turns on the indispensable, incorporated question of causation: can *temporary* intoxication from drug use provide the "mental disease or defect" universally required to warrant exculpation on the grounds of insanity?

The logical response to the inquiry is that a temporary, delusional state created by "voluntary" use of drugs is not the type of causative factor that is implicit within the phrase "mental infirmity, disease or defect."¹⁴⁴ Indeed, the rule in the overwhelming majority of jurisdictions, Florida included, is that temporary insanity which would free the accused from criminal responsibility cannot be the result of alcohol or drug use.¹⁴⁵ A temporary state of

143. Assuming, *arguendo*, that the mental state which is the product of a steroid-induced psychosis is indeed the equivalent of legal insanity, then the only critical issue will be causation.

144. See W. LAFAVE & A. SCOTT, *supra* note 120, § 4.10(g), at 395. "Voluntary" is necessarily defined here as an uncoerced physical act, the consequences of which are foreseeable by the actor. Some courts have claimed that recognizing as an exculpatory factor an individual's voluntary creation of a disease or defect by drug use would violate public policy. See *infra* note 147 and accompanying text; *State v. Trantino*, 44 N.J. 358, 369, 209 A.2d 117, 122 (1965), *cert. denied*, 382 U.S. 993, *reh'g denied*, 383 U.S. 922 (1966).

145. 21 AM. JUR. 2D *Criminal Law* § 54, at 171-72 (1981) ("Temporary insanity which arises from present voluntary intoxication is no defense to a criminal charge. This is true even though the defendant's temporary state of mind may meet the requirements of legal insanity . . ."); *State, Attorney For Twentieth Circuit v. McNally*, 336 So.2d 713, 715 (Fla. 2d DCA 1976) (Florida law's test for the recognition of insanity as a result of voluntary intoxication "contemplates a mental disease or disorder which manifests itself intermittently or permanently *irrespective* of consumption of [intoxicant]."). See also *State v. Hall*, 214 N.W.2d 205, 207-208 (Iowa 1974) (affirming the trial court's refusal of an insanity instruction which would have included temporary insanity induced by drugs); *Evans v. State*, 645 P.2d 155, 160 (Alaska 1982) (adopting the standard that the accused's intoxicated state is irrelevant to the issue of insanity). Nonetheless, some courts have found that a temporary state of mind, equivalent to legal insanity, may indeed exculpate an accused, despite the fact that the state was created by the self-administration of drugs or alcohol. See Annotation, *Effect of Voluntary Drug Intoxication Upon Criminal Responsibility*, 73 A.L.R.3d 98, 130 (1976). Cf. *State v. Maik*, 60 N.J. 203, 287 A.2d 715, 722 (1972) (holding that a psychosis met the test of insanity even though it was voluntarily caused by drug use). At least one court has reasoned that the cause of such a state is irrelevant. See, e.g., *id.* at 722 ("We think it compatible with the philosophical basis of M'Naghten to accept the fact of a schizophrenic episode without inquiry into its etiology.").

intoxication cannot provide the type of "disease or defect" that would warrant criminal exculpation via the insanity defense.¹⁴⁶ Most courts and commentators have reasoned that to include such a state of mind within the definition of insanity would throw open a window of opportunity through which the voluntarily intoxicated offender could escape, casting a pall over public safety. The precedent set would encourage recklessness as individuals would be free to ingest intoxicants knowing that, if they do so to the point of temporarily eliminating their cognitive capacity, they will be *completely* free from the force of the law. Public policy would prohibit such a result.¹⁴⁷

Any defect, disease, or infirmity that casts itself in the form of a steroid-induced psychosis is still likely to be the product of self-administered drug use. Therefore, a steroid-induced psychotic's use of the insanity defense would be foreclosed even before any issue of the degree of cognitive impairment is reached.¹⁴⁸

146. H. FINGARETTE & A. HASSE, *MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY* 112 (1979). See W. LAFAVE & A. SCOTT, *supra* note 120, §4.10, at 388 ("[One is not] insane just because he is intoxicated, for insanity requires a 'disease of the mind' . . ."). See, e.g., *People v. Free*, 94 Ill. 2d 378, 406, 447 N.E.2d 218, 231 (holding that a toxic psychosis prompted by the voluntary ingestion of alcohol and drugs does not constitute mental disease or defect), *cert. denied*, 464 U.S. 865 (1983); *Gibson v. State*, 55 Wis. 2d 110, 197 N.W.2d 813 (1972) ("We do not consider that a voluntarily drugged condition is a form of insanity which under the American Law Institute test of insanity can constitute a mental defect or disease."); *State v. Kolisnitschenko*, 84 Wis. 2d 492, 503, 267 N.W.2d 321, 326 (1978) ("[W]e are not willing to hold in this case that a temporary psychotic state which lasts only for the period of intoxication and which is brought into existence by . . . voluntary intoxication constitutes a mental disease . . ."). Cf. MODEL PENAL CODE § 2.08(3) (1985) ("Intoxication does not, in itself, constitute mental disease within the meaning of Section 4.01.").

147. See *Linehan v. State*, 442 So.2d 244, 249 (Fla. 2d DCA 1983) ("[A] purpose of criminal law is to protect society from behavior that endangers the public safety . . . That purpose and the deterrent objectives of criminal law may be subverted by relieving a person from the consequences of his own conduct.), *aff'd as to result*, 476 So.2d 1262 (Fla. 1985); H. FINGARETTE & A. HASSE, *supra* note 146, at 111-112. *But see infra* note 157 (arguing that public policy is not violated fully by the criminal law's recognition of the defense of voluntary intoxication because a successful use of that defense, see *infra* note 167, unlike a successful insanity defense, most likely will not result in complete exculpation).

148. This result seems inconsistent. Why will the law recognize insanity brought on by long term drug use but not that which results from a temporary bout? The law seems to reason that by recognizing intoxicant-induced insanity only when it is a settled condition brought on by years of using the substance the risk of an individual feigning intoxication and escaping punishment will be reduced. See Note, *supra* note 133, at 1221 ("[B]y requiring a long period of excessive drinking with recognizable syndromes, a degree of objective evidential corroboration is attained which reduces the possibility of fraud which may be present in ordinary cases of intoxication."). *But Cf.* J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 531 (2d ed. 1960) (claiming that any argument that drunkenness can be feigned to the degree of avoiding penal blame is absurd).

B. Voluntary Intoxication

This Article has concluded that a steroid-induced psychosis—even if it satisfies the cognitive test of insanity—fails as a method of completely eliminating culpability under the insanity defense because, in essence, it would be a temporary insanity created by the voluntary, excessive use of a drug. However, because anabolic steroids are taken voluntarily and induce changes in mental status, consideration of the applicability of the defense of voluntary intoxication is appropriate.¹⁴⁹

1. Intoxication?

In analyzing the etiology and nature of a steroid-induced psychosis to determine whether the criteria necessary to establish an intoxication defense are present, the threshold question would of course be whether such a psychosis is “intoxication” at all. Because Florida has no applicable statute, the American Law Institute’s Model Penal Code, discussed above, provides an adequate definition.¹⁵⁰ Section 2.08(5)(a) of the Model Penal Code specifically defines “intoxication” as “a disturbance of mental or physical capacities resulting from the introduction of substances into the body.”¹⁵¹ In light of the recent research findings, a steroid-induced psychosis surely would meet this standard.¹⁵² Anabolic steroids are introduced into the body and, when done so in large doses, the recent research indicates that they may disturb the mental capacities.¹⁵³ In the terms of this definition, then, a steroid-induced psychosis would constitute “intoxication.”¹⁵⁴

149. W. LAFAYE & A. SCOTT, *supra* note 120, § 4.10, at 387-88. See generally Singh, *History of The Defense Of Drunkenness in English Criminal Law*, 49 L.Q. REV. 528, 530 (1933); Hall, *Intoxication And Criminal Responsibility*, 57 HARV. L. REV. 1045 (1944); Paulsen, *Intoxication As A Defense To Crime*, 1961 U. ILL. L.F. 1; Note, *supra* note 133. One commentator aptly sums up this area of the law: “A scholar in search of logic, consistency and clarity of expression in the law would do well to look elsewhere than in the cases involving intoxication as a defense.” Smith, *Intoxication As A Defense To A Criminal Charge In Pennsylvania*, 76 DICK. L. REV. 15, 16 (1971).

150. MODEL PENAL CODE § 2.08(5)(a) (1985). “The great majority of states . . . have included drugs within the intoxication provision.” MODEL PENAL CODE § 2.08 comment at 366 (1985).

151. MODEL PENAL CODE § 2.08 (1985). The explanatory note to section 2.08 asserts that this broad definition is not to be limited to the effects of alcohol or narcotics. *Id.* explanatory note at 350.

152. See Pope & Katz, *supra* note 14.

153. See *supra* notes 101-111 and accompanying text.

154. But see MONT. CODE ANN. § 45-2-101(30) (1989) (defining an intoxicating substance as “any controlled substance . . . and any alcoholic beverage . . .”). Were a statute similar to Montana’s applicable in a state that did not include anabolic steroids within their

2. Evidence of Intoxication and Criminal Intent: A Conundrum for the Law

Voluntarily created intoxication will relieve a person of criminal responsibility for a specific intent crime¹⁵⁵ if the intoxication rendered that person incapable of forming¹⁵⁶ the specific intent constituting an element of the crime.¹⁵⁷ This rule is accepted in

schedule of controlled substances, steroids would not, by definition, be an intoxicating substance.

155. Specific intent is, in general terms, some intent beyond the mere intent to perform the physical act required for the crime. W. LAFAYE & A. SCOTT, *supra* note 120, § 4.10, at 389 n.18 ("Thus burglary requires an intent to commit a felony within the building in addition to the intent to break and enter the building; larceny an intent to steal the property in addition to the intent to take and carry away the property."); Special Project, *supra* note 129, at 1175 n.318 ("Specific intent is the intent to commit a particular act with a specific objective in mind which constitutes the harm defined by the law.") (quoting M. BASSIOUNI, *SUBSTANTIVE CRIMINAL LAW* 178 (1978)). Chief Justice Traynor of the Supreme Court of California has defined specific intent as the "intent to do some further act or achieve some additional consequence" beyond the intent to perform the proscribed act. *People v. Hood*, 1 Cal. 3d 444, 457, 462 P.2d 370, 378, 82 Cal. Rptr. 618, 626 (1969). "A crime may be labeled as a 'specific intent' crime either by legislative prescription or through common law interpretation." Boettcher, *supra* note 134, at 34. See generally H. FINGARETTE & A. HASSE, *supra* note 146, at 77-104 (summarizing the history of the specific intent/general intent distinction).

156. American jurisdictions take three approaches to the admissibility of evidence of intoxication. Nearly half the states will admit evidence of voluntary intoxication whenever it is relevant to the particular specific intent as defined by the crime. P. LOW, *CRIMINAL LAW* 139 (1984) (West Black Letter Series). Many states, again nearly half, only will admit evidence of voluntary intoxication if counsel offers it to show that the defendant was *incapable of forming* the specific intent required to establish a particular crime. *Id.* In a few states, evidence of voluntary intoxication is wholly inadmissible to show the lack of specific intent. *Id.* Florida apparently follows the rule that evidence of voluntary intoxication is admissible only to show that the defendant was incapable of forming a requisite specific intent. *E.g.*, *Linehan v. State*, 476 So.2d 1262, 1264 (Fla. 1985) ("We emphasize that voluntary intoxication is an affirmative defense and that the defendant must come forward with evidence of intoxication at the time of the offense sufficient to establish that he was *unable to form* the intent necessary to commit the crime charged.") (emphasis added); *Gentry v. State*, 437 So.2d 1097 (Fla. 1983) ("In this instance voluntary intoxication could only be used to show that the intoxication was so extensive as to suspend the power of reasoning, rendering the appellant *incapable of entertaining* the requisite specific intent.") (emphasis added); *Garner v. State* 28 Fla. 113, 153-54, 9 So. 835, 845 (Fla. 1891) ("Whenever . . . a specific or particular intent is an essential or constituent element of the offense, intoxication, though voluntary, becomes a matter for consideration, or is relevant evidence, with reference to the *capacity or ability of the accused to form or entertain the particular intent . . .*") (emphasis added).

157. See Special Project, *supra* note 129, at 1173. But see J. HALL, *supra* note 148, at 533-34 (noting that some courts ignore the rule in cases that "outrage public sensibilities"). See *supra* note 155 for a definition of specific intent. It is important to "note that evidence of alcohol consumption prior to the commission of a crime does not, by itself, mandate the giving of jury instructions with regard to voluntary intoxication." *Linehan*, 476 So.2d at 1264. Moreover, voluntary intoxication does not of itself prove absence of intent. *Leon v. State*, 186 So.2d 93 (Fla. 3d DCA 1966). The issue is always a factual one: was the intoxica-

most jurisdictions, including Florida.¹⁵⁸

With respect to most crimes, the state must prove that the defendant *intended* to commit the crime with which he is charged.¹⁵⁹ The requisite intent of a crime is known as the *mens rea*.¹⁶⁰ Defense counsel introduces evidence of voluntary intoxication to show that the defendant was incapable of possessing the *mens rea* that is an indispensable element of the crime.¹⁶¹ If this effort is successful, a necessary element of proof has failed and the law considers that the crime was not committed.¹⁶² However, voluntary intoxication will not shield a defendant from criminal responsibility in all circumstances. While some crimes require proof of a specific intent,¹⁶³ other crimes require only a showing of a *general* intent.¹⁶⁴ The proof of voluntarily incurred intoxication will

tion far reaching enough to deprive the accused of the ability to form the requisite intent? This Article previously asserted that public policy would preclude individuals from freeing themselves of criminal responsibility by becoming intoxicated. See *supra* note 147 and accompanying text. Logically extended, this policy would preclude reliance on any defense involving voluntary intoxication. This Article, however, will not debate the policy implications of the law recognizing the voluntary intoxication defense. It will suffice to say that public policy is not violated fully with the defense of voluntary intoxication because a successful use of that defense, unlike a successful insanity defense, most likely will not result in complete exculpation.

158. Annotation, *Modern Status Of The Rules As To Voluntary Intoxication As Defense To Criminal Charge*, 8 A.L.R.3d 1236, 1240 (1966) ("Apparently no court has ever dissented from the proposition, and it is embodied in the statutes in some jurisdictions."); *Cirack v. State*, 201 So.2d 706 (Fla. 1967). However, it seems some jurisdictions do not follow the rule. See, e.g., *McDaniel v. State*, 356 So.2d 1151 (Miss. 1978) (Sugg, J., specially concurring); *State v. Jordan*, 285 Mo. 62, 225 S.W. 905 (Mo. 1920). See generally J. HALL, *supra* note 148, 529-557 (discussing the voluntary intoxication defense).

159. W. LAFAVE & A. SCOTT, *supra* note 120, §3.4, at 212.

160. *Morissette v. United States*, 342 U.S. 246, 252 (1952).

161. See W. LAFAVE & A. SCOTT, *supra* note 120, § 4.10(a), at 389.

162. See Special Project, *supra* note 129, at 1174 n.304 (citing *Commonwealth v. Graves*, 461 Pa. 118, 334 A.2d 661 (1975)). See also W. LAFAVE & A. SCOTT, *supra* note 120, § 4.10(a), at 388 n.7 ("This is so even if an applicable statute provides that voluntary intoxication is no excuse for crime, since intoxication which negates an element is not excusing a crime which has been committed but rather negating the commission of the crime."). It must be noted that if the defendant becomes voluntarily intoxicated for the purpose of carrying out the crime, the intoxication will have no effect on his ultimate culpability and the defendant will be punished to the full extent of the law. See *Garner v. State*, 28 Fla. 113, 9 So. 835 (1891).

163. See *supra* notes 155-57 for a definition and discussion of specific intent.

164. General intent is merely the intent to do the physical act which the crime proscribes. W. LAFAVE & A. SCOTT, *supra* note 120, § 4.10(a), at 389-90. Cf. *People v. Hood*, 1 Cal. 3d 444, 456-57, 462 P.2d 370, 378, 82 Cal. Rptr. 618, 626 (1969) (Traynor, C.J.) ("When the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence, we ask whether the defendant intended to do the proscribed act. This intention is deemed to be a general criminal intent.").

only negate a *specific* intent element of a crime.¹⁶⁵ It will not negate the *general* intent component, as mere proof of the commission of the proscribed act, *actus reus*, will be sufficient to show the accused possessed general intent, regardless of his intoxicated state.¹⁶⁶ Because of this phenomenon, mitigation, as opposed to complete exculpation, will be the result.¹⁶⁷

165. W. LAFAVE & A. SCOTT, *supra* note 120, § 4.10(a), at 389. See *supra* notes 155-57 for a definition and discussion of specific intent.

166. W. LAFAVE & A. SCOTT, *supra* note 120, § 4.10(a), at 389-90. See *supra* note 164 for a definition of general intent. To establish the general intent element of a crime the prosecution only need prove *actus reus*—the proscribed act. The criminal intent is imputed from the performance of that proscribed act. Note, *supra* note 133, at 1212. General intent is not negated by proof of voluntary intoxication. This phenomenon occurs because nearly all acts which are defined as criminal consist of at least a general intent component. See Boettcher, *supra* note 134, at 34. As voluntary intoxication only negates specific intent, the general intent always will endure because it is imputed from the defendant's act. By merely performing a proscribed act a person will be considered to have formed general intent, despite his being intoxicated. As a result, an individual who commits a proscribed act while voluntarily intoxicated never will be exculpated completely; even if he is secure from conviction of a specific intent crime, if proven to have committed a proscribed act, he always can be convicted of a general intent crime. See also *People v. Tocco*, 138 Misc.2d 510, 513-14, 525 N.Y.S.2d 137, 140 (N.Y. Sup. Ct. 1988) ("Crimes in which the requisite *mens rea* is one of recklessness are classified as 'general intent' crimes . . . [T]he majority of cases in the United States create a special rule relating to intoxication, thereby not allowing an intoxicated individual to avail himself of the defense in crimes of recklessness."). Cf. MODEL PENAL CODE § 2.08(2) (1985) ("When recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such awareness is immaterial.").

As one already may have surmised, specific and general intent have been extremely difficult concepts to define and apply. In fact, at least one Justice of the Florida Supreme Court has announced a willingness to abandon the specific intent/general intent distinction. See *Chestnut v. State*, 538 So.2d 820, 825 (Fla. 1989) (Shaw, J., specially concurring) ("I write only to note again that the nebulous distinction between general and specific intent crimes and the defense of voluntary intoxication bear reexamination in a suitable case.").

167. "Mitigation" as used here would refer to the phenomenon which is a product of the specific intent/general intent distinction. As this Article has pointed out, intoxication may preclude conviction for a specific intent crime. However, included within the elements of a specific intent crime are the elements of a lesser included offense which may require the state to prove a mere *general* intent. See *Scurry v. State*, 521 So.2d 1077, 1079 (Fla. 1988) (Grimes, J., dissenting) ("A necessarily lesser included offense is an essential aspect of the greater offense. It is legally impossible to prove the greater offense without at the same time proving the lesser offense."). If that is the case, the intoxication will not be a defense to the formation of the general intent. However, as a general intent, lesser included offense normally possesses a lesser degree of culpability, the punishment for committing the lesser included offense is potentially less than if the specific intent crime were charged and proved. Therefore, mitigation results. In essence, proof of intoxication affects the crime of which the person is convicted and, in so doing, may lessen punishment. See Special Project, *supra* note 129, at 1175; *supra* note 155 and accompanying text. For example, a defendant may be charged with first degree premeditated murder, a specific intent crime. He may offer evidence of intoxication to show that he was incapable of forming the requisite specific intent—i.e., premeditated intent to kill. If the intoxication defense is successful in negating the specific intent required by the first degree murder statute, the defendant is still suscep-

3. Specific Intent and the Steroid-Induced Psychotic

The Florida Supreme Court has recognized the voluntary intoxication defense.¹⁶⁸ As a result, the defense would be a relevant consideration for counsel searching to find a mitigating theory for the steroid-induced psychotic charged with a specific intent crime.¹⁶⁹ If the defendant introduces evidence which adequately shows this psychosis to be a form of intoxication,¹⁷⁰ the theory would allow the jury to consider whether the condition precluded the defendant from forming the intent required as an element of the crime.¹⁷¹ If the jury does find that the defendant was incapable of forming a specific intent because of the intoxicated condition, the likely result would be mitigation; the defendant would be convicted, if at all, only of a crime requiring proof of a mere general intent.

If the law is going to recognize the voluntary intoxication defense, a court's admission of evidence of a steroid-induced psychosis to establish the defense is logical and equitable. Indeed, the voluntary intoxication defense applies to drunkenness—a state which would include many conditions far from a complete loss of rationality.¹⁷² Thus, if a jury¹⁷³ could find that a person inebriated at the

tible of conviction for second degree murder, a lesser included offense to first degree murder and, in Florida, a general intent crime. See *Gentry v. State*, 437 So.2d 1097, 1099 (Fla. 1983) (noting that a conviction for second degree murder in Florida requires only a general intent). As second degree murder is a general intent crime, evidence of voluntary intoxication will not negate the requisite general intent. Thus, a successful voluntary intoxication defense may allow a defendant to escape conviction for the specific intent crime of first degree murder, but still allow conviction on the lesser included offense of second degree murder. Because a conviction for second degree murder would result in less punishment than a conviction for first degree murder, the obvious result of a successful voluntary intoxication defense would be mitigation.

168. See, e.g., *Linehan v. State*, 476 So.2d 1262 (Fla. 1985); *Cirack v. State*, 201 So.2d 706 (Fla. 1967); *Garner v. State*, 28 Fla. 113, 9 So. 835 (1891).

169. A steroid-induced psychotic charged with first degree felony murder also could use the defense if the underlying felony with which he was charged was a specific intent crime. See *Linehan v. State*, 476 So.2d 1262 (Fla. 1985). For example, Horace Williams, charged with robbery and first degree murder, asserted the defense of voluntary intoxication. Transcript at 2733, *State v. Williams*, No. 86-9275 CF (Fla. 15th Cir. Ct., June 10, 1987).

170. See *supra* notes 150-154 and accompanying text.

171. See generally Annotation, *Admissibility of Expert Testimony as To Whether Accused Had Specific Intent Necessary For Conviction*, 16 A.L.R.4th 666 (1982).

172. See Special Project, *supra* note 129, at 1149-51 (describing the effects of alcohol on the mind). The commentators are careful to point out that the intoxicant need not render the defendant unconscious or incapable of distinguishing right from wrong in order to render him incapable of forming specific intent. See, e.g., W. LAFAVE & A. SCOTT, *supra* note 120, § 4.10(a), at 391.

173. The issue of whether the accused is so intoxicated as to be incapable of forming

hands of alcohol was incapable of forming the requisite specific intent, it certainly follows that it could find that an accused afflicted with the type of psychosis which recently has been attributed to steroid use similarly could be unable to form specific intent.

The choice to rely on a voluntary intoxication defense brings with it both advantage and limitation.¹⁷⁴ Advantageously, the defendant who chooses to rely on the voluntary intoxication defense need only introduce enough evidence of intoxication so that the jury is left with a reasonable doubt as to whether the defendant was capable of forming the specific intent; the prosecution retains the burden of persuasion, and must overcome the evidence of intoxication to prove beyond a reasonable doubt that the defendant in fact formed the requisite intent.¹⁷⁵ Moreover, the defendant's *voluntary* ingestion of the intoxicant is irrelevant.

The primary limitation inherent in the use of the voluntary

the requisite intent is a question of fact. *Link v. State*, 429 So.2d 836 (Fla. 3d DCA 1983); *Jenkins v. State*, 58 Fla. 62, 50 So. 582 (1909).

174. In order to raise the defense of intoxication the defendant first must plead not guilty. *W. LAFAYE & A. SCOTT, supra* note 120, § 4.10(i), at 398. At trial the defendant must introduce evidence of intoxication, as well as evidence that the intoxication rendered the defendant unable to form the specific intent. *Linehan v. State*, 476 So.2d 1262, 1264 (Fla. 1985). See also *infra* note 175 (discussing the constitutional implications of the assignment of the burden of proof with respect to intoxication). The defense attorney also would have to request a jury instruction similar to that found in the FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.04(g) (1987). Section 3.04 provides in pertinent part:

The use of [alcohol] [drugs] to the extent that it merely arouses passions, diminishes perceptions, releases inhibitions or clouds reason and judgment does not excuse the commission of a criminal act.

However, where a certain mental state is an essential element of a crime, and a person was so intoxicated that he was incapable of forming that mental state, the mental state would not exist and therefore the crime could not be committed.

As I have told you, [the intent to (specific intent charged)] [premeditated design to kill] [(other mental state)] is an essential element of the crime of (crime charged).

Therefore, if you find from the evidence that the defendant was so intoxicated from the voluntary use of [alcohol] [drugs] as to be incapable of forming [the intent to (specific intent charged)] [premeditated design to kill] . . . or you have a reasonable doubt about it, you should find the defendant not guilty of (crime charged).

Id.

175. The burden of *producing* evidence of intoxication is on the defendant, but where the intoxication is offered not as an affirmative defense but rather to negative an element of the crime, then the burden of *persuasion* constitutionally cannot be placed on the defendant. *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975). The state has the burden to prove beyond a reasonable doubt every fact necessary to constitute the crime charged—intent included. *In re Winship*, 397 U.S. 358, 364 (1970). The evidence of intoxication merely goes to rebut the presence of intent. *State v. Schulz*, 102 Wis. 2d 423, 429-30, 307 N.W.2d 151, 156 (1981).

intoxication defense lies in its applicability only to specific intent crimes. Its inability to render an individual incapable of forming *general* intent usually will prevent the defense from completely exculpating a defendant.

Nonetheless, where the facts so warrant, counsel defending a steroid-induced psychotic charged with a specific intent crime should consider asserting the defense of voluntary intoxication. Further, prosecutors and the bench should be aware that evidence of such a psychosis may be sufficient to negate the specific intent element of a crime.

4. Is It Always Voluntary?

The basis for the law's refusal to recognize the *complete* exculpation of a voluntarily intoxicated offender is the principle that he who *voluntarily* uses intoxicants and subsequently commits a crime shall not go completely unpunished.¹⁷⁶ Public policy is compromised if a person charged with a violent crime marches off scot-free solely because he *willingly* became intoxicated by his own hand; however, public policy is not compromised if an individual who was *not willingly* intoxicated remains unpunished for crimes he committed during the period of intoxication. One must ask, then, whether the intoxication is willing when the intoxicants in question are anabolic steroids and the intoxication is an unforeseen psychosis. Is it true that individuals ingest anabolic steroids *knowing* of the drugs' ability to produce an intoxicating effect and with the attainment of that effect as the self-evident goal of their ingestion? If the answer to this compound question is no, and this Article asserts that in many cases it is, then the propriety of generically characterizing the intoxication attributed to anabolic steroids as voluntary is questionable.¹⁷⁷ Indeed, in light of the realities of

176. The criminal law, in recognizing that voluntary intoxication is a defense to specific intent crimes, has implemented a mitigating mechanism which inherently recognizes that an intoxicated offender is not as culpable as one who is sober; at the same time, in holding that voluntary intoxication will not negate a general intent, the law has attempted to stand fast to the principle that one who commits a crime after knowingly ingesting intoxicants should not be completely exculpated. See J. HALL, *supra* note 148, at 537. Cf. *State v. Maik*, 60 N.J. 203, 214, 287 A.2d 715, 720-21 (1972) (noting that the policy behind the general rule that voluntary intoxication in and of itself will not completely excuse criminal conduct "rest[s] upon public policy, demanding that he who seeks the influence of liquor or narcotics should not be insulated from criminal liability because that influence impaired his judgment or his control. The required element of badness can be found in the intentional use of the stimulant or depressant.").

177. The concept of "voluntary" should entail more than just the mechanical performance of an act. Rather, it should connote a mechanical act which is accompanied by a sense

modern steroid use and the recency of the documentation of the potential psychiatric repercussions that may accompany it, it is plausible that an individual who has become intoxicated by using anabolic steroids may have done so involuntarily. Consequently, a steroid-induced psychosis may have to be addressed in many cases not as *voluntary* intoxication but as *involuntary* intoxication.

C. *Involuntary Intoxication*

In contrast to the defense of *voluntary* intoxication, *involuntary* intoxication is a complete defense to a crime in a *M'Naghten* jurisdiction.¹⁷⁸ Having its origin in the common law, the defense of involuntary intoxication serves as a complete shield for the accused, whether he is charged with a general or a specific intent crime.¹⁷⁹ The defense requires a defendant to prove three elements: (1) that the defendant was indeed intoxicated; (2) that the intoxication was involuntarily created; and (3) that as a result of this involuntary intoxication the defendant's mental state met the jurisdiction's test for insanity.¹⁸⁰

Although the defense of involuntary intoxication is recognized in many states by statute,¹⁸¹ Florida has neither recognized, nor rejected, the defense in either statute or judicial opinion.¹⁸² For

of awareness on the part of the actor as to the full implications of the act. See *State v. Hall*, 214 N.W.2d 205, 214 (Iowa 1974) (LeGrand, J., dissenting). Cf. MODEL PENAL CODE § 2.08(5)(b) (1985) (defining "self-induced" intoxication as "intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know . . .").

178. W. LAFAVE & A. SCOTT, *supra* note 120, § 4.10(f), at 393-94. See *Hendershott v. People*, 653 P.2d 385 (Colo. 1982) ("Involuntary intoxication is without moral culpability and, for this reason, is a complete defense to all crimes."), *cert. denied*, 459 U.S. 1225 (1983). However, the defense is rarely used. In fact, "a survey of the cases involving the *voluntary* intoxication defense indicates that the possibility of using an *involuntary* intoxication defense seems to have been frequently ignored, even though the elements for the defense were present." Annotation, *When Intoxication Deemed Involuntary So As To Constitute A Defense To A Criminal Charge*, 73 A.L.R.3d 195, 203-204 (1976) (emphasis added).

179. See W. LAFAVE & A. SCOTT, *supra* note 120, § 4.10(f), at 393-94.

180. See generally *id.* at 393-94.

181. *E.g.*, GA. CODE ANN. § 26-704 (Harrison 1988); COLO. REV. STAT. § 18-1-804(3) (1986); DEL. CODE ANN. tit. 11, § 423 (1987). Cf. MODEL PENAL CODE § 2.08(4) (defining "self-induced intoxication"). The Model Penal Code, although it does not use the term, clearly adheres to the common law approach to the involuntary intoxication defense. Specifically, section 2.08(4) provides that intoxication which is not self-induced is an affirmative defense when the defendant can establish that his state of mind would have constituted legal insanity were it the product of a mental disease or defect. *Id.*

182. *But see* *Crusoe v. State*, 239 So.2d 147 (Fla. 2d DCA 1970) (suggesting in dicta that drunkenness, be it voluntary or involuntary, doesn't necessarily exculpate); *State, Attorney For Twentieth Circuit v. McNally*, 336 So.2d 713 (Fla. 2d DCA 1976) (dicta) (court

this reason, Florida is a perfect laboratory for analyzing whether a steroid-induced psychosis may indeed be a form of involuntary intoxication.¹⁸³

1. Involuntary?

As this Article already has concluded that a steroid-induced psychosis is a form of intoxication,¹⁸⁴ the next inquiry necessarily inspects the involuntariness of this intoxication. Again, because there is no statute or court decision binding a Florida court, a tribunal would be free to proceed under the common law principles, looking to see whether the situation at hand resembles any of the circumstances in which the common law traditionally has considered intoxication to be "involuntary."

The common law has recognized intoxication that results from alcohol or drugs as involuntary when any of four conditions was met: (1) the intoxication was coerced or the result of duress;¹⁸⁵ (2) the intoxication was pathological;¹⁸⁶ (3) the intoxication resulted from a substance taken pursuant to a physician's advice;¹⁸⁷ or, (4) the intoxication was the result of an innocent mistake by the accused as to the intoxicating nature of the substance ingested.¹⁸⁸ In order to render the intoxication involuntary the defendant will have to show that the facts surrounding his affliction with the steroid-induced psychosis parallel one of these four scenarios. However, such a task is not easy to do.¹⁸⁹

rejects involuntariness defense asserted on the basis of addiction; court, also in dicta, speculates that the only time intoxication could be truly involuntary is when it occurs by "Force Majeure". Cf. *Powers v. State*, 369 So.2d 640 (Fla. 3d DCA 1979), cert. denied, 381 So.2d 769 (Fla. 1980) (Although the defendant argued she was temporarily insane at the time of the commission of the offense by reason of involuntary intoxication, the court affirmed the conviction without addressing the issue of whether the defense of involuntary intoxication is recognized in the common law of Florida.).

183. Unbound by a statute or a court decision, a Florida tribunal would be free to proceed with its analysis, looking to see whether the present situation fits into any of the scenarios in which the common law recognized intoxication as involuntary. See *Wilson v. Renfro*, 91 So.2d 857, 859 (Fla. 1956) ("In the absence of statute, the common law continues to be in force . . ."); *Brooks v. City of West Miami*, 246 So.2d 115, 116 (Fla. 3d DCA) ("The common law is in effect except as it is modified or superseded by statute."), cert. denied, 249 So.2d 691 (Fla. 1971); *State v. Hupf*, 48 Del. 254, 257, 101 A.2d 355, 356 (Del. 1953) ("Since our statute . . . contains no definition, we must look to common-law principles.").

184. See *supra* notes 150-154 and accompanying text.

185. See *infra* notes 190-195 and accompanying text.

186. See *infra* notes 196-201 and accompanying text.

187. See *infra* notes 202-216 and accompanying text.

188. See *infra* notes 217-228 and accompanying text.

189. See *City of Minneapolis v. Altimus*, 306 Minn. 462, 472, 238 N.W.2d 851, 858

a. Duress/Coerced

The common law recognized that intoxication which was coerced or the result of duress was involuntary.¹⁹⁰ However, the courts that have discussed duress or coercion as a causative factor of involuntary intoxication, most of them in dicta, have been very restrictive in their application of the concept.¹⁹¹ Some have gone so far as to say that a defendant's intoxication will not be considered involuntary as a result of duress or coercion unless the defendant was physically forced to ingest the intoxicant.¹⁹²

Save an extraordinary circumstance, a steroid-induced psychosis clearly is not the product of an outside force. The individual who ingests anabolic steroids normally administers the drug by means of his own physical act, either by injection or ingesting the steroid orally.¹⁹³ Where the drug is administered by another person, for instance when the user is unable to inject himself,¹⁹⁴ it

(Minn. 1976) (en banc) ("Involuntary intoxication . . . is a most unusual condition. The circumstances in which an instruction on the defense of involuntary intoxication will be appropriate will accordingly be vary rare."). Although some courts and commentators have claimed that involuntary intoxication is a rare, if not impossible, occurrence, it is important to note that this conclusion is based on the record of the appellate courts. If the trier of fact in a given case determined that intoxication was involuntary and, as a consequence, the defendant was acquitted, there would have been no appeal and no appellate record. See A. GOLDSTEIN, *THE INSANITY DEFENSE* 63-64 (1967) (arguing this point in response to those who claim that the occurrences for a successful insanity defense have been rare).

190. Using the definition in section 2.09(1) of the Model Penal Code, an individual's ingestion of an intoxicant can be considered to have been the result of duress where he was "coerced to [ingest] by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist."

191. See, e.g., *Evans v. State*, 645 P.2d 155 (Alaska 1982); *Burrows v. State*, 38 Ariz. 99, 297 P. 1029 (1931); *Borland v. State*, 158 Ark. 37, 249 S.W. 591 (1923); *Perryman v. State*, 12 Okla. Crim. 500, 159 P. 937 (1916).

192. E.g., Annotation, *supra* note 158, at 1239 ("[T]he decisions indicate that it is only where the alcohol is introduced into the accused's system by Force Majeure that the intoxication would be regarded as involuntary . . ."); *Tackett v. Commonwealth*, 205 Ky. 490, 492, 266 S.W. 26, 26-27 (1924) ("One's intoxication is not involuntary unless against his will, as where he is compelled to drink by force . . ."); *State v. Bunn*, 283 N.C. 444, 457, 196 S.E.2d 777, 786 (1973) ("[I]t is only when alcohol has been introduced into a person's system without his knowledge or by Force Majeure that his intoxication will be regarded as involuntary."); *Perryman v. State*, 12 Okla. Crim. 500, 502, 159 P. 937, 938 (1916) ("In fact, involuntary intoxication . . . can never exist where the person intoxicated . . . drinks the intoxicant . . . without being made to do so by force. . ."). Cf. Special Project, *supra* note 129, at 1179 (arguing that such a strict coercion requirement is unjustified; instead advocating a standard similar to the requirement of that amount of duress needed to void a contract—an amount short of physical force.).

193. See *supra* text accompanying note 24.

194. See Deposition of Maurice Williams at 28, *State v. Horace Williams*, No. 86-9275 CF (Fla. 15th Cir. Ct. taken May 17, 1988) (noting how Maurice Williams had to inject his brother Horace because Horace was unable to inject himself).

normally is done with full consent. Consequently, the involuntariness of a steroid-induced intoxication is not likely to be the result of duress or coercion.¹⁹⁵

b. Pathological

Another form of intoxication which the common law characterized as involuntary is a state known as "pathological intoxication."¹⁹⁶ The Model Penal Code explains that pathological intoxication occurs "where the actor suffers a reaction to the substance that is grossly excessive in degree and the actor did not know of his special susceptibility."¹⁹⁷ In order to be "pathologically" intoxicated the defendant not only must have some pre-existing condition that rendered him more susceptible to a particular intoxicant, but also, and even more critical, this pre-existing condition must be one of which he was not apprised. Again, only a handful of courts have discussed such a notion; most of those courts have rejected its applicability because the defendant in the case was aware of his unique susceptibility.¹⁹⁸

Implicit in the doctrine of pathological intoxication is the notion that the defendant was aware he was ingesting an intoxicant.¹⁹⁹ This awareness would render the doctrine inapplicable to

195. It may be possible to make an argument that the modern athletic milieu "coerced" an athlete to use anabolic steroids, and that, consequently, any resulting intoxication cannot be characterized as voluntary. See *infra* note 249 (suggesting that much of today's steroid use is environmentally induced).

196. W. LAFAYE & A. SCOTT, *supra* note 120, § 4.10(f), at 394. See also Comment, *Pathological Intoxication and the Voluntarily Intoxicated Criminal Offender*, 1969 UTAH L. REV. 419.

197. MODEL PENAL CODE § 2.08(5) explanatory note at 350 (1985). See also *id.* § 2.08 comment at 364 (defining occurrence of pathological intoxication as those "cases in which an intoxicating substance is knowingly taken into the body and, because of a bodily abnormality, intoxication of an extreme and unanticipated degree results . . .").

198. E.g., *Kane v. United States*, 399 F.2d 730 (9th Cir. 1968), *cert. denied*, 393 U.S. 1057 (1969); *United States v. Jewette*, 438 F.2d 495 (8th Cir.) (implicitly rejecting the notion that intoxicants combined with a pre-existing mental condition would lead to involuntary intoxication when the defendant was sufficiently apprised of his unique susceptibility), *cert. denied*, 402 U.S. 947 (1971).

199. Implicit within the language of MODEL PENAL CODE § 2.08(5) is the notion that for the degree of intoxication to be out of the ordinary or "grossly excessive," there must have been at least some amount of intoxication expected. This is so because if the substance was not perceived to be an intoxicant the resulting intoxication would not be "pathological," but rather the result of an innocent mistake. See *infra* notes 217-228 and accompanying text. See also *Kane v. United States*, 399 F.2d at 737 (noting that "the clause 'intoxication grossly excessive in degree, given the amount of the intoxicant' presumably comprehends not only the idea that a person so afflicted knows that he has a lower tolerance to alcohol than in the case of one not so afflicted, but that he knows that, once the tolerance level has been reached, the conduct induced thereby is usually more radical than otherwise would be

the condition of a steroid-induced psychotic. With anabolic steroids one often can assert that the afflicted defendant had no idea that the drugs were intoxicants at all.²⁰⁰ Thus, it clearly would be inaccurate to say that the defendant's resulting intoxication was "atypical" or "grossly excessive in degree," as such language connotes that there is at least some sort of objective, reasonably expected intoxicating effect by which to assess the degree of the actual intoxication. Such an "expected" degree of intoxication is not ascertainable, for it is arguably non-existent. Thus, pathological intoxication most likely would not be applicable in the case of a steroid-induced psychotic.²⁰¹

c. Medically Prescribed

The common law also considered intoxication involuntary where a defendant had become intoxicated from ingesting a prescribed drug pursuant to medical advice and without being aware of the drug's potential intoxicating effects.²⁰² Like the other forms

the case.").

200. See *supra* note 217-228 and accompanying text.

201. However, if a steroid-induced psychosis is not a distinguishable phenomenon from the well-documented aggressiveness that long has been known to accompany steroid use, and assuming, *arguendo*, that the objectively expected increase in aggressiveness constitutes a form of intoxication, then pathological intoxication might be a viable way to establish the involuntariness of this "intoxication." To wit, it has been said that certain persons are susceptible in different, more far reaching ways to the effects of large amounts of hormones being ingested into their bodies. See Taylor, *supra* note 19, at 65. If some persons, because of their innate biological makeup are susceptible, beyond the expected increase in aggressiveness, to a more far reaching intoxicating effect in the form of a psychosis, then that intoxication very well could be pathological. If the expected aggressiveness is the objective standard of intoxication, a psychosis would be clearly "atypical" or "grossly excessive." Because the defendant would be unaware of his unique susceptibility to the excessive ingestion of synthetic hormones, the standard for pathological intoxication as set out by the Model Penal Code would be satisfied. The same argument may be made when the psychiatric repercussions of anabolic steroid use become more well known. Again, if an individual, because of some pre-existing condition, is afflicted with a more far-reaching psychiatric effect than the degree of impairment which was commonly expected to accompany the psychosis, then he might be pathologically intoxicated. In this scenario, the objective standard of intoxication could be the degree of impairment expected to accompany the psychosis. Any effect beyond this objective standard would be atypical or grossly excessive in degree.

202. W. LAFAVE & A. SCOTT, *supra* note 120, § 4.10(f), at 394. See, e.g., *City of Minneapolis v. Altimus*, 306 Minn. 462, 468, 238 N.W.2d 851, 856-57 (1976); *Prather v. Commonwealth*, 215 Ky. 714, 287 S.W. 559 (1926) (evidence that a defendant who was convicted of fraudulent conversion of trust funds had been under the influence of morphine as a result of an addiction created by a physician's postoperative prescription was sufficient to create a jury question as to voluntariness); *Burnett v. Commonwealth*, 284 S.W.2d 654 (Ky. 1955) (holding that evidence of defendant's intoxication from overdose of narcotics prescribed by a physician was sufficient for a jury question); *Saldiveri v. State*, 217 Md. 412, 425, 143 A.2d 70, 77 (1958) (dicta) (recognizing that "involuntary intoxication caused by the unskilled ad-

of involuntary intoxication, the instances for its use, let alone its successful use, have been rare.²⁰³ Nonetheless, the law's recognition that the use of a medically prescribed drug may lead to involuntary intoxication may be of practical application in the case of a steroid-induced psychotic. Since a considerable amount of the steroids used in the United States is obtained through physicians,²⁰⁴ it is quite possible that any given steroid user obtained his drugs via prescription. Further, most physicians who prescribe the drugs probably are not aware that psychosis potentially is an effect of excessive use.²⁰⁵ Thus, it is a distinct possibility that a user is ingesting "prescribed" steroids, pursuant to medical advice, and without the prescribing physician's having informed the user that a severe psychosis is a possible side effect of the drug.²⁰⁶

As a result, the voluntariness of the resulting intoxication is called into question. In *City of Minneapolis v. Altimus*,²⁰⁷ the Minnesota Supreme Court, on one of the infrequent occasions where the intoxication of the accused was held to be involuntary,²⁰⁸ announced a test to determine whether intoxication resulting from prescribed drugs is involuntary. In order to classify the resulting intoxication as involuntary, "the defendant must not know or have reason to know that the prescribed drug is likely to have an intoxi-

ministration of a drug by a physician ordinarily constitutes a valid defense." Cf. *Johnson v. Commonwealth*, 135 Va. 524, 115 S.E. 673 (1923) (finding that a defendant who drank whiskey to kill pain of toothache, without doctor's advice, was *voluntarily* intoxicated); *People v. Koch*, 250 A.D. 623, 294 N.Y.S. 987 (N.Y. App. Div. 1937) (concluding that defendant's inadvertent overdose of a medically prescribed drug did not fall within the purview of a D.W.I. statute's definition of voluntary intoxication).

203. Special Project, *supra* note 129, at 1181.

204. See *supra* note 39 and accompanying text.

205. This is the result of the recency of the new findings and the large number of recent journal articles which fail to mention psychosis as a side effect. See *supra* note 104 and accompanying text; Deposition of Dr. David L. Katz, M.D. at 72, *State v. Horace Williams*, No. 86-9275 CF (Fla. 15th Cir. Ct. taken May 9, 1988).

206. It is important to understand that just because a drug was prescribed by no means indicates that the user was put on warning of all possible implications. Merrill, *Compensation For Prescription Drug Injuries*, 59 VA. L. REV. 1 (1979). Professor Merrill explains:

[E]ven complete physician candor will not assure that the patient will be fully aware of the risks because the drug's manufacturer may not be adequately informed or may not have conveyed to the physician all of the available information For practical purposes, fully informed patient participation in the selection and use of prescription drugs is an illusory goal.

Id. at 7-8.

207. 306 Minn. 462, 238 N.W.2d 851 (1976) (en banc).

208. The court held, specifically, that the trial court erred in refusing to grant an instruction on involuntary intoxication. 238 N.W.2d at 855.

cating effect."²⁰⁹ The test has a subjective component which precludes an assertion of involuntariness if the defendant had actual knowledge of the intoxicating potential of the substance; in addition, a subjective/objective prong mandates an inquiry into whether an accused had information from which a person of reasonable intelligence would infer that psychiatric repercussions could accompany steroid use.²¹⁰ This subjective/objective prong prevents an accused's claim of "I didn't know" from automatically rendering his intoxication involuntary.

Applying the foregoing test it seems that the intoxication brought on by prescribed anabolic steroids could be involuntary. Absent actual knowledge, it is plausible to assert that the typical steroid user is not armed with information from which a reasonable man would draw the conclusion that a psychosis would be a result of excessive use.²¹¹ There is an abundance of information from which a user could make a reasonable inference as to the potential for physiological side effects to accompany excessive steroid use.²¹² This is not so with the recently discovered psychiatric side effects. Arguably, most steroid users currently would not have the information from which a reasonable man of ordinary intelligence would make an inference that steroids are intoxicants.²¹³

209. 238 N.W.2d at 857. The court also notes that the complete test requires the defendant to prove that the intoxicant was the proximate cause of the condition and that the condition is the equivalent of legal insanity. *Id.* Also required, yet rather self-evident, is that the drug be prescribed. This requirement raises another collateral issue. If the policy is that the accused's intoxication should be involuntary because he received the drug from someone that he held in trust, should not the reasoning extend beyond the instances where the drug is received from a doctor? Consider this argument in light of the claims that young athletes often get steroids from persons who, though they are not physicians, still are in a position where the athlete looks to them with trust. See *supra* note 51 and accompanying text. The *Altimus* test was, in essence, derived from the Model Penal Code definition for "self-induced" intoxication. See Model Penal Code § 2.08(5)(b) (1985).

210. The *Altimus* test asks whether the defendant "had reason to know" of the intoxicating potential of the substance. 238 N.W.2d at 857. The defendant has "reason to know" where he has "knowledge of facts from which a reasonable man of ordinary intelligence or of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist." RESTATEMENT (SECOND) OF TORTS § 12 comment a (1977).

211. See *supra* text accompanying note 112.

212. See *supra* notes 87-88 and accompanying text.

213. *But see supra* note 112 (noting that the recent research has been reported in iron game magazines). The accuracy of the textual assertion is dependent entirely upon the standard to which the law holds a particular steroid user. The "reason to know" standard expressly takes into consideration the superior intelligence of the actor. As a result, experienced athletes or steroid users may be held to a higher degree of culpability. Therefore, certain steroid users may have "reason to know" that psychiatric repercussions may accom-

Nonetheless, the efficacy of an argument that the "intoxication" is involuntary because it resulted from a prescribed drug is reduced because of the practices of the "patient." When anabolic steroids are prescribed, the user often does not limit the amount ingested to the amount prescribed. Instead, athletes take amounts far in excess of the prescribed dose, supplementing their supply on the black market.²¹⁴ An athlete who engaged in supplementation would be foreclosed from claiming involuntary intoxication because, "where the intoxication is achieved by an overdose of the medicine, the resulting intoxication has been viewed as the fault of the accused."²¹⁵

Recently enacted legislation also has limited the future applicability of a claim of involuntariness under the medically prescribed doctrine. In the past, only ethical considerations acted to prevent a physician from prescribing anabolic steroids for a non-medical purpose. However, new legislation, both federal and state, has created a severe punitive disincentive which is likely to lower the percentage of anabolic steroids which are obtained via prescription.²¹⁶ It is obvious that as anabolic steroids are prescribed less frequently, it becomes less likely that the "medically prescribed" defense will be appropriate.

pany steroid use whereas a reasonable man of ordinary intelligence may not. Indeed, if a certain steroid user had read one of the above-mentioned magazines and, as a result, he had been apprised of the potential for psychiatric repercussions to accompany excessive steroid use, the assertion in the text certainly is assailable. Arguably, reports of the recent findings in these magazines could serve as information from which a reasonable man could make an inference that the steroids may affect his cognitive capacity. As such, he would have "reason to know" of the potential intoxicating effect of the substance, and it would be improper to label any resulting intoxication as involuntary.

214. See *supra* text accompanying note 44.

215. Annotation, *supra* note 178, at 200. See *People v. Turner*, 680 P.2d 1290, 1293 (Colo. Ct. App. 1983) ("Generally, a prescription will serve to place a patient on notice that an excessive dose will impair his faculties Therefore, where no controverting evidence is presented, a trial court would be correct in finding that excessive use of a prescription drug constituted voluntary intoxication."). Cf. *People v. Koch*, 250 A.D. 623, 294 N.Y.S. 987 (1937) (holding that extreme intoxication caused by inadvertent overdose was not voluntary intoxication within a statute's definition).

216. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 2403, 102 Stat. 4230 (codified at 21 U.S.C.A. § 333(e)(10) (West Supp. 1989)) (imposing criminal liability upon "any person who distributes or possesses with the intent to distribute any anabolic steroid for any use in humans other than the treatment of disease pursuant to the order of a physician . . ."). Many states have adopted similar enactments either in the form of legislation or administrative regulation. See, e.g., CAL. HEALTH & SAFETY CODE § 11153.5 (West 1988 Supp.); Ohio Monthly Record, January 1988, at 861-862 (to be codified at § 4731-11-05 in the OHIO ADMIN. CODE); COLO. REV. STAT. § 12-36-117(1)(v)-(w) (Supp. 1989).

d. Mistake Of Fact

The final scenario in which the common law recognized intoxication as involuntary was where the accused had become intoxicated after innocently ingesting a substance he did not know to be an intoxicant.²¹⁷ The doctrine essentially requires that the accused make an innocent mistake of fact as to the intoxicating potential of the substance he ingests; this mistake can occur with or without the trickery or contrivance of another person.²¹⁸ In either event,

217. W. LAFAVE & A. SCOTT, *supra* note 120, § 4.10(f), at 394. *See, e.g.*, *People v. Low*, 732 P.2d 622 (Colo. 1987) (dicta) (concluding that evidence that defendant charged with first degree assault was afflicted with a temporary toxic psychosis due to the ingestion of 120 cough drops could have supported a judgment of acquittal on the grounds of involuntary intoxication where the accused was neither aware of the possible intoxicating side effects of the drops nor put on warning of such effects by past use); *People v. Turner*, 680 P.2d 1290 (Colo. Ct. App. 1983) (evidence that defendant did not know, and had not been warned, of the intoxicating effect of a drug created a jury question as to the voluntariness of his resulting intoxication); *People v. Penman*, 271 Ill. 82, 110 N.E. 894 (1915) (holding that a defendant charged with murder allegedly had been tricked into taking cocaine tablets thinking them to be breath perfumers and, as such, it was error for the trial court to refuse evidence of the circumstances surrounding the ingestion, for if a mistake was made it would have rendered the intoxication involuntary); *State v. Brown*, 38 Kan. 390, 16 P. 259 (1888) (holding that because an individual who drinks liquor not knowing of its intoxicating nature is not voluntarily intoxicated, it was error for the trial court to both exclude evidence which showed the defendant's ignorance of the liquor's intoxicating nature and to instruct the jury that one's ignorance was no excuse for crime); *Torres v. State*, 585 S.W.2d 746 (Tex. Crim. App. 1979) (evidence that defendant unknowingly consumed a drug preparation created a jury question as to the voluntariness of intoxication).

218. Some commentators have claimed that involuntary intoxication by mistake of fact is exemplified primarily by the individual who is tricked or deceived by the act of another into ingesting a substance which he did not know to have intoxicating capabilities. *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 120, § 4.10(f), at 394; Special Project, *supra* note 129, at 1180. Some courts have approached the issue in this manner. *See, e.g.*, *State v. Hall*, 214 N.W.2d 205, 206 (Iowa 1974); *City of Minneapolis v. Altimus*, 306 Minn. 462, 238 N.W.2d 851 (1976) (en banc). Using such restrictive circumstances to describe the scenario in which an innocent mistake of fact occurs is natural because in many of the cases in which an individual did make an innocent mistake of fact the mistake was the result of an affirmative act by a third party. *See, e.g.*, *People v. Penman*, 271 Ill. 82, 110 N.E. 894 (1915); *Torres v. State*, 585 S.W.2d 746 (Tex. Crim. App. 1979). However, it is illogical to require a defendant claiming involuntary intoxication by innocent mistake of fact to show an affirmative act by a third party. Foreseeability of an intoxicating effect, regardless of another's contrivance or machinations, should be the relevant inquiry. *Cf.* MODEL PENAL CODE § 2.08(5)(b) (1985) (not requiring an affirmative act of another in order to render intoxication not "self-induced"); COLO. REV. STAT. § 18-1-804(5) (1986) (statutory definition of "self-induced" intoxication tracks Model Penal Code's definition in section 2.08(5)(b)); MONT. CODE ANN. § 45-2-203 (1989) (no requirement of an affirmative act by another to render intoxication involuntary; recognizes defense when defendant "proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected, or otherwise ingested the substance causing the condition."); DEL. CODE ANN. tit. 11, §§ 423-424 (1987) (statute does not require an affirmative act by another to establish involuntary intoxication). *Cf. Low*, 732 P.2d at 627 (dicta) ("Involuntary intoxication by definition occurs when the defendant does not knowingly ingest an intoxicating substance or ingests a substance *not known to be an*

consistent with the other forms of the involuntary intoxication defense, the occasions for claiming that one's intoxication was involuntary due to an innocent mistake have been infrequent.²¹⁹

One court has defined "involuntary" intoxication as the converse of that which is "self-induced."²²⁰ Consequently, the Model Penal Code's definition of "self-induced intoxication" informs analysis in this scenario. Section 2.08(5)(b) of the Model Penal Code defines "self-induced intoxication" as "intoxication caused by substances which the actor knowingly introduces into his body, the tendency of which to cause intoxication he knows or ought to know."²²¹ If this definition of "self-induced intoxication" is expressed in the negative, the result is a standard for determining when intoxication is *not* "self-induced" or, alternatively put, is involuntary. Under this standard, involuntary intoxication might be defined as that intoxication caused by substances that the actor knowingly introduces into his body, the tendency of which to cause intoxication he does not know, nor which he ought to have known. Although this logical inversion would state the test in terms of whether the defendant "ought to have known," that approach would be slightly inconsistent with the tack the language in the commentary to the Model Penal Code seems to suggest. The commentary notes that the Code's definition of "self-induced intoxication" affords a defense to the individual who was intoxicated "by a substance whose tendency to intoxicate the actor does not know

intoxicant) (emphasis added); *DeBerry v. Commonwealth*, 289 S.W.2d 495, 497 (Ky.) ("One who commits a crime under the influence of a drug should be held guilty if he takes the drug *knowing the effect it is likely to have.*") (emphasis added), *cert. denied*, 352 U.S. 881 (1956).

219. See Special Project, *supra* note 129, at 1180.

220. *Low*, 732 P.2d at 627 (citing COLO. REV. STAT. § 18-1-804(3) (1986)).

221. See MODEL PENAL CODE § 2.08(5)(b) (1985). Implicit in section 2.08(5)(b), as well as in the state codifications which parallel it, is the notion that the relevant inquiry must be foreseeability. At least one Justice of the Iowa Supreme Court has recognized that to define "self-induced" as the mechanical ingestion of the drug, ignoring the foreseeability of its intoxicating nature, is incompatible with the modern notions of criminal responsibility. See *State v. Hall*, 214 N.W.2d 205, 214 (Iowa 1974) (LeGrand, J., dissenting) ("I am convinced that voluntary as here used should relate to a knowledgeable acceptance of the danger and risk involved."). The relevant inquiry would become: Did the defendant foresee, or should he reasonably have foreseen, that the substance he was ingesting was an intoxicant? *Cf. Torres*, 585 S.W.2d at 748 ("Although she voluntarily drank the preparation, unless she knew it contained the drug her actions were not a volitional consumption of the intoxicant."); *DeBerry*, 289 S.W.2d at 497 ("One who commits a crime under the influence of a drug should be held guilty if he takes the drug *knowing the effect it is likely to have.*") (emphasis added); Annotation, *supra* note 178, at 201 ("A mistake or misjudgment concerning the potency of the intoxicant, or concerning one's capacity for the intoxicant, it is uniformly held, will not render the resulting intoxication involuntary *as long as the individual knew that he was consuming an intoxicant.*") (emphasis added).

and has no *reason to know*.²²² Because the commentary's approach in applying the "mistake of fact" doctrine would implement the same "reason to know" standard which the *Altimus* court used for determining whether an individual is involuntarily intoxicated from a prescription drug,²²³ this Article will analyze a mistake of fact using the "reason to know" standard in furtherance of a uniform approach.²²⁴ Consequently, absent actual knowledge, the crit-

222. MODEL PENAL CODE § 2.08 comment at 364 (1985).

223. See *supra* notes 209-210 and accompanying text.

224. An alternative approach is possible. Professor Low has noted that, in his estimation, "[t]he phrase 'ought to know' probably incorporates the standard of negligence defined in § 2.02(2)(d) [of the Model Penal Code]." P. Low, *supra* note 156, at 154. Section 2.02(2)(d) provides that "[a] person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct." MODEL PENAL CODE § 2.02(2)(d) (1985). In addition, the section superimposes upon this definition a requirement that this "risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." *Id.* Were this standard used to give life to the nebulous phrase "ought to know," the test to assess whether an individual's intoxication was not self-induced would in essence ask whether the accused actually knew he was ingesting an intoxicant or whether he *should have been aware* of a substantial and unjustifiable risk that he was ingesting an intoxicant. Although the ultimate answer to this question is, of course, fact-dependent, a general application of the negligence standard to a steroid-induced psychosis may be useful.

As section 1.13(10) of the Model Penal Code reveals that the term "material element" encompasses matters relating to the existence of an excuse for the actor's conduct, the presence of intoxication would be a material element of an involuntary intoxication defense. Having established that the presence of intoxication is a material element, the analysis moves to an assessment of the nature of the risk that this element exists. In the present context, the inquiry asks whether the risk that intoxication will result from the ingestion of anabolic steroids is both *substantial* and *unjustifiable*. "The term 'substantial' refers to the degree of likelihood that the element exists or will result." P. Low, *supra* note 156, at 93. "The term 'unjustifiable' refers to the reasons one might have for taking the risk and requires that these reasons not be good ones." *Id.* Assessing the nature of the risk in terms of this standard is purely the domain of the trier of fact in each unique situation and it is difficult to predict the outcome on a case to case basis. For example, the term "substantial," defined in terms of the likelihood the element exists or will result, is a relative term which is capable of being interpreted in many ways. In the current context, it is just as plausible to argue that the risk of being overwhelmed by a steroid-induced psychosis is substantial as it is to argue that it is not. Similarly, the term unjustifiable can be construed different ways by different persons. While Professor Low's articulation of the meaning which inheres in the "unjustifiable" prong is excellent, and as good as we are going to get, it still begs the question: what reasons are "good" reasons? Is it justifiable for a weightlifter to use anabolic steroids in training to achieve Olympic glory for the United States? How about an NFL linebacker striving to bring home a Super Bowl championship to his economically depressed community? Are these good reasons which would make steroid use justifiable despite the risk of intoxication? While some may say they are not, others might disagree. Clearly, the normative component of the inquiry makes the determination uniquely one for the trier of fact.

Assuming, *arguendo*, that the risk is substantial and unjustifiable, the next inquiry seeks to determine whether the accused should have been aware of this risk. Attempting to

ical inquiry becomes: did the accused have reason to know that the

answer this query illuminates the difference between defining the term "ought to know" in section 2.08(4) by means of the "reason to know" standard as opposed to defining it in terms of the negligence standard of section 2.02(d)(2). The difference stems from section 2.02's application of the mental state "should know." As the Restatement (Second) of Torts notes, "[t]hese two phrases ["reason to know" and "should know"] . . . differ in that 'reason to know' implies no duty of knowledge on the part of the actor whereas 'should know' implies that the actor owes another the duty of ascertaining the fact in question." RESTATEMENT (SECOND) OF TORTS § 12 comment at 20 (1965). Specifically, " 'should know' indicates that the actor is under a duty to another to use reasonable diligence to ascertain the existence or non-existence of the fact in question and that he would ascertain the existence thereof in the proper performance of that duty." *Id.* The existence of a duty to investigate sheds new light on the issue of involuntariness. It appears at least plausible that, in light of the recent media reports documenting the potential for psychosis to accompany steroid use, a reasonably diligent investigation might reveal the existence of the risk. In contrast, it is clear that many steroid users who do *not* make an investigation will continue to lack information from which a reasonable person would infer the existence of the fact in question, namely the potential for anabolic steroid use to produce intoxication. Consequently, it is possible that an accused may not have "reason to know" of the risk, but, at the same time, because of the potential for the intoxicating capability of anabolic steroids to be the product of a reasonably diligent investigation, the same accused potentially "should know" of the risk.

If the trier of fact concludes that the accused should have been aware of what is, assumptively, a substantial and unjustifiable risk, the final requirement necessary to establish that an accused was negligent is a determination by the trier of fact that the "failure of the defendant to perceive the risk involved a gross deviation from the standard of care that a reasonable person would have observed in the actor's situation." P. Low, *supra* note 156, at 96. In essence, this portion of the inquiry requires the trier of fact to determine whether the failure of an anabolic-steroid user to perceive the risk that his ingestion of steroids may lead to intoxication constitutes a *gross* deviation from the standard of care that would be observed by a reasonable person who was embarking upon or continuing a steroid regimen. Again, this seems like an issue upon which reasonable jurors could differ. On the one hand, it seems plausible to argue that where an individual knows that steroids will have some mental effect in the form of increased aggressiveness it is a gross deviation from the standard of care not to investigate further to determine if other, more far-reaching mental-status changes may occur. On the other hand, one also can argue that a reasonable person in a steroid user's position would not extend his investigation beyond the multitude of authorities which indicate that the sole mental status change to accompany anabolic steroid use is an increase in aggressiveness. See *supra* note 104. As such, the failure of an accused to do so could not be a *gross* deviation from the standard of care.

Policy issues may inform a court's decision as to the proper standard to apply when assessing a steroid user's mistake of fact as to the intoxicating nature of the steroids he ingested. While the authors recommend a "reason to know" standard, there may be policy based reasons for adopting the negligence standard and its "should know" mental state. As "should know" is completely objective and imposes a duty to investigate in an effort to ascertain the fact in question, a court may apply this somewhat stricter standard to a "mistake of fact" scenario while applying a "reason to know" standard when dealing with an involuntariness claim based on the use of *prescribed* steroids. The court might reason that the objective "should know" standard, and its appurtenant duty to investigate, rightfully is imposed in a situation where a user is ingesting black market steroids. In contrast, the court might find that the more lenient subjective/objective "reason to know" standard, and its lack of a duty to investigate, is more appropriate in the context of prescription drugs because of the users potential reliance on the expertise of the physician to inform him of any

substance he ingested was an intoxicant.²²⁵

Currently, this question may be answered in the negative for steroids. The psychiatric repercussions that can accompany the use of anabolic steroids have come to light only recently and, even now, awareness of these effects is for the most part limited to isolated sectors of the public.²²⁶ Although the new findings have received some scattered publicity,²²⁷ this media coverage is sufficiently limited so that a steroid user might not have information from which a reasonable man would infer that anabolic steroids were intoxicants.²²⁸ Lacking such information, a steroid user would not have "reason to know" that the drugs he was ingesting were intoxicating substances. Consequently, a user afflicted with a steroid-induced psychosis may, as a result of a mistake of fact, be involuntarily intoxicated. In fact, the intoxication which results from anabolic steroid use could, at this point in time, be the paradigm of that which is involuntary.

e. Arguments Against Characterizing the Intoxication As Involuntary

Because it would be beneficial to defense counsel, prosecutors, and judges who find themselves having to address the issue, a discussion of the arguments which may be offered against the application of the involuntary intoxication defense to a steroid-induced psychosis follows.

dangers. At the very least, the "reason to know" standard must be applied to an individual intoxicated by the ingestion of prescribed steroids because it is clearly illogical to impose a duty to investigate upon individuals who obtain drugs through a physician. In short, there may be a principled reason for the standard to differ in the "prescribed steroid" and "mistake of fact" scenarios.

225. See *supra* note 210 for a definition of "reason to know."

226. Deposition of Dr. David L. Katz, M.D., *supra* note 205, at 72. See also *supra* note 104 (noting the many recent articles and books which fail to mention a psychosis among the list of side-effects).

227. See, e.g., Monmaney & Robins, *The Insanity of Steroid Abuse*, NEWSWEEK, May 23, 1988, at 75; Altman, *New "Breakfast of Champions": A Recipe for Victory or Disaster*, N.Y. Times, Nov. 20, 1988, at 34, col. 6.

228. *But see supra* note 213 (noting that an individual may have information that steroids are intoxicants; if so, he would have reason to know). Even so, it is important that we as a modern society avoid what is a common human tendency, namely the tendency to ignorantly chastise with the response, "If I knew, he surely knew." This is not always true. See *People v. Turner*, 680 P.2d 1290 (Colo. Ct. App. 1983) (suggesting that "[t]o deny the defendant the chance to go to the jury on the issue of whether his intoxication was involuntary . . . is to give more weight to what might be assumed to be common knowledge of the effects of ingesting an excessive dose of a drug, than the specific evidence elicited on the subject."). *Id.* at 1293. Cf. Yessis, *supra* note 95, at 39, 172 (recognizing that many individuals engage in steroid use blind to the potential side effects of their use).

i. Is This Really Something New?

Prosecutors inevitably will argue that any claimed distinction between the well-documented ability of anabolic steroids to increase aggressiveness and the potential for steroid use to lead to a debilitating psychosis is completely artificial. They will argue that these two psychological side effects are not completely exclusive and that this psychosis is nothing more than the commonly perceived increase in aggressiveness raised to a higher degree.²²⁹

However, as this Article previously established,²³⁰ the psychosis clearly is distinguishable from a mere increase in aggressiveness in that an anabolic steroid-induced psychosis, as defined, falls within the Model Penal Code's definition of intoxication while an increase in aggressiveness does not. Moreover, the potential for anabolic steroid use to lead to a debilitating psychosis is a side effect which is arguably unforeseen by users. In essence, psychosis, it being distinguishable from a mere increase in aggressiveness, sits alone, unnoted by the steroid users of today.²³¹ As such, most steroid users would not have information from which a person of ordinary intelligence would have foreseen or perceived it as a potential side effect of their steroid use and thus, absent actual knowledge, an individual afflicted by such a psychosis may have been afflicted involuntarily.

ii. The Inevitable Analogy to the LSD Cases

Prosecutors may analogize claims of a steroid-induced psychosis to the LSD²³² cases.²³³ In the 1970's, hallucinogenic drug users charged with various crimes set up an involuntary intoxication defense based on their use of LSD.²³⁴ They argued that LSD and

229. Assuming, solely for the sake of argument, that the aggressiveness itself were intoxication, the reasonable steroid user probably should have known that such a state could have resulted from his use of the drugs. Indeed, there is "a large amount of 'common' information and lore among athletes, who consider changes of mood, temperament, and personality to be among the drugs' most characteristic effects." Katz & Pope, *supra* note 90, at 41. In accord with the reasoning of *Commonwealth v. Campbell*, 445 Pa. 488, 284 A.2d 798 (1971) and *State v. Hall*, 214 N.W.2d 205 (Iowa 1974), because the psychosis would be nothing more than an unpredictable degree of an otherwise foreseeable intoxication, it would be voluntary. See *infra* notes 232-242 and accompanying text. A claim that the user was a mere victim of misjudgment with respect to the potency would not be sufficient to render it involuntary. Annotation, *supra* note 178, at 201.

230. See *supra* note 107-111 and accompanying text.

231. See Yessis, *supra* note 95, at 172.

232. LSD is the acronym for lysergic acid diethylamide.

233. See *infra* note 234 and accompanying text.

234. See, e.g., *Commonwealth v. Campbell*, 445 Pa. 488, 284 A.2d 798 (1971); *State v.*

other hallucinogenic drugs had a more far-reaching mental effect than alcohol, and that since it was unknown how far this effect did reach, they should be considered involuntarily intoxicated due to a mistake as to the *extent* of the resulting intoxication.²³⁵ The claims were roundly rejected. Using these cases, the prosecution argument in a steroid-induced psychosis case may begin with the premise that these other jurisdictions have treated the intoxication produced by hallucinogenic drugs as voluntary, in effect analogizing it to alcohol intoxication, even though the exact degree of the intoxication resulting from hallucinogenic drugs frequently is unforeseeable.²³⁶ Applying this reasoning to anabolic steroids, the prosecutor would claim that anabolic steroids are drugs and, as was true in the LSD cases, no distinction is permissible between the degree of their mind-altering effects so as to render impairment of a lesser degree voluntary and that to a greater degree involuntary.²³⁷ Absent an adoption of the premise that psychosis is distinguishable from aggressiveness,²³⁸ this argument is certainly valid.

However, as this Article urges, aggressiveness is distinguishable from psychosis in that the latter constitutes intoxication while the former does not; the LSD cases, therefore, are distinguishable. In essence, a common denominator that was present in the LSD cases is absent with anabolic steroid use. In each of the LSD cases

Hall, 214 N.W.2d 205 (Iowa 1974).

235. See *id.* (rejecting the argument that defendant who knowingly took a mind affecting drug, but was afflicted in an unpredictable fashion, should be rendered involuntarily intoxicated); *Commonwealth v. Campbell*, 445 Pa. 488, 495, 284 A.2d 798, 801 (1971) (rejecting argument that intoxication, resulting from a knowing and willing ingestion of LSD, should not be equated to voluntary intoxication from alcohol because the resulting degree of said intoxication is unpredictable). Although these courts rejected the argument, others have not been so confident that it was that misguided. See, e.g., *State v. Hall*, 214 N.W.2d at 211-214 (LeGrand, J., dissenting); *Brinkley v. United States*, 498 F.2d 505, 511 (8th Cir. 1974) ("In light of the changing state of medical knowledge regarding hallucinogens, we think the district court may have underestimated the unique and potentially dangerous impact that prolonged use of LSD appears to have on the psychological state and behavioral pattern of some users."); *Pierce v. Turner*, 402 F.2d 109, 112-113 (10th Cir. 1968) ("We anticipate of course, that the demands of due process may require adjustment and refinement in traditional and "stock" instructions on the subject of criminal responsibility in view of the frightening effects of hallucinatory drugs.") (*dicta*), *cert. denied*, 394 U.S. 950 (1969).

236. See, e.g., *State v. Cooper*, 111 Ariz. 332, 334, 529 P.2d 231, 233 (1974); *State v. Hall*, 214 N.W.2d 205, 207 (Iowa 1974); *State v. Roisland*, 1 Or. App. 68, 77, 459 P.2d 555, 559 (1969) ("The voluntary use of intoxicants other than alcohol is comparable to the voluntary use of alcohol There is no reason why the culpability should not be the same."); *Commonwealth v. Campbell*, 445 Pa. 488, 495, 284 A.2d 798, 801 (1971).

237. See *Campbell*, 284 A.2d at 801; *State v. Hall*, 214 N.W.2d 205 (Iowa 1974). *Cf. id.* at 213 (LeGrand, J., dissenting) ("To treat all [drugs] alike simply because each is classified generally as a drug strikes me as a judicial copout.")

238. See *supra* note 107-111 and accompanying text.

the substance ingested by the accused was perceived to have at least *some* intoxicating potential.²³⁹ There remains a critical difference with anabolic steroids. In the case of anabolic steroids the intoxicating effect is involuntary not because, as was argued in the LSD cases, the intoxicating effect is greater than otherwise would be perceived, but because there is an intoxicating effect at all.²⁴⁰ In the LSD cases, the defendants had knowledge that the substance ingested at least would have some intoxicating effect.²⁴¹ Again, assuming that aggressiveness is distinguishable from the psychosis, most anabolic steroid users have no knowledge that the substances might have an intoxicating effect. Since the only psychological side effect commonly perceived to accompany anabolic steroid use has been increased aggressiveness, and since aggressiveness does not fall within the Model Penal Code's definition of intoxication, steroids never have been perceived as intoxicants.²⁴²

239. See *Campbell*, 284 A.2d at 799 n.1 ("Campbell stated that he had taken LSD . . . on three previous occasions."); *Hall*, 205 N.W.2d at 208 ("If [defendant's] own testimony is believed he knew it was a mind-affecting drug.").

240. Cf. Annotation, *supra* note 178, at 203 (defines "voluntary" as "the natural and reasonably foreseeable outcome of an accused's voluntary conduct . . ."). But see *Campbell*, 284 A.2d at 801 ("The very fact that the effects of a voluntary, non-medical use of a hallucinogenic drug are predictably unforeseeable should require courts to decide in the public interest that this is not legally sufficient to completely exculpate . . .").

241. See *supra* note 239.

242. Making the assumption that the two psychological side effects resulting from anabolic steroid use are distinguishable, and assuming further that one constitutes intoxication while the other does not, it is possible to argue that the theme of the LSD cases is inapplicable to the present issue. However, it is certainly an open question as to whether the courts will accept the necessary premise. In fact, theoretical niceties frequently fail to translate into judicially cognizable distinctions. In reality, it is possible that a court addressing the issue will reject this Article's premise, assuming instead that a steroid-induced psychosis is merely an aggravated degree of the otherwise foreseeable side effect of increased aggressiveness. If a court rejects the distinction, the LSD cases could be used to frame an argument against characterizing the psychosis as an involuntary intoxication.

In the past, serious mental status changes have been noted with other medications not viewed by physicians or patients as intoxicants. See *Drugs That Cause Psychiatric Symptoms*, 26 THE MEDICAL LETTER ON DRUGS AND THERAPEUTICS 75 (August 17, 1984). However, if the defendant had experienced a temporary psychosis as a result of his steroid use on a prior occasion, this experience should serve to put him on warning of its possible effects. Assuming, of course, that the user recognized his psychotic behavior and its causal relationship to his steroid use, he would have had "reason to know" that psychotic effects could be a consequence of the steroid use. As a result, the intoxication clearly would be voluntary. See Annotation, *supra* note 178, at 203 ("As a general proposition, past experience with the intoxicant, or other information which puts the accused on notice that he will suffer a violent intoxicating reaction from a particular intoxicant has ordinarily been considered sufficient to treat the intoxication as voluntary.").

iii. A User Of A Black Market Drug Should Be On Warning

A third argument would note that because steroids usually are obtained on a black market that consists of unreliable and unknown sources,²⁴³ a steroid user of ordinary intelligence ought to have information from which he could infer that the consequences of steroid use could be unpredictable.²⁴⁴ The argument would reason that a steroid user, while he might not be held to know *specifically* that steroids would cause a psychosis, most likely has information from which he can infer that steroids are drugs, and that appurtenant to drug use, especially inordinate amounts of an unknown quality, is the possibility for wild, unforeseeable mental effects.²⁴⁵ The argument reduced to its simplest form is "buyer beware": he who uses black market drugs is per se on notice that *anything* may happen as a result of the use. The mistake of fact it is recalled must be *innocent*.²⁴⁶ It is at least arguable that knowing use of a black market drug would preclude any assertion that one's mistake was innocent.

iv. Illegal?

A final argument is closely related to the last. This argument finds its roots in the observation that a steroid-induced psychosis is the result of the self-administered use of an *illegal* drug.²⁴⁷ Re-

243. See *supra* notes 48-57 and accompanying text.

244. See, e.g., H. FINGARETTE & A. HASSE, *supra* note 146, at 112 ("[One] deliberately takes the risk that as a result of the ingestion of drugs he may commit a serious harm."). See also *Commonwealth v. Campbell*, 284 A.2d at 801 ("The very fact that the effects of a voluntary, non-medical use of a hallucinogenic drug are predictably unforeseeable should require courts to decide in the public interest that this is not legally sufficient to completely exculpate . . .").

245. While this argument is otherwise well grounded, it implicitly makes an assumption that is far from realistic. It assumes that the reasonable man takes anabolic steroids recognizing that they, at least in some way, could affect his mind. In light of the growing evidence that steroid users are gravely uninformed and suffer from alarming misconceptions about the drugs, such an assumption is unreasonable. In terms of the drugs efficacy, all the user sees is bigger muscles and more strength. The deleterious effects they perceive, if any, are likely to be the claims of liver disorders and cancer, as well as the visually perceptible acne and testicular shrinkage. Quite simply the effects they recognize, both good and bad, are often purely physical. See Yessis, *supra* note 95, at 172.

246. See *supra* text accompanying note 217.

247. See *Murder Conviction*, Miami Herald, June 8, 1988, at 4A, col. 2 (quoting Prosecutor Richard Burton: "This is voluntary use of illegal drugs."). This argument is grounded in public policy. If a person who commits a crime after ingesting an *illegal* drug can completely escape punishment, a dangerous precedent purportedly is set. However, the illegality of anabolic steroid use is a very fact-dependent issue. Anabolic steroids are controlled substances under Florida Law. FLA. STAT. ANN. § 893.03(4)(b) (West Supp. 1988). As such, it is unlawful in Florida to possess steroids that were not prescribed lawfully by a physician. FLA.

calling that the mistake of fact necessary to render the resulting intoxication involuntary must be *innocent*,²⁴⁸ it is plausible that a determination that the drug use which produced the intoxication was illegal would make such a finding of innocence unlikely. Yet, the term "innocent" cannot always be defined rigidly; illegality

STAT. ANN. § 893.13(1)(f) (West Supp. 1988). However, if the steroids are lawfully prescribed the use would not be illegal. Therefore, even in a state such as Florida where anabolic steroids are controlled substances, all use is not *per se* illegal. Moreover, beyond Florida and other states that have included anabolic steroids in their schedules of controlled substances, see e.g., CAL. HEALTH & SAFETY CODE § 11056(f) (West Supp. 1988), the issue is even more muddled.

Federal law does not require the Food and Drug Administration to list all the drugs that are dispensable only by prescription. Food Drug Cosm. L. Rep. (CCH) ¶ 70,077. Consequently, the "initial determination of whether a drug for human use should be restricted to prescription sale under the Federal Food, Drug, and Cosmetic Act is generally the responsibility of the manufacturer or distributor." *Id.* However, a federal court has held that hormones, including natural testosterone and its synthetic analogues, were not safe and efficacious for use except under the supervision of a physician. *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 74 (9th Cir. 1951). Consequently, anabolic steroids today clearly only are dispensable by prescription. See 21 U.S.C. § 353(b)(1) (1982) (providing that a drug found not safe for use except under the supervision of a practitioner shall be dispensed only by written prescription, oral prescription, or by lawfully refilling an oral or written prescription); PHYSICIAN'S DESK REFERENCE, *supra* note 31, at 1975, 2254 (1988) (anabolic steroids listed as prescription drugs). It is important to note that while the drugs in a jurisdiction's schedule of controlled substances can be distributed only by prescription, many other drugs that do not appear within the controlled substance schedule similarly may be distributed only by prescription. After *El-O-Pathic*, anabolic steroids are among the latter, even if not included among the former.

Nonetheless, anabolic steroids are *not* controlled substances under federal law, nor under the laws of most states. See, e.g., 21 U.S.C.A. § 812 (West 1981 & Supp. 1989) (anabolic steroids not included within the United States Code's schedules of controlled substances). As such, one who merely possesses anabolic steroids without a prescription, having no intent to sell, is not in violation of federal law. Compare FLA. STAT. ANN. § 499.03 (West 1988) (illegal to possess prescription drug in Florida without a prescription) with 21 U.S.C.A. § 844 (1988 Supp.) (unlawful under federal law to possess a controlled substance without a prescription). In fact, one commentator has noted that not including a drug within the constraints of the federal Controlled Substances Act would amount to decriminalizing the substance. Mitchell, *Deregulating Mandatory Medical Prescription*, 12 AM. J. L. & MED. 207, 234 (1986). Moreover, if prescribed the use clearly would not be illegal. In essence, a blanket statement that all steroid use constitutes "illegal" drug use does not always prove true.

Some may claim that the recent Congressional action proscribing the prescription of anabolic steroids would seem to take the wind out of any argument that steroid use is often legal. Nonetheless, even if a physician has violated the law by prescribing for sports use, the prescriber's use pursuant to an otherwise lawful prescription would still seem not to be in violation of the law. However, legislation has been introduced recently towards the end of making anabolic steroids controlled substances. See H.R. 3216, 100th Cong., 1st Sess. (introduced Aug. 7, 1987) (proposing to amend § 202 of the Controlled Substance Act, 21 U.S.C. § 812(c) by adding methandrostenolone [Dianabol] to Schedule I.). See generally Uzych, *Steroids and the Law*, MUSCLE & FITNESS, Feb. 1989, at 119 (surveying the various state and federal statutes bearing on the distribution and use of anabolic steroids).

248. See *supra* text accompanying note 217.

should not, per se, equate to "not innocent." Instead, the surrounding facts and circumstances must be considered. In some plausible scenarios the factual circumstances could be such that a reasonable juror might find that a mistake as to the intoxicating nature of a drug was innocent, although the use of that drug is illegal.²⁴⁹ Therefore, the uninformed public, as well as the courts,

249. This Article has asserted that anabolic steroids are being used by many who are gravely uninformed as to the potential of the drugs to produce psychotic repercussions—a class which arguably includes the hundreds of thousands of adolescents who reportedly are using the drugs. See *supra* note 70. These statistics create the potential for interesting hypothetical situations.

It is possible that despite an accused's steroid use being illegal, a jury might be so moved by the surrounding circumstances of a case that it concludes the individual's steroid use was innocent. A plausible hypothetical should clarify this proposition. Assume Monte, a 15 year old altar boy with no previous criminal record, from a good home, at the behest of his football coach, friends, and parents, and fueled by environmentally induced dreams of athletic success, begins using anabolic steroids which he purchases on the black market. Also, assume that Monte lives in Miami, Florida, a jurisdiction in which his mere possession and use of the steroids without a prescription is illegal. See *supra* note 247. Further, assume that Monte uses the steroids having no notion that they have any effect on the mind, let alone that they can cause a debilitating psychosis. Finally, let us say Monte, without any previous psychotic symptoms, becomes overwhelmed by a psychosis and brutally axes his beautiful mother Rocky to death. Suddenly Monte emerges from his cognitive disattachment to find himself manacled hand and foot, faced with charges of first degree murder and the possibility of death in the electric chair. In light of these tragic circumstances, a jury might reject a prosecutor's claim that because Monte's steroid use was illegal, it is per se "not innocent."

Moreover, the potential for immensely *disparate* results emerges because of the requirement that one's mistake be innocent. For example, two individuals who become overwhelmed by a psychosis and commit heinous murders might attempt to advance an involuntary intoxication defense. Let us assume that the first individual lives in Florida where mere possession of anabolic steroids is illegal and that the second lives in a jurisdiction where it is not. Because the first individual's steroid use was illegal, a jury might find his mistake "not innocent" and reject his involuntary intoxication defense, subjecting him to the full brunt of the law. In contrast, because the second individual's use was not illegal, a jury might characterize his mistake as innocent, allowing him to establish that his intoxication was involuntary. If the charge was first degree murder, the first, living in Florida, potentially could be sentenced to death; the second, if successful in establishing the other elements of the involuntary intoxication defense, might walk away completely exculpated. Obviously, immensely disparate treatment of two offenders might result because of the mere coincidence that one's steroid use was legal while the other's was not.

This potential for disparate results is illuminated further within the context of the above hypothetical. Let us compare Monte's plight to that of his friend Gerry. If Gerry had become overwhelmed by a steroid-induced psychosis and also had committed a heinous murder, but, unlike Monte, had obtained and used his steroids in a state where possession without a prescription is not illegal, his use would have been legal, his mistake potentially innocent, and he would have a legitimate claim that his intoxication was the result of an innocent mistake of fact. Gerry, if successful in establishing the other elements of the involuntary intoxication defense, might walk away completely exculpated. As noted above, were a jury to determine that Monte's illegal drug use prevented his mistake from being innocent, he would be unable to establish an involuntary intoxication defense (at least under the "mistake of fact" prong of the involuntary intoxication doctrine) and, assuming he was una-

should avoid infringing on the role of the juror by making wholesale determinations of what is and is not innocent conduct. In fact, in most cases the requirements of due process command that the issue be given to the trier of fact and also should prevent a court from prohibiting a defendant's raising such a defense.²⁵⁰

In sum, as long as the public remains uninformed of the psychiatric repercussions that may accompany anabolic steroid use, it is possible to assert that a steroid-induced psychotic was involuntarily intoxicated because he innocently mischaracterized the anabolic steroids he ingested as non-intoxicating substances. While some equally plausible arguments against such a conclusion can be asserted, the applicability of these arguments, like those in support, is wholly dependent upon the factual circumstances. Consequently, there should be but one iron-clad rule: the issue of the innocence of the defendant's mistake of fact is uniquely the province of the trier of fact.

ble to establish some other defense, may be convicted and subject to the death penalty.

There are arguments, beyond the emotionally compelling facts of a specific case, that counsel might advance in an effort to establish that a defendant's steroid use was innocent despite it being illegal. One argument draws its strength from the potential role our modern society plays in inducing anabolic steroid use. Specifically, it might be argued that much of today's steroid use is environmentally induced, a product of society's inordinately rewarding the performances enhanced by anabolic steroids at all levels. *See, e.g., Marino Tops NFL Salary List With \$1.45 Million in 1988*, Miami Herald, Jan. 14, 1988, at 1D, col. 1 (report that 13 NFL players made at least \$1 million dollars in 1988 evidences the substantial rewards American society bestows upon professional athletes); *BULLETIN OF THE UNIVERSITY OF MIAMI 25* (Undergraduate Studies 1988-89) (four year athletic scholarship at the University of Miami, measured in tuition costs alone, would be worth in excess of \$40,000); Douglas, *Steroids: The Myth and the Reality*, *MUSCLEMAG*, Feb. 1989, at 87, 89 ("It's estimated that Ben Johnson lost eleven million dollars worth of endorsements due to his loss of the gold medal."). Although the costs of using steroids are prevalent in terms of both physical harm and potential stigma, *see Anderson, Convicted For Speeding*, N.Y. Times, Sept. 27, 1988, at 53, col. 1 (disqualified gold medalist lives forever with a tainted reputation), it is clear that the cost/benefit ratio created by the modern athletic milieu has given athletes much incentive to use the drugs. *See Janofsky & Alfano, Victory At Any Cost: Drug Pressure Growing*, N.Y. Times, Nov. 21, 1988, at 1, 34, col. 1. Consequently, counsel might argue that for the modern athletic environment to induce steroid use without informing the user of the psychotic ramifications, and for the law then to deny that user the opportunity to utilize the defense of involuntary intoxication on the grounds that the use may be illegal, or alternatively, because the user of black market steroids "should have known," produces a result which is morally questionable. As Professor Kadish so poignantly stated: "To blame a person is to express a moral criticism . . ." S. KADISH, *supra* note 114, at 87. Thus, when society criticizes an individual for the ultimate result of drug use, use which society itself possibly has induced without warning of its implications, one might conclude society has become guilty of a grave degree of hypocrisy.

250. *See In re Oliver*, 333 U.S. 257 (1948).

f. Educate

If the potential exculpation of a steroid-induced psychotic offends public sensibilities, a simple solution is available. By educating current and potential steroid users as to the possible "intoxicating" effects of anabolic steroid use the involuntariness of this use would be eliminated.²⁵¹ If a reasonable man ought to know that these drugs can cause this intoxicating effect, then the resulting intoxication would be considered self-induced and, as such, never would result in complete exculpation. Consequently, American governmental bodies, through education, must make the psychiatric repercussions that may accompany steroid use reasonably foreseeable. If government begins to inform the public of the drastic psychological possibilities that may accompany steroid abuse, the oppressiveness of punishing those who commit crime while intoxicated from steroids would be eliminated, for the intoxication no longer would be involuntary.²⁵²

2. State of Mind Must Equate To Legal Insanity

Even if America's leaders decide not to educate, it must be

251. Recently-enacted California legislation provides an excellent model of an education program which, if effectively utilized, could eliminate the "involuntariness" of the intoxication which results from the ingestion of anabolic steroids. See CAL. EDUC. CODE § 51262 (West Supp. 1988) ("In order to increase the knowledge of students about the effects of the use of anabolic steroids, the Superintendent of Public Instruction shall develop a steroid education package consisting of teacher lesson plans, student pamphlets, parent pamphlets, and videotapes to be distributed directly to school districts."). To educate the adult population to the extent of making the intoxicating effects of anabolic steroids reasonably foreseeable, a legislature could mandate that signs telling of the potential psychological effects be posted in all facilities that steroid abusers would be likely to frequent, i.e. gyms, health clubs, locker rooms, etc. Cf. CAL. CIV. CODE § 1812.97 (West Supp. 1988) (requiring all athletic facilities to post signs warning of the *illegality* of aiding or abetting unlawful sale, use, or exchange of steroids). With Congress' awareness recently piqued, a Congressional mandate funding the education program and mandating the athletic facility notice might be feasible. See Anti-Drug Abuse Act of 1988, P.L. No. 100-690, § 2402, 102 Stat. 4230 (instructing the Comptroller General to conduct a study on the extent of steroid use among high school students, and other adults).

252. An education program also could serve as a method of "general" deterrence. See A. BLUMBERG, *CRIMINAL JUSTICE* 323 (2d ed. 1979) (explaining that general deterrence is the theory that "the punishment imposed on a specific offender serves notice to potential malefactors that they will suffer a similar fate."). The number of users could be reduced vastly by the inclusion of a poignant warning in the education programs: "Warning: Use anabolic steroids and you could become grossly intoxicated, commit a crime, and wind up spending the rest of your life in prison." Such a consideration would affect drastically the cost/benefit analysis the potential user would perform. Some might have offered the theory of general deterrence as a viable purpose for punishing even the unwary steroid-induced psychotic. However, even putting the constitutionality of such punishment aside, it still would be ineffective unless people were *educated* about this threat of punishment.

made clear that the involuntary intoxication defense is not an easily wielded tool. So far, this Article only has determined that the first two requirements necessary to such a defense can be met: that the psychosis is intoxication and that this intoxication could be created involuntarily. The third element is critical and quite possibly insurmountable: the involuntary intoxication must produce a state of mind that is the equivalent of legal insanity.²⁵³ In effect, the defendant's intoxication must be of such a degree that if his incapacity was the result of a mental disease or defect, instead of an excessive dose of the intoxicant, he would be legally insane.²⁵⁴

As noted, Florida recognizes the *M'Naghten* rule as the legal standard of insanity.²⁵⁵ Thus, an accused claiming involuntary intoxication must satisfy *M'Naghten* by establishing that the intoxicant rendered him incapable of knowing the nature and the consequences of his actions, or, alternatively, incapable of knowing his actions were wrong.²⁵⁶ This is indeed a formidable, if not impossi-

253. Section 2.08(4) of the Model Penal Code provides that, as a prerequisite to establish an involuntary intoxication defense, the defendant must establish that the intoxication so affected his mental status that he is left in a condition satisfying the requirements of the jurisdiction's definition of legal insanity. MODEL PENAL CODE § 2.08(4) (1985) ("Intoxication which is [involuntary] . . . is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law."). Cf. MODEL PENAL CODE § 4.01 (1985) (noting that the Code would consider a defendant insane "if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law."). Section 2.08(4) articulates the law which is regnant in the United States. See, e.g., *City of Minneapolis v. Altimus*, 306 Minn. 462, 471, 238 N.W.2d 851, 857 (1976) (holding that the defense of involuntary intoxication is "available only when the defendant is legally insane at the time of the alleged criminal offense."); *Torres v. State*, 585 S.W.2d 746, 749 (Tex. Crim. App. 1979) (holding that the test used for insanity is similarly applicable to involuntary intoxication). Section 2.08(4) also implicitly provides that involuntary intoxication, like voluntary intoxication, would be a defense if it negates a required mental state. S. KADISH & S. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 963 (5th ed. 1989). However, were this the case, evidence of involuntary intoxication only would be able to mitigate, not completely exculpate, for the same reasons evidence of voluntary intoxication is so limited. See *supra* note 167. See also P. Low, *supra* note 156, at 207 ("The involuntary intoxication in effect substitutes for the 'mental disease or defect' in the formulation of the insanity defense, and the rest of the insanity defense then governs.").

254. See MODEL PENAL CODE § 2.08 comment at 363 (1985) ("[Intoxication that is not self-induced] excuses only if the resulting incapacitation is as extreme as that which would establish irresponsibility had it resulted from mental disease.").

255. See *supra* note 121 and accompanying text. See also W. LAFAVE & A. SCOTT, *supra* note 120, §4.2(a), at 312 ("The *M'Naghten* test has become the predominant test in the United States.").

256. Cf. *City of Minneapolis v. Altimus*, 306 Minn. 462, 238 N.W.2d 851 (Minn. 1976). The *Altimus* court stated the parameters of the defense as follows:

Thus, a defense of involuntary intoxication should be allowed only in cases

ble, task as the restrictive *M'Naghten* standard impedes the involuntarily intoxicated offender in his effort to establish the defense. Despite heavy criticism,²⁵⁷ *M'Naghten's* grip on the law of insanity seems to be tightening.²⁵⁸ Consequently, it is likely that an accused attempting to utilize the defense of involuntary intoxication will continue to be hindered by the age-old chains of the *M'Naghten* rule.²⁵⁹

Moreover, jurors have a natural aversion to completely exculpating someone who has committed a violent crime.²⁶⁰ It is quite possible that they would reject an involuntary intoxication defense even if the evidence clearly showed an involuntarily intoxicated defendant whose state of mind satisfied *M'Naghten*. Nonetheless, if the defendant can prove to the satisfaction of the trier of fact that his involuntary intoxication left him in a condition which would be legal insanity were it not the product of an intoxicant, the three elements of the involuntary intoxication defense will have been

where the defendant at the time of committing the alleged criminal act was laboring under such a defect of reason because of a mental deficiency caused by involuntary intoxication as not to know the nature of his act, or that it was wrong.

Id. at 858.

257. See W. LAFAYE & A. SCOTT, *supra* note 120, § 4.2(c), at 317-19; A. GOLDSTEIN, *supra* note 189, at 46-47. The cognitive approach of *M'Naghten* is all or nothing. See R. GERBER, *supra* note 118, at 32 ("The test calls for total impairment: the accused must not know at all."). It is claimed that such an approach—by failing to recognize that insanity is a matter of degree, of gray areas rather than black on white—has limited substantially the opportunities for its successful use. *Id.* at 32. Alternatively, the inability to know right from wrong must be complete, another unrealistic requirement that has restricted the use of the defense. See Diamond, *Criminal Responsibility Of The Mentally Ill*, 14 STAN. L. REV. 59, 61 (1961) (claiming that "just about every defendant, no matter how mentally ill, no matter how far advanced his psychosis, knows the difference between right and wrong in the literal sense of the phrase . . .").

258. See W. LAFAYE & A. SCOTT, *supra* note 120, § 4.2(c), at 317 n.70 (noting that Congress has adopted a *M'Naghten* style insanity test for use in the federal courts and that recent law reform proposals, like *M'Naghten*, are stated solely in cognitive terms.).

259. Although it is difficult to meet the restrictive *M'Naghten* test, it is the authors' position that a steroid-induced psychosis may debilitate an individual to the point that he is unable to know the nature and the consequences of his acts, or that his acts are wrong. Consequently, a steroid-induced psychosis may render an individual legally insane. For an argument that an individual suffering from a steroid-induced psychosis may be insane as the law defines the condition, see Testimony of David L. Katz, M.D., *State v. Horace Williams*, No. 86-9257 CF (Fla. 15th Cir. Ct. June 10, 1988).

260. See A. GOLDSTEIN, *supra* note 189, at 5, 24, 42, 63. Further, it must be noted that complete exoneration is an even more unattractive option to a jury because, unlike an individual insane as a result of a mental disease or defect, a steroid-induced psychotic would not be likely to spend a great deal of time, if any, in a hospital. See, e.g., Order Pursuant to MD. HEALTH-GEN. CODE ANN. § 12-117 at 4, *State v. Michael David Williams*, *supra* note 10 (Williams, afflicted with a steroid-induced psychosis, was ordered discharged 22 days after the court found him guilty but not criminally responsible.).

met and the accused shall be exculpated.²⁶¹

3. Procedure

Finally, prosecutors and defense counsel should be aware of the procedure for utilizing the defense of involuntary intoxication. There is no special plea which raises the defense.²⁶² The defendant simply enters a plea of not guilty.²⁶³ However, involuntary intoxication is an affirmative defense.²⁶⁴ Consequently, the defendant has not only the burden of going forward with evidence of intoxication but also the ultimate burden of persuasion.²⁶⁵ Through the testimony of experts the defense will have to prove that the resulting psychosis was indeed intoxication,²⁶⁶ that the intoxication was involuntary,²⁶⁷ and that the defendant was legally insane at the time he committed the criminal act.²⁶⁸

IV. CONCLUSION

An attorney representing a steroid user charged with a crime must consider implementing evidence of a steroid-induced psycho-

261. Further, if research advances to a point where it is much clearer that a steroid-induced psychotic's state of mind is such that he is unable to know the nature or consequences of his act or that he is unable to know right from wrong, then the likelihood of satisfying *M'Naghten* may be increased. Today, the research addressing the psychiatric effects of anabolic steroid use is still at a very young stage. See Deposition of Dr. David L. Katz, M.D., *supra* note 205, at 57-58.

262. See W. LAFAVE & A. SCOTT, *supra* note 120, § 4.10(i), at 398. See also AMI Criminal 4005 (1982) (Michie) (Prepared by the Ark. Supreme Court Comm. on Jury Instructions, Wayne Matthews, Chairman) (model jury instruction that might be requested when an accused offers involuntary intoxication as an affirmative defense).

263. See W. LAFAVE & A. SCOTT, *supra* note 120, § 4.10(i), at 398.

264. *Id.* § 4.10(i), at 398.

265. See *City of Minneapolis v. Altimus*, 306 Minn. 462, 472, 238 N.W.2d 851, 858 (1976) (en banc). Cf. *supra* note 175 (discussing the constitutional limitations upon the allocation of the burden of proof in a case where intoxication is offered as a defense). The defendant attempting to use voluntary intoxication to negate specific intent has the burden of production, but not the burden of persuasion. This is because the lack of specific intent is not being offered as an affirmative defense, but rather as evidence negating an element that the prosecution has to prove. In contrast, the claim of involuntary intoxication is an affirmative defense.

266. Annotation, *supra* note 178, at 204.

267. *Id.* See also *Grayson v. State*, 687 P.2d 747, 749 (Okla. Crim. App. 1984) ("Thus, in order to invoke the defense of involuntary intoxication, a defendant must produce sufficient evidence to raise a reasonable doubt as to the voluntariness of defendant's intoxication."). Testimony will have to establish not only the absence of actual knowledge, but also the fact that the defendant "ought not have known."

268. It should be noted that in many of the cases dealing with involuntary intoxication, involuntariness was established but the defense failed to show that the intoxication deprived the accused of the necessary mental capacity. Annotation, *supra* note 178, at 204.

sis to eliminate or, alternatively, limit the accused's criminal responsibility. However, due to the inescapable reality that any resultant psychotic state is merely a by-product of drug use, reliance on the standard insanity defense is misplaced. Instead, a steroid-induced psychosis—which, as defined, falls within the generous ambit of the Model Penal Code's definition of intoxication—is more appropriately an occasion for a voluntary or an involuntary intoxication defense. Even so, attorneys attempting to advance either theory of intoxication should remember that pragmatic barriers abound. Still, creative counsel, if armed with a case which is factually appropriate, may find the defense to be a legitimate option in attempting to exculpate a client. In sum, the authors implore defense counsel, prosecutors, and the bench to apprise themselves of the issues that may arise if a steroid user is charged with a crime.