

# Commentary: Alcoholic Blackout— Does It Remove *Mens Rea*?

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Disorders of impulse control are commonly induced by alcohol. As Lady Macbeth said, “That which hath made them drunk hath made me bold; What hath quenched them hath given me fire” (Ref. 1, p 1231).

The report by van Oorsouw *et al.*<sup>2</sup> from The Netherlands re-emphasizes the prevalence of alcohol-induced blackouts in a community sample and suggests that the claim of amnesia during a criminal event may serve a “strategic purpose” in court. This raises questions that are of importance to the legal system in general and to the forensic psychiatrist in particular.

Blackouts “consist of a dense amnesia for significant events which have occurred during a drinking episode, which at the time outward behaviour perhaps seemed little disordered” (Ref. 3, p 595).

Although alcohol has been consumed for the duration of recorded history, and probably before, remarkably divergent opinions about drinking behavior are held by scientists and lay persons, perhaps reflecting positions that are more philosophical or religious than empirical. The tools of epidemiology, as used by van Oorsouw *et al.*,<sup>2</sup> are powerful aids in the validation of syndromes and provide clues to the etiology of disease. Recent research has demonstrated the varieties of genetic transmission of alcohol abuse and has helped to elucidate genetic/environmental interactions in the etiology of this major public health and social problem.<sup>4</sup> Previous epidemiological surveys have reported that of college students who drink, more than 50 percent have experienced a blackout at some point in their lives.<sup>5</sup> Criminal or dangerous behavior is not unusual during a blackout. In their sample, van Oorsouw *et al.*<sup>2</sup> found that 85

percent of blackout-claiming individuals had had a road accident, and White *et al.*<sup>6</sup> found that 37.5 percent of their male sample had had fights, 25 percent had damaged or vandalized property, and 25 percent had had intercourse with someone they did not know.

Blackouts during alcohol intake are phenomena similar to episodes of “transient global amnesia,” a neurological syndrome that closely resembles a blackout, except that it occurs in the absence of alcohol, perhaps because of basilar cerebrovascular insufficiency (or during a migraine-equivalent episode). These episodes are not accompanied by drowsiness, inattentiveness, or impairment of consciousness, and speech and behavior may appear normal to an outside observer.<sup>3</sup> White<sup>7</sup> has described the mechanism for alcoholic blackouts as involving disruption of activity in the hippocampus. Ethanol inhibits NMDA (*N*-methyl-D-aspartate type of glutamate receptor), a receptor involved in synaptic plasticity and long-term potentiation (LTP).<sup>8</sup>

The differential diagnosis of the cause of amnesic episodes includes complex partial seizures, hypoglycemia, transient ischemic attacks, concussions and head injury, intoxication with sedatives, Korsakoff's syndrome, or encephalitis. Psychogenic amnesia may also be considered, but there is usually an emotional precipitant. These victims do not even remember their own names, and they may have amnesic periods lasting days or weeks.

The memory deficit of alcohol-induced Wernicke-Korsakoff syndrome, actually two different disorders, consists of a “global confusional state” in Wernicke syndrome, versus the purely anterograde and inconsistent retrograde memory disorder of Korsakoff syndrome, which does not include a confused state.<sup>9</sup> Confabulation is a striking, but inconsistent,

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feature of Korsakoff syndrome, which may be mistaken for dissimulation or outright deception. It has been defined as: "The falsification of memory occurring in clear consciousness in association with an organically derived amnesia" (Ref. 10, p 31). The amnesia of a blackout is specific to a given period of alcohol intake, whereas the amnesia of Korsakoff syndrome is a chronic condition that may or may not be treatable with vitamin B-1.

The laws in most jurisdictions in the United States specifically disallow voluntary intoxication as a defense in criminal court, but involuntary intoxication, as by a prescribed drug or poisoning by others, is a valid defense. Are blackouts voluntary if not anticipated? Is a blackout the result of "voluntary" intoxication? Can a person have a blackout that was the unforeseen or unexpected consequence of drinking? Does that constitute an involuntary state? Chronic alcoholism may be interpreted as a disease and may therefore be involuntary.

Another essential question is whether *mens rea*, the mental state or quality of behavior required for the offense,<sup>11</sup> exists. Terms such as intentional, knowing, reckless, and criminally negligent<sup>12</sup> are used to define *mens rea*. If one is mentally unable to form intent or to understand that the proscribed behavior is wrong, then one is not guilty. Diminished capacity is a defense based on the inability to form specific intent because of a mental disease or defect, rather than knowledge of right or wrong, and may reduce the degree of the crime.<sup>12</sup>

Van Oorsouw *et al.*,<sup>2</sup> however, did not address the essential questions: does a blackout remove *mens rea*? Or does amnesia prove that the understanding of right or wrong was impaired? Also unanswered is the question of how one might validate a claim of amnesia without corroboration.

Does a blackout interfere with the will, in addition to the memory? Clearly, alcohol intoxication impairs self-control. Does a memory defect affect control? Current federal law has eliminated the second prong of the insanity statutes, which in Connecticut law states: "the defendant, because of a mental disease or defect, lacked the substantial capacity either to appreciate the wrongfulness of his or her conduct or *to control the conduct within the requirements of the law*" [emphasis added].<sup>13</sup> One may therefore be innocent in a state court and guilty in a federal court, with exactly the same facts, because federal law has eliminated the control of conduct as an element.<sup>14</sup> This

paradox should be resolved by informed legislation that takes into consideration current neuropsychiatric reality.

The question, then, is whether a defendant knew what he or she was doing and/or could control his or her actions during a blackout. Intent is an element of guilt in the concept of *mens rea*. Alcohol intake may therefore be either a mitigating factor or an aggravating factor, depending on the circumstances of the offense.

To have a blackout may require a certain amount of alcohol intake, but there is no particular level that reliably results in amnesia. Blackouts may occur at any time in the course of alcoholism, even during the first drinking experience.<sup>14</sup>

The degree of intoxication a person experiences depends not only on the blood alcohol level, but on the rate of increase of that level and the person's tolerance.<sup>9</sup> Factors in the causation of blackouts include genetics.<sup>16</sup> One may have a blackout without appearing drunk or impaired, or may be drunk and exercise bad judgment or control and not have a blackout. During blackouts, persons may carry on conversations, drive automobiles, and engage in other complicated behavior.<sup>9</sup> Therefore even eyewitnesses may be unaware that a person is having a blackout.

How does one know if a person who cannot remember an event was able to understand it or could control behavior during the performance of an act? Can someone who appears normal to an observer be unaware of the nature and quality of an act? Every psychiatrist understands that there are persons who act on delusions or respond to the auditory hallucinations of the voice of God and are not responsible for their actions in a moral or ethical sense, but behavior when intoxicated is more problematic. The lay public on a jury may understandably be more skeptical if such a claim appears to be self-serving. Clearly, alcoholic intoxication dissolves the superego before it dissolves the power to act. People do things while drunk that they would never do when sober.

Peter Fenwick, writing in *Psychological Medicine*, has suggested that automatism is the absence of mind.<sup>17</sup> His learned analysis distinguishes between "sane automatisms," which are caused by an external factor such as alcohol, and "insane automatisms," such as epilepsy or a brain tumor. Fenwick asserts that acts carried out during an alcoholic blackout are automatisms, and cites Redeski who observed that,

“alcohol provides an example of a process leading to automatism, and in a few instances defendants have been acquitted of offenses committed in a state of alcoholic automatism, recorded as total intoxication, as distinct from partial intoxication” (Ref. 18, p 187).

In conclusion, alcoholic blackouts are states of absence of mind that should be recognized by the law as exculpatory in cases in which they are the unanticipated result of social drinking, when intoxication was neither desired nor expected. The syndrome exists, and although any claim of mental illness or defect may be malingered or feigned, blackouts are a real entity that should be recognized by forensic experts.

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