THE VOLUNTARY ACT RE QUIREMENT IN PRISON CONTRABAND CASES

INTRODUCTION

When has one committed the crime of introducing prison contraband? This is an important question when one is visiting a prison, voluntarily or otherwise, and a question which can be surprisingly difficult to answer. Most state statutes punishing the introduction of prison contraband look much like California's statute:

> Except when otherwise authorized by law . . . any person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, any state prison . . . or within the grounds belonging to the institution, any controlled substance, . . . any device, contrivance, instrument, or paraphernalia intended to be used for unlawfully injecting or consuming a controlled substance, is guilty of a felony . . . .[1]

These statutes are straightforward, containing a mens rea, usually , usutwadT0 1 Tf 0 Tc -4.10 [(, us)2.( )045 (
introducing contraband statutes. However, in a subset of prison contraband cases, where the defendant is arrested with the contraband already on his or h person, loaded into the back of a police car, and taken to the county jail, th violation is not so clear. These cases are complicated by the defendant's simple defense that they did not want to bring their contraband to jail; rather, their arres "forced" them to bring it into the facility.

Usually, these cases play out like the case of People v. Gastelo, where the defendant was arrested for being under the influence of a controlled substance

1. CAL. PENAL CODE § 4573(a) (2011).

2. ARIZ. REV. STAT. ANN. § 13-2505(A)(1) (2016); PENAL § 4573(a); COLO. REV. STAT. ANN. § 18-8-203(1)(a) (2012); OHIO REV. CODE ANN. § 2921.36(A) (2013).

3. ARIZ. REV. STAT. § 13-2505(A)(2) (2016); COLO. REV. STAT. ANN. § 18-8-203(1)(a) (2012); MO. REV. STAT. § 221.111 (2017); OHIO REV. CODE ANN. § 2921.36(A) (2013).

4. Jesse Rhodes, The File Inside the Cake: True Tales of Prison Escapes, SMITHSONIAN.COM (June 14, 2011), http://www.smithsonianmag.com/arts-culture/the-file-inside-the-cake-true-tales-of-prison-escapes-15653967/ [https://perma.cc/WTR3-BLH2].

5. Wilson v. Haney, 430 S.W.3d 254, 256 (Ky. Ct. App. 2014).

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and placed in the back of a police car.[6] The arresting officer informed the defendant that possessing controlled substances at the jail was a felony.[7] The defendant manifested understanding but did not declare possession of any forbidden items.[8] Once at the jail, officers conducted an intake search and discovered .32 grams of methamphetamine in the defendant's sweatshirt.[9] Gastello was charged and found guilty of bringing a controlled substance into prison.[10]

Gastellowas decided in California, one of the majority of States that punish suspects arrested while in possession of contraband and taken to prison with specific, prison-contraband statutes.[11] But in a handful of States, when faced with nearly identical facts, the courts will find the defendant innocent.[12] This discrepancy stems from courts' varying interpretations of their voluntary act requirements.[13] While some courts find that defendants like Gastello commit a voluntary act somewhere within their possession, arrest, and journey to jail, others do not. Bizarrely enough though, the voluntary act requirements in these jurisdictions are also remarkably similar. So here is the problem, various courts facing effectively identical facts and with practically identical voluntary act requirements reach conflicting results in introducing-prison-contraband cases.[14]

Part I of this paper seeks to illustrate the problem by analyzing two conflicting introducing-prison-contraband cases in the context of each State's voluntary act requirement. Part II asks the practical question of "how?": how

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results? I argue that the courts employ two tools, time-framing and disjoining/unifying acts to reach "subjective" rather than "objective" concepts of voluntariness. Part III asks the "why?" question: why do courts manipulate a given arrestee's conduct to reach their understanding of voluntariness? I argue that in addition to the language of the statutes, "includes a voluntary act," courts are guided by personal means. Acknowledging that courts, at least in part, are deciding introducing-prison-contraband cases on personal grounds, Part IV offers model statutes to standardize our approach to culpability. And finally, Part

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The first case is State v. Winsor.[19] On December 3, 2001, Ian Winsor was pulled over for driving the wrong direction down a one-way street.[20] The acting officer, Sergeant K.J. Heather, collected Winsor's information and ran it through a computerized database of law enforcement information.[21] The search revealed two outstanding warrants for possession of a controlled substance and a probation violation.[22] Accordingly, Officer Heather arrested Winsor and placed him in the back of the police car.[23] Officer Heather informed Winsor that he was being taken to the county jail and that, if he had any other drugs on him, he should turn them over now because possessing drugs at the jail would constitute a felony.[24] Winsor remained silent.[25] As part of the admission process of the county jail, Winsor was sea

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> Appellant was convicted for his voluntary conduct of possessing a controlled substance in or about the county jail. Appellant's willful possession of a controlled substance itself constitutes the requisite voluntary act. His secreting the substance in or about the county jail, regardless of whether he was present voluntarily, satisfies evidentiary requirements to support the conviction.[43]

The court is very clear on its implementation of the "single voluntary act" view, recognizing that Winsor's presence may have been involuntary, but nonetheless finding the requisite voluntary act in his prior possession. The court later does a quick analysis of Winsor's possession:

> The arresting officer asked [Winsor] if he had any other controlled substances on his person and informed him that bringing a controlled substance onto the premises of the county jail constituted a felony. Once he was apprised of this fact, [Winsor] had sufficient time to dispose of or terminate his control over the controlled substance.[44]

The court found that Winsor voluntarily possessed the marijuana under Missouri Revised Statute 562.011(3), which requires he "was aware of his . . . control for a sufficient time to have enabled him . . . to dispose of it," and therefore, his voluntary possession was the requisite single voluntary act.[45]

In its argument in Tippetts, the State offers the same rationale employed by the court in Winsor to support a conviction. The court wrote, "[t]he state argues alternatively that, even if defendant did not voluntarily introduce the marijuana into the jail, he voluntarily possessed it before his arrest and that act is sufficient to satisfy O.R.S. 161.095(1)."[46] Yet, where this ratit8rilte telotesrab(s)2.6 (r)3.5 nr.4 (1.0)3.5 (oduc)01 (n (

takes, these tools will help the court justify the inclusion or exclusion of a voluntary act.[54]

Applying time-framing and disjoining/unifying actions to the introducing-prison-contraband context, we begin to see the process by which these two courts reach opposing conclusions. In Winsor, the court explicitly disjoins the actions of possession and presence, when it states, "[t]o accept [Winsor]'s position that his voluntary act of possessing a controlled substance is somehow negated by the fact that he was involuntarily on the county jail's premises would render section 221.111.1(1) meaningless."[55] By disjoining the actions, the court allows itself to create a time-frame that could either include or exclude Winsor's voluntary act, possession. The

Holmes writes, "[t]he reason for requiring an act [as a precondition for the existence of an offense] is, that [it] implies a choice, and that it is [considered unfair] to make a [person] answerable for harm, unless he might have chosen otherwise."[62] In fact, regardless of one's theory of punishment (utilitarian prevention, retribution, incapacitation, rehabilitation, etc.), that punishment becomes unhinged from its purpose without a voluntary act.[63] There is nothing to prevent, no conduct to be condemned and avoided, and no one to be rehabilitated where the punished action is involuntary. The courts have imposed an act requirement because of an implicit understanding that punishment loses its punch without a voluntary act.

When viewed in light of its purpose, the voluntary act requirement begins to acquire new boundaries not present in a strict construal of its language. We might now ask not only, "does the conduct include a voluntary act?" but further, "can that voluntary act fairly predicate the derivative punishment?" When we ask both questions, as opposed to just the first, we get a more precise and just implementation of the voluntary act requirement. I believe that courts in introducing-prison-contraband cases have unconsciously been asking themselves these questions, and then using time-framing and disjoined/unified actions to reach their preferred result.

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voluntary act requirement stands as a necessary predicate to culpability. Doug Husak argues that "[i]f the act requirement should be construed to hold that only acts are and ought to be the objects of liability, it unquestionably is false" because the State regularly punishes non-acts, like possession. Douglas Husak, *Rethinking the Act Requirement*, 28 CARDOZO L. REV. 2437, 2439 (2007).

62. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 54 (Little, Brown & Co. 1949) (1881).

63. In his book *The Limits of the Criminal Sanction*, Herbert Packer compiles a list of common theories of punishment in Chapter Three. Packer places every theory of punishment under the umbrella of two ultimate purposes: (1) "[T]he . . . infliction of suffering on evildoers" and (2) "the prevention of crime." HERBERT PACKER, THE LIMITS OF THE CRIMINAL SANCTION 36 (1968). Julian Hermida notes that these different theories all rely in some way on a voluntary act to justify their purpose:

> Utilitarians would see little social benefit in punishing a person who does not carry out a voluntary act. This argument is not based on an idea of intrinsic justice, but on the belief that punishing an involuntary offender would not effectively deter the offender or other members of society who many commit similar involuntary acts. Retributivism's major tenet is that the offender deserves punishment when he 'freely chooses to violate society's rules.' An offender who does not act voluntarily—even if he produced social harm—does not deserve to be punished.

Julian Hermida, *Convergence of Civil Law and Common Law in the Criminal Theory Realm*, 13 U. MIAMI INT'L & COMP. L. REV. 163, 197–98 (2005) (footnotes omitted).

And regarding incapacitation and rehabilitation, Packer notes, "A man who is shown to have committed a homicide through an accident for which he was not at fault does not present a case for social protection through measures of incapacitation or reform." PACKER, *supra*, at 64.

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That the courts rely not only on a strict reading of the voluntary act requirement, but on notions of guilt is evident in the language employed in these cases. The cases that find no voluntary act focus on the defendant's lack of choice or autonomy. In State v. Cole, the New Mexico Court of Appeals stated that "a voluntary act requires something more than awareness. It requires an ability to choose which course to take-i.e., an ability to choose whether to

consideration of culpability, what some authors have called an "epistemic precondition" of blameworthiness.[68]

Interestingly though, despite their bearing on culpability, the officers' warnings have little to no effect on the completion of a voluntary act. By the rationale set out in Winsor, the only relevant inquiry is whether the defendant voluntarily possessed the marijuana at the time of the arrest. Remember there the court stated, "Appellant's willful possession of a controlled substance itself constitutes the requisite voluntary act."[69] Admittedly in Winsor, the court did refer to the officer's warning in deciding that Winsor had voluntarily possessed the marijuana, but that was not a necessary route. The court could have determined that Winsor voluntarily possessed the marijuana "for a sufficient time to have enabled him . . . to dispose of it" because the car ride to the county jail was lengthy. Or, like it did in Herron, the court could find appellant had ample opportunity to dispose of the drugs because "[t]he evidence at trial showed that appellant was inside an apartment for ten to fifteen seconds before Officer Thomas entered."[70] These alternative methods of proving voluntary possession highlight the possibility that a court could meet the single voluntary act requirement without reference to the officers' warnings, even though it is precisely those warnings which ensure culpability.

Arguably, the officers' warnings create a duty for the defendants to dispose of their drugs and the failure to do so becomes an omission, which satisfies liability to the same extent as a voluntary act.[71] "An omission is either (a) a deliberate failure to perform a certain positive action or (b) a failure, whether deliberate or not, to fulfill a moral or legal duty or reasonable expectation."[72] Under this definition, retaining possession of a controlled substance after a

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warning could conceivably fit under either category.[73] However, the law generally requires an omission be a failure to perform while under a legal duty not a moral duty or reasonable expectation and certainly not the mere failure to perform any positive action. For example:

> [W]here a married man, during his wife's temporary absence from home, engaged in a drunken debauch with an adult woman of experience, he owed her no legal duty of care and protection which would render him legally responsible for her death from an overdose of morphine, taken with suicidal intent, though he neglected to obtain medical assistance for her. On the other hand, where the mother of a young child absented herself from the family home while the child was locked in a bedroom and the child was killed in a fire of undetermined

stance. The issue only arises when the court's notion of culpability is opposed to that of the community.

Fortunately, the law does not have to conclusively answer the most difficult questions, like, what exactly comprises voluntariness and what is the best standard of culpability. The law need only meet these problems head-on with statutes effectuating if not the best, at least a consistent, level of culpability.

Unfortunately, it is difficult to draft accurate statutes for introducing-prison-contraband cases because the added moral reprehensibility which distinguishes simple drug possessors from drug smugglers lies primarily in their intention, and not their actions. Take for example two criminals: Criminal A possesses two grams of marijuana, which he hopes and intends to smuggle into a local correctional facility by getting arrested. Criminal B possesses two grams of marijuana and has no intention or hope of ever introducing it into a correctional facility. In fact, just the opposite, criminal B would prefer to not have the marijuana at a correctional facility, for fear of committing a more serious crime. One would hope that when criminal A is arrested and searched at the county jail, he is charged under the introducing-prison-contraband statute. However, when criminal B, who has committed identical acts to criminal A, is arrested and searched, one would hope that he receives a lighter sentence than criminal A.

How then are the statutes to distinguish the two criminals? Statutes can criminalize intention in the form of mens rea requirements, but not without creating significant evidentiary problems (proof of

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for courts to satisfy only the letter of the voluntary act requirement, i.e., that it "includes a voluntary act," and not its purpose of ensuring culpability.

The court does exactly this in State v. Barnes, when it held that "the voluntary act nectancacit ht i

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> Z. For the purposes of subsection Y, no person being searched as part of an initial admittance process shall be found to be within the premises of any correctional center as the term "correctional center" is defined under section 217.010, or any city, county, or private jail.

Under this proposed statute, criminals like A and B could be separated on purely statutory grounds. For instance, if a person is arrested and taken to the county jail, due to subsection Z, he or she is no longer automatically in violation of section 221.111, by reason of his or her mere possession. However, the person could still be in violation of subsection X. Importantly, though, violation of subsection X requires a showing that he or she knowingly delivered or attempted to deliver the contraband into the premises. The added requirement of proving delivery or attempted delivery effectively safeguards those like criminal B, who involuntarily brought contraband to the correctional facility, because mere possession of contraband at the initial search stage will not be sufficient evidence of delivery. Yet, because delivery is still punished, those like criminal A, who voluntarily brought contraband with the intention to smuggle the items inside can still be found guilty. Admittedly, there are new evidentiary hurdles posed by requiring a showing of delivery, but these hurdles are small and surmountable if the arrestee is truly guilty. Evidence of delivery could include an intended or probable recipient, a suspicious quantity of contraband, or a contraband item uniquely useful to the prison context.[103] These evidentiary hurdles will undoubtedly create some instances where the guilty criminal walks free, but they will also ensure freedom for many more innocent arrestees.

Additionally, separating the acts of delivery and possession by statute helps prevent courts from using disjoining/unifying behavior to selectively find (t)5.3 6 -0.003 (a)0.8 (t)P6(.8 (l)-6.5.3 (i)5.3 (ng t)5.2 (he)01)5.3 (.227 Tdt6 -0.0020.8 (a)0.(>2 (

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level of culpability. Otherwise, judges will continue to employ the arbitrary selection of voluntary acts with the help of time-framing and disjoining/unifying acts in order to reach results they find satisfy personal notions of guilt.

CONCLUSION

The voluntary act requirement should do what it was meant to do: ensure culpability. Under a single voluntary act view it does not. Nowhere is this more evident than in our introducing-prison-contraband cases. Right now, the majority of States find a woman, arrested, placed in the back of a police car, and driven to a correctional facility with drugs in her pocket, to be guilty of introducing prison contraband. This woman could have no desire to commit the crime, or, if the drugs were a cell phone, she might not even know the crime was being committed. Nevertheless, courts have time and again found these defendants liable.

In response to the seemingly limitless boundary of the single voluntary act requirement, I propose the explicit addition of culpability. And in response to