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## Punishing Temporary Drug-Induced Insanity: An Analysis of *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011)

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Note\*

# Punishing Temporary Drug-Induced Insanity: An Analysis of *State v.* *Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011)

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I. INTRODUCTION

On a cold December afternoon, two roommates—Joseph Hotz and Kenneth Pfeiffer—consumed psilocybin mushrooms.<sup>1</sup> Two hours later, Pfeiffer was dead by Hotz’s hands.<sup>2</sup> The intervening events were more bizarre and horrific than any after-school special. By stabbing his roommate to death in the midst of a drug-induced paranoia, Hotz did the unthinkable while he was unable to think.

Defenses that palliate a defendant’s criminal liability because of intoxication are “[f]requently reviled” and “ever-controversial.”<sup>3</sup> *State v. Hotz* raises the difficult question of whether a criminal intent formed in the midst of temporary drug-induced insanity is one deserving of punishment. The answer depends on whether the criminal law is viewed through the prism of retributivism or utilitarianism. An act committed in the midst of insanity, whatever its cause, is not as culpable as an act committed while sane. However, excusing an offender by reason of temporary drug-induced insanity fails to protect the public from a potentially dangerous individual.

In extending to other drugs its prior case law denying the insanity defense to those temporarily insane due to the effects of alcohol, the Nebraska Supreme Court failed to relate its decision to the conflicting rationales of punishment. By treating Hotz’s criminal act the same as any other, the court perhaps worked an injustice on a less than fully culpable offender. Surprisingly, the court suggested that if only Hotz had severely abused drugs over a prolonged period of time—instead of experimenting with drugs recreationally—he may well have been excused of criminal liability under the settled-insanity doctrine.<sup>4</sup>

This Note begins by briefly outlining the defenses of insanity and voluntary intoxication, both in Nebraska and beyond. Next, this Note provides an outline of the status of both temporary and settled drug-induced insanity, both in general and in Nebraska. Following the overview of the relevant criminal law, the facts and holdings of *State v. Hotz* will be recounted.

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1. *State v. Hotz*, 281 Neb. 260, 262, 795 N.W.2d 645, 648 (2011).  
 2. *Id.* at 263–64, 795 N.W.2d at 649.  
 3. Meghan Paulk Ingle, Note, *Law on the Rocks: The Intoxication Defenses are Being Eighty-Sixed*, 55 VAND. L. REV. 607, 608–09 (2002).  
 4. *See Hotz*, 281 Neb. at 273–74, 795 N.W.2d at 655–56.

This Note's analysis starts by tracing the different strands of the settled-insanity doctrine and the justifications for its existence. Ultimately, this Note concludes that the settled-insanity doctrine, as contemplated by the Supreme Court of Nebraska and expounded elsewhere, is unsound on retributive grounds. Next, this Note discusses how the competing aims of retributivism and utilitarianism, particularly incapacitation, are set in conflict by temporary drug-induced insanity. Finally, this Note concludes that the best way for the law to address offenders like Hotz is through an offense of reckless or negligent intoxication. Culpability, and therefore criminal liability, should be based on the offender's decision to become intoxicated and not the criminal act committed in the midst of temporary drug-induced insanity.

## II. INSANITY DEFENSE BACKGROUND

### A. Insanity Defense Generally

The insanity defense, "developed as a means of saving from retributive punishment those individuals who were so different from others that they could not be blamed for what they had done,"<sup>5</sup> has ancient and geographically varied origins. A defense based on the offender's insanity is found in ancient Muslim, Hebraic, Roman,<sup>6</sup> and Chinese law.<sup>7</sup> Marcus Aurelius, Roman emperor from AD 121–180, is credited with the maxim *furiosus solo furore punitur*—madness is its own sole punishment.<sup>8</sup>

The four tests for insanity employed by modern courts in the United States are the *M'Naghten*, *Model Penal Code* (MPC), "irresistible impulse," and *Durham* or "product" tests.<sup>9</sup> Of these four, the *M'Naghten* and MPC tests are the most commonly used.<sup>10</sup> Under the *M'Naghten* test:

[T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring

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5. WAYNE R. LAFAVE, *CRIMINAL LAW* § 7.1(c)(6), at 372 (4th ed. 2003).

6. Brian E. Elkins, *Idaho's Repeal of the Insanity Defense: What are We Trying to Prove?*, 31 *IDAHO L. REV.* 151, 161 (1994).

7. JOHN BIGGS, JR., *THE GUILTY MIND: PSYCHIATRY AND THE LAW OF HOMICIDE* 31 (1955).

8. *Id.* at 47.

9. Leslie A. Johnson, Note, *Settled Insanity is Not a Defense: Has the Colorado Supreme Court Gone Crazy?* *Bieber v. People*, 43 *U. KAN. L. REV.* 259, 262 (1994). The early English test for insanity pre-dating *M'Naghten*—often termed the "wild beast test," which excused an offender by reason of insanity if he was "totally deprived of his understanding and memory, so as not to know what he is doing, no more than an infant, a brute, or a wild beast"—did not survive to the modern era. BIGGS, *supra* note 7, at 88.

10. See Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 *CALIF. L. REV.* 943, 959 (1999).

under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.<sup>11</sup>

Although they materially differ in other elements of the defense,<sup>12</sup> the MPC,<sup>13</sup> *Durham*,<sup>14</sup> and “irresistible impulse”<sup>15</sup> standards also require some form of mental disease, defect, or illness.

The insanity defense became the object of legislative reform following the acquittal of John Hinkley Jr.—the failed assassin of President Reagan—by reason of insanity.<sup>16</sup> During the late 1970s, twenty-four states made their insanity standards less inclusive.<sup>17</sup> For its part, Congress considered a number of proposals to abolish the insanity defense but eventually settled on evidentiary and procedural reforms.<sup>18</sup> Some states, not satisfied with procedural limits, entirely abolished the insanity defense which, prior to 1979, had been recognized in every state in the Union.<sup>19</sup> Although courts voided early legislative attempts to abolish the insanity defense as violations of due process,<sup>20</sup> the judiciary proved more amenable to such legislation toward the end of the twentieth and the beginning of the twenty-first centuries.<sup>21</sup> Currently, four states—Idaho, Utah, Montana, and Kansas—do not excuse offenders by reason of insanity.<sup>22</sup>

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11. M'Naghten's Case, (1843) 8 Eng. Rep. 718, 722; 10 Cl. F. 200, 210.

12. For example, the “irresistible impulse” test does not require that the offender not have understood the nature and consequences of his act or its wrongfulness. See LAFAVE, *supra* note 5, § 7.3(a), at 389.

13. See MODEL PENAL CODE § 4.01(1) (1962) (requiring a “mental disease or defect”).

14. *Durham v. United States*, 214 F.2d 862, 874–75 (D.C. Cir. 1954) (holding that an offender is excused “if his unlawful act was the product of mental disease or mental defect”), *overruled by* *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972).

15. See *Regina v. Oxford*, (1840) 173 Eng. Rep. 941, 950; 9 Car. & P. 525, 546 (“If some controlling disease was, in truth, the acting power within [the offender] which he could not resist, then he will not be responsible.”).

16. See Elkins, *supra* note 6, at 154.

17. ROBERT F. SCHOPP, AUTOMATISM, INSANITY, AND THE PSYCHOLOGY OF CRIMINAL RESPONSIBILITY 31 (1991).

18. Elkins, *supra* note 6, at 154–55.

19. See Andrew M. Levine, Note, *Denying the Settled Insanity Defense: Another Necessary Step in Dealing with Drug and Alcohol Abuse*, 78 B.U. L. REV. 75, 79 (1998).

20. See *State v. Lange*, 123 So. 639, 641–42 (La. 1929); *Sinclair v. State*, 132 So. 581, 584–87 (Miss. 1931); *State v. Strasburg*, 110 P. 1020, 1023–24 (Wash. 1910).

21. See *State v. Searcy*, 798 P.2d 914 (Idaho 1990); *State v. Bethel*, 66 P.3d 840 (Kan. 2003); *State v. Korell*, 690 P.2d 992 (Mont. 1984); *State v. Herrera*, 895 P.2d 359 (Utah 1995).

22. See IDAHO CODE ANN. § 18-207 (2004); KAN. STAT. ANN. § 22-3220 (2007); MONT. CODE ANN. § 46-14-102 (2004); UTAH CODE ANN. § 76-2-305 (LexisNexis 2003).

## B. Insanity Defense in Nebraska

The *M'Naghten* standard was established early in Nebraska<sup>23</sup> and has remained the only test for insanity used in the state.<sup>24</sup> Early decisions, however, distinguished between “partial” and “general” insanity. In *Thurman v. State*,<sup>25</sup> the defendant was charged with “shooting with intent to kill” and attempted to interpose an insanity defense.<sup>26</sup> The defendant was apparently lucid at times and the district court instructed the jury “[t]hat the law recognizes partial as well as general insanity; that a person may be insane upon one or more subjects, and sane as to others.”<sup>27</sup> The district court further instructed the jury that “[i]t is not every delusion that can be considered an insane delusion. The delusion must be of such a character that, if things were as the delusion imagined them to be, they would justify the act springing from the delusion.”<sup>28</sup> The Nebraska Supreme Court affirmed the instructions.<sup>29</sup>

In *Kraus v. State*,<sup>30</sup> the jury was given the insanity instruction approved in *Thurman* but without any limitation for those defendants who were only “partially” insane.<sup>31</sup> The Nebraska Supreme Court called the distinction between the “generally” insane and the “partially” insane (those who had insane delusions but were otherwise sane) arbitrary and overruled *Thurman*.<sup>32</sup> The court found that excusing offenders by reason of insanity only if they would have been justified in acting had their delusions been reality “practically holds a man confessed to be insane, accountable for the exercise of the same reason, judgment, and controlling mental power, that is required of a man in perfect mental health.”<sup>33</sup>

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23. See *Wright v. State*, 4 Neb. 407, 409 (1876) (“[M]ental incapacity may result from various causes, such as non-age, lunacy, or idiocy, and whenever interposed as a defense, the inquiry is necessarily reduced to the single question of the ability of the accused to distinguish between right and wrong, at the time of committing the act complained of.”).

24. See *NJI2d Crim.* 7.0 cmt. (1992 ed.). Although the procedure of the insanity defense in Nebraska is determined by statute, see *NEB. REV. STAT.* § 29-2203 (Reissue 2008), the substantive rules of the insanity defense have largely remained the province of the courts. See *State v. Hotz*, 281 Neb. 260, 270, 795 N.W.2d 645, 653 (2011).

25. *Thurman v. State*, 32 Neb. 224, 49 N.W. 338 (1891), *overruled by Kraus v. State*, 108 Neb. 331, 187 N.W. 895 (1922).

26. *Id.* at 224–26, 49 N.W. at 338–39.

27. *Id.* at 227, 49 N.W. at 339 (internal quotation marks omitted).

28. *Id.* at 226, 49 N.W. at 338 (internal quotation marks omitted).

29. *Id.* at 227, 49 N.W. at 339.

30. *Kraus v. State*, 108 Neb. 331, 187 N.W. 895 (1922).

31. *Id.* at 334, 187 N.W. at 896.

32. *Id.* at 336, 342, 187 N.W. at 897, 899.

33. *Id.* at 339, 187 N.W. at 898 (quoting *State v. Jones*, 50 N.H. 369, 387 (1871)) (internal quotation marks omitted).

### III. VOLUNTARY INTOXICATION DEFENSE BACKGROUND

#### A. Voluntary Intoxication Defense Generally

In contrast to insanity, early English common law did not allow a defendant's voluntary intoxication at the time of the alleged criminal act to mitigate his criminal culpability.<sup>34</sup> Voluntary intoxication was instead sometimes treated as an aggravation of the offense<sup>35</sup> and was not allowed as evidence to prove that the defendant did not have the mens rea required for the crime charged.<sup>36</sup> Sir Edward Coke, reflecting on the law's treatment of intoxicated defendants, called an intoxicated person a "voluntarius demon."<sup>37</sup> Early American courts followed the stern English view.<sup>38</sup> During the nineteenth century, however, courts began to re-examine how they treated defendants who were intoxicated at the time of their alleged crimes.<sup>39</sup> By the end of the century, the practice of using a defendant's voluntary intoxication as evidence to show that he did not possess the requisite mens rea was established on both sides of the Atlantic.<sup>40</sup>

The voluntary intoxication defense,<sup>41</sup> however, has not been available to defendants for all crimes. Traditionally, the defense has been restricted to defendants charged with a crime that requires a "specific," as opposed to a "general" intent.<sup>42</sup> Despite various definitions of

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34. Lawrence P. Tiffany, *The Drunk, the Insane, and the Criminal Courts: Deciding What to Make of Self-Induced Insanity*, 69 WASH. U. L.Q. 221, 226 (1991).

35. *State v. Painter*, 63 S.E.2d 86, 91 (W. Va. 1950); 4 WILLIAM BLACKSTONE, COMMENTARIES \*25-26; JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 349 (2006).

36. See Tiffany, *supra* note 34, at 226.

37. *State v. Wilson*, 144 N.W. 47, 51 (Iowa 1913).

38. Ingle, *supra* note 3, at 613.

39. See *Evers v. State*, 20 S.W. 744, 746 (Tex. Crim. App. 1892) (noting that in the preceding sixty years there had been a persistent effort in English and many American courts to allow the jury to consider the defendant's intoxication to determine whether a crime had in fact been committed).

40. See *Montana v. Egelhoff*, 518 U.S. 37, 46-47 (1996).

41. The "defense" of voluntary intoxication is a failure of proof claim in which the defendant attempts to show that the prosecution cannot prove guilt because the defendant did not possess an element of the crime, almost always mens rea. DRESSLER, *supra* note 35, at 349. If a defendant's voluntary intoxication prevented him from forming the requisite specific intent, he is acquitted of that crime but may be convicted of another offense, often one only requiring a general intent. See Phillip E. Hassman, Annotation, *Effect of Voluntary Drug Intoxication Upon Criminal Responsibility*, 73 A.L.R.3d 98, 121 (1976). Furthermore, if the defendant was incapable of possessing the specific intent required at the time of the criminal act, he may still be convicted of the crime if he formed the intent prior to his intoxication. *People v. Kelly*, 176 N.W.2d 435, 440 (Mich. Ct. App. 1970). The *involuntary* intoxication defense is an excuse defense. Generally, an offender that has committed a crime will be excused if, due to his involuntary intoxication, the offender was rendered temporarily insane at the time of the criminal act. See, e.g., *United States v. F.D.L.*, 836 F.2d 1113, 1116 (8th Cir. 1988).

42. See *Kelly*, 176 N.W.2d at 437.

specific intent,<sup>43</sup> the predominant view is that specific intent is “some intent in addition to the intent to do the physical act which the crime requires.”<sup>44</sup> However, courts have consistently allowed evidence of voluntary intoxication to negate the mens rea requirement of an offense when the offense does not neatly fit the usual definition of specific intent. The most common example is premeditation and deliberation in cases of first-degree murder.<sup>45</sup> The specific/general intent distinction has been roundly criticized by both courts<sup>46</sup> and academics.<sup>47</sup>

As with the insanity defense, the voluntary intoxication defense became the subject of legislative scrutiny during the 1970s, when increased use of the defense coincided with a rise in crime rates.<sup>48</sup> In response, state legislatures, and occasionally courts,<sup>49</sup> severely limited the relevance of a defendant’s voluntary intoxication<sup>50</sup> or made a defendant’s voluntary intoxication irrelevant to the question of whether the defendant possessed the requisite mens rea for a given crime.<sup>51</sup> Abolishing the voluntary intoxication defense altogether has generally been found constitutional by state courts<sup>52</sup> and has the approval of the United States Supreme Court.<sup>53</sup>

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43. See Matthew J. Boettcher, *Voluntary Intoxication: A Defense to Specific Intent Crimes*, 65 U. DET. L. REV. 33, 41–42 (1987).

44. LAFAYE, *supra* note 5, § 9.5(a), at 474.

45. See Note, *Intoxication as a Criminal Defense*, 55 COLUM. L. REV. 1210, 1214–15 (1955).

46. See, e.g., *Kelly*, 176 N.W.2d at 444 (“The right to interpose this defense should depend on something more substantial than a technical distinction that was seized upon by a judge 130 years ago and adopted by other judges to reach results thought sound in the cases then before them.”).

47. See, e.g., Ingle, *supra* note 3, at 630 (criticizing the general/specific intent distinction as “attempting to impose an artificial construct, unsupported by scientific evidence, on the eternal conundrum presented by the intoxicated actor: ‘What was he thinking?’”).

48. *Id.* at 614. Statistics showed a strong correlation between consumption of alcohol and other drugs and violent crime. One study reported that in 50% of homicides, 62% of aggravated assaults, and 50% of incidents of spousal abuse, the offender was intoxicated with alcohol at the time of the criminal act. *Id.* at 614 & n.40. Another study reported that in 1989, more homicides were committed by an intoxicated offender than with a firearm. Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482, 483 (1997).

49. See *White v. State*, 717 S.W.2d 784 (Ark. 1986) (holding that voluntary intoxication is no longer a defense to any crime).

50. See 18 PA. CONS. STAT. ANN. § 308 (West 1998) (limiting the voluntary intoxication defense to determinations of the degree of murder for which a defendant may be held criminally liable).

51. E.g., OKLA. STAT. ANN. tit. 21, § 153 (West 2002).

52. E.g., *State v. Souza*, 813 P.2d 1384, 1386 (Haw. 1991). *But see State v. Egelhoff*, 900 P.2d 260 (Mont. 1995), *rev'd*, *Montana v. Egelhoff*, 518 U.S. 37 (1996).

53. See *Montana v. Egelhoff*, 518 U.S. 37 (1996).

## B. Voluntary Intoxication Defense in Nebraska

Despite some limited criticism of the distinction,<sup>54</sup> prior to April 14, 2011,<sup>55</sup> Nebraska recognized the general/specific intent version of the voluntary intoxication defense.<sup>56</sup> In addition to crimes requiring a specific intent, Nebraska allowed the defendant to introduce evidence of his voluntary intoxication to rebut the prosecution's evidence regarding the "state of mind elements" of deliberation, premeditation, purpose, and willfulness.<sup>57</sup> The Nebraska Supreme Court rarely made the specific/general intent distinction explicit, preferring to give a more generalized statement of the rule: "Ordinarily, voluntary intoxication does not justify or excuse a crime, unless an accused is intoxicated to an extent or degree that the accused is incapable of forming the intent required as an element of the crime charged."<sup>58</sup> Yet, the term "specific intent" occurred fairly regularly in early Nebraska Supreme Court opinions,<sup>59</sup> and the court again affirmed the distinction in the first months of 2011, writing that voluntary intoxication "may be considered to negate specific intent."<sup>60</sup> Most of the crimes for which a voluntary intoxication instruction has been affirmed—first-degree murder,<sup>61</sup> burglary,<sup>62</sup> assault with intent to rape,<sup>63</sup> robbery,<sup>64</sup> theft,<sup>65</sup> and larceny<sup>66</sup>—are consistent with the principles applied by other specific/general intent jurisdictions.<sup>67</sup>

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54. See *State v. Reynolds*, 235 Neb. 662, 691, 457 N.W.2d 405, 423 (1990) (alteration in original) (quoting WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 4.10, at 554 (1986)) (internal quotation marks omitted) ("[I]t may be said that it is better, when considering the effect of the defendant's voluntary intoxication upon his criminal liability, to stay away from those misleading concepts of general intent and specific intent.").

55. L.B. 100, 102d Leg., 1st Sess. (Neb. 2011).

56. *NJI2d Crim.* 8.0 cmt. (1992 ed.).

57. *Id.*

58. *State v. Lixey*, 238 Neb. 540, 543, 471 N.W.2d 444, 446 (1991) (citing *State v. Saltzman*, 235 Neb. 964, 970, 458 N.W.2d 239, 244 (1990)).

59. See, e.g., *Hill v. State*, 42 Neb. 503, 516, 60 N.W. 916, 922 (1894).

60. *State v. Hotz*, 281 Neb. 260, 270, 795 N.W.2d 645, 653 (2011) (citing *Tvrz v. State*, 154 Neb. 641, 48 N.W.2d 761 (1951)).

61. *E.g.*, *State v. Lamb*, 213 Neb. 498, 508, 330 N.W.2d 462, 468 (1983).

62. *E.g.*, *State v. Coleman*, 196 Neb. 721, 723, 246 N.W.2d 61, 62 (1976).

63. *Head v. State*, 43 Neb. 30, 33, 61 N.W. 494, 495 (1894).

64. *E.g.*, *State v. Barnes*, 185 Neb. 384, 388–89, 176 N.W.2d 18, 21 (1970).

65. *State v. Lixey*, 238 Neb. 540, 541–43, 471 N.W.2d 444, 445–46 (1991) (defining "theft" as "tak[ing], or exercis[ing] control over, movable property of another with the intent to deprive him or her thereof").

66. *E.g.*, *Daugherty v. State*, 154 Neb. 376, 380–81, 48 N.W.2d 76, 78–79 (1951) (quoting *McIntosh v. State*, 105 Neb. 328, 328, 180 N.W. 573, 573 (1920)) (internal quotation marks omitted) (defining "larceny" as the "unlawful and felonious stealing, taking, and carrying away of the personal property of another . . . with the felonious intent on the part of the taker to permanently deprive the owner of his property").

67. See *supra* section II.A.

The legal effect of a defendant's voluntary intoxication, however, is no longer in the Nebraska Supreme Court's hands. L.B. 100, signed into law on April 14, 2011, provides: "A person who is intoxicated is criminally responsible for his or her conduct. Intoxication is not a defense to any criminal offense and shall not be taken into consideration in determining the existence of a mental state that is an element of the criminal offense . . . ."68 Thus, a defendant's voluntary intoxication is no longer relevant to the question of whether a defendant possessed the requisite mens rea for a given crime in Nebraska.

#### IV. TEMPORARY AND SETTLED DRUG-INDUCED INSANITY BACKGROUND

##### A. Temporary and Settled Drug-Induced Insanity Generally

At the crossroads of the insanity and voluntary intoxication defenses lies "temporary" and "settled" drug-induced insanity. The law has long distinguished the immediate intoxicating effects of the consumption of drugs from a mental impairment that lingers after the initial high has passed.<sup>69</sup> The former, labeled "temporary insanity," has not been allowed to excuse a criminal act.<sup>70</sup> Blackstone deemed temporary drug-induced insanity an "artificial, voluntarily contracted madness."<sup>71</sup> Although temporary insanity raises the "potentially provocative" question of whether an intent formed in the midst of a drug-induced hallucination or psychosis is the same as an intent formed in the mind of a sober man, it has not provoked much debate among courts in the United States.<sup>72</sup> Virtually all jurisdictions that have directly addressed the question of whether temporary insanity may operate as an excuse have answered in the negative.<sup>73</sup> Most have easily

68. L.B. 100, 102d Leg., 1st Sess. (Neb. 2011).

69. DRESSLER, *supra* note 35, at 356.

70. Boettcher, *supra* note 43, at 33 ("It is by now hornbook law that voluntary intoxication of any degree affords the accused no excuse for crime.").

71. 4 WILLIAM BLACKSTONE, COMMENTARIES \*25.

72. Ingle, *supra* note 3, at 635.

73. See *State v. Hall*, 214 N.W.2d 205, 207 (Iowa 1974); *Parker v. State*, 254 A.2d 381, 388 (Md. Ct. Spec. App. 1969); *Jones v. State*, 648 P.2d 1251, 1254 (Okla. Crim. App. 1982); *State v. Sexton*, 904 A.2d 1092, 1110 (Vt. 2006). State legislatures have shared the same view as their courts. See, e.g., WASH. REV. CODE ANN. § 10.77.030(3) (West 2002) ("No condition of mind proximately induced by the voluntary act of a person charged with a crime shall constitute insanity."). Although no jurisdiction directly addressing the issue has excused an offender by reason of his temporary drug-induced insanity, several have implicitly done so. For example, temporary insanity as an excuse was "implicitly recognized" in *Webber v. United States*, 395 F.2d 397 (10th Cir. 1968), "necessarily implied" in *United States v. Stewart*, 443 F.2d 1129 (10th Cir. 1971), "apparently recognized" in *People v. King*, 181 Colo. 439 (1973), and "strongly implied" in *State v. Painter*, 135 W. Va. 106 (1950). Hassman, *supra* note 41, at 130-33. A fifteen-year-old that killed his two sisters after inhaling glue fumes was apparently also excused by

reached this decision by declaring that intoxication, at least the immediate effect of intoxication, is not a mental disease or defect.<sup>74</sup>

Settled insanity or, as it is occasionally still called, delirium tremens,<sup>75</sup> is the second form of insanity that arises solely through the consumption of drugs. In contrast with temporary insanity, the defense of settled insanity has long received a warm reception from the courts. Works as early as Sir Matthew Hale's *History of the Pleas of the Crown* recognized that an offender may be excused for a criminal act committed in the midst of a "fixed phrenzy" caused by prolonged drug consumption.<sup>76</sup> Although some jurisdictions require that the offender's consumption of drugs have been "prolonged" and the resulting insanity be "permanent," such limitations are not universal.<sup>77</sup> At its broadest, settled insanity is merely a mental impairment caused by drug consumption, amounting to insanity, that lasts beyond the period of immediate intoxication.<sup>78</sup> Of the courts that have had the opportunity to determine whether settled insanity will excuse an offender, all but one<sup>79</sup> have determined that it does.<sup>80</sup> The drafters of the MPC appear to support the majority view.<sup>81</sup> Nevertheless, a substantial number of jurisdictions have not had the opportunity to decide the issue,<sup>82</sup> and settled insanity remains "relatively novel and rarely discussed."<sup>83</sup>

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reason of his temporary insanity in a juvenile case in Detroit. See Comment, *LSD—Its Effects on Criminal Responsibility*, 17 DEPAUL L. REV. 365, 371 (1968).

74. See *Gray v. State*, 731 So. 2d 816, 818 (Fla. Dist. Ct. App. 1999); *State v. Souza*, 813 P.2d 1384, 1386 (Haw. 1991); *Sexton*, 904 A.2d at 1110; *State v. Wicks*, 657 P.2d 781, 782 (Wash. 1983). Some state legislatures have come to the same conclusion. See, e.g., HAW. REV. STAT. § 702-230(3) (1993).

75. Todd Paul Myers, *Halcion Made Me Do It: New Liability and a New Defense—Fear and Loathing in the Halcion Paper Chase*, 62 U. CIN. L. REV. 603, 632 (1993).

76. *State v. Wilson*, 144 N.W. 47, 51–52 (Iowa 1913).

77. See *supra* section IV.A.

78. See *Parker v. State*, 254 A.2d 381, 388 (Md. Ct. Spec. App. 1969) (defining settled insanity as where "the insanity not only existed while a person was under the influence of intoxicating spirits as an immediate result of imbibing, but existed independent of such influence, even though the insanity was caused by past imbibing").

79. See *Bieber v. People*, 856 P.2d 811 (Colo. 1993).

80. *State v. Sexton*, 904 A.2d 1092, 1103 (Vt. 2006).

81. See MODEL PENAL CODE § 2.08 cmt. at 362 (1962).

82. See Levine, *supra* note 19, at 87–88 (reporting that twenty states had not yet addressed whether offenders with settled insanity would be excused for the crimes they commit).

83. *Id.* at 98.

## B. Temporary and Settled Drug-Induced Insanity in Nebraska

*Hotz* first addressed temporary insanity caused by a drug other than alcohol, but the Nebraska Supreme Court has long held that the immediate effects of alcohol intoxication, regardless of their severity, do not entitle a defendant to an insanity instruction.<sup>84</sup> The court first addressed this question in the 1879 decision *Schlencker v. State*, answering in the negative.<sup>85</sup> *Schlencker* restricted the legal significance of the offender's voluntary alcohol intoxication to the issue of whether he deliberated and premeditated the homicide.<sup>86</sup> The court later affirmed the principle that the immediate effects of alcohol consumption cannot excuse an offender of his crime.<sup>87</sup>

L.B. 100 in effect codified the Nebraska Supreme Court's no-excuse rule. The act, in pertinent part, provides: "[I]nsanity does not include any temporary condition that was proximately caused by the voluntary ingestion, inhalation, injection, or absorption of intoxicating liquor, any drug or other mentally debilitating substance, or any combination thereof."<sup>88</sup>

Yet the distinction between the immediate and lingering effects of drug use has long been made, although rarely discussed at length, in the opinions of the Nebraska Supreme Court. In *Schlencker*, the court affirmed the following jury instruction: "[S]ettled insanity, produced by intoxication, affects the responsibility in the same way as insanity produced by any other cause. But insanity immediately produced by intoxication does not destroy responsibility where the patient, when sane and responsible, made himself voluntarily intoxicated."<sup>89</sup> The court found that the offender experienced "a mere temporary frenzy" and "[t]here was not a syllable of evidence of the existence of settled insanity."<sup>90</sup> Five years after *Schlencker* was decided, the court explained:

The law recognizes a wide distinction between those cases where the mental derangement results from voluntary periodical intoxication, and the condition of insanity or imbecility produced by protracted over-indulgence in the use of liquor. Drunkenness in the first class of cases is never, strictly speaking, a defense, although generally admissible, as bearing upon the question of intention, where the crime charged includes a specific intent.<sup>91</sup>

84. See *Ford v. State*, 46 Neb. 390, 400, 64 N.W. 1082, 1085 (1895) ("Drunkenness is no excuse for crime.' The soundness of this statement cannot be successfully controverted.").

85. *Schlencker v. State*, 9 Neb. 241, 252, 1 N.W. 857, 861 (1879).

86. *Id.*

87. See *State v. Reynolds*, 235 Neb. 662, 693, 457 N.W.2d 405, 423 (1990); *State v. Tvrz*, 154 Neb. 641, 651, 48 N.W.2d 761, 767 (1951).

88. L.B. 100, 102d Leg., 1st Sess. (Neb. 2011).

89. *Schlencker*, 9 Neb. at 252, 1 N.W. at 861.

90. *Id.* at 253, 1 N.W. at 862.

91. *Hill v. State*, 42 Neb. 503, 516, 60 N.W. 916, 919 (1894).

Although the term “settled insanity” appears nowhere in the opinion, *Kraus v. State*<sup>92</sup> held that a defendant whose hallucinations were solely a product of prolonged consumption of alcohol was entitled to an insanity instruction. While in the midst of a bizarre hallucination, the defendant attempted, but failed, to kill himself by jumping off a windmill, then killed his wife and two young children, and then again failed to kill himself with a self-inflicted gunshot to the head.<sup>93</sup> Although the defendant had consumed “considerable quantities” of alcohol preceding the homicides, he based his insanity defense on his status as a “paranoic,” a condition resulting from “the continued and excessive use of alcoholic liquors.”<sup>94</sup> As the defendant had no marital difficulties and was a loving father, the “only motive that could be ascribed for his act, except that of insanity, was his [immediate] intoxication and discouragement over farming affairs and over the condition of his prospective wheat crop.”<sup>95</sup> Although the case was remanded for a new trial, the Nebraska Supreme Court found that “[t]he evidence in the case very strongly point[ed] to the conclusion that the accused was insane, and he was entitled to have that defense fully protected.”<sup>96</sup>

Although L.B. 100 expressly provides that temporary drug-induced insanity is not an excuse for a criminal act,<sup>97</sup> debate on the bill revealed that the senators understood that the settled drug-induced insanity doctrine was recognized in Nebraska and would not be disturbed by the legislation. Senator Colby Coash, the introducer of the bill, explained during floor debate:

[Temporary drug-induced insanity] is not to be confused with that of someone who acquires a mental illness caused by a prolonged pattern of consistent drug and/or alcohol abuse, nor is it to be confused with someone who has become impaired because of involuntary ingestion of drugs or alcohol. Both exceptions are currently recognized and do not seek to be changed by an action in this bill . . . .<sup>98</sup>

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92. *Kraus v. State*, 108 Neb. 331, 187 N.W. 895 (1922).

93. *Id.* at 332–33, 187 N.W. at 896.

94. *Id.* at 332, 187 N.W. at 896.

95. *Id.* at 333, 187 N.W. at 896.

96. *Id.* at 341, 187 N.W. at 899.

97. L.B. 100, 102d Leg., 1st Sess. (Neb. 2011).

98. *Transcript of Floor Deb. on L.B. 100*, 102d Leg., 1st Sess. 10 (Neb. 2011) [hereinafter *Floor Deb. on L.B. 100*] (statement of Sen. Coash). Senator Coash reiterated this point before the Judiciary Committee: “We know that someone’s prolonged use of drugs or alcohol can permanently damage the receptors in the brain, and we know that that can cause permanent brain damage. We don’t seek to address that in this bill . . . .” *Hearing on L.B. 100 Before the Judiciary Comm.*, 102d Leg., 1st Sess. 54 (Neb. 2011) (statement of Sen. Coash).

V. FACTS, PROCEDURAL POSTURE, AND DISPOSITION OF  
*STATE V. HOTZ*

Joseph Hotz and the victim, Kenneth Pfeiffer, were roommates and students at Chadron State College.<sup>99</sup> At approximately 4 p.m. on December 5, 2008, both consumed psilocybin mushrooms and smoked marijuana.<sup>100</sup>

At 6 p.m., the Chadron Police Department received the first of two 911 calls reporting the rampage of a young man through a residential neighborhood.<sup>101</sup> Police responding to the calls apprehended Hotz after a foot pursuit.<sup>102</sup> Hotz was able to tell the officer where he lived, and when police arrived at the address, they found Pfeiffer's body lying in a hallway and blood covering the walls.<sup>103</sup> The autopsy of Pfeiffer's body revealed that he had sustained fifty-one "sharp force" type injuries, four of which were potentially fatal.<sup>104</sup>

From late in the evening of December 5th and into the early morning hours of December 6th, Hotz was interviewed by Sergeant Monica Bartling of the Nebraska State Patrol.<sup>105</sup> Hotz told Bartling that after he had taken the mushrooms, he developed a feeling of "not existing," and the dynamic between himself and Pfeiffer became antagonistic.<sup>106</sup> Hotz said he felt that Pfeiffer was mocking him and "all his intellectual pursuits" and that it was "kill or be killed."<sup>107</sup> Pfeiffer became aggressive, Hotz brandished a knife, and a scuffle ensued after which Hotz ran down to the basement.<sup>108</sup> After returning from the basement, Hotz told Bartling that Pfeiffer refused to leave him alone and that Hotz feared for his life.<sup>109</sup> Hotz stabbed Pfeiffer in the arm and Pfeiffer yelled at him, "Joey, this is real! This is real!"<sup>110</sup> A second scuffle erupted in the hallway and Hotz had a hazy memory of his repeatedly stabbing Pfeiffer.<sup>111</sup>

Hotz was charged with first-degree murder, attempted murder, attempted robbery, terroristic threats, and four counts of use of a deadly weapon to commit a felony in the District Court of Dawes County.<sup>112</sup>

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99. *State v. Hotz*, 281 Neb. 260, 262, 795 N.W.2d 645, 648 (2011).

100. *Id.*

101. *Id.*

102. *Id.* at 263, 795 N.W.2d at 648–49.

103. *Id.* at 263–64, 795 N.W.2d at 649.

104. *Id.* at 265, 795 N.W.2d at 649.

105. *Id.* at 264, 795 N.W.2d at 649.

106. *Id.*

107. *Id.* (internal quotation marks omitted).

108. *Id.*

109. *Id.*

110. *Id.* (internal quotation marks omitted).

111. *Id.*

112. Kerri Rempp, *County Attorney Files More Charges Against Hotz*, THE CHADRON RECORD, Dec. 18, 2008, <http://rapidcityjournal.com/thechadronnews/news/county->

Hotz filed a timely notice of intent to rely on the insanity defense and claimed that he was temporarily insane as a result of his ingestion of psilocybin mushrooms.<sup>113</sup> The State filed a motion in limine to prohibit expert testimony on the issue of insanity on the ground that Hotz was not laboring under a mental disease or defect at the time of the offenses.<sup>114</sup> Although it was unclear from the record whether the motion was granted or denied, the district court instructed the jury that Hotz had given notice of his intent to rely on the insanity defense.<sup>115</sup>

At trial, Hotz presented expert testimony from Dr. Daniel Wilson, who told the court that at the time of the alleged crimes, Hotz was suffering from “hallucinogen-induced psychosis” and “hallucinogen-induced delirium,” both of which are included in the *Diagnostic and Statistical Manual of Mental Disorders*.<sup>116</sup> The State objected on lack of foundation and relevancy grounds and the district court sustained the objection.<sup>117</sup> Hotz made an offer of proof during which Dr. Wilson stated that Hotz’s temporary insanity “obliterated his ability to know right from wrong.”<sup>118</sup>

At the conclusion of evidence, Hotz requested that the jury be given an insanity instruction.<sup>119</sup> The district court refused and instead instructed the jury on the voluntary intoxication defense.<sup>120</sup> The jury, however, seemed confused and submitted a question to the court: “From the beginning the jury was under the impression that we were to determine insanity or not. Why was the change made for our decision?”<sup>121</sup> Nevertheless, the jury returned a guilty verdict on the charges of second-degree murder, attempted second-degree murder, terroristic threats, and three counts of use of a weapon to commit a felony.<sup>122</sup> Hotz’s timely motion for a new trial was overruled and the district court sentenced him to 46 to 135 years imprisonment, including 20 to 50 years for second-degree murder.<sup>123</sup> All sentences were ordered to run consecutively.<sup>124</sup>

On appeal, the Nebraska Supreme Court addressed two issues: (1) whether the voluntary use of drugs other than alcohol may give rise to an insanity defense, and (2) whether Hotz was entitled to a new trial

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attorney-files-more-charges-against-hotz/article\_753885f2-eb0a-5b06-ad8e-dbd0f3823d4e.html.

113. *Hotz*, 281 Neb. at 265, 795 N.W.2d at 650.

114. *Id.*

115. *Id.*

116. *Id.* at 265–66, 795 N.W.2d at 650.

117. *Id.* at 267, 795 N.W.2d at 651.

118. *Id.* (internal quotation marks omitted).

119. *Id.*

120. *Id.*

121. *Id.* (internal quotation marks omitted).

122. *Id.*

123. *Id.* at 267–68, 795 N.W.2d at 651.

124. *Id.* at 268, 795 N.W.2d at 652.

because the district court's failure to instruct the jury on insanity constituted an "[i]rregularity in the proceedings," given the court's ruling on the State's motion in limine and Hotz's reliance on the defense at trial.<sup>125</sup>

The court first addressed the issue—one of first impression—of whether temporary drug-induced insanity caused by a drug other than alcohol could excuse Hotz for his criminal acts.<sup>126</sup> The court affirmed the denial of Hotz's request for an insanity instruction on the basis of the *M'Naghten* test's mental disease or defect requirement.<sup>127</sup> Noting the uniformity with which other jurisdictions refuse to excuse offenders by reason of their temporary insanity, the court stated "that temporary insanity brought on by voluntary intoxication is not a 'mental disease or defect' as understood under the common law."<sup>128</sup>

The court also emphasized that Hotz's claimed temporary insanity was voluntarily produced and that he was aware, by virtue of his previous experiments with psilocybin mushrooms, of the effect they could have on his mental processes.<sup>129</sup> The court explained that "[w]hile the mental state resulting from extreme intoxication may in some cases be 'tantamount to insanity,' . . . its origin as a self-induced impairment fundamentally distinguishes it for most courts from a naturally occurring mental disease or defect that leads to insanity."<sup>130</sup> Regarding the risks that Hotz knowingly assumed by taking psilocybin mushrooms, the court said: "He had taken mushrooms in the past and had experienced anxiety and delusions. Hotz was well aware of the mind-altering effects the mushrooms might have."<sup>131</sup>

The court, however, distinguished temporary drug-induced insanity from settled drug-induced insanity. The court explained: "The general rule can be summarized as follows: 'Insanity combined with, or resulting from, intoxication is a defense to homicide if it is of a permanent nature and meets the test of insanity generally . . .'"<sup>132</sup> The court identified the rationales for the distinction as the futility of punishing those with settled insanity and the moral remoteness of the past drug consumption.<sup>133</sup> Hotz's condition, the court emphasized,

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125. *Id.* at 269, 278, 795 N.W.2d at 652, 658 (internal quotation marks omitted).

126. *Id.* at 269, 795 N.W.2d at 652.

127. *See id.* at 277–78, 795 N.W.2d at 657–58.

128. *Id.* at 274, 795 N.W.2d at 656.

129. *Id.* at 277, 795 N.W.2d at 657–58.

130. *Id.* at 277, 795 N.W.2d at 657 (alteration in original) (quoting *State v. Sexton*, 904 A.2d 1092, 1100 (Vt. 2006)).

131. *Id.* at 277, 795 N.W.2d at 657–58.

132. *Id.* at 272, 795 N.W.2d at 654 (quoting 40 C.J.S. *Homicide* § 23, at 386–87 (2006)).

133. *Id.* at 273–74, 795 N.W.2d at 655.

was only temporary and “there [was] no evidence that he suffered permanent mental problems from his use of drugs.”<sup>134</sup>

The court, however, granted Hotz a new trial on the ground that the district court’s refusal to instruct the jury on insanity amounted to an irregularity in the proceedings.<sup>135</sup> Although the district court’s ruling on the State’s motion in limine was unclear, Hotz relied on the defense for the entirety of the trial proceedings. Furthermore, the question submitted to the district court by the jury during deliberations was evidence that the jury believed it was to decide the question of insanity.<sup>136</sup> The court concluded that “Hotz’s ability to mount a defense was severely compromised when he was barred from asserting the insanity defense at what amounted to the eleventh hour.”<sup>137</sup>

## VI. THE TWO PRONGS OF SETTLED DRUG-INDUCED INSANITY

### A. “Intermittent” Settled Insanity

A handful of jurisdictions excuse offenders because of their settled drug-induced insanity without requiring that the mental impairment be permanent<sup>138</sup> or produced by a prolonged period of over-consumption. An early case representative of what might be called the “intermittent” version of the settled-insanity doctrine is the 1851 decision *United States v. McGlue*.<sup>139</sup> The defendant, the second officer on a ship, killed the first officer while the vessel was on the high seas or within the dominion of the Imaum of Muscat.<sup>140</sup> No evidence showed the defendant had a prolonged history of alcohol abuse, only that he “had drunk intemperately of the ardent spirit of the country during some days before the occurrence.”<sup>141</sup> Justice Curtis, instructing the jury, defined “delirium tremens” as consisting of delirium, sleeplessness, and tremulousness, ending when “sleep occurs, and reason thus returns.”<sup>142</sup> Although Curtis defined insanity in terms of the defendant’s incapacity “to distinguish between right and wrong” and “un-

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134. *Id.* at 277, 795 N.W.2d at 658.

135. *Id.* at 280, 795 N.W.2d at 659.

136. *Id.* at 278–79, 795 N.W.2d at 658–59.

137. *Id.* at 280, 795 N.W.2d at 659.

138. The intermittent prong of the settled-insanity doctrine should not be confused with temporary drug-induced insanity. Temporary drug-induced insanity is comprised of a mental impairment lasting only so long as the immediate intoxication. See *supra* section IV.A. Intermittent settled insanity requires that the mental impairment linger beyond the immediate period of intoxication, although it need not, in contrast with prolonged and permanent settled insanity, linger permanently.

139. *United States v. McGlue*, 26 F. Cas. 1093 (C.C.D. Mass. 1851).

140. *Id.* at 1093.

141. *Id.* at 1096.

142. *Id.*

derstand[ ] the nature of his act,” he did not instruct the jury that the defendant had to prove such incapacity was the result of a mental disease or defect.<sup>143</sup> *McGlue*'s statement of the settled-insanity doctrine, however, has persisted in some pockets of the United States despite a requirement that the defendant prove he suffered from a mental disease or defect at the time of the criminal act.<sup>144</sup>

Courts applying this expansive version of the settled-insanity doctrine have excused offenders despite the short period of preceding drug abuse and the briefness of their insanity. For example, in *Porreca v. State*,<sup>145</sup> the Maryland Court of Special Appeals, despite requiring long-term drug abuse,<sup>146</sup> held that a defendant was entitled to assert a settled-insanity defense even though his insanity preceding the criminal act was intermittent and he returned to sanity two to four months after the crime.<sup>147</sup> The Florida Supreme Court in *Britts v. State*<sup>148</sup> held that a ten-day “drunk” causing a lingering mental impairment could excuse an offender.<sup>149</sup> In *People v. Conrad*,<sup>150</sup> the Michigan Court of Appeals determined that an offender who killed his brother could be excused by reason of settled insanity that ended six weeks after his brother's death and was caused by two weeks of PCP use.<sup>151</sup>

## B. “Prolonged” and “Permanent” Settled Insanity

During the same period *McGlue* was decided, however, some courts interpreted the settled-insanity doctrine narrowly and excused an offender only if he had engaged in long-term, chronic drug abuse that resulted in permanent insanity. As the Georgia Supreme Court explained in 1886, “if the mania, insanity or unsoundness of mind, though produced by drunkenness, be permanent and fixed, so as to destroy all knowledge of right and wrong, then the person thus laboring under these infirmities would not be responsible.”<sup>152</sup> This narrower version of the settled-insanity doctrine has been adopted by a number of courts.<sup>153</sup>

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143. *Id.* at 1095.

144. *See* *State v. McNally*, 336 So. 2d 713, 714 (Fla. Dist. Ct. App. 1976); *Porreca v. State*, 433 A.2d 1204, 1208 (Md. Ct. Spec. App. 1981); *Commonwealth v. Herd*, 604 N.E.2d 1294, 1298 (Mass. 1992).

145. *Porreca*, 433 A.2d 1204.

146. *Id.* at 1208.

147. *Id.* at 1206.

148. *Britts v. State*, 30 So. 2d 363 (Fla. 1947).

149. *Id.* at 364.

150. *People v. Conrad*, 385 N.W.2d 277 (Mich. Ct. App. 1986).

151. *Id.* at 281.

152. *Beck v. State*, 76 Ga. 452, 453 (1886).

153. *See* *McNeil v. United States*, 933 A.2d 354, 369 (D.C. Cir. 2007); *Jones v. State*, 648 P.2d 1251, 1255 (Okla. Crim. App. 1982); *State v. Hartfield*, 388 S.E.2d 802,

Courts applying the prolonged and permanent settled-insanity test have denied offenders the insanity defense on the basis of the relative brevity of their history of drug abuse and the lingering effects of such abuse. For example, the Supreme Court of Virginia held in *White v. Commonwealth*<sup>154</sup> that an offender's heavy use of cocaine over a three-month period was not the "long-term, chronic, and habitual abuse" the settled-insanity doctrine required.<sup>155</sup> Likewise, in *State v. Sexton*<sup>156</sup> the Vermont Supreme Court held that the offender's use of a medley of illegal drugs over a two-month period preceding his crime<sup>157</sup> was not a lengthy enough period of drug abuse.<sup>158</sup> Instead, the court determined that the settled-insanity doctrine was intended to only apply in cases where the drug abuse lasts "many years" and results in organic brain damage.<sup>159</sup> Finally, the Virginia Court of Appeals, in *Morgan v. Commonwealth*,<sup>160</sup> held that an offender's mental recovery following his decision to seek medical treatment precluded the application of the settled-insanity doctrine because the offender's insanity was not "permanent."<sup>161</sup>

### C. Is Differential Treatment of Settled and Temporary Insanity Justified?

On their face, it may be hard to reconcile opinions such as *McGlue*, which assume a "settled" insanity that disappears with a good night's sleep, with opinions such as *Beck*, which speak of a settled insanity that never ends. The early cases regarding each prong of the settled-insanity doctrine seem to describe two distinct lingering mental impairments that can result from the abuse of drugs: withdrawal symptoms and cumulative organic brain damage.<sup>162</sup> Viewed in this context, the "intermittent" version of the settled-insanity doctrine seems to provide some merit to the near-uniform decisions of courts, such as *Hotz*, to deny the insanity defense to the temporarily insane but to allow it for the settled insane. After all, in order to have withdrawal symptoms, the addict must withdraw from an actual habit of drug consumption. Whereas the conduct of the temporarily insane de-

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804 (S.C. 1990); *State v. Sexton*, 904 A.2d 1092, 1102 (Vt. 2006); *Morgan v. Commonwealth*, 646 S.E.2d 899, 905 (Va. Ct. App. 2007).

154. *White v. Commonwealth*, 636 S.E.2d 353 (Va. 2006).

155. *Id.* at 358.

156. *State v. Sexton*, 904 A.2d 1092 (Vt. 2006).

157. *Id.* at 1103–04, 1113–14.

158. *Id.* at 1103–04.

159. *Id.*

160. *Morgan v. Commonwealth*, 646 S.E.2d 899 (Va. Ct. App. 2007).

161. *Id.* at 905.

162. See *LSD—Its Effect on Criminal Responsibility*, *supra* note 73, at 371 (noting the failure of modern courts to make a distinction between settled insanity caused by alcoholism and the withdrawal from alcohol).

defendant shows only the naked desire to become intoxicated, insanity due to drug withdrawal is the result of the defendant's desire to rid himself of his demons and, in the process, remove the danger that his drug consumption poses to the public.

Yet whatever merit this distinction may have had has been lost by modern courts that apply a broad definition of settled insanity encompassing "intermittent" impairments. It is doubtful that the ten-day "drunk" in *Britts*<sup>163</sup> or the two-week PCP binge in *Conrad*<sup>164</sup> resulted in an addiction to drugs, the withdrawal from which caused the defendants' insanity. Furthermore, *Conrad* exposes another flaw within the broad version of the settled-insanity doctrine when it is extended to drugs other than alcohol. Once PCP is metabolized by the user's body following consumption, it is stored in fat cells and is re-released into the user's bloodstream when the fat cells are activated.<sup>165</sup> Thus, the initial high a PCP user experiences and the high that the defendant in *Conrad* experienced are one and the same. Neither is due to withdrawal from the drug or organic brain damage. Instead, both highs are the result of the body's absorption of PCP via the bloodstream. That one high occurred immediately and the other at a later point is not sufficient to declare an act committed in the former PCP daze a culpable act and an act committed in the latter PCP daze excusable.

In *Hotz*, the Nebraska Supreme Court suggested that it contemplates the prolonged and permanent version of the settled-insanity defense.<sup>166</sup> The distinction between temporary drug-induced insanity and the prolonged and permanent prong of settled insanity, however, is similarly difficult to justify. Under its prolonged and permanent version, the settled-insanity doctrine is often justified on the ground that the offender's earlier decisions to consume drugs in excess have become so morally remote over time that he is not culpable for later criminal acts.<sup>167</sup> As Justice Story famously wrote, "[t]he law looks to the immediate, and not to the remote cause; to the actual state of the party, and not to the causes, which remotely produced it."<sup>168</sup> This justification, however, is contrary to principles of retributivism. As the Colorado Supreme Court, the only court to reject altogether the settled-insanity doctrine, explained:

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163. *Britts v. State*, 30 So. 2d 363, 364 (Fla. 1947).

164. *People v. Conrad*, 385 N.W.2d 277 (Mich. Ct. App. 1986).

165. *McNeil v. United States*, 933 A.2d 354, 368 (D.C. Cir. 2007).

166. *See supra* Part V.

167. *See, e.g., State v. Sexton*, 904 A.2d 1092, 1102 (Vt. 2006) ("The underlying rationale for the settled insanity doctrine is generally explained . . . as a compassionate concession that at some point a person's earlier voluntary decisions become so temporally and 'morally remote' that the cause of the offense can reasonably be ascribed to the resulting insanity rather than the use of intoxicants.").

168. *United States v. Drew*, 25 F. Cas. 913, 914 (C.C.D. Mass. 1828).

There is no principled basis to distinguish between the short-term and long-term effects of voluntary intoxication by punishing the first and excusing the second. If anything, the moral blameworthiness would seem to be even greater with respect to the long-term effects of many, repeated instances of voluntary intoxication occurring over an extended period of time.<sup>169</sup>

The Nebraska Supreme Court denied Joseph Hotz, a recreational user of psilocybin mushrooms, a potential excuse but suggested that if he had chronically abused the same drug over a period of years such that he “suffered from permanent mental problems from his use of drugs,”<sup>170</sup> he would have been excused. But Hotz would not become afflicted with “permanent mental problems” without abusing psilocybin mushrooms a countless number of times, thereby voluntarily putting himself in the same dangerous mental state that precipitated the death of Kevin Pfeiffer a countless number of times. If Hotz’s culpability was based, at least in part, on the reckless or negligent decision to ingest hallucinogenic drugs, his culpability would seem to be much higher if he were a chronic, rather than a recreational, drug abuser. After *Hotz*, “[t]he message is clear—under the criminal law, it is better to be a chronic drug abuser than an occasional one.”<sup>171</sup>

Excusing offenders because of their settled insanity, defined by prolonged drug abuse resulting in a permanent insanity, on the basis of “moral remoteness” is also speculative. While “[o]ne should not be blamed for every harmful act that can be linked to a much earlier transgression,”<sup>172</sup> this may not be the situation in cases applying the prolonged and permanent prong of the settled-insanity doctrine. Although an offender may have begun abusing drugs years before, it is possible that it was a drug binge last month, last week, or even the day before the criminal act that pushed the offender’s mental state past the point of willful control and into the hinterland of insanity.

The prolonged and permanent version of the settled-insanity doctrine may also create perverse incentives for a drug abuser considering ending his consumption of drugs and seeking medical treatment. Because the defendant in *Morgan v. Commonwealth* had stopped using drugs and sought treatment for his liver condition, his mental state improved.<sup>173</sup> As a result, he was denied the possibility of an excuse.<sup>174</sup> Therefore, in the wake of *Morgan*, “clever” drug abusers could continue to consume drugs and refuse treatment in order to avoid criminal liability. *Morgan* also raises the question of whether an offender’s insanity that is “permanent” at the time of the criminal

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169. *Bieber v. People*, 856 P.2d 811, 817 (Colo. 1993).

170. *State v. Hotz*, 281 Neb. 260, 277, 795 N.W.2d 645, 658 (2011).

171. Johnson, *supra* note 9, at 270.

172. DRESSLER, *supra* note 35, § 24.05(B), at 356.

173. *Morgan v. Commonwealth*, 646 S.E.2d 899, 905 (Va. Ct. App. 2007).

174. *Id.*

act and the trial would continue to be “permanent” if the offender later received proper medical care.

The prolonged and permanent version of the settled-insanity doctrine is also sometimes justified on the ground that the offender desires only the immediate effects of drug abuse and not its lingering effects,<sup>175</sup> or that while drug abusers are aware that consuming drugs will immediately impair their mental states, they may be less aware that drug abuse could also cause a lingering mental impairment.<sup>176</sup> As the Texas Court of Criminal Appeals explained in 1892:

There is no difference between the two kinds of insanity, so far as the mental *status* concerned, but they differ widely in their causes and results. The first is from drinking as a remote result, the second from drinking as a direct result. The first is an involuntary result from which all shrink alike, the second is voluntarily sought after. In the first, there is no criminal responsibility; but in the second, responsibility never ceases.<sup>177</sup>

As long as a drug user is aware of the possibility of a lingering mental impairment, however, it is not clear why the fact that he did not desire that particular impairment should impact his criminal liability. And it is difficult to argue that drug users are no longer aware of the potential for mental impairments lasting beyond the immediate period of intoxication. Rejecting this justification for the settled-insanity defense, the Colorado Supreme Court wrote:

We do not see any qualitative difference between a person who drinks or takes drugs knowing that he or she will be momentarily “mentally defective” as an immediate result, and one who drinks or takes drugs knowing that he or she may be “mentally defective” as an eventual, long-term result. In both cases, the person is aware of the possible consequences of his or her actions.<sup>178</sup>

Although rarely emphasized in judicial opinions, if the distinction between the prolonged and permanent version of settled insanity and temporary insanity has any redeeming ground, it is the utilitarian justification of incapacitation.<sup>179</sup> Because an offender excused by reason of his insanity generally will be committed to a mental health facility only so long as his insanity persists,<sup>180</sup> an offender excused by reason of temporary insanity will be released immediately after acquittal unless he has other mental impairments that justify his commitment. An offender excused by reason of permanent insanity caused by pro-

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175. See, e.g., *Porreca v. State*, 433 A.2d 1204, 1207 (Md. Ct. Spec. App. 1981) (explaining that the difference between temporary and settled drug-induced insanity is “one between the direct results of drinking, which are voluntarily sought after, and its remote consequences”).

176. See *Parker v. State*, 254 A.2d 381, 388 (Md. Ct. Spec. App. 1969).

177. *Evers v. State*, 20 S.W. 744, 748 (Tex. Crim. App. 1892).

178. *Bieber v. People*, 856 P.2d 811, 816 (Colo. 1993).

179. This justification may create some theoretical incongruities because utilitarianism is a rationale for punishment and the confinement of an offender found not guilty by reason of his insanity is not considered punishment.

180. MARTIN R. GARDNER & RICHARD G. SINGER, *CRIMES AND PUNISHMENT: CASES, MATERIALS, AND READINGS IN CRIMINAL LAW* 377, 1163–64 (4th ed. 2004).

longed drug abuse, however, will continue to be confined for an indefinite period following his acquittal.<sup>181</sup>

## VII. THE CONFLICT BETWEEN RETRIBUTIVISM AND UTILITARIANISM

### A. Retributivism and Punishing the Temporarily Insane

The strongest support for excusing criminal acts committed by an offender in a state of temporary drug-induced insanity lies in the offender's lack of culpability for his criminal act. There lies a wide gulf between the moral culpability of a person who forms an intent to kill another while in full possession of his mental faculties and a person who, like Joseph Hotz, forms that intent in the midst of insanity caused by a chemical agent.<sup>182</sup> If the law regards an actor not culpable for a criminal act committed while insane,<sup>183</sup> why is Hotz culpable?

Courts have, in fact, had little difficulty in finding criminal acts committed by an offender in a fit of temporary drug-induced insanity culpable. As one early court asserted:

[T]here is, in truth, no injustice in holding a person responsible for his acts committed in a state of voluntary intoxication. It is a duty which everyone owes to his fellow-men and to society, to say nothing of more solemn obligations, to preserve, so far as it lies in his own power, the inestimable gift of reason.<sup>184</sup>

Modern courts continue to look back in time to when the offender committed the charged criminal act and pin culpability on the decision to become intoxicated.<sup>185</sup> More precisely, courts find the offender's decision to become intoxicated culpable because in so doing the offender

181. See *People v. Kelly*, 516 P.2d 875, 882 (Cal. 1973) (emphasizing that an offender who is excused by reason of settled insanity will be subject to confinement in a mental institution), *superseded by statute*, CAL. PENAL CODE § 22 (West 1999), as recognized in *People v. Boyer*, 133 P.3d 581, 622 (Cal. 2006).

182. See GLANVILLE WILLIAMS, CRIMINAL LAW § 181, at 564 (2d ed. 1961).

183. See *Johnson*, *supra* note 9, at 259.

184. *People v. Rogers*, 18 N.Y. 9, 18 (N.Y. 1858).

185. See *State v. Maik*, 287 A.2d 715, 721 (N.J. 1972) ("The required element of badness can be found in the intentional use of the stimulant or depressant."); *State v. Wicks*, 657 P.2d 781, 784 (Wash. 1983) (Utter, J., dissenting) ("The central reason for prohibiting the assertion of mental conditions brought on by voluntary intoxication as a complete defense is that one who consumes alcohol or drugs should realize the possibility of potentially dangerous effects."). *But see* *Commonwealth v. Herd*, 604 N.E.2d 1294, 1299 (Mass. 1992) ("We are unwilling, in order to justify a homicide conviction, to permit the moral fault inherent in the unlawful consumption of drugs to substitute for the moral fault that is absent in one who lacks criminal responsibility."). The no-excuse rule regarding temporary drug-induced insanity bears some resemblance to the felony-murder rule in that both hold a person criminally liable because an earlier "wrong" is causally connected to a later harm. See Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1067 (1944).

may have been negligent or reckless as to the risk that his intoxication could cause him to harm another person.<sup>186</sup> The Nebraska Supreme Court's emphasis on the fact that Hotz's prior experimentation with psilocybin mushrooms had given him knowledge of the drug's effects and caused him to experience paranoia on at least one prior occasion, along with its lack of emphasis on the brutal manner in which Pfeiffer died,<sup>187</sup> suggests that Hotz's culpability was grounded, at least in part, on his possibly reckless or negligent decision to consume a hallucinogen.

Pushing the crime back in time from Hotz's killing of Pfeiffer to his decision to consume psilocybin mushrooms, however, places the court's decision on shaky retributive grounds. In doing so, the court embraced "the abandoned notion that one who intentionally commits a serious wrong is so vicious a person that he should be liable for any consequences however unforeseeable and unsought."<sup>188</sup> The treatment of offenders who commit criminal acts while temporarily insane from the immediate effects of intoxication is one of the few remaining areas of the law where the "evil mind" approach to mens rea remains in use.<sup>189</sup> Under this ancient view of mens rea, a defendant who had, in the words of Blackstone, an "evil mind" or "vicious will" was liable for any criminal act he committed in this state of mind regardless of whether he had a culpable mental state in regard to the particular act.<sup>190</sup> The evil mind approach to mens rea was rejected in the country that spawned it over a century ago<sup>191</sup> and, with the current element-based understanding of mens rea,<sup>192</sup> has no place in the criminal law.

## B. Utilitarianism and Punishing the Temporarily Insane

While the unfairness of holding an offender liable for an act committed in a state of temporary drug-induced insanity is difficult to deny, proponents of the no-excuse rule have balanced this unfairness

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186. See Tiffany, *supra* note 34, at 241–42; see also *People v. Velez*, 221 Cal. Rptr. 631, 637 (Cal. Ct. App. 1985) (explaining that for defendants who were rendered unconscious due to their voluntary intoxication "the imposition of criminal responsibility . . . is predicated on a theory of criminal negligence").

187. See *supra* Part V.

188. Hall, *supra* note 185, at 1070.

189. The similarity between the "evil mind" understanding of mens rea and recent decisions by courts and legislatures to deny the voluntary intoxication defense altogether is even stronger. After L.B. 100, an offender who, because of his intoxication, lacked the requisite mental state for the crime with which he is charged will be unable to prove that he did not commit the crime because his lack of a culpable mental state is negated by his prior wrong of becoming intoxicated. See L.B. 100, 102d Leg., 1st Sess. (Neb. 2011).

190. GARDNER & SINGER, *supra* note 180, at 388.

191. See *Regina v. Pembliton*, (1874) 12 Cox C.C. 607 (Eng.).

192. See GARDNER & SINGER, *supra* note 180, at 422.

against the utilitarian concern of protecting the public.<sup>193</sup> As one court explained:

In the forum of conscience there is no doubt considerable difference between a murder deliberately planned and executed by a person of unclouded intellect, and the reckless taking of life by one infuriated by intoxication; but human laws are based upon considerations of policy, and look rather to the maintenance of personal security and social order, than to an accurate discrimination as to the moral qualities of individual conduct.<sup>194</sup>

If the purpose of the insanity defense is, as some have suggested, to allow the state to incapacitate an offender who continues to pose a potential threat to the public but deserves to be acquitted due to his lack of culpability,<sup>195</sup> then this purpose would not be served by allowing an excuse based on temporary drug-induced insanity. Because Hotz's "mental disease" dissipated one day after he committed the criminal acts,<sup>196</sup> excusing him by reason of insanity would have resulted in a true acquittal. Although the Nebraska Supreme Court did not discuss its decision in terms of incapacitation, other courts addressing the issue of temporary drug-induced insanity have explicitly made the link.<sup>197</sup>

### VIII. THE MENTAL DISEASE REQUIREMENT

The Nebraska Supreme Court expressly denied Hotz an insanity defense because of his inability to prove that he suffered from a mental disease or defect, as required by Nebraska's *M'Naghten*-based insanity defense.<sup>198</sup> Other courts have also concluded that the mental disease or defect requirement bars an excuse based on temporary drug-induced insanity.<sup>199</sup> Yet early American decisions did not consider intoxication to be an affliction wholly separate from insanity but rather a species of insanity that should not be excused because of its origins in the offender's vice.<sup>200</sup> This reasoning has also been applied in some modern jurisdictions which include a mental disease or defect

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193. Keiter, *supra* note 48, at 506.

194. *People v. Rogers*, 18 N.Y. 9, 18 (N.Y. 1858).

195. See LAFAVE, *supra* note 5, § 7.1(b), at 370 (discussing but not endorsing the theory).

196. Brief for Appellee at 9, *State v. Hotz*, 281 Neb. 260, 795 N.W.2d 645 (2011) (No. S-10-105).

197. See, e.g., *State v. Maik*, 287 A.2d 715, 721 (N.J. 1972) ("[T]o say that one who offended while under such influence was sick would suggest that his sickness disappeared when he sobered up and hence he should be released. Such a concept would hardly protect others from the prospect of repeated injury.").

198. See *supra* Part V.

199. See, e.g., *State v. Sexton*, 904 A.2d 1092, 1100 (Vt. 2006) (explaining that the immediate effects of drug consumption cannot satisfy the mental disease or defect requirement). The MPC expressly provides that intoxication does not "in itself, constitute mental disease." MODEL PENAL CODE § 2.08(3) (1962).

200. See *United States v. Drew*, 25 F. Cas. 913, 913 (C.C.D. Mass. 1828).

requirement as part of their insanity standards.<sup>201</sup> Furthermore, courts have had few qualms about considering intoxication to be a mental disease or defect when the intoxication is involuntary,<sup>202</sup> despite the effects of drug consumption on the mind being the same regardless of how the drugs were consumed.

Medical professionals have concluded that intoxication can in some cases be a mental disease. Hotz attempted to prove that, due to the immediate effects of his drug consumption, he suffered from “hallucinogen-induced intoxication delirium” and a “hallucinogen-induced psychotic disorder,” both of which are included as mental disorders in the American Psychiatric Association’s (APA) *Diagnostic and Statistical Manual of Mental Disorders* (DSM).<sup>203</sup> Although the DSM is not sacrosanct,<sup>204</sup> the APA is the governing body of a group of doctors solely devoted to treating mental illnesses and their conclusions should not be ignored by courts deciding what constitutes a mental disease.

As noted by the Nebraska Supreme Court, Hotz’s alleged insanity was “voluntary” in the sense that he voluntarily consumed the chemical agent that caused his mental impairment.<sup>205</sup> However, courts have not shied away from accepting mental diseases like syphilis that have a “quasi-voluntary” nature.<sup>206</sup> Furthermore, a distinction can be made between the voluntariness of Hotz’s alteration of his mental state and the voluntariness of the acts he committed while in a state of insanity. Ultimately, by somewhat summarily denying Hotz an excuse on the basis of the mental disease or defect requirement, the Nebraska Supreme Court failed to explore Hotz’s criminal liability in the context of the complicated issues of culpability and public welfare raised by temporary drug-induced insanity.

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201. See *Allen v. State*, 539 So. 2d 1124, 1126 (Ala. Crim. App. 1988) (alteration in original) (quoting *Lister v. State*, 437 So. 2d 622, 624 (Ala. Crim. App. 1983)) (internal quotation marks omitted) (“Although excessive intoxication may produce insanity . . . legal insanity does not embrace every kind of mental disease and disorder that renders a person not responsible for his acts.”).

202. See, e.g., *City of Minneapolis v. Altimus*, 238 N.W.2d 851, 858 (Minn. 1976) (“[A] defense of involuntary intoxication should be allowed only in cases 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.”).

203. Other offenders have similarly availed themselves of the DSM without success. See, e.g., *People v. Free*, 447 N.E.2d 218, 230–32 (Ill. 1983).

204. *State v. Klein*, 124 P.3d 644, 651 (Wash. 2005).

205. See *supra* Part V.

206. WILLIAMS, *supra* note 182, § 181, at 566.

### IX. THE OFFENSE OF RECKLESS OR NEGLIGENT INTOXICATION

One may wonder, “[i]f a man is punished for doing something when drunk that he would not have done when sober, is he not in plain truth punished for getting drunk?”<sup>207</sup> The answer to this question may be yes, but some acts of drug consumption are deserving of criminal sanction beyond penalties for consumption itself if the drug is illegal. Nevertheless, while the criminal law has long “compromise[d] between the punishment of inebriate offenders in complete disregard of their condition, because it was brought on voluntarily, and the total exculpation suggested by the actual facts at the time the harm occurred,”<sup>208</sup> the Nebraska Supreme Court’s decision in *Hotz* has swung the pendulum too far in the former direction.

A solution to the tension between the lack of an offender’s culpability for acts committed while insane and the need to protect the public is to: (1) excuse criminal acts committed by an offender suffering from temporary drug-induced insanity, and (2) create a new offense of reckless or negligent intoxication. The first step would prevent the injustice of holding an offender criminally liable for an act committed while insane. The second step recognizes that if an offender like *Hotz* was culpable for the crimes he committed in a state of temporary insanity, it is due to his decision, while sane, to consume a drug while cognizant or having notice of the potential harm to others.<sup>209</sup> An offense of reckless or negligent intoxication, therefore, would rightly direct courts to view the act of consuming drugs, rather than later acts committed in a state of temporary insanity, as the act deserving of punishment. In addition to being superior to the traditional no-excuse rule on retributive grounds, this approach would also serve the public interest in the incapacitation of individuals who have manifested a willingness to become grossly intoxicated while knowing or having reason to know of the risks to others that their drug consumption may pose.

No American jurisdiction has adopted an offense of reckless or negligent intoxication. There is, however, an example of a similar offense across the Atlantic. The German Draft Penal Code provides:

- (1) Anybody who intentionally or negligently becomes intoxicated with alcoholic beverages or other intoxicants shall be punished with penal custody or a fine . . . if he commits an unlawful act while in such state and cannot be punished for it, because as a result of the intoxication he was either irresponsible or his irresponsibility cannot be ruled out. (2) If the perpetrator foresaw or could foresee that he might commit unlawful acts while intoxicated, the punishment shall be jailing up to five years, penal custody or a fine. (3) The pun-

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207. *Id.* at 564.

208. Hall, *supra* note 185, at 1054.

209. See PETER CLYNE, GUILTY BUT INSANE: ANGLO-AMERICAN ATTITUDES TOWARD INSANITY AND CRIMINAL GUILT 28 (1973).

ishment may not exceed in kind and degree the punishment provided for the commission of the act committed while intoxicated . . . .<sup>210</sup>

Support for a similar legislative enactment has been voiced in American courts<sup>211</sup> and was discussed in the Nebraska Legislature during consideration of L.B. 100.<sup>212</sup>

The creation of a new offense of reckless or negligent intoxication would, of course, present the legislature and ultimately the courts with difficult questions. Reckless intoxication should be punished more severely than negligent intoxication, given that recklessness is a more culpable *mens rea*, but how should the offense be graded in light of the magnitude of the risk and the actual harm wrought? Should the offense only apply to those offenders who have been excused for their commission of a subsequent criminal act by reason of their temporary insanity? What risk need the defendant have subjectively disregarded (or objectively should have been aware of) in order to justify criminal liability? Yet, despite definitional challenges, the offense of reckless or negligent intoxication has the potential to strike a better balance between the competing concerns of an offender's culpability and the public welfare.

## X. CONCLUSION

In 1893, the Nebraska Supreme Court, confronted with an intoxicated defendant, declared: "As much as we may desire to discourage drunkenness, and as deplorable the habit of drinking, with its train of wrecks and ruin, may be, we must still recognize the frailty of human beings, and adopt [sic] the law to the actual condition of the party."<sup>213</sup>

210. COMPARATIVE CRIMINAL LAW PROJECT, THE GERMAN DRAFT PENAL CODE E 1962, § 351, at 189 (Neville Ross trans., 1966). An offense of "being drunk and dangerous" was also enacted in Denmark. WILLIAMS, *supra* note 182, § 183, at 573 n.7. Commentators in the United States have expressed support for a law similar to the German provision. See Chad J. Layton, Comment, *No More Excuses: Closing the Door on the Voluntary Intoxication Defense*, 30 J. MARSHALL L. REV. 535, 563 (1997).

211. See *People v. Kelley*, 176 N.W.2d 435, 442 n.23 (Mich. Ct. App. 1970) ("Entirely rational and workable would be . . . the crime of committing crimes under the influence of drug or liquor.").

212. During floor debate on L.B. 100, one senator noted that, "[t]here was an option presented that could have been considered, that was rejected, which would create an offense . . . for those who voluntarily ingest a controlled substance and then commit a crime, and it would be a stated offense where you wouldn't have to give these jury instructions with regard to whether or not the individual had formed the necessary intent. . . . [T]hat's the better direction I believe for this state to go in." *Floor Deb. on L.B. 100*, *supra* note 98, at 13 (statement of Sen. Council). As Senator Council suggested, the offense of reckless or negligent intoxication would apply to defendants who lacked the requisite *mens rea* because of their intoxication in addition to those offenders who formed the requisite *mens rea* in a fit of temporary drug-induced insanity.

213. *O'Grady v. State*, 36 Neb. 320, 322, 54 N.W. 556, 556-57 (1893).

Joseph Hotz's use of psilocybin mushrooms certainly left a saddening trail of wrecks and ruin. The Nebraska Supreme Court in *State v. Hotz*, however, failed to adapt the law to the actual condition of the offender. Instead, Hotz was punished as if he had stabbed Kenny Pfeiffer fifty-one times while perfectly sober, not temporarily insane from the effects of drugs.

Such a result is at odds with the court's intimations that Hotz may have been excused if his drug-induced insanity was of the permanent variety caused by years of drug abuse. Given that the true basis for culpability was founded not on the actual stabbing, which was done while Hotz was temporarily insane, but on the decision to become intoxicated knowing the drug's possible effects, it is odd that Hotz may have escaped criminal liability altogether if he had been a heavier drug user. If anything, the individual who abuses drugs over a prolonged period to such a degree that he permanently alters the way his brain functions is much more culpable due to the countless number of times he has placed the public welfare in jeopardy by becoming intoxicated. All that can be said in favor of the temporary/settled insanity distinction struck by the court is that it serves the utilitarian aim of incapacitation.

Punishing the temporarily insane offender creates a tug-and-pull between the two competing justifications for punishment: retributivism and utilitarianism. A criminal act committed in a state of temporary drug-induced insanity is not as culpable as the same act committed by a sober offender. Those who choose to take drugs knowing or having notice of the risk that their intoxication may pose to others are dangerous, however, and their incapacitation protects the public. The Nebraska Supreme Court's decision—that temporary drug-induced insanity does not palliate criminal liability in any way—furthered the utilitarian aim of incapacitation at the expense of ignoring Hotz's diminished culpability.

Following the passage of L.B. 100, however, the legal status of temporary drug-induced insanity is beyond the Nebraska Supreme Court's power to remedy. A better balance between the competing aims of retributivism and utilitarianism can be struck by a law declaring that temporary drug-induced insanity operates as an excuse and creating an offense of reckless or negligent intoxication. This new offense would better serve retributive goals by basing culpability on the reckless or negligent decision to consume drugs instead of the act committed while temporarily insane. Society's interest in incapacitation will continue to be served by the punishment of those who consume drugs knowing or having reason to know that they are endangering others. Joseph Hotz may well have deserved punishment, but not for those acts committed while temporarily insane.