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Law on the Rocks: The Intoxication Defenses Are Being Eighty-Sixed

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I. INTRODUCTION

> **THE COURT:** It says, "Intoxication itself is not a defense to the prosecution for an offense. However, intoxication, while voluntary or involuntary, is admissible in evidence if it is relevant to negate a culpable mental state." Now what does that mean?
>
> **MR. TATUM:** Your Honor, that only goes to show—if this jury finds that Mr. Wagner was voluntarily intoxicated, they could find from that that he did not act knowingly under the applicable statutes . . . .
>
> **THE COURT:** You mean that a man can get so drunk, if he's walking down the street and then he blacks out, and then he gets in a car and drives it and kills somebody, he's not guilty of vehicular homicide because he didn't—he was so drunk he couldn't appreciate what happened? Is that what you're saying?[1]

Although the voluntary and involuntary intoxication defenses remain alive in a majority of American jurisdictions,[2] their health appears questionable. Frequently reviled, often just misunderstood,[3] the intoxication defenses have become an increasingly endangered species within the American criminal law landscape, threatening soon to go the way of the dinosaur. Although the volun-

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1. This dialogue reflects a conversation between the trial judge and the defendant's attorney, R. at 331-34, Tennessee v. Wagner, C.C.A. No. 02C01-9809-CC-00264, 1999 Tenn. Crim. App. LEXIS 1344 (Tenn. Crim. App. Dec. 30, 1999) (No. 96-228).

2. *See* Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. CRIM. L. & CRIMINOLOGY 482, 518-20 (1997) (providing a comprehensive listing of states that recognize the voluntary intoxication defense); *see also* PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 65(a)(1) & n.4 (1984) (discussing availability of the involuntary intoxication defense).

3. *See supra* note 1 and accompanying text.

tary and the involuntary intoxication defenses are similar in many ways, each faces a unique threat to its continued existence.

The ever-controversial voluntary intoxication defense faces possible elimination by statutory abrogation. Originally developed by nineteenth-century common law courts,[4] the defense[5] recognizes that an intoxicated[6] defendant may be incapable of possessing the mens rea[7] specified by an offense.[8] Increasingly criticized in recent

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4. *See, e.g.*, Chad J. Layton, Note, *No More Excuses: Closing the Door on the Voluntary Intoxication Defense*, 30 J. MARSHALL L. REV. 535, 537 (1997).

5. The term "voluntary intoxication defense" can be a misnomer. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 293 n.4 (2d ed. 1995). Rather than exculpating a defendant's criminal conduct, voluntary intoxication evidence generally will only mitigate the offense by negating a specific mental state, i.e., reducing an intentional assault charge to a reckless assault conviction. *See id.* at 306. Intoxication never actually justifies the defendant's actions; however, in some extreme cases, it may be introduced as an excuse for the defendant's conduct, similar to insanity. *See id.* at 302-03.

6. Although the effects of alcohol vary among users and the legally defining characteristics of the inebriate appear to vary among jurisdictions, *see generally infra* Part V, the following list offers an estimate of the physical effects of certain blood alcohol concentrations ("BAC"):

0.05 BAC	Some minor impairment of reasoning and memory. Behavior may become exaggerated and emotions are intensified. (Approximately two drinks for a 160-pound man)
0.10 BAC	Significant impairment of motor coordination and loss of good judgment. This is the level of legal intoxication in most states. (Approximately four drinks for a 160-pound man)
0.12 BAC	Vomiting usually occurs. (Approximately five drinks for a 160-pound man)
0.15 BAC	Gross motor impairment and lack of physical control. Euphoria is reduced and dysphoria (anxiety, restlessness) is beginning to appear. (Approximately six drinks for a 160-pound man)
0.20 BAC	Feeling dazed and disoriented. May need help to stand or walk. Blackouts are likely at this level. (Approximately eight drinks for a 160-pound man)
0.25 BAC	All mental, physical and sensory functions are severely impaired. Increased risk of serious injury through falls, accidents or choking on vomit. (Approximately ten to eleven drinks for a 160-pound man)
0.30 BAC	Stupor. The intoxicated person has little comprehension of where he is.
0.35 BAC	Coma is possible. This is the level of surgical anesthesia.
0.40 & up	Onset of coma and possible death.

See Be Responsible About Drinking, Inc., Estimated BAC Information, *at* http://www.brad21.org/bac_charts.html (last visited Jan. 19, 2002); Be Responsible About Drinking, Inc., Effects At Specific B.A.C. Levels (related to the Blood Alcohol Concentration (BAC)), *at* http://www.brad21.org/effects_at_specific_bac.html (last visited Jan. 19, 2002); SpeedImpact.org, Blood Alcohol Concentration (BAC) Levels and Effects!, *at* http://www.speedimpact.org/alc_fx.html (last visited Jan. 19, 2002). Although this chart deals solely with the effects of alcohol, the intoxication defenses also encompass intoxication through ingestion of drugs. *See* Ashaki Fitzpatrick, *Erosion of the Right to Put on a Defense: The Disallowance of Use of Voluntary Intoxication Evidence in Criminal Defenses*, 1998 DET. C.L. MICH. ST. U. L. REV. 1240, 1241-42.

7. The mens rea ("guilty mind") is the mental state, or intent, required to accompany a criminal act. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 217 (5th ed. 1989).

years,[9] the defense received a substantial blow to its continued vitality in the 1996 Supreme Court decision *Montana v. Egelhoff*.[10] In a sharply divided opinion,[11] a plurality of the Court held that a defendant does not possess a constitutional right to present evidence of voluntary intoxication in his defense.[12] The *Egelhoff* decision has caused much commentary, both positive and negative, from legal scholars and practitioners.[13] In its wake, a number of states have proposed or adopted statutes banning the use of the voluntary intoxication defense.[14]

The involuntary intoxication defense[15] faces a slower demise—a long descent into legal irrelevancy. The involuntary intoxication defense typically entitles a defendant to acquittal when his intoxication came about in a nonculpable manner.[16] Currently, it remains available in every jurisdiction,[17] at least in theory, and has

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8. *See* M. CHERIF BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 473 (1978).

9. *See generally* Keiter, *supra* note 2 (detailing various criticisms leveled at the defense by those who feel that it protects intoxicated defendants at the expense of their innocent victims); Layton, *supra* note 4 (same).

10. 518 U.S. 37, 56 (1996).

11. Four Justices dissented (Stevens, O'Connor, Souter, and Breyer); three of them filed separate dissenting opinions. *See id.* at 38. In a dissenting opinion joined by the other three, Justice O'Connor argued that "[t]he Montana statute places a blanket exclusion on a category of evidence that would allow the accused to negate the offense's mental-state element. In so doing, it frees the prosecution, in the face of such evidence, from having to prove beyond a reasonable doubt that the defendant nevertheless possessed the required mental state. In my view, this combination of effects violates due process." *Id.* at 62 (O'Connor, J., dissenting).

12. *See id* at 38.

13. *Compare* Derrick Augustus Carter, *Bifurcations of Consciousness: The Elimination of the Self-Induced Intoxication Excuse*, 64 MO. L. REV. 383, 434-36 (1999) (arguing that "[a]lcohol must be treated as a dangerous instrument . . . . " and that "[d]espite the historical concessions to alcohol within the American way of life, there must be personal accountability"), *with* Fitzpatrick, *supra* note 6, at 1261 (contending that "[i]f defendants are prevented from putting evidence of voluntary intoxication before the jury, then the compulsory process right to present evidence is stifled, and the ability to move forward in the adversary process is obstructed").

14. *See, e.g.*, FLA. STAT. ANN. § 775.051 (West 2000) (abolishing the defense in 1999); OHIO REV. CODE ANN. § 2901.21(C) (West 1997 & Supp. 2000) (barring the defense in 2000). California State Senator Ray Haynes introduced a bill to ban the defense in 1998 and in 1999; thus far, he has met with little success. *See* California State Senate Republican Caucus, End the Voluntary Intoxication Defense, *at* http://republican.senate.ca.gov/opeds/36/oped114.asp (Jan. 22, 1999) (editorial by Sen. Ray Haynes).

15. Unlike voluntary intoxication, involuntary intoxication can be accurately described as a "defense." *See supra* note 5. Generally, an involuntarily intoxicated defendant will be entitled to acquittal. *See* DRESSLER, *supra* note 5, at 305.

16. A "nonculpable" manner is defined differently by various jurisdictions but generally includes the following: coerced intoxication, fraudulently induced intoxication, intoxication from prescription medicine, and pathological intoxication. *See* ROBINSON, *supra* note 2, § 65(g).

17. *Id.* § 65(a)(1). In drawing this conclusion, Robinson notes that many states' criminal statutes are silent regarding the availability of the involuntary intoxication defense; however, he concludes that where there are express provisions limiting the use of the voluntary intoxication

been unimpaired by the *Egelhoff* holding.[18] Despite the involuntary intoxication defense's apparent viability, it has been observed that, if one were to judge the state of the law from court opinions, the involuntary intoxication defense is "simply and completely non-existent."[19]

Ensuring the survival of the intoxication defenses may justifiably be seen as a questionable cause to champion. As one law student observed, "Even with my limited experience in the law, I know that presenting a defense like 'My client was too drunk so he shouldn't be criminally liable' is not the most palatable option for a case."[20] Yet, is it wise to allow our society's distaste for intoxicated offenders to abridge the basic right to present a defense? As currently formulated and applied, the intoxication defenses are problematic; however, revision, not abolition, should be the judicial and legislative response.

Part II of this Note discusses the genesis and subsequent history of the intoxication defenses. Part III explains the two primary versions of both the voluntary and involuntary intoxication defenses, and describes criticisms of each defense. Part IV examines various factors that may contribute to the current backlash against the intoxication defense. Part V examines the often problematic application of the intoxication defenses, showing how judges and juries may be effectively interpreting the defenses out of existence. Finally, Part VI proposes a statutory revision designed to better meet the goals of the intoxication defense.

II. THE TURBULENT HISTORY OF THE INTOXICATION DEFENSES

Perhaps more than any other criminal defenses, the viability of the intoxication defenses have been subject to the shifting whims of society. In *Egelhoff*, the Supreme Court rejected a due process argument for requiring the admission of intoxication evidence.[21] The *Egelhoff* Court concluded that, although the voluntary intoxication defense had gained validity in American criminal jurisprudence at the time of the Fourteenth Amendment's ratification, its

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defense, a state code's silence regarding the involuntary intoxication defense will be construed to indicate its availability. *Id.* at § 65(a)(1) n.4.

18. *See id.* (Supp. 2001).

19. JEROME HALL, GENERAL PRINCIPLES OF THE CRIMINAL LAW 539 (2d ed. 1960).

20. Alexey Y. Kaplunov, *Disproving Criminal Intent with a Shot Glass*, CHI. DAILY L. BULL., Dec. 29, 1998, at 5.

21. *See* 518 U.S. 37, 56 (1996).

checkered past and controversial present has barred it from consideration as a "fundamental principle of justice."[22] Some legal commentators have taken issue with the Supreme Court's brusque dismissal of the historical significance of this defense, noting that it has existed in the United States, in some form, for nearly two centuries.[23] This debate regarding the intoxication defense's "fundamental" nature merely represents the latest skirmish in a long legal war over the significance of intoxication evidence.

A. The Voluntary Intoxication Defense in Early English Common Law

At early English common law, the courts allowed no mitigation to a voluntarily intoxicated offender.[24] In *Reniger v. Fogossa*, a 1551 English case currently enjoying renewed attention thanks to Justice Scalia's reliance upon its "fundamental" principles in *Egelhoff*, it was observed:

> [I]f a person that is drunk kills another, this shall be Felony, and he shall be hanged for it, and yet he did it through Ignorance, for when he was drunk he had *no Understanding* nor Memory; but inasmuch as that Ignorance was occasioned by his own Act and Folly, and he might have avoided it, he shall not be privileged thereby.[25]

Some commentators believed that, rather than mitigating an offense, a defendant's voluntary intoxication should actually aggravate it.[26] The English courts' stern rejection of the voluntary intoxi-

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22. *See id.* at 43-48 (tracing the history of the voluntary intoxication defense in England and the United States, and concluding that "[i]nstead of the uniform and continuing acceptance we would expect for a rule that enjoys 'fundamental principle' status, we find that fully one-fifth of the States either never adopted the 'new common law' rule at issue here or have recently abandoned it").

23. Fitzpatrick, *supra* note 6, at 1254-55 (noting that the "voluntary intoxication defense [first] graced American criminal law in the nineteenth century" and "great weight must be given to the continuous duration of its existence and the fact that forty states currently permit use of the defense"). In an article assessing the intoxication defenses, written fifty years prior to *Egelhoff*, Professor Jerome Hall observed that even early English opponents of the voluntary intoxication defense experienced misgivings regarding a hard line ban on intoxication evidence. Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1048 (1944). According to Hall, these doubts were "reflected in mitigating doctrines left at odds with countervailing legal principles." *Id.*

24. *See, e.g.*, Carter, *supra* note 13, at 383; R.U. Singh, *History of the Defence of Drunkenness in English Criminal Law*, 49 LAW. Q. REV. 528, 530 (1933); *see also* Reniger v. Fogossa, 75 Eng. Rep. 1 (K.B. 1551) (approving death sentence for an extremely intoxicated offender).

25. *See* 518 U.S. at 45 (alteration in original) (quoting *Reniger*, 75 Eng. Rep. at 31).

26. *See id.* at 44 (citing 4 W. BLACKSTONE, COMMENTARIES *25-26 for authority). *But see* Hall, *supra* note 23, at 1046 (stating that Coke's and Blackstone's efforts to make inebriation an aggravating factor "met with no success"). In a 1933 article surveying the English history of the

cation defense has been variously described as arising from the Enlightenment assumption that people are "rational agents motivated by self-interest"[27] or, less benignly, as the product of a legal system that restricted a defendant's ability to call witnesses and present evidence.[28]

B. The Evolution of the Voluntary Intoxication Defense in America

Early American courts initially followed England's strict ban on the voluntary intoxication defense.[29] The 1847 American edition of Matthew Hale's *Pleas of the Crown* stated: " 'Drunkenness . . . can never be received as a ground to excuse or palliate an offence: this is not merely the opinion of a speculative philosopher, the argument of counsel, or the obiter dictum of a single judge, but it is a sound and long established maxim of judicial policy. . . . ' "[30] Early American judges expressed disdain for intoxicated offenders, embodied by the oft-quoted observation of Justice Story who, upon rejecting a party's intoxication evidence, noted: " 'This is the first time, that I ever remember it to have been contended, that the commission of one crime was an excuse for another. Drunkenness is a gross vice . . . . ' "[31]

By the late nineteenth century, however, judicial attitudes towards intoxication had begun to shift. A new "scientific" school of thought, which attributed criminal behavior to biological and environmental factors, began to replace the classical view that criminals were merely sinful and selfish individuals.[32] This revised outlook evoked increased sympathy for intoxicated offenders. In the 1819 case of *King v. Grindley*, an English court recognized that intoxication might serve as a defense to crimes requiring specific intent.[33] Eventually, the majority of American courts also allowed a

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intoxication defenses, R.U. Singh concluded that it would be difficult to determine whether, in actual practice of law, drunkenness ever served to aggravate an offense because there were simply no English cases on point. Singh, *supra* note 24, at 531.

27. Keiter, *supra* note 2, at 485-86.

28. *See* Kyndra K. Miller, Note, *Criminal Law-Intoxication as a Defense: The Drunk and Dangerous Model*, 33 LAND & WATER L. REV. 749, 751 (1998).

29. *See, e.g.*, Fitzpatrick, *supra* note 6, at 1243.

30. *See id.* (quoting 1 MATTHEW HALE, PLEAS OF THE CROWN *32 n.33).

31. *Egelhoff*, 518 U.S. at 44 (quoting United States v. Cornell, 25 F. Cas. 650, 657-58 (C.C.R.I. 1820) (Story, J.)); Carter, *supra* note 13, at 383 n.3.

32. Keiter, *supra* note 2, at 486.

33. Miller, *supra* note 28, at 751-52 (citing King v. Grindley, Worcester Sum. Assizes 1819 MS). *But see* Singh, *supra* note 24, at 537 (reporting that *Grindley* was overruled in the 1835 case *King v. Carroll* and that the judge in *Carroll* declared that "there would be no safety for human life if [*Grindley*'s rule] were to be considered as law").

voluntary intoxication defense to criminal charges that required a specific intent.[34]

The 1960s and 1970s constituted the heyday of the voluntary intoxication defense.[35] In 1956, the American Medical Association officially recognized alcoholism as a disease, thus providing support for the theory that voluntary intoxication was actually, in a sense, "involuntary" and more similar to mental illness than to criminal behavior.[36] Two federal circuit courts compared punishing an alcoholic's drinking to punishing an insane person, an infant, or a leper.[37] Legal commentators agreed, advocating leniency for intoxicated offenders with arguments such as: "If 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?"[38]

Unfortunately, the rise of the voluntary intoxication defense appeared to coincide with an increasing crime rate.[39] Statistics began to show a strong correlation between violent crime and self-induced intoxication. Inebriated offenders were implicated in fifty percent of homicides, sixty-two percent of aggravated assaults, and fifty percent of spousal abuses, rapes, and property offenses.[40] A

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34. *See* Fitzpatrick, *supra* note 6, at 1244. "Crimes requiring specific intent include burglary, assault with intent to rape, robbery, kidnapping, felonious escape, automobile theft, forgery, larceny, murder, assault with the intent to murder, and various other crimes." *Id.* at 1244 n.20 (relying upon 5 AM. JUR. 2d *Proof of Facts* § 4 (1994)). In the 1870 case *Roberts v. Michigan*, the Supreme Court of Michigan explained this new voluntary intoxication rule as follows:

> [T]he jury should have been instructed, that if his mental faculties were so far overcome by the intoxication, that he was not conscious of what he was doing, or if he did know what he was doing, but did not know why he was doing it, or that his actions and the means he was using were naturally adapted or calculated to endanger life or produce death; then he had not sufficient capacity to entertain the intent, and in that event they could not infer that intent from his acts. But if he knew what he was doing, why he was doing it, and that his actions with the means he was using were naturally adapted or likely to kill, then the intent to kill should be inferred from his acts in the same manner and to the same extent as if he was sober.

19 Mich. 401, 418-19 (Mich. 1870).

35. *See generally* Keiter, *supra* note 2, at 486-92; Miller, *supra* note 28, at 752.

36. *See* Keiter, *supra* note 2, at 486.

37. *See id.* The Supreme Court reined in this trend toward leniency in *Powell v. Texas*, 392 U.S. 514 (1968), holding that the Eighth Amendment did not prevent states from criminalizing public intoxication. *See* Keiter, *supra* note 2, at 487.

38. *See* GLANVILLE WILLIAMS, CRIMINAL LAW: THE GENERAL PART 564 (2d ed. 1961).

39. *See* Keiter, *supra* note 2, at 489-92 & n.53 (citing RUTH MASTERS & CLIFF ROBERSON, INSIDE CRIMINOLOGY 43 (1990)).

40. *See* Carter, *supra* note 13, at 384-85 (referring to statistics provided in Robert A. Moore, *Legal Responsibility and Chronic Alcoholism*, 122 AM. J. PSYCHIATRY 748 (1966) and Note, *Alcohol Abuse and the Law*, 95 HARV. L. REV. 1660, 1681-82 (1981)). A 1998 study by the U.S. Dep't of Justice reported similar alcohol/crime correlations. *See* Lawrence A. Greenfeld, *An Analysis of National Data on the Prevalence of Alcohol Involvement in Crime*, NCJ-168632, *available at* http://www.ojp.usdoj.gov/bjs/pub/ascii/ac.txt (Apr. 5-7, 1998, rev. Apr. 28, 1998).

study of convicted homicide offenders showed that the typical intoxicated killer consumed approximately eighteen drinks before committing the crime.[41] Courts began to question whether alcoholics were truly powerless in regulating their consumption.[42] Concern for victims of the intoxicated offender began to override any concern for the offender himself. As one commentator noted, "Legislatures have since been more inclined to see inebriated killers as killers rather than as inebriates."[43]

C. The Egelhoff *Case*

In 1987, in response to renewed concerns regarding intoxicated offenders, the Montana legislature amended a criminal statute that had allowed consideration of voluntary intoxication evidence in crimes requiring a specific intent.[44] The revised statute stipulated: " 'A person who is in an intoxicated condition is criminally responsible for his conduct and an intoxicated condition is not a defense to any offense and may not be taken into consideration in determining the existence of a mental state which is an element of the offense unless the defendant proves that he did not know that it was an intoxicating substance when he consumed, smoked, sniffed, injected or otherwise ingested the substance causing the condition.' "[45]

In the landmark case of *Montana v. Egelhoff*, a plurality of the U.S. Supreme Court upheld the validity of this revised statute.[46] Rejecting the defendant's constitutional challenge, the Court concluded that the Due Process Clause did not require the admission of voluntary intoxication evidence.[47] Fourteen other states have adopted the Montana approach to voluntary intoxication, either by common law[48] or by statute.[49] Legislators in other states

41. *See* Miller, *supra* note 28, at 752.
42. *See* Keiter, *supra* note 2, at 491.
43. *Id.*
44. Miller, *supra* note 28, at 750 n.18.
45. *See id.* (quoting MONT. CODE ANN. § 45-2-203 (1997)).
46. 518 U.S. 37, 56 (1996).
47. *See id.*
48. Mississippi and South Carolina courts have ruled to exclude evidence of intoxication under common law. *See* McDaniel v. Mississippi, 356 So. 2d 1151, 1161 (Miss. 1978); South Carolina v. Vaughn, 232 S.E. 2d 328, 330 (S.C. 1977).
49. State legislatures in Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Missouri, Montana, Ohio, Oklahoma, and Texas have passed statutes barring the admission of voluntary intoxication evidence. *See* ARIZ. REV. STAT. ANN. § 13-503 (West 2001); ARK. CODE ANN. § 5-2-207 (1999); DEL. CODE ANN. tit. 11, § 421 (1995); FLA. STAT. ANN. § 775.051 (2000); GA. CODE ANN. § 16-3-4(c) (1999); HAW. REV. STAT. ANN. §702-230(1) (Michie 1999);

have also introduced bills that would ban the defense of voluntary intoxication.[50]

D. The Involuntary Intoxication Defense

Unlike the more controversial voluntary intoxication defense, the involuntary intoxication defense enjoyed early recognition in Anglo-American common law.[51] In an 1835 action entitled *Pearson's Case*, an English court held, "If a party be made drunk by stratagem, or the fraud of another, he is not responsible."[52] This rule also extended to intoxication that resulted from a physician's lack of skill in prescribing medications.[53] Currently, American courts generally recognize the defense when the defendant's intoxication is the result of coercion,[54] fraud,[55] an unexpected effect from prescription medication,[56] or "pathological intoxication."[57] According to one commentator, however, a survey of case law reveals few examples where the involuntary intoxication defense has been effectively employed.[58]

IDAHO CODE § 18-116 (Michie 1997); IND. CODE ANN. § 35-41-3-5 (Michie 1998); MO. REV. STAT. § 562.076(1) (1999); MONT. CODE ANN. § 45-2-203 (2001); OHIO REV. CODE ANN. § 2901.21(C) (West 1997 & Supp. 2000); OKLA. STAT. ANN., tit. 21, § 153 (West 1987); TEX. PENAL CODE ANN. § 8.04(a) (Vernon 1994).

50. *See* California State Senate Republican Caucus, *supra* note 14.

51. *See* Singh, *supra* note 24, at 533.

52. Hall, *supra* note 23, at 1054-55 (quoting Pearson's Case, 168 Eng. Rep. 1108 (N.P. 1835)).

53. *Id.* at 1055.

54. Burrows v. Arizona, 297 P. 1029, 1031 (Ariz. 1931) (concerning young man who is told that he will be left in the desert if he does not drink alcohol), *overruled on other grounds by* Arizona v. Hernandez, 320 P.2d 467, 469 (1958). Although *Burrows* is sometimes cited as an example of coerced involuntary intoxication, *see* BASSIOUNI, *supra* note 8, at 475 n.136, the young defendant in *Burrows* was *not* relieved of responsibility for murder based on his intoxication, 297 P. at 1034.

55. Illinois v. Penman, 110 N.E. 894, 898 (Ill. 1915) (concerning defendant who was told that cocaine tablet was a breath freshener).

56. Kelly v. Salt Lake City Civil Serv. Comm'n, 8 P.3d 1048, 1050 (Utah Ct. App. 2000) (concerning police officer who exhibited bizarre behavior after taking prescription sleep aid).

57. Minnesota v. Martin, 591 N.W.2d 481, 486 (Minn. 1999). The term "pathological intoxication" or "pathological alcohol reaction" has been defined as "[a]n extraordinarily severe response to alcohol, especially to small amounts, marked by apparently senseless violent behavior, usually followed by exhaustion, sleep, and amnesia for the episode." Robert J. Pandina, *Idiosyncratic Alcohol Intoxication: A Construct that Has Lost Its Validity?*, *in* EXPLORATIONS IN CRIMINAL PSYCHOPATHOLOGY 142, 143 (Louis B. Schlesinger ed., 1996) (quoting MARK KELLER ET AL., A DICTIONARY OF WORDS ABOUT ALCOHOL 189 (1982)). The actual existence of this phenomenon has been often questioned by the medical and scientific communities. *Id.* at 142.

58. Hall, *supra* note 23, at 1056 (stating that while it is hazardous to generalize concerning an enormous body of law, "the reports record hardly a single decision actually holding that the defendant was involuntarily intoxicated"); *see also* DRESSLER, *supra* note 5, at 304 (calling Hall's

III. FORMULATIONS OF THE INTOXICATION DEFENSES

Currently, the voluntary intoxication defense remains available in thirty-five states. United States jurisdictions employ two primary formulations of the voluntary intoxication defense: the specific-intent version and the *Model Penal Code* (MPC) version.[59] The involuntary intoxication defense remains available in every state.[60]

A. The Specific-Intent Version of the Voluntary Intoxication Defense

First recognized in the 1819 English case *King v. Grindley*,[61] the "specific-intent" formulation of the voluntary intoxication defense remains the version of choice for a majority of states.[62] This formulation of the defense generally states that a person is not guilty of a crime if, as the result of his intoxication at the time of the offense, he was incapable of forming, or in fact did not form, the specific intent[63] required by the statutory definition of the offense.[64]

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assessment an "exaggeration," but admitting that cases of involuntary intoxication are "exceedingly uncommon"). Hall posited that current judicial standards for "involuntary" intoxication were unduly restrictive, noting that:

> [F]raud, narrowly interpreted in these cases to require complete innocence of the nature of alcoholic drink, wrongfully induced, cannot be perpetrated even on normal children . . . . As regards "coercion," the caselaw implies that a person would need to be bound hand and foot, and the liquor literally poured down his throat, or that he would have to be threatened with immediate serious injury, before the exception, so universally voiced, would have any effect on judicial decision.

Hall, *supra* note 23, at 1056.

59. *See* Keiter, *supra* note 2, at 492.

60. *See supra* notes 17-19 and accompanying text.

61. *See supra* note 33.

62. Twenty-two states admit intoxication as a defense only for crimes requiring a "specific intent." *See* CAL. PENAL CODE § 22 (West 2001); COLO. REV. STAT. ANN. § 18-1-804(1) (2001); 720 ILL. COMP. STAT. ANN. § 5/6-3(a) (West 2001); IOWA CODE ANN. § 701.5 (2001); KAN. STAT. ANN. § 21-3208(2) (2000); LA. REV. STAT. ANN. § 14:15(2) (2001); MINN. STAT. ANN. § 609.075 (2001); NEV. REV. STAT. ANN. §193.220 (Michie 2001); S.D. CODIFIED LAWS § 22-5-5 (Michie 2001); TENN. CODE ANN. § 39-11-503 (2000); UTAH CODE ANN. § 76-2-306 (2001); WASH. REV. CODE § 9A.16.090 (2001); WYO. STAT. ANN. § 6-1-202(a) (Michie 2001); Hook v. Maryland, 553 A.2d 233, 236 (Md. 1989); Massachusetts v. Troy, 540 N.E.2d 162, 166-67 (Mass. 1989); Michigan v. Langworthy, 331 N.W.2d 171, 172-75 (Mich. 1982); Nebraska v. Lesiak, 449 N.W.2d 550, 552 (Neb. 1989); New Mexico v. Tapia, 466 P.2d 551, 552-53 (N.M. 1970); North Carolina v. White, 229 S.E.2d 152, 157 (N.C. 1976); Rhode Island v. Sanden, 626 A.2d 194, 199 (R.I. 1993); Vermont v. D'Amico, 385 A.2d 1082, 1084 (Vt. 1978); West Virginia v. Keeton, 272 S.E.2d 817, 820 (W.Va. 1980); *see also* Keiter, *supra* note 2, at 519-20 (providing a similar list of jurisdictions employing the specific intent formulation of the voluntary intoxication defense).

63. Criminal offenses are generally classified as requiring either a "general intent" or a "specific intent." *See, e.g.*, United States v. Bailey, 444 U.S. 394, 403 (1980). Unfortunately, as the Supreme Court noted in *Bailey*, the terms "general intent" and "specific intent" have not been clearly defined:

In this context, the "specific intent" element means that, in addition to proving that the defendant committed a certain act (e.g., assault or breaking and entering), the prosecution must also prove that he did it with the intent to cause a particular result (e.g., breaking and entering *with the intent to commit a felony therein*).[65]

Among states adhering to the specific-intent version of the voluntary intoxication defense, there is a significant difference between statutes stipulating that the defendant must be "incapable of forming" the specific intent and statutes that merely require a determination that the defendant "did not form" the specific intent.[66] Professor Joshua Dressler explains this distinction by observing that acquittal should be more difficult to obtain in an "incapacity" jurisdiction because intoxication seldom renders a person incognizant to such a degree that he is incapable of forming an intention.[67] Dressler disfavors the "incapacity" language because it allows a jury to convict when "it determines that the defendant had the capacity to form the specific intent, without resolving the pertinent question—*did* the defendant form the intent?"[68]

Although the specific-intent rule is the oldest formulation of the voluntary intoxication defense, it is likely the most problematic. Commentators have called the distinction between general- and specific-intent crimes "an irrational anachronism,"[69] and have criticized the application of this formula as "illogical, inconsistent, and inequitable."[70] Critics of this version of the voluntary intoxication defense point out that there is often no substantial difference between the nature of general- and specific-intent offenses; therefore, application of the defense frequently hinges on the vagaries of legis-

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> Sometimes "general intent" is used in the same way as "criminal intent" to mean the general notion of *mens rea*, while "specific intent" is taken to mean the mental state required for a particular crime. Or, "general intent" may be used to encompass all forms of the mental state requirement, while "specific intent" is limited to the one mental state of intent. Another possibility is that "general intent" will be used to characterize an intent to do something on an undetermined occasion, and "specific intent" to denote an intent to do that thing at a particular time and place.

Id. (quoting WAYNE R. LAFAVE & AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW § 28 (1972)). For a list of offenses that are typically classified as "specific intent" crimes, see *supra* note 34.

64. *See* Carter, *supra* note 13, at 409.

65. *See id.* at 405.

66. *See* DRESSLER, *supra* note 5, at 298-99 n.37.

67. *Id.*

68. *Id.*

69. Miller, *supra* note 28, at 756.

70. Carter, *supra* note 13, at 411.

lative language choices.[71] In *New Jersey v. Stasio*, the New Jersey Supreme Court discussed the sometimes irrational results of the specific-intent rule, noting: "[W]here the . . . offense requires only general intent, such as rape, intoxication provides no defense, whereas it would be a defense to an attempt to rape, specific intent being an element of that offense. Yet the same logic and reasoning which compels exculpation due to the failure of specific intent to commit an offense would equally compel the same result when a general intent is an element of the offense."[72]

B. The Model Penal Code *Version of the Voluntary Intoxication Defense*

Widespread dissatisfaction with the specific-intent formulation of the voluntary intoxication defense led to the creation of a new version of the defense that does not distinguish between general and specific-intent crimes.[73] Under the MPC rule, a defendant is not guilty of the offense charged if he lacked the state of mind

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71. Miller, *supra* note 28, at 756. The Florida Supreme Court's statutory analysis in *Frey v. Florida* clearly illustrates this problem. 708 So. 2d 918 (Fla. 1998). In *Frey*, the defendant was convicted of "aggravated battery on a law enforcement officer" and "resisting arrest with violence." *Id.* at 919. On appeal, he argued that "resisting arrest with violence" was a specific-intent crime and that his requested instruction on voluntary intoxication should have been given. *Id.* Even though "aggravated battery on a law enforcement officer" had been classified as a specific-intent crime, the court concluded that "resisting arrest with violence" was a general-intent crime because the statute stated that " '[w]hoever knowingly and willfully resists, obstructs, or opposes any officer . . . in the lawful execution of any legal duty, by offering or doing violence to the person of such officer . . . is guilty of a felony of the third degree . . .' " *Id.* at 919-20 (quoting FLA. STAT. Ch. 843.01 (1993). The court noted that "resisting arrest with violence" would be a specific-intent offense if the statute were recast to read "[w]hoever knowingly and willfully resists . . . an officer . . . in the lawful execution of any legal duty, *with the intent of doing violence to the person of such officer* . . . is guilty of a felony of the third degree." *Id.* at 920 & n.2 (emphasis added).

72. 396 A.2d 1129, 1133-34 (N.J. 1979) (citation omitted).

73. *See supra* notes 64, 70-72 and accompanying text; *see also* California v. Hood, 462 P.2d 370, 377-78 (Cal. 1969) (stating that crimes are "too often" characterized as either specific- or general-intent based solely upon the presence or absence of words describing a mens rea in the statutory language of the offense).

required with respect to an element of the crime.[74] Currently, ten states adhere to the MPC version of the defense.[75]

Despite its improvements upon the specific-intent rule, the MPC's formulation of the voluntary intoxication defense has also evoked controversy, primarily with respect to its treatment of crimes that incorporate a "reckless" mens rea in their definitions.[76] The MPC stipulates that in cases involving voluntary intoxication, a defendant will be deemed to have acted "recklessly" if he was not conscious of a risk of which he would have been aware when sober.[77] Therefore, under the MPC, an intoxicated person who merely behaved negligently can be punished for a reckless crime.[78]

C. The Involuntary Intoxication Defense

The involuntary intoxication defense is available to a defendant who became inebriated in a nonculpable manner.[79] The exact meaning of the phrase "nonculpable manner" varies from jurisdic-

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74. DRESSLER, *supra* note 5, at 306. Dressler provides the following example to illustrate the MPC test:

> [A]ssume that under state law "rape" occurs when a male "knowingly has nonconsensual sexual intercourse with a female not his wife." Under this statute, *D* would be entitled to acquittal if, because of his self-induced intoxication, he did not have the knowledge required by the offense, e.g., he did not know that he was having intercourse, he did not know that the female did not consent, or he did not know that the victim was a "female not his wife."

Id.

75. *See* ALA. CODE § 13A-3-2(b) (1994); CONN. GEN. STAT. ANN. § 53a-7 (West 2001); KY. REV. STAT. ANN. § 501.080(1) (Michie 1999); ME. REV. STAT. ANN. Tit. 17-A, § 37 (West 2001); N.H. REV. STAT. ANN. § 626:4 (1996); N.J. STAT. ANN. § 2C:2-8 (West 1995); N.Y. PENAL LAW § 15.25 (McKinney 1998); N.D. CENT. CODE § 12.1-04-02 (1997); OR. REV. STAT. § 161.125 (1990 & 1998 Supp.); WIS. STAT. ANN. § 939.42(2) (West 2001). For an extensive discussion of one state's rejection of the specific-intent rule in favor of the MPC formulation, see New Jersey v. Cameron, 514 A.2d 1302, 1303-08 (N.J. 1986).

76. *See, e.g.*, PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY & BLAME 105-06 (1995).

77. MODEL PENAL CODE § 2.08(2) (1962).

78. MPC Commentary contends that awareness of the potential dangers of intoxication is now so widespread as to justify generally equating "the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk." MODEL PENAL CODE § 2.08 cmt. (1962). This blanket assumption might be countered by a contrary opinion expressed by Professor Jerome Hall:

> [S]ince drinking alcoholic liquor is not usually followed by gross intoxication and such intoxication does not usually lead to the commission of serious injuries, it follows that persons who commit them while grossly intoxicated should not be punished unless, at the time of sobriety and the voluntary drinking, they had such prior experience as to anticipate their intoxication and that they would become dangerous in that condition.

HALL, *supra* note 19, at 556.

79. BASSIOUNI, *supra* note 8, at 475.

tion to jurisdiction,[80] but typically includes: coerced intoxication, fraudulently induced intoxication, intoxication from prescription medicine, and pathological intoxication.[81] In states where the involuntary intoxication defense has been codified, statutes typically stipulate that involuntary intoxication is a defense if, as a result of the involuntary intoxication, the defendant lacked the capacity to know or appreciate the nature, quality, or wrongfulness of his conduct.[82] Generally, a defendant who was involuntarily inebriated at the time of an offense will be acquitted of both specific- and general-intent crimes.[83]

As in the case of voluntary intoxication,[84] the MPC formulation[85] of the involuntary intoxication defense allows a defendant to produce intoxication evidence to negate the requisite mens rea regarding any element of an offense (except in offenses involving "recklessness").[86] The MPC also allows an involuntarily inebriated defendant to invoke his intoxication as an affirmative defense when it resulted in a condition that would meet the MPC test for insanity.[87]

IV. CHALLENGES TO THE CONTINUED EXISTENCE OF THE INTOXICATION DEFENSES

Even in jurisdictions where the intoxication defenses are allowed, a wise lawyer might well shy away from employing them.

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80. *See, e.g.*, ALA. CODE § 13A-3-2(c) cmt. (2000) ("Involuntary intoxication is intoxication resulting from force, fraud or artifice . . . ."); GA. CODE ANN. § 16-3-4(b) (Michie 2000) ("Involuntary intoxication means intoxication caused by: (1) consumption of a substance through excusable ignorance; or (2) [t]he coercion, fraud, artifice, or contrivance of another person."). Many jurisdictions leave the definition of involuntary intoxication to be determined through the negative inferences of the voluntary intoxication definition. *See, e.g.*, WYO. STAT. ANN. § 6-1-202(b) (Michie 2001) ("Intoxication is self-induced if it is caused by substances which the defendant knows or ought to know have the tendency to cause intoxication and which he knowingly and voluntarily introduced or allowed to be introduced into his body unless they were introduced pursuant to medical advice.").

81. *See supra* notes 54-57.

82. *See, e.g.*, DEL. CODE ANN. tit. 11, § 423 (2000); 720 ILL. COMP. STAT. ANN. § 5/6-3 (West 2001); MO. ANN. STAT. § 562.076(1) (West 2001).

83. *See* DRESSLER, *supra* note 5, at 305.

84. *See supra* Part III.B.

85. *See, e.g.*, ALA. CODE § 13A-3-2 (stipulating that "intoxication, whether voluntary or involuntary, is admissible in evidence whenever it is relevant to negate an element of the offense charged").

86. MODEL PENAL CODE § 2.08(1) (1962).

87. *Id.* § 2.08(4). The MPC test for insanity is stated as follows: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01(1) (1962).

Perhaps more than any other aspect of the criminal law, the treatment of the intoxicated offender calls into question our own moral values and forces us to examine our empathy for and aversion to human frailty. Should we sympathize with the intoxicated offender? And if we sympathize with him, are we doing so at the expense of his innocent victim? This moral dilemma highlights merely one of the challenges to the continued existence of the intoxication defenses.

A. The Intoxication Defenses Do Not Conform with Theories of Punishment

Legal scholars advance three primary theories to justify the punishment of criminals: utilitarianism, retributivism, and denunciation.[88] The intoxication defenses, as currently formulated and applied, tend to conflict with all three theories.

1. The Utilitarian Model

Utilitarians believe that laws should be formulated to deter criminal or antisocial conduct.[89] Given the statistics currently linking intoxication and criminal behavior,[90] the voluntary intoxication

88. *See, e.g.*, DRESSLER, *supra* note 5, at 8-14; Ronald J. Rychlak, *Society's Moral Right to Punish: A Further Exploration of the Denunciation Theory of Punishment*, 65 TUL. L. REV. 299, 300-01 (1990); *see also* Morris Raphael Cohen, *Moral Aspects of the Criminal Law*, *in* CRIME, LAW, AND SOCIETY 35, 47-49 (Ahraham S. Goldstein & Joseph Goldstein eds., 1971) (discussing retributivism); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454-55 (1997) (contrasting the ultilitarian and retributivist views).

89. *See* Robinson & Darley, *supra* note 88, at 454-55.

90. A 1998 analysis of the alcohol-crime link reported that "nearly 4 in 10 violent victimizations involve use of alcohol . . . and about 4 in 10 offenders . . . self-report that they were using alcohol at the time of the offense." *See* Greenfeld, *supra* note 40. It should be noted that some researchers have questioned the traditional "intoxication leads to crime" assumption, observing that these statistics may be equally indicative of an opposite hypothesis that "crime leads to intoxication." *See* Helene Raskin White & D.M. Gorman, *Dynamics of the Drug-Crime Relationship*, *in* NATIONAL INSTITUTE OF JUSTICE, CRIMINAL JUSTICE 2000, at 151, 174 (2000), *available at* http://www.ojp/usdoj.gov/nij/criminal_justice2000/vol2_2000.html. Raskin White and Gorman observe that "several aspects of the professional criminal lifestyle are conducive to heavy drinking and drug use, such as working periodically, partying between jobs, being unmarried, and being geographically mobile." *Id.* (citations omitted). They further observe that "[i]n addition to subcultural and lifestyle explanations, it has been proposed that deviant individuals may use drugs in order to self-medicate or to give themselves an excuse to act in a deviant manner." *Id.* (citations omitted). Although interesting, the potential significance of this alternate theory is somewhat deflated by statistics revealing that two-thirds of victims who were attacked by an "intimate" (current or former spouse, significant other) reported that alcohol had been a factor in

defense runs afoul of a utilitarian legal model because it does not serve to deter excessive drinking or drug use, which may lead to crime. It has been argued that by reducing criminal liability the voluntary intoxication defense may, in fact, provide some form of perverse incentive to a would-be offender.[91] This point has been the focus of much virulent criticism directed at the voluntary intoxication doctrine.[92]

The involuntary intoxication defense initially appears to be more cohesive with the principles of utilitarianism. After all, punishment will not deter antisocial conduct when that conduct is not the product of the defendant's free will. One could, however, present an argument that the involuntary intoxication defense also appears to encourage antisocial or socially undesirable conduct, in some cases. Conceivably, a person may have fewer qualms about coercing or tricking another into taking an intoxicant when he knows that his victim will not incur liability for any resulting actions.[93] If an involuntary intoxication defense was entirely unavailable to people who suffer ill effects from prescription medication, physicians might be encouraged to take extra care in explaining to patients the possible, even if very unusual, side effects of certain drugs.[94]

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the crime. Greenfeld, *supra* note 40. Presumably, these "intimate" crimes were not typically perpetrated by "career criminals."

91. *E.g.*, Keiter, *supra* note 2, at 510 ("Far from deterring excessive intoxication, states limiting intoxicated offenders' responsibility effectively subsidize intoxication to the extent they allow it to exculpate. Limits on their legal responsibility assure inebriates they may consume dangerous intoxicants, secure in the knowledge that the law will shield them from serious punishment.").

92. *See, e.g., id. But see* Hall, *supra* note 23, at 1048 (dismissing this argument as irrational). Hall states: "Since a person who planned to commit a crime would not wish to incapacitate himself by becoming grossly intoxicated (and that is the degree relevant to the moot issues of penal responsibility), even less persuasive is the argument that prospective offenders would actually become intoxicated 'as a shield.' Such professed grounds of decision indicate bias against inebriate wrongdoers rather than rational support of the rule." *Id.*

93. *See generally* Illinois v. Penman, 110 N.E. 894, 900 (Ill. 1915) (concerning defendant who ingested cocaine tablets after being told that they were breath fresheners). This Note does not mean to suggest that the actor in this case was influenced by the existence of the involuntary intoxication defense. The case is merely given as an example of a situation in which awareness of the defense could be construed to be an underlying factor.

94. *See* Kelly v. Salt Lake City Civil Serv. Comm'n, 8 P.3d 1048, 1050-51 (Utah Ct. App. 2000) (concerning physician who prescribed sleep aid for defendant and stated that it was not unusual for patients taking the same dosage as defendant to act in a "bizarre fashion" and consistently warned patients to go straight to bed after taking the drug, but could not specifically recall telling the defendant to do so).

2. The Retributivist Model

Retributivism argues that a person should be punished when he chooses to violate the law, regardless of whether the punishment will have any future deterrent effect on crime in society.[95] Sometimes characterized as a "just deserts" philosophy,[96] retributivism also advocates punishment in proportion to the offender's moral desert for the crime.[97] In principle, the intoxication defenses comply with this theory of liability. It is not a crime merely to become intoxicated. Therefore, when an intoxicated individual commits a crime, a retributivist would want to assess whether this person was able to "freely choose" to violate the law in his inebriated condition. The intoxication defenses, accordingly, allow for consideration of the defendant's "culpable mental state."[98]

In practical application, however, the voluntary intoxication defense often appears to thwart the aims of retributivism rather than to further them. As previously noted, the specific-intent version of the defense places undue emphasis on the wording of criminal statutes, resulting in illogical and inequitable distinctions between those defendants who may take advantage of the defense and those who may not.[99] By jettisoning the artificial distinction between general and specific intent, the MPC formulation of the voluntary intoxication defense ostensibly allows for a more just assessment of the defendant's culpability. In practice, however, its inherent presumption of recklessness can result in equally odd outcomes, with negligent intoxicated offenders finding that they face the same liability as purposeful intoxicated offenders.[100]

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95. Robinson & Darley, *supra* note 88, at 454-55.

96. *Id.* at 454.

97. Cohen, *supra* note 88, at 47-48.

98. *See supra* Part III.

99. *See supra* Part III.A.

100. Professors Paul H. Robinson and John M. Darley discuss this phenomenon in the book *Justice, Liability & Blame*, observing:

> Given this approach by current law [culpable intoxication immediately establishes a minimum culpability level of recklessness], the primary focus of inquiry in investigations and trials is on whether the person has the minimum required culpability as to becoming intoxicated ["negligence" in MPC § 2.08(5)(b)]. A higher culpability as to becoming intoxicated—recklessly, knowingly, or purposely—does not increase the person's liability. Nor do different levels of a person's pre-intoxication culpability as to committing the offense have a bearing on his liability. In concrete terms, this means that a person may only be negligent as to becoming intoxicated but that the law will impute recklessness to him or her—even recklessness as to causing death. . . .
>
> At the same time, an individual who (for one reason or another) intentionally desires to harm another, gets intoxicated, and does so, is given the same li-

3. The Denunciation Model

The denunciation theory justifies punishment as a means of declaring society's intolerance for criminal conduct.[101] It is essentially a hybrid of utilitarianism and retributivism, simultaneously embracing utilitarian goals, such as reinforcing standards for proper conduct within the community, and retributivist goals, such as stigmatizing the offender.[102] In a denunciation model of criminal law, the voluntary intoxication defense can be quite problematic. Like many current beer commercials, which glorify the joys of intoxicating wares while surreptitiously tacking on a brief "drink responsibly" message, jurisdictions that allow the voluntary intoxication defense may send a mixed message regarding proper societal conduct. In theory, the voluntary intoxication defense may appear to endorse inebriation by allowing mitigated liability;[103] but, in reality, drunken defendants often face judges and juries hostile to the defense.[104] While our society disdains the inebriate to such an ex-

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ability treatment as an individual who has no desire to harm another but gets intoxicated and does so accidentally.

ROBINSON & DARLEY, *supra* note 76, at 105.

101. Rychlak, *supra* note 88, at 331.

102. *Id.* at 331-32; *see also* DRESSLER, *supra* note 5, at 13 (describing denunciation as a hybrid of utilitarianism and retributivism).

103. This Note does not mean to suggest that the intoxication defenses are *intended* to endorse inebriation or that they actually serve to do so; however, this "endorsement" criticism has been voiced too frequently by opponents of the intoxication defenses for it to be blithely dismissed by the defense's advocates. State Senator Ray Haynes, who has introduced bills to ban the defense in California, professes in his promotional literature, "[O]ur state [by allowing the voluntary intoxication defense] says to criminals, 'If you are going to go out and murder somebody, get drunk or high first, that will help you beat the rap.' " California State Senate Republican Caucus, End the Voluntary Intoxication Defense, *at* http://republican.senate.ca.gov/opeds/36/oped114.asp (Jan. 22, 1999) (editorial by Sen. Ray Haynes); *see also* Hall, *supra* note 23, at 1048 (discussing the argument that intoxication may be used "as a shield" by offenders if the defense is allowed); Keiter, *supra* note 2, at 510 (arguing that the intoxication defenses teach "potential offenders that antisocial behavior is tolerated when it is committed under the influence of illegal drugs or alcohol").

104. Although there are no current statistics regarding judge and jury attitudes toward the voluntary intoxication defense, recent court opinions offer ample evidence of decreased tolerance for intoxicated offenders in today's "Just Say No" climate. *See* Chattin v. Florida, 779 So. 2d 415, 415 (Fla. Dist. Ct. App. 2000) (concerning number of prospective jurors who stated that they could not follow a voluntary intoxication defense instruction if given, and judge neglected to strike two of these jurors); Wells v. Florida, 776 So.2d 1129 (Fl. Dist. Ct. App. 2000) (concerning trial judge who committed reversible error by failing to strike jurors who stated that they would have difficulty applying the voluntary intoxication defense). A defendant's invocation of the voluntary intoxication defense may ironically result in a harsher sentence from judges and juries who perceive the defense as an attempt to avoid personal responsibility. In *Tennessee v. Wagner*, a truck driver presented evidence of amphetamine intoxication in his defense to charges of reckless driving, aggravated assault, and evading arrest. C.C.A. No. 02C01-9809-CC-00264, 1999 Tenn. Crim. App. LEXIS 1344, at *1 (Tenn. Crim. App. Dec. 30, 1999). In reviewing his sentence,

tent that mere public drunkenness can be considered a crime,[105] the voluntary intoxication defense perversely seems to reward drunken behavior by reducing criminal punishment.[106] This disjuncture between societal norms of proper conduct and the sort of conduct "endorsed" by the voluntary intoxication defense creates a significant legal tension in a denunciation model of criminal punishment.

As with the other two theories of criminal punishment, the involuntary intoxication defense fares better in a denunciation model.

B. The Intoxication Defenses Can Be Counterintuitive to a Layperson

Regardless of whether a criminal defense conforms to legal philosophers' various theories of punishment, application of the defenses will ultimately be problematic if they do not conform to social intuitions regarding what the law should be.[107] For instance, a law that offends the sensibilities of the average citizen may be subject to nullification by a hostile jury.[108]

In their 1995 book *Justice, Liability & Blame*, Professors Paul H. Robinson and John M. Darley reported the results of two original studies examining community attitudes toward the MPC versions of the voluntary and involuntary intoxication defenses.[109] Although the community view and the MPC's version were not as far apart in their basic philosophies as the professors originally hy-

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a dissenting appellate court judge noted, "I find the six year sentence is necessary to protect the public in view of the defendant's refusal to accept responsibility for his use of drugs and driving . . . ." *Id.* at *37 (Hayes, J., dissenting); *see also Wells*, 766 So. 2d at 1130 (concerning prospective juror who stated that she would have trouble applying the defense because she believed in people "accepting responsibility" for their actions).

105. The crime of public drunkenness often merely involves appearing drunk in public. PETER MCWILLIAMS, AIN'T NOBODY'S BUSINESS IF YOU DO: THE ABSURDITY OF CONSENSUAL CRIMES IN OUR FREE COUNTRY 444 (1996). It often does not involve any other antisocial activities, such as trespassing or disturbing the peace. *Id.*; *see, e.g.*, IND. CODE ANN. § 7.1-5-1-3 (West 2001) (stipulating that "[i]t is a Class B misdemeanor for a person to be in a public place or a place of public resort in a state of intoxication"). Contrary to what one might think, public drunkenness laws are not collecting dust on some back room shelf of the local police precinct—apparently they are still vigorously enforced. MCWILLIAMS, *supra* note 105, at 444. In 1994, more than six percent of all arrests (or 713,200 total) were for public drunkenness. *Id.*

106. *See supra* note 103.

107. *See generally* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 151-55 (1986) (discussing laws that were often nullified by juries because they were "unpopular in the community" or seen as unduly harsh).

108. *See id.*

109. ROBINSON & DARLEY, *supra* note 76, at 114-15, 146-47.

pothesized, the "average"[110] citizen's moral intuitions did conflict with the MPC in a number of significant ways.[111]

1. The Voluntary Intoxication Study

Robinson and Darley's voluntary intoxication study presented respondents with various scenarios in which the defendant, despondent over his roommate's affair with his girlfriend, becomes intoxicated and subsequently beats an individual to death with a lead pipe.[112] In reviewing the respondents' attitudes toward their hypothetical voluntarily intoxicated offender, Robinson and Darley found two primary conflicts between the respondents' views and the tenets of the MPC.[113] First, the respondents placed great emphasis on the offender's pre-intoxication culpability in committing the crime while the MPC places no such importance on this factor.[114] Robinson and Darley noted: "[W]hen a person is purposeful as to causing death before he becomes intoxicated, the subjects would impose liability for murder although [the MPC's] voluntary intoxication provisions impose liability only for manslaughter. That is, the [MPC], counterintuitively, do[es] not discriminate the case of the individual who is purposeful about killing another beforehand

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110. There is some question regarding the actual "averageness" of the professors' respondent pool. *See* Deborah W. Denno, *The Perils of Public Opinion*, 28 HOFSTRA L. REV. 741, 745-51 (2000). Professors Robinson and Darley admitted this potential flaw in the studies, stating:

> [A] difficulty with our studies is not inherent in the research design but lies instead in the particular procedures we used for selecting our respondents. Putting it inelegantly, we grabbed whomever we could get our hands on. Typically, the subjects were neighbors, family or friends of the students.

ROBINSON & DARLEY, *supra* note 76, at 222. Analyzing census data, Professor Deborah Denno later concluded that Robinson and Darley's respondents were wealthier, better educated, and more Republican than the rest of the country. Denno, *supra* at 751. In addition, minorities appeared to be underrepresented while females were slightly overrepresented. *Id.* Despite this limitation, the book is an excellent resource for exploring the layperson's view of the criminal codes. *See id.* at 766 (noting that the book is "enormously enlightening on a wide range of topics").

111. ROBINSON & DARLEY, *supra* note 76, at 114-15, 146-47.

112. *Id.* at 107. In some scenarios the defendant killed the duplicitous roommate, in others he killed a drinking buddy. *Id.* The scenarios also varied the defendant's mental state prior to drinking (i.e., *D* plans to kill roommate prior to becoming intoxicated, *D* is merely angry with roommate prior to becoming intoxicated, etc.) and his culpability for his intoxication (i.e., *D* intended to get drunk, *D* did not realize that alcohol would mix with medication to produce extreme intoxication, etc.). *Id.* It should be noted that the violence of the particular scenario employed by this voluntary intoxication study may have colored the respondents' reactions to the defense. *See* Denno, *supra* note 110, at 755-56 (pointing out that certain scenarios used in the Robinson and Darley studies were more lurid than others and may have generated more antipathy in the respondents).

113. ROBINSON & DARLEY, *supra* note 76, at 115.

114. *Id.*

and then gets drunk and kills from the case of the individual who has no such pre-intoxication purpose."[115]

Second, Robinson and Darley noted that the defendant's level of culpability in becoming intoxicated had a slight effect on the liability assigned by the respondents, while the MPC does not differentiate between levels of culpability in becoming intoxicated once the threshold of negligence has been established.[116] The professors observed that "the alteration of liability judgments caused by the person's level of culpability for getting intoxicated is inconsistent with the doctrine's treatment of a person's culpability as to becoming intoxicated as a simple 'trigger'—a minimum requirement—rather than as a liability factor."[117] In their summary of the voluntary intoxication study's results, Robinson and Darley suggested that this conflict could be resolved by revising the MPC to impose a slightly higher degree of liability upon defendants who exercise a greater level of culpability in becoming intoxicated.[118]

Unfortunately, Robinson and Darley's study provides minimal help in determining whether the MPC's imposition of a reckless mens rea on a negligently intoxicated offender is amenable to the general population.[119] The professors noted that "[c]oncerns that negligence as to becoming intoxicated might be too low a level on which to impose liability cannot be perfectly tested in this study since the respondents see the person we tried to portray as negligent[120] as about midway between negligent and reckless."[121]

2. The Involuntary Intoxication Study

Robinson and Darley's involuntary intoxication study employed a hypothetical between two brothers who have a history of antagonism.[122] After an argument, one brother, who has become involuntarily intoxicated, waits until the other brother has fallen

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115. *Id.* Robinson and Darley note that the codes do not *prevent* a prosecutor from presenting this evidence of the pre-intoxication motive to kill—it is simply not a consideration in their formulation of the defense. *Id.*

116. *Id.*

117. *Id.* at 113.

118. *Id.* at 115.

119. *Id.* at 114.

120. In Robinson and Darley's negligent intoxication scenario, the defendant is taking medication for a back condition. *Id.* at 107. The defendant "never reads the warning label on his medication and is unaware of any possibility that the medication will react with alcohol to produce severe intoxication, although the warning label clearly states this." *Id.*

121. *Id.* at 114.

122. *Id.* at 140.

asleep, douses him with kerosene, and sets him on fire.[123] The involuntary intoxication is caused by an unexpected interaction between two medications—a painkiller to control long-term pain and an over-the-counter cold medicine.[124] The physician who prescribed the painkiller failed to mention any drug interaction side effects, and the brother did not think to ask.[125]

Robinson and Darley varied the intoxicated brother's degree of incapacity from the interaction.[126] In one sense, the results of the study were predictable: respondents placed a higher liability on the intoxicated brother in the scenarios where his cognition and control were the least impaired by the drug interaction.[127] A surprising aspect of the study revealed that, in all but one scenario,[128] a majority of the respondents imposed some punishment on the involuntarily intoxicated brother.[129] This result conflicts with the general common law rule that involuntary intoxication entitles a defendant to acquittal in specific- and general-intent crimes.[130]

C. The Intoxication Defenses Are Difficult to Apply

The need to establish a mens rea (a "guilty mind") in criminal prosecutions is a basic principle of law[131] that becomes incredibly murky when dealing with the intoxicated defendant. The concept of general- and specific-intent crimes originated due to the difficulty of establishing the exact criminal intentions of an inebriated

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123. *Id.* As with Robinson and Darley's voluntary intoxication scenario, *see supra* Part VI.B.1, the exceptionally violent nature of the crime presented in this scenario may have made the hypothetical defendant particularly unsympathetic to respondents and colored their responses to the involuntary intoxication defense in general. *See* Denno, *supra* note 110, at 755-56.

124. ROBINSON & DARLEY, *supra* note 76, at 140. Robinson and Darley noted that they included the over-the-counter cold medicine in the scenario in order to create the perception of a relatively safe drug that a person could reasonably expect not to interact with the painkiller. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 141.

128. In the scenario in which the intoxicated brother had a "high cognitive dysfunction" (an unawareness of the meaning or the wrongfulness of the harmful actions), fifty-two percent of the respondents concluded that he should not punished and/or liable for his actions. *Id.* at 141 tbl.5.5. Robinson and Darley noted that, interestingly, respondents read a high cognitive dysfunction as implicitly incorporating a high level of control dysfunction as well. *Id.* at 143-44. The professors observed, "Intuitively, a person who is thinking so oddly as to be unaware of the wrongfulness of killing somebody may be seen by respondents as not able to stop the action because he or she sees no moral need to stop it." *Id.* at 144.

129. As previously observed, the particularly gruesome nature of the control scenario—fiery fratricide—may have contributed to the respondents' desire to impose some form of liability on the involuntarily intoxicated brother. See *supra* notes 112, 123.

130. DRESSLER, *supra* note 5, at 304-05.

131. KADISH & SCHULHOFER, *supra* note 7, at 217.

offender.[132] Unfortunately, this judicial band-aid merely serves to exacerbate the problem by attempting to impose an artificial construct, unsupported by scientific evidence,[133] on the eternal conundrum presented by the intoxicated actor: "What was he thinking?"

In a criminal prosecution, the attempt to determine whether an intoxicated defendant acted purposely, knowingly, recklessly, or with sufficient malice often threatens to turn judge and jury into amateur psychologists and philosophers. Consider a case where the voluntarily intoxicated defendant hallucinates and, in this state, injures a person whom he mistakenly believes will harm him.[134] The defendant has acted intentionally within the context of his hallucination; however, since he would never have committed the crime but for his delusion, can the defendant really be held to have committed an intentional offense?[135]

Next, consider a case in which the defendant committed a murder to which there are no witnesses. The defendant claims to remember nothing of the crime and the medical examiner testifies that, at the time of the murder, the defendant would, in fact, have had a very high blood alcohol content (in the range of 0.26 to 0.30).[136] Under these circumstances, can one conclude beyond a reasonable doubt whether the defendant acted purposely, knowingly, or recklessly?[137]

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132. Layton, *supra* note 4, at 553.

133. Carter, *supra* note 13, at 413 (noting that "[t]here is no scientific evidence presented to confirm the intuitive assumption that alcohol obliterates specific intent thougbts, but not general intent thoughts," and reporting that "Professor [Jerome] Hall, in 1948, noted that the intention to perform a bodily movement is usually inseparable from the reason why the movement is performed"); *see also supra* note 64 (noting that the terms "specific intent" and "general intent" have never been sufficiently defined).

134. *See* Iowa v. Hall, 214 N.W.2d 205, 206 (Iowa 1974) (concerning a defendant who, high on LSD and hallucinating, killed a person whom he believed was a rabid dog); Tennessee v. Wagner, C.C.A. No. 02C01-9809-CC-00264, 1999 Tenn. Crim. App. LEXIS 1344, at *2-10 (Tenn. Crim. App. Dec. 30, 1999) (concerning a defendant afflicted with amphetamine-induced psychosis, who ran a number of cars off the road believing that they contained snipers who were out to get him). Both cases are discussed in greater detail *infra* Part V.C.

135. Judging by the verdicts in *Iowa v. Hall* and *Tennessee v. Wagner*, the answer to this question appears to be "yes." *See infra* Part V.C.

136. *See* Minnesota v. Crowsbreast, No. C3-00-14, 2000 WL 1664730, at *1 (Minn. App. Nov. 7, 2000).

137. In the *Crowsbreast* case, a jury found the defendant guilty of second-degree intentional murder, second-degree felony-murder, and first-degree assault. *Id.* at *1. The Minnesota Court of Appeals affirmed: "By finding Crowsbreast guilty of second-degree intentional murder, the jury implicitly rejected his voluntary intoxication defense. Although the evidence indicates that Crowbreast's blood alcohol content was quite high, between 0.26 and 0.30, at the time of the murder, the supreme court has affirmed a jury's finding of intentional homicide by defendants with comparably high blood-alcohol levels." *Id.* at *3. For an estimate of the physical effects of a 0.26 or 0.30 BAC, see *supra* note 6.

An understandable discomfort in attempting to solve such riddles may be largely responsible for the current move away from the intoxication defenses.[138]

V. THE INTOXICATION DEFENSES ARE ESSENTIALLY UNAVAILABLE AS CURRENTLY CONSTRUED

While the criminal code books in a majority of American jurisdictions still retain some formulation of the intoxication defenses, judges and juries appear increasingly inclined to interpret the defenses in a manner that ultimately provides little or no defense at all. For example, one response to the problem of determining an intoxicated actor's exact state of mind has been to construe the intoxication defenses in such a way that only an entirely incapacitated actor could effectively contend that he did not act with the necessary mens rea.[139] The following cases serve to illustrate further various ways in which restrictive or questionable legal interpretations serve to abridge the use of the intoxication defenses.

A. Intoxication Must Render the Defendant Unconscious

In some cases, judges and juries have found that the defendant's mere ability to remain conscious demonstrates enough awareness to negate the intoxication defenses.[140] In *Kansas v. Walker*, the Supreme Court of Kansas directly addressed this issue.[141] The defendant in *Walker* complained that the trial court's jury instruction regarding voluntary intoxication presented a verbal Catch-22 by stating that intoxication must have rendered the defendant "utterly devoid of consciousness or awareness" in order to be considered as a defense.[142] The defendant contended that this instruction would make the voluntary intoxication defense available only where the defendant was comatose at the time of the of-

138. *See generally* Miller, *supra* note 28, at 757-58 (observing that "[g]iven the lack of scientific evidence concerning how alcohol affects intent, it is not surprising that both the Montana and the MPC approach seem tentative in recognizing the intoxication defense").

139. *See* Hall, *supra* note 23, at 1050. Hall noted that, even when jurisdictions pay "lip service" to the intoxication defenses, the practical usefulness of these exculpatory doctrines can be greatly abridged "by the insistence that 'the intoxication must be . . . of that degree and extent as renders the defendant practically an automaton.' " *Id.* (quoting language from Tate v. Kentucky, 80 S.W.2d 817, 821 (Ky. 1935)).

140. *See, e.g.*, Kansas v. Walker, 845 P.2d 1, 15-16 (Kan. 1993).

141. *Id.*

142. *Id.* at 15.

fense.[143] The *Walker* court admitted that this interpretation rendered the voluntary intoxication defense a nullity since "being both comatose and capable of doing any act is impossible."[144] The court held that they would "disapprove of" further usage of the contested phrase, but that its use did not warrant reversal in this case.[145]

While generally not going so far as to state that the defendant's intoxication must render him "utterly devoid of consciousness," courts and juries sometimes appear surreptitiously to apply this standard. In a recent case, *Tenneseee v. Crim*, the court found the defendant to be guilty of "knowingly"[146] possessing more than 0.5 grams of cocaine with the intent to sell within one thousand feet of a school and "knowingly" possessing less than 0.5 ounces of marijuana.[147] On appeal, the defendant argued that he had been too intoxicated to "be aware of the nature of his conduct."[148] At trial, the arresting officer had testified that the defendant was "drunk as a Lord"[149] at the time of the apprehension, noting that he had been unable to perform a field sobriety test due to the defendant's extreme inebriation.[150] Despite the arresting officer's own admission that the defendant was very intoxicated, the trial judge concluded that defendant was capable of *knowing* that he possessed less than 0.5 ounces of marijuana, *knowing* that he possessed more than 0.5 grams of cocaine, *knowing* that he was within one thousand feet of a school, and *knowingly* intending to sell the cocaine.[151] The Tennessee Criminal Court of Appeals upheld the defendant's convictions, noting that the defendant was "able to get out of his vehicle, open the back door and retrieve identification from his jacket

143. *Id.*

144. *Id.*

145. *Id.* at 15-16.

146. Under the applicable statute in this case, a person "acts *knowingly* with respect to conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist." TENN. CODE ANN. § 39-11-302(b) (West 2000) (emphasis added).

147. No. 01C019803CC00101, 2000 WL 255325, at *1-2 (Tenn. Crim. App. Feb. 18, 2000). The defendant was also found guilty of possession of a firearm on school grounds. *Id.* at *1. He was sentenced to serve fifteen years for the cocaine conviction. *Id.* Sentences for the other two offenses were suspended. *Id.*

148. *Id.* at *2.

149. The officer recalled that the defendant had slurred speech, bloodshot eyes, and difficulty standing, sitting, locating his identification, and using his car keys. *Id.* at *1.

150. *Id.*

151. *Id.* at *2. The trial judge acknowledged that the defendant was "clearly intoxicated," but concluded that he was still capable of "knowing" conduct. *Id.* It is unclear from the court's opinion in *Crim* what evidence was presented to indicate that the defendant intended to sell the cocaine. At the time of his arrest, he was alone in his car. *Id.* at *1.

pocket."[152] The court's superficial analysis of the defendant's mental state appears to equate the mere ability to perform basic physical movements, such as opening a car door, with "knowing" mens rea for each of the charged offenses.[153]

B. The Defendant's Subsequent Recollection of a Crime Demonstrates Intent

Another problematic, but apparently popular, method that judges and juries have employed to curtail application of the intoxication defenses has been the use of an intoxicated defendant's subsequent recollection of the offense to infer his criminal intent *at the time of the offense.*[154]

In *Minnesota v. Thunberg*, the defendant was convicted of second-degree felony murder for stabbing his girlfriend to death.[155] The victim, Katherine Jones, had recently broken up with the defendant, but still lived with him at the time of her slaying.[156] Witnesses to the crime testified that the defendant, who had spent the week "crying and drinking," had walked into the kitchen, mumbling, and emerged with a knife.[157] Suddenly, he lunged at Jones, stabbing her four times.[158] Following his arrest, defendant had a blood alcohol content of 0.24.[159]

On appeal, the defendant contended that his level of intoxication prevented him from forming the requisite intent for second-degree felony murder.[160] The Supreme Court of Minnesota affirmed

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152. *Id.* at *2.

153. In contrast, the Indiana courts have developed a reasonable guideline for determining an intoxicated offender's ability to form the requisite mens rea. *See* Wright v. Indiana, 730 N.E.2d 713, 718 (Ind. 2000). The courts have held that evidence showing the defendant's ability to "devise a plan, operate equipment, instruct the behavior of others, or carry out acts requiring physical skill" may be used as proof of his ability to form the requisite mens rea. *Id.* These specified acts, as opposed to basic motor functions such as getting in and out of a vehicle, do seem to require a level of practical thought and physical dexterity that would not be displayed by an extremely intoxicated actor.

154. *See, e.g.*, Minnesota v. Thunberg, 492 N.W.2d 534, 539 (Minn. 1992) (finding that the defendant's later confession that he had killed the victim provided sufficient evidence that he possessed the requisite intent for second-degree felony murder).

155. *Id.* at 535.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 536. The defendant's toxicology expert testified that, at the time of the offense, his blood alcohol content could have been between 0.26 and 0.28. *Id.* For an estimate of the physical effects of this BAC level, see *supra* note 6.

160. *Thunberg*, 492 N.W.2d at 539. Under Minnesota law, a defendant is "guilty of second-degree felony murder if he 'causes the death of a human being, without intent to effect the death

defendant's conviction, stating that a BAC of 0.24 "does not compel the conclusion that he could not form specific intent."[161] Although blackouts are common at a BAC of 0.20,[162] the court expressed skepticism regarding the sincerity of defendant's claimed lack of recollection of the stabbing itself, characterizing his blackout as "selective."[163] The court noted that, while the defendant claimed he could not remember the stabbing, he did recall holding a red-handled knife and remembered some events immediately following the attack.[164] Shortly after the stabbing, the defendant also had confessed to the crime to a number of people, including upstairs neighbors, the police, and the hospital doctor.[165] The court concluded that this evidence was sufficient to sustain the defendant's conviction, but failed to explain how the defendant's later recollection of various incidents demonstrated that he was capable of having the specific intent to commit a felony offense at the time of the crime.[166]

A similar line of reasoning was employed by a court in *Kansas v. Hayes*, in which the defendant had been convicted of intentional second-degree murder in the stabbing death of a fellow partygoer.[167] The defendant and his brothers had become involved in an altercation with the victim following a birthday party, during which time the defendant pulled a knife and stabbed the victim multiple times.[168] After the fight, the defendant went to his aunt's house where he tearfully admitted to stabbing someone.[169]

On appeal, the defendant argued that the trial court erred by refusing to instruct the jury on voluntary intoxication.[170] Although the defendant testified that he drank "some beer and a pint of whiskey" on the evening of the party, the Kansas Supreme Court concluded that the lower court's refusal was merited because there was no evidence indicating that the defendant's faculties were

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of any person, while committing or attempting to commit a felony offense . . . . ' " *Id.* (quoting MINN. STAT. ANN. § 609.19(2) (West 1987)).

161. *Id.*

162. *See supra* note 6.

163. *Thunberg*, 492 N.W.2d at 53.

164. *Id.*

165. *Id.* In using this post-crime confession as evidence of the defendant's recollection of the actual event, the court apparently ignored the defendant's testimony stating that he did recall, after the attack, his friend telling him that he had stabbed Jones. *Id.* at 535.

166. *Id.* at 539.

167. 17 P.3d 317, 318 (Kan. 2001).

168. *Id.*

169. *Id.*

170. *Id.* at 322.

greatly impaired.[171] Specifically, the court noted that the defendant's confession to his aunt suggested that he was "aware of his involvement" in the crime.[172]

These holdings, which indicate that "intention" can be inferred merely from later "awareness" of the crime and of the defendant's involvement in it, seem to restrict the use of the voluntary intoxication defense to instances in which the defendant experiences a total blackout from the time of the incident up until the time of apprehension.

C. Delusionary Intentions Are Still Intentions; Drug-Induced Psychosis Is Voluntary Intoxication

Occasionally, cases arise in which the defendant, suffering from a drug-induced hallucination, commits an offense while believing that he is acting in self-defense.[173] These cases raise the question of whether an intention that takes place within the context of an intoxication-induced delusion qualifies as an "intentional" mens rea for the purposes of determining criminal responsibility. This seems like a potentially provocative question. The courts have resoundingly answered "yes" to this question, however, showing little interest in addressing the psychological subtleties involved in these cases.[174] This lack of analysis may be partly explained by the infrequency with which these "delusionary intention" cases arise and the fact that they are often framed as insanity or involuntary intoxication issues on appeal.[175]

The case of William Curtis Wagner highlights problems inherent in the application of the intoxication defenses to cases involving drug-induced hallucinations.[176] Wagner, a truck driver for nearly eight years, was heading home from a long haul when he stopped at a convenience store to buy a soda and a headache remedy.[177] As he returned to his truck, an unidentified man approached Wagner and offered to give him something to "keep [him] awake,"

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171. *Id.*

172. *Id.*

173. *See* Iowa v. Hall, 214 N.W.2d 205, 206 (Iowa 1974); Tennessee v. Wagner, C.C.A. No. 02C01-9809-CC-00264, 1999 Tenn. Crim. App. LEXIS 1344, at *4 (Tenn. Crim. App. Dec. 30, 1999).

174. *See Wagner*, 1999 Tenn. Crim. App. LEXIS 1344, at *15-16; *Hall*, 214 N.W.2d at 210-11.

175. *Wagner*, 1999 Tenn. Crim. App. LEXIS 1344, at *12-16; *Hall*, 214 N.W.2d at 213-14 (LeGrand, Mason, and Rawlings, JJ., dissenting).

176. *Wagner*, 1999 Tenn. Crim. App. LEXIS 1344, at *1.

177. *Id.* at *3.

which the man called "crank."[178] Interpreting this to mean that the substance was some form of caffeine, Wagner allowed the man to put some in his drink.[179] Wagner recalled getting back into his truck and driving for a while.[180] The next thing that Wagner claims to remember is waking up in jail.[181]

During this "blackout" period, while in a state of amphetamine-induced intoxication,[182] Wagner led police on an extended chase up a Tennessee highway.[183] During this pursuit, Wagner's truck damaged a number of cars and caused serious injury to the occupants of one vehicle.[184] The chase ended when Wagner eventually pulled over at a rest stop and exited his vehicle.[185] He reportedly responded to the sight of the armed officers surrounding his vehicle by asking, "What did I do? What's going on?"[186] On the way to the emergency room, Wagner told the police that there were "snipers [who were] going to shoot him . . . , snipers behind signs . . . [and] snipers in other cars . . . ."[187]

The jury rejected Wagner's voluntary and involuntary intoxication defenses, finding him guilty of eight counts of aggravated assault, three counts of vandalism, three counts of leaving the scene of an accident, and a number of other miscellaneous charges

178. *Id.* at *4. "Crank" is a slang term for methamphetamine, a stimulant that produces wakefulness, euphoria, and an improved ability to concentrate on simple tasks when administered in therapeutic doses. *See* Edward Henry Benton et al., Note, *Drugs and Criminal Responsibility*, 33 VAND. L. REV. 1145, 1169-70 (1980). Methamphetamine is also known as "speed" or "crystal meth." *Id.* at 1169 n.268.

179. *Wagner*, 1999 Tenn. Crim. App. LEXIS 1344, at *4. A psychiatrist, testifying for the defense, stated that he had heard the word "crank" used "to describe any and all stimulant substances, anywhere from caffeine all the way to and including amphetamine-similar substances." *Id.* at *12. He further testified that in a "clinical setting" the word crank is "generally used by non-addictive individuals to refer to non-amphetamine stimulants." *Id.* For the prosecution, a truck driver who witnessed the chase testified that "crank" is an "illegal substance that most [truck] drivers know about." *Id.*

180. *Id.* at *10.

181. *Id.*

182. Acute amphetamine intoxication is characterized by restlessness, anxiety, and delirium. *See Special Project*, *supra* note 177, at 1170. This may progress to a pattern of psychosis that is clinically indistinguishable from paranoid schizophrenia and includes paranoid delusions as well as visual and auditory hallucinations. *Id.* Wagner apparently had an aberrant reaction to the drug since his toxicology reports following the incident showed a "therapeutic," not "toxic," level of the methamphetamine. *Wagner*, 1999 Tenn. Crim. App. LEXIS 1344, at *10. This fact lends credence to his claim that he was inexperienced with crank. *Id.* at *10-11.

183. *Wagner*, 1999 Tenn. Crim. App. LEXIS 1344, at *5-9.

184. *Id.* at *5-8.

185. *Id.* at *8.

186. *Id.*

187. *Id.* at *9.

including violation of the seat belt law.[188] On appeal, Wagner contended that the State failed to prove beyond a reasonable doubt that he was not involuntarily intoxicated.[189] The Tennessee Court of Criminal Appeals affirmed Wagner's convictions, noting that the jury had obviously rejected Wagner's claim that the unidentified man at the truck stop had tricked him into taking methamphetamine.[190]

Although Wagner's "fraudulent" intoxication story seems questionable, the resolution of his case is troubling. Whether or not Wagner was previously familiar with crank, the evidence tended to show that he experienced an extremely aberrant effect from the drug that day.[191] Having taken the methamphetamine to increase his alertness, Wagner had no reason to anticipate—and certainly no reason to desire—the hallucinatory mental state that ensued. No evidence was introduced to indicate a motive for Wagner's bizarre behavior.[192] He had no previous history of violence.[193] While a conviction for "reckless" crimes would be understandable in such a case, the court appeared to equate an intention to take a drug with an intention consequently to perform any number of deranged acts.[194] The court's superficial analysis ignores the real issue of whether Wagner intended to run innocent people off the road and knew that he was doing this.

Another problem presented by these cases concerns the definitions of "involuntary" versus "voluntary" intoxication. Where the defendant, as in the *Wagner* case, voluntarily ingests a substance, but suffers an unanticipated, "involuntary" reaction, does this alter the voluntary nature of his intoxication? In a 1974 case, *Iowa v.*

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188. *Id.* at *1-2. The court sentenced Wagner to six years of incarceration. *Id.* at *2.

189. *Id.* at *12.

190. *Id.* at *15-16, 33.

191. Wagner's blood test showed a therapeutic level of the drug in his system, yet his behavior indicated acute intoxication. *Id.* at *10; *see also* Benton et al., *supra* note 178, at 1170 (noting that acute amphetamine intoxication is "characterized by . . . confusion, talkativeness, anxiety[,] . . . and delirium").

192. *See Wagner*, 1999 Tenn. Crim. App. LEXIS 1344, at *8-11.

193. Wagner had previously been charged with unlawful possession of a weapon and had been sentenced to one year of probation. *Id.* at *27.

194. In upholding the trial court's denial of alternative sentencing measures, the court of appeals approvingly quoted the following statement by the trial judge:

> "I say this, Mr. Wagner, I'm sorry for you, but what you did and the excuse you give, the Court felt that what you did was deliberate and that you had to have known that [the drug you took] would affect you . . . . That in and of itself, without anybody being injured, is a very serious matter, and the Court feels the jury was quite lenient on you . . . ."

Id. at *27-28.

Hall, the Supreme Court of Iowa wrestled with this question.[195] The defendant, a hitchhiker accused of shooting a man who had given him a ride, testified that acquaintances in California had given him a pill that was supposed to make him feel "groovy."[196] The defendant took the pill while driving the victim's car and soon began hallucinating.[197] He claimed that at the time of the shooting he believed the victim to be a rabid dog.[198] At trial, two doctors hypothesized that the defendant had ingested LSD.[199] Rejecting the defendant's insanity and intoxication defenses, a jury found him guilty of first-degree murder.[200]

On appeal, the Supreme Court of Iowa was divided regarding the appropriate treatment of drug-induced hallucinations.[201] The majority rejected the defendant's involuntary intoxication argument, noting that he was not tricked or forced into taking the pill.[202] The dissent disagreed with the majority's interpretation of "voluntary" intoxication, arguing:

> The testimony shows defendant took a pill which he knew to he a drug hut which he did not know to be LSD and which he testified he thought to he harmless, although he had been told it would make him feel groovy. There is nothing to indicate he knew it could induce hallucinations or lead to the frightening debilitating effects of mind and body to which the doctors testified. The majority nevertheless holds the defendant's resulting drug intoxication was voluntary. I disagree.
>
> Surely, a court which has so zealously guarded unwary defendants from "voluntary" guilty pleas made without full realization of the consequences and which has rejected any attempted waiver of constitutional rights unless knowingly and intelligently made—surely that same court will not now say this defendant *voluntarily* drugged himself because he willingly swallowed a pill without knowledge of its nature and while ignorant of its potentially harmful effects.
>
> In other words, does voluntary in this context refer to the *mechanical* act of ingesting the pill or does it refer to a willing and intelligent assumption of the possible harmful consequences of that act?[203]

Ultimately, the Supreme Court of Iowa ruled to affirm the defendant's sentence.[204]

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195. 214 N.W.2d 205, 206 (Iowa 1974).
196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 207.
200. *Id.*
201. *Id.* at 205, 211 (en banc) (6-3 decision).
202. The Iowa courts did not allow alcohol-induced temporary insanity ("pathological intoxication") as a complete defense when intoxication was voluntary, and the majority concluded that this rule should be extended to voluntary drug intoxication. *See id.* at 207-08.
203. *Id.* at 214 (LeGrand, Mason, and Rawlings, JJ., dissenting) (citations omitted).
204. *Id.* at 211.

In light of the paucity of evidence supporting the defendant's theory of the case,[205] the outcome of *Hall* appears justified, but the *Hall* dissent clearly had hoped to raise policy concerns regarding interpretation of the intoxication defenses that reached beyond the fact pattern at issue.[206] Justice Cardozo once observed that "[t]he dissenter speaks to the future."[207] Unfortunately, as demonstrated by the court's analysis in *Tennessee v. Wagner*, the question posed by the *Hall* dissent has yet to receive thoughtful judicial examination.[208]

VI. A PROPOSED REVISION

As shown by the preceding discussion, the hydraheaded dilemma presented in assessing criminal liability for intoxicated actors will not be easily conquered. No proposed revision will either correct all of the perceived problems or satisfy all of the parties to the legal debate. With that caveat, this Note offers the following suggestions for revision of the intoxication defenses.

A. Where There Is Sufficient Evidence of Intoxication, Establish a Baseline Mens Rea of "Recklessness"

The first step in attaining a more coherent, useful intoxication defense should be the abandonment of dubious analysis of inebriated offenders' "intentions" at the time of the crime.[209] In a 1944

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205. The defendant was the only surviving witness of these events; no other witnesses corroborated his story. *Id.* at 206-07. The State presented evidence indicating that the defendant took $208 from the victim's wallet following the shooting, which supported a robbery motive for the crime. *See id.* at 206.

206. *Id.* at 214 (LeGrand, Mason, and Rawlings, JJ., dissenting).

207. BENJAMIN N. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 36 (1931).

208. *See* Tennessee v. Wagner, C.C.A. No. 02C01-9809-CC-00264, 1999 Tenn. Crim. App. LEXIS 1344, at *12-17 (Tenn. Crim. App. Dec. 30, 1999).

209. Recognizing the difficulty in determining an intoxicated offender's intent, some commentators have suggested the adoption of a "drunk and dangerous" statute similar to the one used in Germany. *See, e.g.*, Layton, *supra* note 4, at 563; Miller, *supra* note 28, at 758-60. The German statute states:

> Whoever intentionally or negligently becomes intoxicated through the use of alcohol or other intoxicating substances is punishable up to five years in prison, if while in that intoxicated condition he commits a criminal act and if by virtue of the intoxication is not responsible for a criminal act (or his non-responsibility is a possibility).

Miller, *supra* note 28, at 758. While the drunk and dangerous statute does have the advantage of eliminating the problematic intent analysis, even an advocate of the statute acknowledges that it has the potential to result in overly lenient sentences, observing:

article, Professor Jerome Hall pointed out that examination of the inebriated defendant's intent, or lack of intent, has imbued the voluntary intoxication defense with a logical fallacy.[210] Professor Hall very perceptively noted that decisions of the courts, which generally restrict the intoxication defenses to crimes in which the defendant lacks intention, rather than control over his conduct, ignores the very nature of most intoxicated offenders' actions.[211] Hall observed that offenses committed by intoxicated actors usually do not reveal "wild, disorganized, aimless" conduct, but rather conduct aimed at attaining specific goals.[212] He concluded that "confusion is inescapable in the prevailing attempted implementation of a mitigating doctrine stated in terms of 'intention' where lack of intention is not an essential differentia as a matter of fact."[213] An inebriated actor may not lack the capacity to intend an act, but may be unable to understand the wrongful nature or consequences of the act. Therefore, he is unable to restrain his antisocial intention. Accordingly, Hall proposed that the intoxication defenses should be expressed in terms of "lack of understanding of the ethical quality of the act and of ability to control," rather than in terms of lack of intent.[214]

In the years following Hall's article, the American Law Institute developed the MPC version of the intoxication defenses,[215] which improved upon the specific-intent formulation of the voluntary intoxication defense by eliminating consideration of arbitrary distinctions between specific- and general-intent crimes in determining the availability of the defense.[216] Unfortunately, the MPC formulation exacerbated the problem identified by Hall by focusing its analysis upon whether the defendant *lacked the state of mind* required with respect to any element of the crime.[217] Thus, the MPC rules merely served to expand the problematic "intention" inquiry.

> [U]nder the drunk and dangerous approach, if a defendant were charged with first degree murder and effectively negated intent with an intoxication defense, that defendant would receive a maximum of five years incarceration. Five years is an offensively lenient approach for someone who took a human life, regardless of [his] intent.

Id. at 760. Therefore, this Note proposes an alternative statutory revision.

210. Hall, *supra* note 23, at 1053-54.

211. *Id.*

212. *Id.*

213. *Id.* at 1054.

214. *Id.* at 1083.

215. *See* DRESSLER, *supra* note 5, at 22-23 (describing the genesis of the MPC project).

216. *Id.* at 306.

217. *Id.*

This Note proposes the following formulation of the intoxication defense, designed to eliminate "intention" analysis: Intoxication is not a defense to prosecution for an offense; but, where the defendant introduces sufficient evidence of extreme intoxication, a reckless mens rea will be presumed in assessing liability.

The proposed "presumption of recklessness" allows judges and juries to focus on fact-based inquiries regarding the credibility of the defendant's intoxication evidence and the physical manifestations of his impairment, rather than requiring these factfinders to delve into murky psychoanalysis of the intoxicated offender's mental processes. Establishing a "reckless" mens rea generally requires proof that the offender disregarded a substantial and unjustifiable risk of which he was aware.[218] Holding inebriated offenders liable for "reckless" crimes under the proposed rule is warranted because of their culpability in becoming grossly intoxicated.[219] Although one may argue that extreme intoxication does not necessarily lead to risky behavior, the drafters of the MPC have convincingly contended that widespread awareness of the potential consequences of excessive drinking should allow the law to impute recklessness to an intoxicated offender.[220]

A few terms in the proposed rule have been left deliberately vague. First, the phrase "sufficient evidence" is meant to accommodate two possible standards of proof, depending on the policy choice of the jurisdiction. A jurisdiction could treat the proposed rule as a standard "failure of proof" defense,[221] such as "mistake-of-fact,"[222] in which case the defendant would merely have the burden of producing the intoxication evidence.[223] Once this has been satisfied, the prosecution would be required to prove beyond a reasonable doubt that the defendant was not too intoxicated to control his actions and to appreciate the import of his conduct. On the other hand, a jurisdiction might choose to treat the proposed intoxication defense as an "excuse," similar to insanity, in which case the defendant should be required to establish his extreme intoxication by a preponderance of the evidence.[224]

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218. *See* ROBINSON, *supra* note 2, § 61(a)(1)(A), at 213. Under the proposed "presumption of recklessness," this showing would not be required. Evidence of extreme intoxication would trigger a finding of recklessness.

219. *See supra* note 78 and accompanying text.

220. *Id.* (citing MODEL PENAL CODE § 2.08 (1962)).

221. DRESSLER, *supra* note 5, at 498.

222. *Id.* at 135.

223. *See* ROBINSON, *supra* note 2, § 65(a)(2), at 293.

224. *Id.* § 176(a), at 339-40. In either case, evidence showing that the defendant was able to devise a plan, operate equipment, instruct the behavior of others, or carry out acts requiring

Second, the phrase "extreme intoxication" is left deliberately open-ended because the effects of various intoxicants on different individuals cannot be precisely calculated or comprehensively defined.[225] For instance, if one were to add language such as "extreme intoxication *which renders the defendant unable to control or appreciate the import of his actions*," this phrase would continue to create problems in cases where the defendant experiences drug-induced hallucinations. In a case such as *Tennessee v. Wagner*, the defendant, while clearly suffering from the extreme effects of an intoxicant, could still be said to be able to control and understand his actions within the context of his hallucination.[226] This "control" language also invites the trier of fact to ponder unfathomables such as: "Did defendant James Egelhoff exhibit control when he kicked the camera out of the hands of the detective—or did he exhibit a lack of control?"[227]

The intoxication defenses should not be drafted in a way that encourages judges and juries to overintellectualize an essentially empirical inquiry. Most people have encountered or experienced intoxication; even extreme intoxication, and are able to identify the phenomenon. The officer in *Tennessee v. Crim* recognized that the defendant was "drunk as a Lord."[228] Officers in *Tennessee v. Wagner* testified to the defendant's bizarre, delusional behavior.[229] It was recognized that these defendants were extremely intoxicated. It would be justifiable to treat them as reckless in such a condition. The courts should not attempt a further inquiry into the workings of these defendants' debilitated thought processes.

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physical skill around the time of the offense would be likely to effectively rebut the defendant's claimed extreme intoxication. *See supra* note 152 and accompanying text (citing Wright v. Indiana, 730 N.E.2d 713, 718 (Ind. 2000)).

225. William Wagner experienced dangerous hallucinations with only a "therapeutic" level of amphetamine in his system. *See* Tennessee v. Wagner, C.C.A. No. 02C01-9809-CC-00264, 1999 Tenn. Crim. App. LEXIS 1344, at *10 (Tenn. Crim. App. Dec. 30, 1999). James Egelhoff was able to hit ambulance attendants and kick a camera from the hands of a detective while he had a BAC of 0.36 (the level of surgical anesthesia). *See* Miller, *supra* note 28, at 757-58.

226. *See supra* Part V.C.

227. *See* Miller, *supra* note 28, at 757-58.

228. No. 01C019803CC00101, 2000 WL 255325, at *2 (Tenn. Crim. App. Feb. 18, 2000).

229. 1999 Tenn. Crim. App. LEXIS 1344, at *8-9.

B. Where Extreme Intoxication Has Been Established, Allow the Defendant's Pre-intoxication Culpability to Rebut the Presumption of Recklessness

In Robinson and Darley's voluntary intoxication study, the respondents placed great emphasis on the offender's pre-intoxication culpability in committing the crime when assessing liability; but, the intoxication defenses currently place no importance on this factor.[230] Under the proposed rule, in a case where the defendant has established extreme intoxication, the prosecution would be able to introduce evidence of the defendant's pre-intoxication culpability in order to rebut the presumption of recklessness.

For example, in *Tennessee v. Crim*, the defendant could probably establish his extreme intoxication through the testimony of the arresting officer.[231] Employing the proposed rule, the court would then presume that the defendant was able to act recklessly, but not knowingly or purposely. Therefore, under this presumption of recklessness, the defendant could not be convicted of *knowingly* possessing less than 0.5 grams of cocaine with intent to sell.[232] The prosecution could rebut the recklessness presumption, however, by introducing evidence showing that, at some time prior to his intoxication, the defendant discussed his intent to sell the cocaine at the school. Therefore, the defendant would be found guilty of the knowing crime regardless of his extreme intoxication at the time of the offense.

This rebuttal of recklessness is justified because the defendant's subsequent intoxication obviously does not invalidate his previous intention to commit the offense. In addition, a codified consideration of the defendant's pre-intoxication culpability effectively invalidates the argument that the intoxication defenses "encourage" offenders to get drunk prior to committing their intended offenses by reducing liability.[233] This addendum to the proposed rule would also bring the intoxication defense's considerations closer to those envisioned by the layperson, as documented by Robinson and Darley's study.[234]

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230. ROBINSON & DARLEY, *supra* note 76, at 115; *see also supra* notes 114-15 and accompanying text.

231. 2000 WL 255325, at *1.

232. *See id.*

233. *See supra* note 103 and accompanying text (detailing "endorsement" criticism of voluntary intoxication defense).

234. *See supra* notes 114-15 and accompanying text (explaining Robinson and Darley study).

C. Where Extreme Intoxication Has Been Established, Allow Consideration of the Defendant's Negligent or Involuntary Intoxication as a Mitigating Factor

It has long been contended that the involuntary intoxication defense is illusory.[235] Like the Loch Ness monster, it is often discussed, sometimes searched for, but ultimately never convincingly documented.[236] The defense's infrequent application may be partly due to a generally felt reluctance to exonerate completely the involuntarily intoxicated actor.[237] In light of Robinson and Darley's findings, indicating that generally a majority of people believe that an involuntarily intoxicated offender should incur some liability for his crime,[238] this Note proposes that the intoxication defenses should be collapsed into a single defense in which involuntary (or negligent) intoxication may be considered as a mitigating factor.[239]

For example, in *Tennessee v. Wagner*, the defendant would establish extreme intoxication based on police testimony describing his delusional behavior and the toxicology reports showing amphetamine in his system.[240] Therefore, he would be liable for reckless, but not intentional or knowing, crimes. If the jury had accepted Wagner's story that he had been tricked into taking the methamphetamine, or if they believed that he did not know that the substance was methamphetamine, but *should have known* (i.e., was negligent), they could further reduce his sentence based on the involuntary or negligent intoxication.

This version of the defense, allowing involuntary intoxication to reduce liability, but not to absolve the defendant's crime, brings it more in line with the views expressed by the respondents in Robinson and Darley's study.[241] Hopefully, this would ultimately result in greater consideration of involuntary intoxication evidence by judges and juries.

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235. *See* Hall, *supra* note 23, at 1054-57.

236. *See supra* note 58 and accompanying text (noting rarity of using involuntary intoxication defense).

237. *See supra* notes 128-30 and accompanying text.

238. *See supra* notes 128-29 and accompanying text.

239. *See supra* notes 128-29 and accompanying text.

240. *See* Tennessee v. Wagner, C.C.A. No. 02C01-9809-CC-00264, 1999 Tenn. Crim. App. LEXIS 1344, at *8-11 (Tenn. Crim. App. Dec. 30, 1999); *see also supra* Part V.C.

241. *See supra* notes 128-29 and accompanying text.

VII. CONCLUSION

The intoxication defenses are gradually disappearing from the legal landscape. The Supreme Court's decision in *Montana v. Egelhoff* approved Montana's ban on the introduction of intoxication evidence, thus granting the state governments the power to abridge the right to present a full criminal defense.[242] Some commentators contend that Americans will not miss this personal right too much.[243] This Note, however, takes the position that the intoxication defenses should not be summarily abandoned. They can be drafted in such a way that they will be easier to apply and more in tune with the expectations and intuitions of the layperson.

This Note's proposed revision of the intoxication defenses improves the currently implemented versions in three significant ways. First, by establishing a presumption of recklessness in cases of extreme intoxication, the revision focuses deliberation on evidence of the defendant's intoxication, rather than on speculation regarding the defendant's debilitated thought processes. Second, by allowing the defendant's pre-intoxication culpability to rebut the presumption of recklessness, the revision eliminates the oft-voiced concern that the intoxication defenses encourage people to become intoxicated prior to committing criminal acts in order to receive reduced liability. Third, by allowing mitigation rather than exculpation in the case of involuntary intoxication, the revision brings the defense more in line with the expectations of the layperson. This proposed revision to the intoxication defenses offers a far better alternative to venturing down the slippery slope of reduced rights offered by the proponents of *Egelhoff*.

Meghan Paulk Ingle[*]

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242. *See generally* 518 U.S. 37 (1996).

243. Commentator Mitchell Keiter noted that eighty-three percent of respondents to a Justice Department survey considered crime a "very serious threat," while only twenty-six percent saw police overreaction to crime a "very serious threat," concluding that "it is debatable whether more Americans fear the 'danger of governmental oppression' or the 'menace of anti-social individual action.' " *See* Keiter, *supra* note 2, at 515. *See generally* Layton, *supra* note 4, at 548 (arguing that "states that disallow voluntary intoxication as an affirmative defense do not pierce the shield of constitutional protections guaranteed to criminal defendants because the state must still prove the defendant's guilt beyond a reasonable doubt").

[*] While interning at the Tennessee Supreme Court, I read the William Curtis Wagner trial transcript and became interested in writing about the intoxication defenses. Therefore, this Note owes its conception to Jayne Workman who offered me the opportunity to intern at the Court and to Betsy Garber who introduced me to many interesting legal issues during my time there. This Note benefited greatly from the hard work of editors Debbie Reule, Sewali Patel, Russ Miller, and Shay Zeemer; I give them my heartfelt thanks. Finally, I am grateful to my

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