The Defense of Voluntary Intoxication: Now You See It, Now You Don't

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I. Introduction

Traditionally, the general rule has been that voluntary intoxication is no defense in a criminal prosecution.[1] It has even been stated that "[t]he rule that voluntary intoxication is not a general defense to a charge of crime based on acts committed while drunk is so universally accepted as not to require the citation of cases."[2] In the past, Indiana has recognized certain exceptions to this general rule. Specific exceptions have included situations where chronic intoxication has created a mental disease which has allowed the defendant to raise a defense of insanity, and situations where the defendant's voluntary intoxication has been used to negate the special intent element contained in crimes requiring specific intent.[3] While the former exception appears to remain unchanged,[4] the latter exception as well as the general rule appear, at first glance, to have been radically altered by the Indiana Supreme Court's decision in *Terry v. State*.[5] From a practical standpoint, however, the change in Indiana's voluntary intoxication defense may be much less radical than first appears. To appreciate fully the impact of *Terry* and its progeny on the defense of voluntary intoxication, a brief examination of the statutory changes in the defense and the history of specific versus general intent is necessary.

II. General and Specific Intent

General intent has been defined as the intent to engage in the prohibited act, while specific intent requires a desire for a particular result or purpose.[6] This distinction has been particularly important in

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[1]*See, e.g.*, Annot., 8 A.L.R. 3d 1236, 1240 (1966).

[2]*Id.*

[3]Conour, *Criminal Justice Notes*, 24 Res Gestae 6, at p. 284 (June 1980).

[4]Although there have been no cases specifically altering this type of exception since the voluntary intoxication defense in Indiana was changed, Harlan v. State, 479 N.E.2d 569 (Ind. 1985), raises doubts about the continued viability of the exception. In *Harlan*, the defendant sought an instruction on the defense of voluntary intoxication, claiming that his heavy consumption of alcohol over a period of several years had contributed to his "*temporary* insanity." The court summarily dismissed the defendant's argument even though he had a twenty-five year history of drinking and suffered from delirium tremens subsequent to his arrest.

[5]465 N.E.2d 1085 (Ind. 1984).

[6]Conour, *supra* note 3, at 284.

the context of the voluntary intoxication defense because of the evidentiary rule of "presumed intent."[7] This rule allows the general intent to commit a crime to be inferred or presumed from the actual commision of the voluntary act(s) because of the general presumption that a person intends the normal consequences of his voluntary acts.[8] It is because of this presumption that voluntary intoxication has traditionally been no defense to general intent crimes. " '[W]hen one voluntarily becomes intoxicated, guilt is attached to the intoxication itself and is then transferred to the criminal act, supplying the required culpability.' "[9] This traditional view would appear to be grounded in the public policy concern that if one voluntarily undertakes to become intoxicated, he generally assumes the responsibility for any wrongdoing he may commit as a result of his intoxication.[10]

When considering those crimes which involve a special or specific intent in addition to the general mens rea required for a criminal act,[11] however, the historical treatment of voluntary intoxication as a defense has been somewhat more generous.[12] Nevertheless, a problem encountered throughout the history of the voluntary intoxication defense has been honing the definition of "specific intent" and determining to which crimes it will apply.[13] In *Carter v. State*,[14] the court noted that the defense appeared to apply only to two types of offenses: those "wherein the crime depends upon the intent, purpose (not motive), aim, or goal with which an act was done," and those "wherein knowledge of an attendant circumstance is a material element of the crime."[15]

The latter category of crimes — those requiring knowledge of attendant circumstances — would include, for example, causing injury to a police officer or knowingly receiving stolen property.[16] These offenses seem to

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[7]*See* Carter v. State, 408 N.E.2d 790, 794-95 n.6 (Ind. Ct. App. 1980). This decision also contains a lengthy and comprehensive analysis of specific and general intent and the history of the voluntary intoxication defense in Indiana.

[8]*Id.*

[9]*Id.* at 798 (quoting Greider v. State, 270 Ind. 281, 284, 385 N.E.2d 424, 426 (1979)).

[10]*Id.*

[11]In other words, these offenses require a desire to provoke a specific outcome or consequence as opposed to those which require only a "guilty mind" to be coupled with the prohibited act.

[12]*See Carter*, 408 N.E.2d at 797-801 for an historical analysis of voluntary intoxication as it relates to specific intent crimes.

[13]*Id.*

[14]408 N.E.2d 790 (Ind. Ct. App. 1980).

[15]*Id.* at 799.

[16]In offenses such as these, a required element of the crime is some type of special knowledge. For example, if the defendant causes injury to a person who is a police officer, but does not know he is a police officer, he might be charged with battery. However, unless it is shown that he knew or should have known his victim was a police officer, the knowledge element of the offense is missing. In terms of the intoxication defense,

have been specific intent crimes. However, the first category, which involves commission of a crime with a purpose or aim to cause a specific consequence, appears to have been quite troublesome for the courts.[17] Although this first category of offense has typically included statutory language such as "with intent to,"[18] this has not always been the case. Examples of offenses which have been held arguably to require a specific intent without this statutory language are rape,[19] public indecency,[20] and even malicious trespass.[21] Although the decisions in these cases were somewhat equivocal, they demonstrate some of the problems which have faced the courts in determining whether an offense requires a specific intent and thus makes the defense of voluntary intoxication available to the defendant.[22] As noted in *Carter*, "[T]he plethora of cases and materials on the subject leads to the conclusion that specific intent and the defense of voluntary intoxication is incapable of concise, succinct definition."[23] Despite these problems, the legislature, through changes in the appropriate statutory language, has attempted to provide more precise guidelines.

III. Statutory Treatment of Voluntary Intoxication

Prior to 1980, Indiana Code section 35-41-3-5(b) stated: "Voluntary intoxication is a defense only to the extent that it negates specific intent."[24] It was because of this language and the prior common law as it related to voluntary intoxication that the problems noted previously arose. In *Williams v. State*,[25] the Indiana Supreme Court addressed the issue of specific intent when determining whether a defendant charged with robbery[26] was entitled to an instruction on the defense of voluntary intoxication. Although the statutory definition of robbery did not contain the term "with intent to," it did contain the more general and much more common term "knowingly or intentionally."[27]

"[i]f the accused was too drunk to know the 'victim' was a police officer, he cannot be convicted . . . ." *Carter*, 408 N.E.2d at 799.

[17]408 N.E.2d at 801.

[18]*Id.* at 799.

[19]*Id.* at 800.

[20]*Id.* at 800-01.

[21]*Id.* at 801.

[22]*Id.*

[23]*Id.* at 799.

[24]Ind. Code § 35-41-3-5(b) (1976), *amended by* Act of Feb. 22, 1980, Pub. L. No. 205-1980, § 1, 1980 Ind. Acts 1651.

[25]402 N.E.2d 954 (Ind. 1980).

[26]Robbery is defined as the knowing or intentional taking of property from another person. Ind. Code § 35-42-5-1 (1982).

[27]*Id.* "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." Ind. Code § 35-41-2-2 (1982).

The court concluded that robbery was a specific intent crime warranting the intoxication instruction because the use of "knowingly" in the statute required that "[t]he taking proscribed must be accompanied by an actual and existing awareness of a high probability that the taking is being accomplished."[28] The court did not abandon the requirement that a specific intent crime be involved before voluntary intoxication could be a defense. However, by implying that any crime defined by the term "knowingly" was one involving specific intent, it appeared that the court was vastly expanding the class of criminal acts to which a defense of voluntary intoxication would be applicable.[29]

Any impact of the *Williams* decision appeared to be shortlived. In 1980 the legislature enacted an amendment to Indiana Code section 35-41-3-5.[30] This amendment struck the words "specific intent" and provided that voluntary intoxication would be a defense only where it "negates an element of an offense referred to by the phrase 'with intent to' or 'with an intention to.' "[31] Although this revision of the statute eliminated some criminal acts which had traditionally been entitled to the defense,[32] it did appear to simplify the task of determining what crimes were to be considered those of specific intent for the purpose of asserting the defense.

IV. The Apparent Expansion of the Defense

Although several years passed with little apparent change in the defense, in 1984 the Indiana Supreme Court decided *Sills v. State*.[33] In *Sills*, the court indicated it was considering a return to a broader application of the voluntary intoxication defense, similar to that favored by the court in *Williams*.[34] In *Sills* the defendant was charged with murder, a crime which did not contain the requisite "with intent" or "intention to" language.[35] The majority in *Sills* decided that it was not error for the trial court to have refused the defendant's tendered instruction on the defense of intoxication because the crime did not fit

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[28]402 N.E.2d at 955.

[29]Because a "knowing" intent requires only awareness of a high probability that the proscribed act will occur instead of an active intent to cause its occurence, more crimes come within the defense of voluntary intoxication, i.e., robbery, battery, criminal trespass, and theft. In addition, these types of offenses would seem to occur much more often than other more traditional specific intent crimes such as murder.

[30]Act of February 22, 1980, Pub. L. No. 205-1980, § 1, 1980 Ind. Acts 1651.

[31]*Id.*

[32]For example, murder, a crime which had historically been one for which the defense of voluntary intoxication was available, no longer was entitled to the defense because it did not contain the requisite statutory language. Ind. Code § 35-42-1-1 (1982).

[33]463 N.E.2d 228 (Ind. 1984).

[34]402 N.E.2d 954.

[35]463 N.E.2d at 236.

into the statutory language,[36] but in a lengthy and vigorous concurrence in the result, Chief Justice Givan concluded that the language of the intoxication statute as amended in 1980[37] was "an anomaly in legal language,"[38] and was therefore unconstitutional.[39]

Using the example of murder, a crime which had traditionally been considered one of specific intent[40] but which was inappropriate for the application of the intoxication defense pursuant to the statute, Justice Givan stated that holding that the murder statute[41] did not contain the language required in the voluntary intoxication statute was "a strain of statutory interpretation."[42] In deciding that the statute as amended should be found unconstitutional, Justice Givan discussed specific versus general intent and mens rea in general, and concluded that the statute as a whole was unworkable.[43]

In *Terry v. State*,[44] the court adopted the argument for the unconstitutionality of the voluntary intoxication statute which had been advanced by Justice Givan in his concurrence in *Sills*.[45] In finding Indiana Code section 35-41-3-5(b) void and without effect,[46] the court quoted extensively from the *Sills* concurrence and stated that

> [a]ny factor which serves as a denial of the existence of *mens rea* must be considered by a trier of fact before a guilty finding is entered. Historically, facts such as age, mental condition, mistake or intoxication have been offered to negate the capacity to formulate intent. The attempt by the legislature to remove the factor of voluntary intoxication, except in limited situations, goes against this firmly ingrained principle.[47]

Although technically the court's finding in *Terry* that Indiana Code section 35-41-3-5(b)[48] was unconstitutional and invalid was dictum,[49] it is dictum that has been repeated numerous times since *Terry* was de-

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[36] *Id.*

[37] IND. CODE § 35-41-3-5(b) (1982).

[38] 463 N.E.2d at 240.

[39] *Id* at 243.

[40] *See Carter*, 408 N.E.2d 790.

[41] IND. CODE § 35-42-1-1 (1982).

[42] 463 N.E.2d at 240.

[43] *Id.* at 240-43.

[44] 465 N.E.2d 1085 (Ind. 1984).

[45] *Id.* at 1087.

[46] *Id.* at 1088.

[47] *Id.*

[48] As amended by Act of Feb. 22, 1980, Pub. L. No. 205-1980, § 1, 1980 Ind. Acts 1651.

[49] Because the court in *Terry* found that the defendant was not entitled to an instruction on voluntary intoxication, the determination that IND. CODE § 35-51-3-5(b) as amended was unconstitutional was not necessary to reach the issue raised on appeal.

cided.[50] In *Hibshman v. State*,[51] the Third District Court of Appeals considered *Terry* and its progency and concluded:

> [I]t seems inescapable that where the legislature has defined a criminal offense *to include* the elements of intentionally or knowingly, it would violate fundamental fairness, i.e. due process, to preclude the jury from considering evidence relevant to that issue of intent merely because it arose in the context of voluntarily induced intoxication.[52]

The effect of the court's decision in *Terry* was to make the defense of voluntary intoxication available to those charged with any crime, regardless of the type of intent involved.[53] From an evidentiary standpoint, this change in the law would seem to be a sweeping and radical one. From a practical, outcome-oriented standpoint, however, the change appears much less drastic because of the level of intoxication which must be shown before a defendant is entitled to a jury instruction on the defense.[54] Whereas traditionally the type of offense determined whether evidence of voluntary intoxication was admissible,[55] Indiana now provides for blanket admissibility of intoxication evidence. The judge then determines whether there is a sufficient evidentiary predicate to warrant a jury instruction on the defense.[56] As the court noted in *Terry*,[57] and as seen in subsequent decisions, this evidentiary predicate may be very difficult to meet.

V. The Narrow Standard for Exculpation

The court in *Terry* set forth a general standard for the availability of the defense by noting that "[i]t is difficult to envision a finding of not guilty by reason of intoxication when the acts committed require a significant degree of physical or intellectual skills."[58] If the defendant

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[50] *See, e.g.*, Butrum v. State, 469 N.E.2d 1174 (Ind. 1984); Anderson v. State, 469 N.E.2d 1166 (Ind. 1984); Murphy v. State, 469 N.E.2d 750 (Ind. 1984); Zachary v. State, 469 N.E.2d 744 (Ind. 1984).

[51] 472 N.E.2d 1276 (Ind. Ct. App. 1985).

[52] *Id.* at 1278.

[53] *See Terry,* 465 N.E.2d at 1088.

[54] Although in Indiana a defendant is now entitled to submit evidence of intoxication in any criminal defense, as will be seen in *Terry*'s progeny, the level of intoxication must be extremely high before the defendant is entitled to have this evidence considered by the jury. *See infra* text accompanying notes 58-68.

[55] *See* the discussion contained in Carter v. State, 408 N.E.2d 790 (Ind. Ct. App. 1980). *See also* Annot., 8 A.L.R. 3d 1236 (1966).

[56] This evidentiary predicate, which relates to the level of intoxication required to raise a reasonable doubt as to the defendant's culpability for his actions, determines whether the judge will instruct the jury on the voluntary intoxication defense.

[57] 465 N.E.2d at 1088.

[58] *Id.*

was able to "devise a plan, operate equipment, instruct the behavior of others or carry out acts requiring physical skills," he would not be entitled to exculpation on the basis of his intoxication.[59] The defendant in *Terry*, who was charged with attempted murder, had made decisions regarding his course of action and had driven a car. Because of those actions, the court held that the trial judge's refusal to give the defendant's tendered instruction on the defense was not error, even in light of the court's expansion of the defense.[60]

The standard of *Terry* was subsequently applied in *Watkins v. State*,[61] where the court found that because a defendant charged with burglary had been able to climb through a basement window, run up and down stairs, converse with his companions, search through a closet, and threaten the victim with a knife, he was not entitled to an instruction on voluntary intoxication even though he had allegedly consumed nine beers, wine, and smoked two marijuana cigarettes.[62] The court concluded that the evidence of the defendant's activities at the time of the offense was sufficient to show that he possessed the requisite mens rea for burglary.[63]

In *Hubbard v. State*,[64] the defendant complained that the trial judge had erred in concluding that voluntary intoxication was not a defense to robbery and in giving the jury an instruction predicated on Indiana Code section 35-41-3-5(b), which had been found invalid by the supreme court in *Terry*.[65] In reviewing the defendant's argument, the court stated that the standard for determining the availability of an instruction on voluntary intoxication was that set forth in *Williams v. State*.[66] Although *Williams* was decided prior to *Terry*, it was also decided before the amendment to Indiana Code section 35-41-3-5 became effective.[67] In order to satisfy the evidentiary predicate under the *Williams* standard, the evidence, if believed, must be "such that it could create a reasonable doubt in the mind of a rational trier of fact that the accused entertained the requisite specific intent."[68]

The use in *Hubbard*[69] of the *Williams* standard would seem to indicate that Indiana still retains the distinction between specific and general

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[59] *Id.*

[60] *Id.*

[61] 468 N.E.2d 1049 (Ind. 1984).

[62] *Id.* at 1051.

[63] *Id.*

[64] 469 N.E.2d 740 (Ind. 1984).

[65] 465 N.E.2d at 1087.

[66] 469 N.E.2d at 742.

[67] IND. CODE § 35-41-3-5, as amended by Act of Feb. 22, 1980, Pub. L. No. 205-1980, § 1, 1980, became effective on September 1, 1980. *Williams* was decided on April 7, 1980. Therefore, the statute in effect at the time that *Williams* was decided still contained the "specific intent" language which was arguably broader and more open to interpretation than the amended language which the court struck down in *Terry*.

[68] 402 N.E.2d at 956.

[69] 469 N.E.2d 740.

intent crimes. Because *Williams* extended the definition of specific intent crimes to include those defined by "knowing" intent,[70] however, it would seem that only the small number of crimes defined by "reckless" intent[71] would remain as general intent crimes. Any remaining distinction between specific and general intent crimes would also seem to be significant only to the extent that it might affect the evidentiary predicate required to procure an instruction on the voluntary intoxication defense.[72]

VI. Unanswered Questions

In *Butrum v. State*[73] the issue was whether voluntary intoxication is an affirmative defense or merely evidence on the issue of mens rea. In *Butrum*, the defendant objected to an instruction that " '[v]oluntary intoxication is not a defense to the crime of murder' "[74] because he had not put forth a claim of voluntary intoxication.[75] The State had attempted to preclude any evidence of the defendant's intoxication, but the trial court had overruled the State's motion on the ground that although intoxication was *not a defense itself*, it *was* relevant to the defendant's mental state and therefore admissible.[76] The Indiana Supreme Court held that the trial court had acted correctly and in accord with *Terry*.[77]

In reaching that conclusion, the court stated that although the *Terry* decision recognized voluntary intoxication as a defense, the real question in *Terry* was "whether or not appellant's intoxication was sufficient to deprive him of the ability to form the necessary intent."[78] The court also stated that the trial judge in *Butrum* had been correct in determining that "it is not intoxication that is a defense, but rather that intoxication may be considered as would any other mental incapacity of such severe degree that it would preclude the ability to form intent."[79]

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[70] 402 N.E.2d at 955.

[71] "Reckless" intent is defined as "plain, conscious and unjustifiable disregard of harm" which "involves a substantial deviation from acceptable standards of conduct." Ind. Code § 35-41-2-2 (1982). Crimes in Indiana defined by "reckless" intent include reckless homicide (Ind. Code § 35-42-1-5 (1982)), criminal recklessness (Ind. Code § 35-42-2-2 (1982)), provocation (Ind. Code § 35-42-2-3 (1982)), and mischief (Ind. Code § 35-43-1-2 (1982)).

[72] Because "specific intent" crimes arguably require a more sophisticated or complex set of actions, the level of intoxication required to obtain an instruction on lack of intent may be somewhat lower than for general intent crimes.

[73] 469 N.E.2d 1174 (Ind. 1984).

[74] *Id.* at 1176.

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

The decision in *Butrum* therefore appeared to contradict an earlier decision, *Jones v. State*,[80] which had implied that voluntary intoxication was what would traditionally be considered an "affirmative defense."[81] In *Jones*, the court had explicitly stated that voluntary intoxication was a defense and that the defendant bore the burden of proof on the issue.[82] The recent decision in *Eagan v. State*,[83] however, seems to cast some doubt on precisely what the court intended by its treatment of voluntary intoxication in *Butrum*.

In *Eagan*, the defendant was charged with attempted murder, and on appeal he complained that the trial court had erred in giving an instruction on the defense which was based on the invalid provision of Indiana Code section 35-41-3-5(b).[84] The court found that although the statutory provision had been found unconstitutional, giving the instruction under the facts of the case had not been error.[85] In reaching its conclusion, the court stated that "[a]lthough there was some evidence presented that the Defendant may have been intoxicated at the time he committed the crime, *it was never interposed as a defense*; and the record reveals that his intoxication, if existing, was not of the debilitating degree that could have raised a reasonable doubt upon the existence of the requisite *mens rea*."[86]

The impact of this language in *Eagan* is uncertain because of the lack of any subsequent interpretation. It could mean that voluntary intoxication is an affirmative defense. However, the statement may have been prompted by peculiar circumstances in the lower court proceedings. In any event, it appears that further clarification of the procedural role of voluntary intoxication is needed.

In addition to the confusion surrounding intoxication's procedural role, the degree and type of incapacity required for exculpation may indicate that voluntary intoxication as an *independent* basis for exculpation has all but been eliminated. The standard for invocation of the intoxication defense has risen to the point where it is similar to the standard which must be met for the invocation of the insanity defense. In the *Butrum* decision, in addition to the court's emphasis on intoxication rising to the level of mental incapacity,[87] the court cited with apparent approval the trial judge's instruction on capacity to form intent.[88] This

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[80]458 N.E.2d 274 (Ind. Ct. App. 1984).

[81]*See* La Fave & Scott, Handbook on Criminal Law 152 (1972).

[82]458 N.E.2d at 276.

[83]480 N.E.2d 946 (Ind. 1985).

[84]*Id.* at 951.

[85]*Id.*

[86]*Id.* (emphasis added).

[87]469 N.E.2d at 1176.

[88]The trial judge's instruction read, "Mental disease or mental defect includes any

instruction substantially paralleled the statutory language of mental disease or defect found in Indiana Code section 35-36-1-1.[89]

This emphasis on the need for intoxication to rise to a level approaching insanity was even more apparent in *Jones v. State*.[90] In noting that "[m]ere intoxication, in the absence of some mental incapacity, . . . cannot be regarded as sufficient,"[91] the *Jones* court added that "[t]he mental incapacity must render a person incapable of appreciating the wrongfulness of his conduct or of conforming his conduct to the requirements of law . . . ."[92] This standard conformed exactly to the statutory language of the insanity defense then in effect.[93] Although *Jones* was decided shortly before *Terry*, the decision in *Butrum*[94] would seem to indicate that the level and type of intoxication required for exculpation in *Jones* is still good law.

If the degree of a defendant's intoxication must rise to a level of mental incapacity akin to insanity, it might well be easier to eliminate the separate defense of voluntary intoxication while allowing intoxication to be considered within the insanity defense. Of course, by so doing, the traditional approach to intoxication as a defense to specific intent crimes would be discarded. In addition, it seems possible to envision a situation where a defendant charged with a specific intent crime such as burglary[95] might demonstrate a level of intoxication sufficient to negate the "intent to commit a felony,"[96] but insufficient to negate the intent for breaking and entering. In this case, the defendant would be entitled to an intoxication instruction for the crime of burglary, but not for the arguably lesser included offense of criminal trespass.[97] Although there

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abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls. . . ." *Id.*

[89] IND. CODE § 35-36-1-1 provides that mentally ill "means having a psychiatric disorder which substantially disturbs a person's thinking, feeling, or behavior and impairs the person's ability to function . . . ."

[90] 458 N.E.2d 274.

[91] *Id.* at 276.

[92] *Id.*

[93] IND. CODE § 35-41-3-6(a) (amended by Act of Feb. 24, 1984, Pub. L. No. 184-1984, § 1, 1984 Ind. Acts 1501) in effect at the time provided that:

> A person is not responsible for having engaged in prohibited conduct if, as a result of mental disease or defect, he lacked substantial capacity either to appreciate the wrongfulness of the conduct or to conform his conduct to the requirements of law.

[94] 469 N.E.2d 1174.

[95] Burglary is defined by statute as breaking and entering a building or structure of another person *with the intent to commit a felony* in it. IND. CODE § 35-43-2-1 (1982). Because of the requirement of a special intention to bring about a certain result, burglary would traditionally have been considered a specific intent crime.

[96] *Id.*

[97] Criminal trespass can be committed by knowingly or intentionally entering the real

have not yet been any cases decided on this issue of lesser included offenses, it seems that the situation may pose some problems for attorneys and judges alike, especially where multiple lesser included offenses are involved.

VII. Conclusion

The practical status of voluntary intoxication in Indiana in the wake of *Terry v. State*[98] remains somewhat unclear despite the courts' attempts to create an appropriate standard. The lack of clarity seems to stem primarily from confusion as to whether intoxication is an affirmative defense which must be raised and proven by the defendant, or whether it is simply evidence to show that the defendant lacked the capacity to form the intent to commit the crime. A mens rea, or "guilty mind", has long been required to hold a person responsible for his "guilty act,"[99] and when the intoxication defense is available to those charged with general intent crimes, the intent element would appear to be equivalent to mens rea. If this is the case, voluntary intoxication would not be an affirmative defense because it goes directly to an element of the crime.[100]

This latter interpretation is supported by Chief Justice Givan's concurrence in *Sills v. State*[101] where he stated:

> Likewise, if intoxication, whether it be voluntary or involuntary, renders that individual so completely *non compos mentis* that he has no ability to form intent, then under our constitution and under the firmly established principles of the *mens rea* required in criminal law, he cannot be held accountable for his actions, no matter how grave or how inconsequential they may be.[102]

Unfortunately, this apparently clear statement has become less clear in light of an apparent equation of intent with voluntary acts in the *Sills* concurrence[103] and in subsequent cases stressing the physical acts of the

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property of another, Ind. Code § 35-43-2-2 (1982), and can therefore be considered, under appropriate circumstances, a lesser included offense of burglary (all of the elements of criminal trespass would be included in burglary, and burglary would include at least one element not found in criminal trespass).

[98]465 N.E.2d 1085.

[99]*See, e.g.*, La Fave & Scott, Handbook on Criminal Law 191-92 (1972). *See also* Sills v. State, 463 N.E.2d at 241-42 (Justice Givan concurring in the result).

[100]*See supra* note 81.

[101]463 N.E.2d 228.

[102]*Id.* at 242.

[103]*Id.* at 241-43.

defendant.[104] Many of the problems that have plagued the insanity defense as it relates to mens rea[105] will probably also visit the voluntary intoxication defense now in effect in Indiana.

The one clear observation, however, is that what at first glance may seem to be a radical expansion of the defense of voluntary intoxication by the court in *Terry* may be better characterized as merely a procedural change in the way the defense is handled from an evidentiary standpoint. Because of all the underlying uncertainties, successful invocation of the voluntary intoxication defense will continue to be a difficult proposition in Indiana.

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[104]*See supra* notes 58-72 and accompanying text.

[105]*See, e.g.*, Note, *Due Process and the Insanity Defense: Examining Shifts in the Burden of Persuasion*, 53 NOTRE DAME LAW. 123 (1977). *See also* Note, Mens Rea, *Due Process and the Burden of Proving Sanity or Insanity*, 5 PEPPERDINE L. REV. 113 (1977).