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ILLINOIS' LATEST VERSION OF THE DEFENSE OF VOLUNTARY INTOXICATION: IS IT WISE? IS IT CONSTITUTIONAL?

Timothy P. O'Neill*

INTRODUCTION

Old habits die hard. Amending the law is not as simple as revising the words of a statute. If lawyers and judges are comfortable with a well-established approach to a legal concept, they may look at a statute which seriously alters that approach, yet profess to see no change.

A good illustration of this phenomenon can be found in the Illinois Criminal Code of 1961 ("1961 Code").¹ Heavily influenced by the Model Penal Code ("MPC"),² the 1961 Code dramatically altered several long-standing Illinois criminal law doctrines. However, several significant changes in the statutory language did not have a corresponding impact in the courtroom.

For example, the 1961 Code discarded Illinois' traditional common law approach to the offense of murder by completely eliminating the concept of "malice aforethought."³ Nevertheless, many Illinois decisions continued to discuss murder in common law terms, ignoring the legislature's express revision of the statutory language.⁴ Similarly, in the area of conspiracy, the Illinois legislature eliminated the common law "bilateral"⁵ conspiracy requirement

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1. ILL. REV. STAT. ch. 38, para. 1-1 (1987). While paragraph 1-1 provides that the code shall be referred to as the "Criminal Code of 1961," it did not become effective until January 1, 1962.

2. MODEL PENAL CODE § 2.04 (1962). For an excellent analysis of the impact of the Model Penal Code on criminal law, see Symposium, *The 25th Anniversary of the Model Penal Code*, 19 RUTGERS L.J. 521 (1988).

3. Compare ILL. REV. STAT. ch. 38, para. 358 (1959) (defines murder as "the unlawful killing of a human being, [] with malice aforethought, either express or implied.") with ILL. REV. STAT. ch. 38, para. 9-1 (1961) (instead of "malice aforethought," the statute reads, "a person who kills an individual without lawful justification commits murder if, . . . [he has intent or knowledge]").

4. See O'Neill, "With Malice Toward None": A Solution to an Illinois Homicide Quandary, 32 DE PAUL L. REV. 107, 114 (1982).

5. The "bilateral" theory of conspiracy requires the actual agreement of at least two participants. *People v. Borrelli*, 392 Ill. 481, 493, 64 N.E.2d 719, 724, cert. denied, 328 U.S. 845 (1946); see also *People v. Bryant*, 409 Ill. 467, 469, 100 N.E.2d 598, 600 (1951) (prosecution or conviction of one conspirator is affected by the disposition of the case against co-conspirators).

and replaced it with the MPC's "unilateral" requirement.⁶ Obviously more comfortable with the traditional common law approach, the Illinois Supreme Court failed to acknowledge this change in the Code's definition of conspiracy.⁷

This phenomenon has also manifested itself in the area of voluntary intoxication. Prior to the adoption of the 1961 Code, Illinois law explicitly held that voluntary intoxication was not a defense to any crime.⁸ A body of Illinois case law, however, had suggested that voluntary intoxication could be a defense to "specific intent" crimes,⁹ but not "general intent" crimes.¹⁰ The 1961 Code, adhering to the MPC, totally altered this scheme. It simply stated that a defendant could not be convicted of an offense if his voluntary intoxication negated the existence of a required mental state. Nevertheless, many Illinois courts steadfastly refused to enforce this clear mandate from the legislature, and continued to interpret the intoxication defense consistent with Illinois cases decided a half-century earlier.

Unfortunately, the confusion does not end there. On January 1, 1988, an amendment to the Illinois statute regarding the voluntary intoxication defense ("1988 amendment") became effective.¹¹ The 1988 amendment jettisoned much of the MPC flavor of the previous statute, and attempted to return to the discarded common law concepts. While the full effect of the 1988 amendment remains unclear, the future of the voluntary intoxication defense in Illinois is murky indeed.

This article will begin by briefly describing the quandary which all courts face in confronting the defense of voluntary intoxication. Next, it will trace the development of the defense at common law, and summarize the alternative approaches followed by various other jurisdictions. The article will then focus upon the Illinois experience with the defense, culminating in the adoption of the 1961 Code and the difficulties presented by the 1988 amendment. Finally, two potential constitutional challenges to the entire structure of the voluntary intoxication defense in Illinois will be discussed.

I. VOLUNTARY INTOXICATION AS A DEFENSE: THE THEORETICAL PROBLEM

Professor George Fletcher has said that the issue of voluntary intoxication is "buffeted between two conflicting principles."¹² On the one hand, our legal system adheres to the concept that a "guilty act" alone is insufficient to

6. The "unilateral" theory of conspiracy requires that only one of the alleged conspirators actually agree to the commission of an offense. See Burgman, *Unilateral Conspiracy: Three Critical Perspectives*, 29 DE PAUL L. REV. 75 (1979).

7. P. ROBINSON, CRIMINAL LAW DEFENSES, § 82(e)(2) (Supp. 1987) (citing *People v. Foster*, 99 Ill. 2d 48, 457 N.E.2d 405 (1983) (construing ILL. REV. STAT. ch. 38, para. 8-2(a) (1981)).

8. See *infra* notes 45-48 and accompanying text.

9. See *infra* notes 49-55 and accompanying text.

10. See *infra* notes 49-55 and accompanying text.

11. ILL. REV. STAT. ch. 38, para. 6-3(a) (1987), amended by P.A. 85-670, § 1 (eff. Jan. 1, 1988).

12. G. FLETCHER, RETHINKING CRIMINAL LAW 846 (1978).

constitute a crime, that there must also be a "guilty mind" or "mens rea."¹³ An intoxicated person's befogged mind may make it impossible for him to possess the mental state required for a conviction. For this reason, it would be unjust to find such a person guilty of a crime.

On the other hand, despite all its theoretical purity, the operation of this concept can be quite troubling. As California Supreme Court Chief Justice Traynor once noted, "even though the moral culpability of an intoxicated criminal may be less than that of a sober person, it is a common belief that a person who voluntarily gets drunk and then commits a crime should not evade the consequences."¹⁴ Illinois Appellate Court Judge Stouder expressed the idea more colorfully when he opposed the concept of "allowing a criminal to commit a crime with a revolver in one hand to commit the deed, and a quart of intoxicating liquor in the other hand with which to create his defense."¹⁵ The issue, then, is how far a society should go to support one of the key concepts of its criminal jurisprudence.¹⁶ To strictly adhere to the mens rea requirement would permit drunken criminals to go unpunished, while creating an "intoxication exception" would undermine the significant place of mens rea in our jurisprudence.

A. A Brief History of the Voluntary Intoxication Defense

The early common law uniformly rejected the idea that voluntary intoxication was a defense to a criminal act.¹⁷ In fact, both Coke and Blackstone argued that voluntary intoxication should be considered an aggravating, rather

13. W. LAFAVE & A. SCOTT, CRIMINAL LAW 212 (1986) [hereinafter CRIMINAL LAW]. The necessity for "mens rea" is expressed in the Latin maxim "*actus non facit reum, nisi mens sit rea*," i.e., "[a]n act does not make the doer of it guilty unless the mind be guilty." BLACK'S LAW DICTIONARY 34 (5th ed. 1979). For a general discussion of mens rea, see CRIMINAL LAW, *supra*, at 212-16.

14. See *People v. Hood*, 1 Cal. 3d 444, 455, 462 P.2d 370, 377, 82 Cal. Rptr. 618, 625 (1969).

15. *People v. Rosas*, 102 Ill. App. 3d 113, 116, 429 N.E.2d 898, 900 (3d Dist. 1981).

The Michigan Supreme Court did not mince words when it expressed its feelings towards drunken offenders:

Voluntary intoxication is an offense not only *malum prohibitum* but *malum in se*, condemned as wrong in and of itself by every sense of common decency and good morals from the time that Noah in his drunkenness brought shame to his sons so that they backed in to cover his nakedness, and Lot's daughters employed it for incestuous purposes.

People v. Townsend, 214 Mich. 267, 272, 183 N.W. 177, 179 (1921).

16. As Professor George Fletcher has said, "[t]here has to be some accommodation between (1) the principle that if someone gets drunk, he is liable for the violent consequences, and (2) the principle that liability and punishment should be graded in proportion to actual culpability." G. FLETCHER, *supra* note 12, at 847.

17. See J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 529-30 (1960); Singh, *History of the Defense of Drunkenness in English Criminal Law*, 49 L.Q. REV. 528, 530 (1933); Special Project, *Drugs and Criminal Responsibility*, 33 VAND. L. REV. 1145, 1172 (1980) [hereinafter Special Project].

than mitigating factor.¹⁸ However, it was Hale who reflected the predominant view when he wrote that an intoxicated person "shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses."¹⁹ The law's distrust of intoxication as a defense seems to have been premised both on a belief that it could be easily feigned²⁰ and that a man should not be able to use a personal vice to shield himself from criminal liability.²¹

The nineteenth century gradually saw the harshness of this rule give way to various exceptions. The first indication that voluntary intoxication could be a mitigating factor was presented by Justice Holroyd in an 1819 English murder case. Although Holroyd said intoxication was not a defense, he did say it could be considered in determining the issue of premeditation.²² The first case in which a jury was actually instructed to consider a defendant's intoxication may have been the 1838 decision of *Regina v. Cruse*.²³ *Cruse* involved a defendant charged with assault with intent to murder, and the jury was instructed that gross intoxication might disprove the intention required for the aggravated offense.²⁴ It was not until fifty years later, however, that a court finally explained that although drunkenness was not an excuse for crime, if intent were a required element of the crime, the jury could consider the defendant's drunkenness in determining whether he had possessed the requisite intent.²⁵

18. J. HALL, *supra* note 17, at 530; Special Project, *supra* note 17, at 1172 n.292 (citing 4 W. BLACKSTONE, COMMENTARIES *25-26).

19. 1 M. HALE, PLEAS OF THE CROWN *32.

20. See Special Project, *supra* note 17, at 1172 n.294. "Now touching the trial of this incapacity . . . this is a matter of great difficulty, partly from the easiness of counterfeiting this disability . . . and partly from the variety of the degrees of this infirmity . . ." *Id.* (quoting 1 M. HALE, PLEAS OF THE CROWN *32).

21. See, e.g., *United States v. Drew*, 25 F. Cas. (C.C.D. Mass. 1828) (No. 14,993) (underscoring the importance of "the law not permitting a man to avail himself of the excuse of his own vice and misconduct, to shelter himself from the legal consequences of such crime").

22. J. HALL, *supra* note 17, at 531-32 (citing *Rex v. Grindley*, *quoted in Rex v. Carroll*, 173 Eng. Rep. 64, 64 (1835)).

23. 173 Eng. Rep. 610 (1838).

24. *Id.* at 612. The court said that:

[D]runkenness is no excuse for any crime whatever, yet it is often of very great importance in cases where it is a question of intention. A person may be so drunk as to be utterly unable to form any intention at all, and yet he may be guilty of great violence. If you are not satisfied that the prisoners, or either of them, had formed a positive intention of murdering this child you may still find them guilty of an assault (a).

Id.

25. The rule was stated thusly:

Although you cannot take drunkenness as any excuse for crime, yet when the crime is such that the intention of the party committing it is one of its constituent elements, you may look at the fact that a man was in drink in considering whether he formed the intention necessary to constitute the crime.

J. HALL, *supra* note 17, at 532 (quoting *Regina v. Doherty*, 16 Cox C.C. 306, 308 (1887)).

At face value, the voluntary intoxication defense is quite revolutionary. Although drunkenness would not *excuse* a criminal act, it could certainly *exculpate* the actor.²⁶ Professor Paul Robinson would later label the voluntary intoxication defense as a "failure of proof" defense. In other words, the defendant only has a defense because the prosecutor is unable to prove the defendant possessed the mental state required for the offense.²⁷

*B. The Puzzling Distinction Between
"Specific" and "General" Intent*

Taken to its logical conclusion, it would appear that voluntary intoxication would be germane to any criminal offense. This, however, has not been the case. In his *Digest of the Criminal Law*, James Fitzjames Stephen stated that intoxication could be applied only to negate a "specific intention."²⁸ In elaborating on this idea, Bishop claimed that evidence of intoxication should be admissible to determine whether a defendant could have acted with the "specific intent" required for the crime.²⁹ Thus, these common law authorities recognized that voluntary intoxication could vitiate a defendant's "specific intent," but not his "general intent." This raises two issues. First, what exactly is the distinction between "specific intent" and "general intent"? Second, why is the distinction germane to the defense of voluntary intoxication?

Professor Fletcher has argued that the "specific intent/general intent" distinction is no more than a compromise fashioned at common law to prevent intoxicated defendants from getting off "scot-free."³⁰ While "general intent" accompanies the base offense, "specific intent" goes beyond the base offense to reach further unrealized objectives.³¹ The common law approach thus permits evidence of intoxication to reduce a defendant's crime to a lower degree, but not to totally acquit him. For example, consider the offense of assault with intent to kill. The common law rule would permit evidence of intoxication to negate the defendant's ulterior, or "specific" intent to kill. The defendant's voluntary intoxication would not, however, negate the "general" intent necessary for the base crime of assault.³²

This approach has been criticized for two reasons. First, it is not always clear whether a given crime is one of "general" or "specific" intent.³³ "Specific

26. As Professor Jerome Hall succinctly expressed it "[t]he judges straight-facedly insist that this rule is quite consistent with the traditional one that voluntary drunkenness never excuses; it is simply that a material element, the required *mens rea*, is lacking in the commission of a homicide under gross intoxication." *Id.* at 533.

27. P. ROBINSON, *supra* note 7, § 65(a), at 286 (1984).

28. J. HALL, *supra* note 17, at 532 n.17.

29. "Evidence of intoxication therefore is admissible for the purpose of ascertaining . . . whether [a defendant] was incapable of entertaining the specific intent charged, where such intent, under the law, is an essential ingredient of the particular crime alleged to have been committed." *Id.* at 534 (quoting 1 BISHOP, CRIMINAL LAW 299 (1923)).

30. G. FLETCHER, *supra* note 12, at 848.

31. *Id.* at 849.

32. *Id.*

33. See G. FLETCHER, *supra* note 12, at 850-51; P. ROBINSON, *supra* note 7, § 65(e), at 298.

intent” has no single meaning. On the one hand, it may simply refer to a well-defined intent.³⁴ On the other hand, some say that “specific intent” means “purposeful,” and that “general intent” includes every other state of mind.³⁵ Still others see it as an “extra” intent requirement for certain crimes.³⁶ The best illustration of the confusion spawned by this tenuous distinction can be found in *People v. Hood*,³⁷ where the California Supreme Court cogently explained how the defense of assault could be defined as *both* a general intent and a specific intent offense.³⁸

Second, even if a distinction between general and specific intent could be agreed upon, its purported relevance to the concept of voluntary intoxication is wrong on principle. As Professors LaFare and Scott have noted, “[I]f intoxication does in fact negate an intention which is a required element of the crime (whether it be called specific intent or general intent), the crime has not been committed.”³⁹ Since voluntary intoxication is essentially a “failure of proof” defense,⁴⁰ a scheme which arbitrarily limits its relevance to only some crimes is “conceptually bankrupt.”⁴¹ If we truly believe in the idea of *mens rea*, we should not be permitted to pick and choose the crimes to which the intoxication defense applies.⁴²

The difficulties arising from the “general intent/specific intent” dichotomy prompted many American jurisdictions to develop a variety of approaches to the intoxication defense.⁴³ These same difficulties also motivated the MPC to diverge significantly from the common law approach.⁴⁴ Before examining the MPC’s approach, however, it is important to briefly examine Illinois’ early experience with the voluntary intoxication defense.

34. G. FLETCHER, *supra* note 12, at 850.

35. P. ROBINSON, *supra* note 7, § 65(e), at 298 (citing Roth, *General vs. Specific Intent: A Time For Terminological Understanding in California*, 7 PEPPERDINE L. REV. 67, 71-75 (1979)).

36. See CRIMINAL LAW, *supra* note 13, at 387-90.

37. 1 Cal. 3d 444, 462 P.2d 370, 82 Cal. Rptr. 618 (1969).

38. *Id.* at 451, 462 P.2d at 378, 82 Cal. Rptr. at 626.

39. See CRIMINAL LAW, *supra* note 13, at 390.

40. P. ROBINSON, *supra* note 7, § 65(a), at 286.

41. *Id.* § 65(e), at 300.

42. Professor Hall has said, “no immediate external situation, however criminal it appears to be, can of itself preclude the possibility that the relevant *mens rea* was lacking; and evidence *aliunde* is always admissible in that regard.” J. HALL, *supra* note 17, at 142.

43. Professor Robinson has identified several approaches taken by American courts in permitting voluntary intoxication to negate a required element of an offense. P. ROBINSON, *supra* note 7, § 65(a), at 289-93. Some jurisdictions permit the defense whenever it negates a required element of the offense. *Id.* Some jurisdictions cling to the common law approach permitting the voluntary intoxication defense to be raised against “specific intent offenses” but not “general intent offenses.” *Id.* Most jurisdictions have adopted either the Model Penal Code approach, which precludes intoxication from negating “recklessness” once it is shown that the actor would have been aware of the risk if he had been sober, or an approach based on the Model Penal Code but narrower in its application. *Id.*

44. MODEL PENAL CODE § 208 (1962).

II. THE VOLUNTARY INTOXICATION DEFENSE IN ILLINOIS AND THE INFLUENCE OF THE MODEL PENAL CODE

A. *The Voluntary Intoxication Defense in Illinois Prior to the 1961 Code*

The Illinois Criminal Code of 1833 included a provision concerning the effect of intoxication.⁴⁵ It stated that drunkenness was no excuse for a crime unless the offender had somehow been forced into his intoxicated state. In that event, the one who had caused the offender to drink was considered the criminal.⁴⁶ This statute continued in force, with no material changes, for well over one hundred years.⁴⁷

Thus, prior to the 1961 Code, many Illinois courts accepted the proposition that voluntary intoxication was not a defense.⁴⁸ Yet Illinois case law also recognized the common law "compromise" which allowed evidence of voluntary intoxication to be used to negate a "specific intent" which would aggravate a "general intent" crime. For example, the 1893 Illinois Supreme Court decision in *Crosby v. People*⁴⁹ held that, although voluntary intoxication was not an excuse for a crime, it might deprive a defendant of a "particular intent" which transformed an offense into a "graver" offense.⁵⁰ Later in the

45. The provision went as follows:

Drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness be occasioned by the fraud, contrivance, or force, of some other person or persons for the purpose of causing the perpetration of an offence; in which case the person or persons so causing said drunkenness, for such negligent purpose, shall be considered principal, or principals, and suffer the same punishment as would have been inflicted on the person or persons committing the offence, if he, she, or they had been possessed of sound reason and discretion.

REVISED LAWS OF ILLINOIS, FIRST DIVISION, § 9 (1833).

46. *Id.*

47. See ILL. REV. STAT. ch. 38, para. 599 (1959). This section provided that:

Drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness be occasioned by the fraud, contrivance or force of some other person, for the purpose of causing the perpetration of an offence; in which case, the person so causing said drunkenness, for such malignant purpose, shall be considered principal, and suffer the same punishment as would have been inflicted on the person committing the offense, if he had been possessed of sound reason and discretion.

Id.

48. *People v. Klemann*, 383 Ill. 236, 48 N.E.2d 957 (1943); *People v. Gilday*, 351 Ill. 11, 183 N.E. 573 (1932); *Bleich v. People*, 227 Ill. 80, 81 N.E. 36 (1907); *Bruen v. People*, 206 Ill. 417, 69 N.E. 24 (1903); *Addison v. People*, 193 Ill. 405, 62 N.E. 235 (1901); *Crosby v. People*, 137 Ill. 325, 27 N.E. 49 (1891); *Dunn v. People*, 109 Ill. 635 (1884); *Bartholomew v. People*, 104 Ill. 601 (1882), *overruled on other grounds by*, *People v. Montgomery*, 47 Ill. 2d 510, 268 N.E.2d 695 (1971); *Fitzpatrick v. People*, 98 Ill. 269 (1881); *Rafferty v. People*, 66 Ill. 118 (1872); *McIntyre v. People*, 38 Ill. 514 (1865).

49. 137 Ill. 325, 27 N.E. 49 (1891).

50. *Crosby v. People*, 137 Ill. 325, 27 N.E. 49 (1891). Specifically, the court said:

[W]here a particular intent is charged, and such intent forms the gist of the offense,

opinion, the court said that a jury could consider the defendant's intoxication only "if the act must be committed with a *specific intent* to constitute the crime charged."⁵¹ Thus, some pre-1961 Code cases allowed voluntary intoxication as a defense to crimes such as burglary,⁵² larceny,⁵³ assault with intent to rape,⁵⁴ and indecent liberties with a minor.⁵⁵

As Professor John Decker notes in his treatise on Illinois criminal law, however, Illinois courts have never been very receptive to the voluntary intoxication defense.⁵⁶ Consider, for example, the degree of intoxication necessary to even raise the defense. As discussed earlier,⁵⁷ voluntary intoxication is essentially a "failure of proof" defense. Therefore, if his intoxication is sufficient to obviate the existence of a required mental state, the defendant should not be held criminally liable. Indeed, there are Illinois cases which support precisely such a concept.⁵⁸ However, there is also a significant body of authority which suggests that something more than mere negation of a required mental state is required. For example, the Illinois Supreme Court in *People v. Cochran*⁵⁹ held that voluntary intoxication could be a defense only where the intoxication was so extreme as "to suspend entirely the power of reason and the accused is incapable of any mental action."⁶⁰ Arguably, to prove the entire suspension of the defendant's power of reason is different—and more difficult—than simply to show that a defendant could not have formed the intent to steal in a burglary case. Nevertheless, the "suspension of the power of reason" standard was cited in numerous other pre-1961 Code Illinois cases.⁶¹

B. *The Model Penal Code Perspective*

The major changes in the Illinois voluntary intoxication statute wrought by the adoption of the 1961 Code cannot be completely understood without first

as contradistinguished from the intent necessarily entering into every crime,—as, where one crime is thereby aggravated into a higher crime, or a misdemeanor enlarged into a felony,—any cause which deprives the defendant of the mental capacity to form such an intent will be a defense to the graver crime.

Id. at 342, 27 N.E. at 52.

51. *Id.* at 343, 27 N.E. at 53.

52. *People v. Jones*, 263 Ill. 564, 105 N.E. 744 (1914); *People v. Bruen*, 206 Ill. 417, 69 N.E. 24 (1903); *Schwabacher v. People*, 165 Ill. 618, 46 N.E. 809 (1897).

53. *Bartholomew v. People*, 104 Ill. 601 (1882); *People v. Herrin*, 295 Ill. App. 590, 15 N.E.2d 598 (4th Dist. 1938).

54. *Addison v. People*, 193 Ill. 405, 62 N.E. 235 (1901).

55. *People v. Klemann*, 38 Ill. 236, 48 N.E.2d 957 (1943).

56. J. DECKER, *ILLINOIS CRIMINAL LAW* 643 (1986).

57. See *supra* notes 40-41 and accompanying text.

58. *People v. Freedman*, 4 Ill. 2d 414, 123 N.E.2d 317 (1954); *People v. Klemann*, 383 Ill. 236, 48 N.E.2d 957 (1943); *People v. Brislane*, 295 Ill. 241, 129 N.E. 185 (1920).

59. 313 Ill. 508, 145 N.E. 207 (1924).

60. *Id.* at 519, 145 N.E. at 211.

61. See, e.g., *People v. Lion*, 10 Ill. 2d 208, 139 N.E.2d 757 (1957); *People v. Minzer*, 358 Ill. 345, 193 N.E. 370 (1934); *People v. Bartz*, 342 Ill. 56, 173 N.E. 779 (1930).

examining the concept of voluntary intoxication as expressed in the MPC. In order to understand the MPC's treatment of voluntary intoxication, however, one must first look to its treatment of mens rea in general.

The common law was replete with colorful terms for various culpable states of mind. It was easy to say that a person was guilty of a certain offense if he acted "willfully," "feloniously," or "maliciously." It was harder to define precisely what any of these terms meant.⁶² In an effort to eliminate this imprecision, the MPC's drafters recognized only four kinds of criminal culpability.⁶³ Other than absolute liability,⁶⁴ the only types of mens rea recognized by the MPC are "purposely,"⁶⁵ "knowingly,"⁶⁶ "recklessly,"⁶⁷ and "negligently."⁶⁸

When the MPC drafters addressed the defense of voluntary intoxication, they acknowledged the usual common law rule that voluntary intoxication was relevant to disprove a "specific intent," but not to disprove a "general intent," in the particular crime at issue.⁶⁹ The drafters admitted that in practice this distinction was "obscure" and "unanalyzed."⁷⁰ Nevertheless, they decided that the MPC should roughly parallel what they perceived to be the effect of the common law rule.⁷¹ Accordingly, the MPC provides that while voluntary intoxication can be used to disprove the existence of a "purposeful" or "knowing" state of mind, it is irrelevant if the state of mind necessary for the offense is either "reckless" or "negligent."⁷²

The drafters' comments directly confronted the issue of forbidding the use of the voluntary intoxication defense as a defense to a crime requiring a "reckless" state of mind.⁷³ In their comments, the drafters admitted that a reckless state of mind required a "conscious disregard" of a risk, and that arguably voluntary intoxication could be allowed to disprove the "awareness" necessary to establish it.⁷⁴ Nevertheless, the drafters chose to preserve what they perceived as the common law's "special rule for drunkenness," which presumed that people are aware of the potential consequences of excessive drinking.⁷⁵

62. See, e.g., *Regina v. Faulkner*, 13 Cox C.C. 550 (1877) (compare the wildly disparate ways Justice Barry and Justice Fitzgerald each define the terms "feloniously," "unlawfully," and "maliciously").

63. MODEL PENAL CODE § 2.02(1) (1962).

64. *Id.* § 2.05.

65. *Id.* § 2.02(2)(a).

66. *Id.* § 2.02(2)(b).

67. *Id.* § 2.02(2)(c).

68. *Id.* § 2.02(2)(d).

69. *Id.* § 2.08 comment 2, at 4 (Tent. Draft No. 9, 1959).

70. *Id.*

71. *Id.* comment 2, at 5.

72. *Id.*

73. *Id.* comment 3, at 8.

74. *Id.*

75. *Id.* comment 3, at 9. Essentially, the drafters defended this decision by citing:

In short, the MPC abolished the vague "general/specific" intent distinction and replaced it with a limited number of precise states of minds.⁷⁶ By preserving the idea that voluntary intoxication is essentially a "failure of proof" defense, the MPC recognized that it can be used to negate the mental state required for "purposeful" and "knowing." However—in deference to common law—the drafters also preserved the "special rule" which held voluntary intoxication to be irrelevant to any offense predicated on either "recklessness" or "negligence."

C. *The Voluntary Intoxication Defense In The 1961 Code*

As a general proposition, concepts in the then incomplete MPC significantly influenced the drafters of the 1961 Code.⁷⁷ For example, the 1961 Code followed the MPC's lead in reducing the number of mens rea terms to four.⁷⁸ Except that Illinois uses the term "intent" to refer to what the MPC defines as "purposeful,"⁷⁹ Illinois has otherwise adopted the MPC's other mens rea terms, "knowledge,"⁸⁰ "recklessness,"⁸¹ and "negligence."⁸²

The MPC likewise influenced the 1961 Code's drafters when they revised the voluntary intoxication statute. As previously discussed,⁸³ Illinois courts had traditionally followed the common law in distinguishing between "specific intent" and "general intent" offenses, with voluntary intoxication available as a defense only to the former. Instead of following the common law, however, the 1961 Code borrowed liberally from the MPC's treatment of this area.⁸⁴

Chapter 38, paragraph 6-3(a) of the 1961 Code ("Section 6-3(a)") provided that "[a] person who is in an intoxicated or drugged condition is criminally

[T]he fundamental point that awareness of the potential consequences of excessive drinking on the capacity of human beings to gauge the risks incident to their conduct is by now so dispensed in our culture that we believe it fair to postulate a general equivalence between the risks created by the conduct of the drunken actor and the risks created by his conduct in becoming drunk.

Id.

76. *Id.* § 2.02.

77. See Committee Foreword, Proposed Illinois Revised Criminal Code (1961) (tentative final draft).

78. ILL. REV. STAT. ch. 38, paras. 4-3, 4-4, 4-5, 4-6, 4-7 (1963).

79. ILL. REV. STAT. ch. 38, para. 4-4 (1987).

80. *Id.* para. 4-5.

81. *Id.* para. 4-6.

82. *Id.* para. 4-7.

83. See *supra* notes 48-61 and accompanying text.

84. The 1961 Code stated:

A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition . . . [n]egatives the existence of a mental state which is an element of the offense.

ILL. REV. STAT. ch. 38, para. 6-3(a) (1961). This version, of course, is very close to the MPC's provision that "Except as provided . . . intoxication of the actor is not a defense unless it negatives an element of the offense." MODEL PENAL CODE § 2.08(1) (1962).

responsible for conduct unless such condition . . . [n]egatives the existence of a mental state which is an element of the offense.”⁸⁵ What did the 1961 Code mean by “a mental state which is an element of the offense”? In considering this question, it should first be noted that the 1961 Code followed the lead of the MPC in that it never mentions either “general intent” or “specific intent.” The only mental states which Illinois recognizes are “intent,” “knowing,” “reckless” and “negligence.”⁸⁶ However, the statutory definition of some offenses, such as robbery,⁸⁷ include none of these four mental states. The 1961 Code explains that this omission did not create absolute liability offenses, but that these offenses instead require the defendant to have acted *either* “intentionally,” “recklessly” or “knowingly.” The definition of these offenses, like the provision on mental states, was clearly patterned after the MPC.⁸⁸

The changes wrought by the 1961 Code in the area of voluntary intoxication are striking. For example, the 1961 Code abolished the old common law “specific intent/general intent”⁸⁹ distinction. Even more significantly, while the MPC specifically exempts “reckless” offenses from the defense of voluntary intoxication,⁹⁰ the 1961 Code conspicuously omitted such an exception. Therefore, the 1961 Code went *beyond* the MPC by apparently allowing voluntary intoxication as a defense to crimes in which “recklessness” is the required mental state. Furthermore, the 1961 Code designated voluntary intoxication as an affirmative defense,⁹¹ thus placing the burden on the state to disprove its existence beyond a reasonable doubt when it is an issue in the case.⁹²

In sum, the 1961 Code not only abolished the traditional common law rule, but its language gave much broader scope to the voluntary intoxication defense than did the language of the MPC. Yet the committee comments to Section 6-3(a) very curiously state that the new voluntary intoxication statute “makes no change in the substantive law as to intoxication.”⁹³ The committee comments therefore failed to recognize the radical changes imbedded in the 1961 Code. Not surprisingly, Illinois courts have often reflected this confusion when they have attempted to construe Section 6-3(a).

85. ILL. REV. STAT. ch. 38, para. 6-3(a) (1961).

86. ILL. REV. STAT. ch. 38, paras. 4-4, 4-5, 4-6, 4-7 (1987).

87. *Id.* para. 18-1.

88. *Id.* para. 4-3(b). The 1961 Code provides that any offense, other than an absolute liability offense, which does not include a particular mental state, can be committed only if the defendant has acted either intentionally, knowingly, or recklessly. This statute is closely patterned after § 2.02(3) of the Model Penal Code.

89. *See supra* notes 31-45 and accompanying text (discussing common law approach to voluntary intoxication defense).

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

91. ILL. REV. STAT. ch. 38, para. 6-4 (1987).

92. *Id.* para. 3-2(b).

93. ILL. ANN. STAT. ch. 38, para. 6-3 (committee comments at 335) (Smith-Hurd 1989).

III. THE ILLINOIS COURTS' FAILURE TO UNDERSTAND SECTION 6-3(a) OF THE 1961 CODE

As previously indicated, it is simply not enough to change the language of the written law. It is also necessary to convince lawyers and judges that the law has actually changed. For whatever reason,⁹⁴ the courts of Illinois have had severe problems accepting the fact that the 1961 Code changed the traditional common law approach to the voluntary intoxication defense. This failure to understand the changes made by the 1961 Code can be seen on several levels.

A. *The Illinois Courts' Retention of the Legislatively-Discarded "Specific Intent/General Intent" Dichotomy*

Although numerous cases illustrate the Illinois courts' difficulty in accepting the effect of the new statutory language, perhaps no case is more emblematic of the courts' intransigence than the third district's 1981 decision in *People v. Rosas*.⁹⁵ The issue in *Rosas* was simple: whether a defendant could claim voluntary intoxication as a defense to a charge of armed robbery. The trial judge in *Rosas* had refused to instruct the jury as to the voluntary intoxication defense.⁹⁶ On appeal, the defendant argued that Section 6-3 of the 1961 Code provided that voluntary intoxication was a valid defense if it negated the mental state required by the particular offense.⁹⁷ The defendant also contended that because the Illinois armed robbery statute required no particular mental state,⁹⁸ the offense could be committed by a person acting either "intentionally," "knowingly," or "recklessly."⁹⁹ Therefore, the defendant argued, the 1961 Code granted him the right to have the jury decide whether his alleged intoxication prevented him from forming all of these mental states.

94. For some interesting suggestions in this area, see Norton, *Criminal Law Codification: Three Hazards*, 10 LOY. U. CHI. L.J. 61 (1978). Professor Norton suggests that judges and lawyers often apply old terminology and concepts to new codification. *Id.* at 63. One reason for this, he notes, is that new codifications usually do not totally change the criminal law and the end result of most cases after new codification is much the same as it was under the old law. *Id.* In addition, new crimes often retain the same names and elements as pre-codification crimes. In the case of the Illinois Criminal Code, Norton blames the drafters in part for the courts' failure to apply the new language to common law concepts. The reason the drafters take some of the blame, he explains, is that they failed to provide terms for certain classifications of crimes. Consequently, courts were invited to use obsolete terms and, as a result, obsolete concepts which accompanied those terms. *Id.* at 64. Specifically, Professor Norton notes that crimes which may be proven by intent, knowledge or recklessness, under 4-3(b), have no name. Courts can call them "intent-knowledge-reckless" crimes, or they can use the common law term, "general intent" crimes. *Id.*

95. 102 Ill. App. 3d 113, 429 N.E.2d 898 (3d Dist. 1981).

96. *Id.*

97. *Id.* at 115, 429 N.E.2d at 899, citing ILL. REV. STAT. ch. 38, para. 6-3 (1979).

98. *Id.* at 114, 429 N.E.2d at 899, citing ILL. REV. STAT. ch. 38, paras. 18-1, 18-2(a) (1979).

99. *Id.* at 115, 429 N.E.2d at 899, citing ILL. REV. STAT. ch. 38, para. 4-3(b) (1979).

The defendant's reading of the 1961 Code in *Rosas* was straightforward and unexceptional. Accordingly, the court did not deny that the 1961 Code provided for precisely what he asked. Nonetheless, the *Rosas* court held that the defendant could not avail himself of the voluntary intoxication defense.¹⁰⁰ In reaching this conclusion, the court first cited to a 1979 Illinois Supreme Court decision which held that voluntary intoxication was not a defense to either robbery or armed robbery because neither were specific intent offenses.¹⁰¹ Therefore, the court responded to the defendant's argument that the 1961 Code did not distinguish between "specific" and "general" intent by stating that *no court* had ever failed to distinguish the two intents.¹⁰²

The *Rosas* court did admit that the Illinois legislature might have intended to eliminate the distinction between "general" and "specific" intent, and that such an interpretation of Section 6-3(a) might be logical.¹⁰³ However, the court relied on "the long-standing" Illinois rule that voluntary intoxication is only a defense to "specific intent" crimes.¹⁰⁴ Interestingly, the court's only support for this proposition was an Illinois case decided in 1865, almost 100 years before the adoption of the 1961 Code.¹⁰⁵ Of course, the court could not support its holding with language from the 1961 Code, because no such language existed.

Not only was the "rule" cited in *Rosas* nowhere to be found in the 1961 Code, but the court did not even attempt to argue that this nonexistent "rule" made any sense. Although the *Rosas* court conceded that its "rule" may not be logical, it nonetheless held that, regardless of logic or legislative intent, a distinction did exist between "general" and "specific intent."¹⁰⁶ Unfortunately, the court did not indicate what this distinction was, nor where any support for such distinction could be found in the 1961 Code.

It is also debatable whether the Illinois Supreme Court has ever entirely understood either the significance of Section 6-3(a) or the changes it effected

100. *Id.* at 116, 429 N.E.2d at 900.

101. *Id.* at 114-15, 429 N.E.2d at 899 (citing *People v. Banks*, 75 Ill. 2d 383, 388 N.E.2d 1244 (1979)). The *Rosas* court also relied on *People v. Baker*, 72 Ill. App. 3d 682, 391 N.E.2d 91 (1st Dist. 1979). In *Baker*, the court applied the newly decided *Banks* decision and held that voluntary intoxication was not a defense to armed robbery because the Illinois Supreme Court had recently determined armed robbery was not a specific intent crime. *People v. Baker*, 72 Ill. App. 3d 682, 685, 391 N.E.2d 91, 94 (1st Dist. 1979).

102. *People v. Rosas*, 102 Ill. App. 3d 113, 116, 429 N.E.2d 898, 900 (3d Dist. 1981). Specifically, the court said, "[r]egardless of the logic of eliminating the distinction between interposing the defense in specific and general intent prosecutions and the possibility of such a legislative intent, we must note that *no court* has ever dissented from the distinction . . ." *Id.* (emphasis added):

103. *Id.*

104. *Id.* at 115, 429 N.E.2d at 899.

105. *Id.* at 115, 429 N.E.2d at 899 (citing *McIntyre v. People*, 38 Ill. 514 (1865)).

106. *Id.* at 116, 429 N.E.2d at 900. More specifically, the court stated "[i]t may be that 'the reasoning supporting the rule is difficult to explicate' . . . and that logic fails to support the present distinction between specific and general intent prosecution." *Id.* Yet the court concluded that "[w]e believe that there is a distinction between general and specific intent offenses and voluntary intoxication may a defense to the latter but not the former." *Id.*

in the underlying law. Consider, for example, its 1986 decision in *People v. Weir*.¹⁰⁷ At issue in *Weir* was whether a defendant whose attorney failed to raise the defense of voluntary intoxication had received ineffective assistance of counsel. The state had charged Weir with unlawful use of weapons and aggravated assault. Weir's attorney stated on the record that because these offenses were "general intent" offenses, he could not raise the defense of voluntary intoxication.¹⁰⁸ The appellate court reversed, holding that the unlawful use of weapons and aggravated assault were "specific intent" crimes. Accordingly, the appellate court found the attorney's failure to raise the voluntary intoxication defense to be ineffective assistance of counsel.¹⁰⁹

On appeal, the state did not dispute the fact that voluntary intoxication was a proper defense to these offenses. However, the Illinois Supreme Court did not take the opportunity to chastise the lower court in dicta for using common law terminology which the Illinois legislature had long ago abolished.¹¹⁰ Instead, the supreme court merely stated, "[a]ccordingly, we do not consider the ways in which the appellate court and the parties have classified the offenses as requiring a specific intent or a general intent."¹¹¹ Consequently, the Illinois Supreme Court erroneously implied that "specific intent" and "general intent" were still relevant concepts in the 1961 Code, despite the legislature's having abolished those terms over two decades before *Weir*.

The misconception that "general intent/specific intent" is a distinction still found in Illinois law can be found in numerous cases decided long after the adoption of the 1961 Code.¹¹² Ironically, these decisions cannot even agree on what the actual difference is between a "general intent" and a "specific intent" offense.¹¹³ Nevertheless, determining whether an offense is "specific intent" or "general intent" is the usual way Illinois courts have decided whether Section 6-3(a)'s voluntary intoxication defense is applicable.¹¹⁴

107. 111 Ill. 2d 334, 490 N.E.2d 1 (1986).

108. 131 Ill. App. 3d 562, 475 N.E.2d 1033, 1035 (3d Dist. 1985), *rev'd*, 111 Ill. 2d 334, 490 N.E.2d 1 (1986).

109. 131 Ill. App. 3d at 564, 475 N.E.2d at 1034.

110. *Weir*, 111 Ill. 2d at 335, 490 N.E.2d at 1. In *Weir*, the supreme court reversed the appellate court and held that the defendant did *not* receive ineffective assistance of counsel. *Id.* The reason, according to the court, was that the attorney's failure to raise voluntary intoxication as a defense to his crime did not prejudice the defendant, since such a defense was very unlikely to succeed in light of the evidence. *Id.*

111. *Id.* at 337, 490 N.E.2d at 2.

112. *People v. Thompson*, 125 Ill. App. 3d 665, 466 N.E.2d 380 (2d Dist. 1984); *People v. Stewart*, 122 Ill. App. 3d 546, 461 N.E.2d 591 (1st Dist. 1984); *People v. Saunders*, 122 Ill. App. 3d 922, 461 N.E.2d 1006 (2d Dist. 1984); *People v. Rosas*, 102 Ill. App. 3d 113, 429 N.E.2d 898 (3d Dist. 1981); *People v. Baker*, 72 Ill. App. 3d 682, 391 N.E.2d 91 (1st Dist. 1979); *People v. Brumfield*, 72 Ill. App. 3d 107, 390 N.E.2d 589 (5th Dist. 1979); *People v. Harkey*, 69 Ill. App. 3d 94, 386 N.E.2d 1151 (5th Dist. 1979); *People v. Hayes*, 37 Ill. App. 3d 772, 347 N.E.2d 327 (1st Dist. 1976); *People v. Hunter*, 14 Ill. App. 3d 879, 303 N.E.2d 482 (1st Dist. 1973).

113. *See infra* notes 160-66 and accompanying text.

114. *See, e.g.,*

Aggravated Assault: People v. Harkey, 69 Ill. App. 3d 94, 386 N.E.2d 1151 (5th Dist. 1979)

Rosas and *Weir* exemplify the fact that Illinois courts have been unable to come to grips with a statute which profoundly altered Illinois law regarding the relevance of the common law terms of "general intent" and "specific intent." Unfortunately, this is not the only aspect of Section 6-3(a) which has confused the courts.

B. *The Role of Voluntary Intoxication as an Affirmative Defense*

Section 6-3(a) of the 1961 Code made voluntary intoxication an affirmative defense in Illinois.¹¹⁵ This meant that if some evidence of intoxication were introduced at trial, the state would have to disprove its existence beyond a reasonable doubt.¹¹⁶ Yet almost two decades after the legislature adopted Section 6-3(a), it was still possible to find an Illinois decision asserting that "it is well established in Illinois that voluntary intoxication is no defense to criminal conduct."¹¹⁷ Such a fundamental error by an appellate court only underscores the failure of the Illinois legal community to appreciate the impact of the 1961 Code in the voluntary intoxication area.

(general intent; no defense).

Armed Robbery/Robbery: *People v. Banks*, 75 Ill. 2d 383, 388 N.E.2d 1244 (1979) (robbery; general intent; no defense); *People v. Rosas*, 102 Ill. App. 3d 113, 429 N.E.2d 898 (3d Dist. 1981) (armed robbery; general intent; no defense); *People v. Baker*, 72 Ill. App. 3d 682, 391 N.E.2d 91 (1st Dist. 1979) (armed robbery; general intent; no defense).

Aggravated Battery/Battery: *People v. Crosser*, 117 Ill. App. 3d 24, 452 N.E.2d 857 (2d Dist. 1983) (aggravated battery; specific intent; defense); *People v. Jones*, 67 Ill. App. 3d 477, 384 N.E.2d 523 (3d Dist. 1978) (battery; specific intent; defense); *People v. Hayes*, 37 Ill. App. 3d 772, 347 N.E.2d 327 (1st Dist. 1976) (battery; specific intent; defense).

Attempt Burglary: *People v. Nugara*, 39 Ill. 2d 482, 236 N.E.2d 693 (dictum) (specific intent; defense), *cert. denied*, 393 U.S. 925 (1968).

Aggravated Kidnapping: *People v. Long*, 30 Ill. App. 3d 815, 333 N.E.2d 534 (2d Dist. 1975) (specific intent; defense).

Burglary: *People v. Wirth*, 77 Ill. App. 3d 253, 395 N.E.2d 1106 (1st Dist. 1979) (specific intent; defense); *People v. Hunter*, 14 Ill. App. 3d 879, 303 N.E.2d 482 (1st Dist. 1973) (specific intent; defense).

Deviate Sexual Assault: *People v. Saunders*, 122 Ill. App. 3d 922, 461 N.E.2d 1006 (2d Dist. 1984) (general intent; no defense).

Murder: *People v. Lensei*, 102 Ill. App. 3d 214, 430 N.E.2d 495 (3d Dist. 1981) (specific intent; defense); *People v. Zynda*, 53 Ill. App. 3d 794, 368 N.E.2d 1079 (2d Dist. 1977) (specific intent; defense).

Involuntary Manslaughter: *People v. Cunningham*, 123 Ill. App. 2d 190, 260 N.E.2d 10 (1st Dist. 1970) (general intent; no defense).

Theft: *People v. Brabson*, 54 Ill. App. 3d 134, 369 N.E.2d 346 (3d Dist. 1977) (specific intent; defense).

Rape: *People v. Brumfield*, 72 Ill. App. 3d 107, 390 N.E.2d 589 (5th Dist. 1979) (general intent; no defense); *People v. Hunter*, 14 Ill. App. 3d 879, 303 N.E.2d 482 (1st Dist. 1973) (general intent; no defense).

Unlawful Use of Weapons: *People v. Remon*, 40 Ill. App. 3d 337, 352 N.E.2d 374 (1st Dist. 1976) (general intent; no defense).

115. ILL. REV. STAT. ch. 38, paras. 6-3, 6-4 (1987) (para. 6-3, amended 1988).

116. *Id.* para. 3-2(b).

117. *See People v. Kuhn*, 68 Ill. App. 3d 59, 385 N.E.2d 388 (3d Dist. 1979).

C. The Effect Which Voluntary Intoxication Must Have Upon the Defendant in Order to Constitute a Defense

Section 6-3(a) plainly states that voluntary intoxication is a defense if it "negatives the existence of a mental state" needed to constitute the charged offense.¹¹⁸ Yet many Illinois courts have adamantly refused to follow this clear mandate. A good example is *People v. Fleming*.¹¹⁹ In *Fleming*, the court said that to constitute a defense, the level of intoxication must be so extreme that it "suspends entirely the power of reason and renders the defendant incapable of forming the specific intent required for the offense."¹²⁰ Section 6-3(a), however, makes reference to neither "specific intent" nor the "suspension of reason." As support for its holding, the *Fleming* court instead cited to the Illinois Supreme Court's 1963 decision in *People v. Tillman*.¹²¹ Although the language which the *Fleming* court quoted can certainly be found in *Tillman*,¹²² the *Tillman* court was concerned with a *pre-1961 Code* criminal prosecution. As a result, the *Fleming* court's decision erroneously suggests that the 1961 Code made no change in the law of voluntary intoxication in Illinois.

This erroneous definition of the level of intoxication needed to constitute a defense has appeared in many post-1961 Code Illinois cases.¹²³ Consequently, these courts have suggested a standard which is more difficult to establish than that required by Section 6-3(a). Whereas Section 6-3(a) merely required that the defendant's intoxication "negative" the requisite mens rea, the *Fleming* court's ruling required that it negative both the requisite mens rea *and* the defendant's ability to form any state of mind at all. Thus, Illinois courts continued to rely on the pre-1961 Code state of the law even decades after the legislature's adoption of Section 6-3(a).

D. Voluntary Intoxication as Applied to Crimes That Require a Reckless State of Mind

As discussed earlier,¹²⁴ the 1961 Code, unlike the MPC, did not prohibit voluntary intoxication as a defense to crimes that required only a "reckless"

118. ILL. REV. STAT. ch. 38, para. 6-3(a) (1985) (amended 1988).

119. 42 Ill. App. 3d 1, 355 N.E.2d 345 (3d Dist. 1976).

120. *Id.* at 3, 355 N.E.2d at 348.

121. 26 Ill. 2d 552, 187 N.E.2d 731 (1963).

122. *Id.* at 557, 187 N.E.2d at 734.

123. See *People v. Walcher*, 42 Ill. 2d 159, 246 N.E.2d 256 (1969); *People v. Gonzales*, 40 Ill. 2d 233, 239 N.E.2d 783 (1968); *People v. Hicks*, 35 Ill. 2d 390, 220 N.E.2d 461 (1966), *cert. denied*, 386 U.S. 986 (1967); *People v. Crosser*, 117 Ill. App. 3d 24, 452 N.E.2d 857 (2d Dist. 1983); *People v. Gilman*, 113 Ill. App. 3d 73, 446 N.E.2d 595 (4th Dist. 1983); *People v. Moon*, 107 Ill. App. 3d 568, 437 N.E.2d 823 (5th Dist. 1982); *People v. Proper*, 68 Ill. App. 3d 250, 385 N.E.2d 882 (5th Dist. 1979); *People v. Gross*, 52 Ill. App. 3d 765, 367 N.E.2d 1028 (4th Dist. 1977); *People v. Newlin*, 31 Ill. App. 3d 735, 334 N.E.2d 349 (5th Dist. 1975); *People v. Heiple*, 29 Ill. App. 3d 452, 330 N.E.2d 556 (5th Dist. 1975); *People v. Fuller*, 17 Ill. App. 3d 1005, 309 N.E.2d 96 (2d Dist. 1974); *People v. Wicker*, 4 Ill. App. 3d 990, 282 N.E.2d 771 (1st Dist. 1972).

124. See *supra* notes 90-93 and accompanying text.

state of mind.¹²⁵ Nothing in the language of Section 6-3(a) would preclude voluntary intoxication from being used as a defense to crimes which explicitly require a "reckless" mens rea.¹²⁶ Similarly, nothing in Section 6-3(a) would preclude voluntary intoxication from being used as a defense to those crimes which have no listed mental state, but which can be established through either an "intentional," "knowing," or "reckless" state of mind under Section 4-3(b) of the 1961 Code.¹²⁷

The Illinois courts, however, have failed to acknowledge these clear statutory mandates. Instead, cases such as *People v. Olson*¹²⁸ hold that voluntary intoxication is not a defense to involuntary manslaughter because that crime requires only a "reckless" state of mind to establish culpability.¹²⁹ In support of its holding, the *Olson* court cited to the decision in *People v. Arndt*,¹³⁰ where the Illinois Supreme Court held that voluntary intoxication was not a defense to involuntary manslaughter because that crime did not require "specific intent."¹³¹ Not surprisingly, the only authority the supreme court could muster for this anachronism was *People v. Flanagan*,¹³² a case decided a full *thirty-two years* before the effective date of the 1961 Code.¹³³

A brief look at the Illinois Pattern Jury Instructions-Criminal ("IPI-Criminal") also reveals that the *Olson-Arndt* rule lacks substantive authority. The 1968 first edition of the IPI-Criminal stated, without citing to any authority, that voluntary intoxication was not a defense to a crime having "recklessness" as the requisite mens rea.¹³⁴ Interestingly, the second edition of the IPI-Criminal repeats this proposition, citing only to *Olson* and *Arndt* for support.¹³⁵

Thus, in the quarter-century following its passage, the Illinois courts have failed dismally in both understanding and implementing the changes wrought by Section 6-3(a). All too often, they have failed to recognize that the 1961 Code: (1) abolished the "general intent/specific intent" distinction inherent in the common law; (2) formally declared voluntary intoxication to be an affirmative defense; (3) changed the level of intoxication required to constitute a

125. Compare ILL. REV. STAT. ch. 38, para. 6-3(a) (1985) (merely states that an intoxicated person is "criminally responsible for conduct unless such condition . . . : (a) Negatives the existence of a mental state which is an element of the offense; . . .) with MODEL PENAL CODE § 2.08(2) (1962) ("when recklessness establishes an element of the offense, if the actor, due to self-induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial").

126. See, e.g., ILL. REV. STAT. ch. 38, para. 9-3 (1985) (involuntary manslaughter and reckless homicide).

127. ILL. REV. STAT. ch. 38, para. 4-3(b) (1961). An example of this type of offense is robbery. ILL. REV. STAT. ch. 38, para. 18-1 (1987).

128. 60 Ill. App. 3d 535, 377 N.E.2d 371 (4th Dist. 1978).

129. *Id.* at 542, 377 N.E.2d at 377.

130. 50 Ill. 2d 390, 280 N.E.2d 230 (1972).

131. *Id.* at 394, 280 N.E.2d at 233.

132. 338 Ill. 353, 170 N.E. 265 (1930).

133. Although the 1961 Code was adopted in that year, it did not go into effect until 1962.

134. ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL No. 24.02 (1968).

135. ILLINOIS PATTERN JURY INSTRUCTIONS—CRIMINAL No. 24-25.02 (2d ed. 1981).

valid defense; and (4) extended the defense of voluntary intoxication to crimes requiring only a "reckless" state of mind.

IV. THE CONFUSED STATE OF THE VOLUNTARY INTOXICATION DEFENSE IN ILLINOIS PRIOR TO THE AMENDMENT OF THE 1961 CODE

In his treatise on defenses in the criminal law, Professor Paul Robinson identified several basic approaches American jurisdictions have taken on the issue of voluntary intoxication.¹³⁶ Robinson grouped these approaches into six categories:

- 1) jurisdictions which permit voluntary intoxication as a defense whenever it negates any required element of the particular crime;¹³⁷
- 2) jurisdictions which adopt the MPC approach, and permit voluntary intoxication to negate either a "purposeful" or "with knowledge" mens rea, but not a "reckless" or "negligent" mens rea;¹³⁸
- 3) jurisdictions which adopt the general approach of the MPC, but have narrowed the availability of the defense by allowing voluntary intoxication to negate only a required purpose or intention, but not other mental states, such as knowledge;¹³⁹
- 4) jurisdictions which follow the common law rule by allowing voluntary intoxication to be raised as a defense to specific intent offenses, but not to general intent offenses;¹⁴⁰
- 5) jurisdictions which allow voluntary intoxication to be raised as a defense only to the offense of murder, and only if the defendant can show that the intoxication negated either his premeditation or deliberation;¹⁴¹ and,
- 6) jurisdictions which bar the use of voluntary intoxication as a defense to any crime.¹⁴²

In 1984, Robinson characterized Illinois as generally falling within category one.¹⁴³ Yet he also noted several Illinois cases recognizing the "general intent/specific intent" distinction, which tended to place Illinois in category four.¹⁴⁴ What Robinson failed to note, however, was that both Illinois case law and the IPI-Criminal preclude the use of voluntary intoxication as a defense where the requisite mental state is "recklessness."¹⁴⁵ Therefore, he did not recognize that Illinois arguably fell into category two as well.¹⁴⁶

Illinois' law on the voluntary intoxication defense prior to 1986 thus fell into at least three of Professor Robinson's six categories. This confused approach to the voluntary intoxication defense could not be permitted to

136. P. ROBINSON, *supra* note 7, § 65(a), at 288-93.

137. *Id.* § 65(a), at 290, § 65(b), at 295-96.

138. *Id.* § 65(a), at 290-91, § 65(c), at 296-97.

139. *Id.* § 65(a), at 291, § 65(d), at 297.

140. *Id.* § 65(a), at 291-92, § 65(e), at 297-301.

141. *Id.* § 65(a), at 292, § 65(f), at 301.

142. *Id.* § 65(a), at 293, § 65(f), at 301.

143. *Id.* § 65(a), at 290 n.5.

144. *Id.* § 65(a), at 292 n.11.

145. See *supra* notes 124-35 and accompanying text.

146. See *supra* note 138 and accompanying text.

continue. Clearly, some changes had to be made either in the statute itself, or in the way Illinois courts interpreted Section 6-3(a).

V. RECENT CHANGES IN ILLINOIS' VOLUNTARY INTOXICATION DEFENSE

A. *The 1986 Amendment to the Illinois Reckless Homicide Statute*

The first change in Illinois law to affect the voluntary intoxication defense occurred in 1986.¹⁴⁷ The Illinois legislature amended the reckless homicide statute not only to specifically exclude voluntary intoxication from the realm of possible defenses, but also to provide that evidence of a defendant's voluntary intoxication would constitute prima facie evidence of the "reckless" mens rea required for the crime itself.¹⁴⁸ Thus, for the first time, a section of the Illinois Criminal Code—not merely case law or the IPI-Criminal—indicated that Section 6-3(a) did not mean what it appeared to mean. This change in the law, however, was minor in comparison to the legislature's revision of Section 6-3(a) two years later.

B. *The 1988 Amendment to Section 6-3(a)*

On January 1, 1988, a dramatic revision of the defense of voluntary intoxication in Illinois went into effect.¹⁴⁹ As Section 6-3(a) now reads:

A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition . . . :

- (a) Is so extreme as to suspend the power of reason and render him incapable of forming a specific intent which is an element of the offense¹⁵⁰

Two points immediately stand out in the revised statutory language. First, the 1988 amendment to Section 6-3(a) ("1988 amendment") reintroduces the discredited standard of "specific intent." Second, the 1988 amendment appears to go beyond requiring that intoxication negate a particular mental state by additionally demanding a "suspension of the power of reason."

1. *The Reintroduction of the "Specific Intent" Concept*

The amended statutory language provides that voluntary intoxication is a defense only to those offenses which require a "specific intent." As previously discussed, serious difficulties arise from basing any affirmative defense upon

147. ILL. REV. STAT. ch. 38, para. 9-3 (1987). In Illinois, a killing caused by reckless acts is construed as "involuntary manslaughter," unless the death is caused by recklessness in driving a motor vehicle, in which case it is construed as "reckless homicide." *Id.*

148. ILL. REV. STAT. ch. 38, para. 9-3 (1987), amended by P.A. 84-272 § 2 (effective Jan. 1, 1986).

149. Illinois Criminal Code, Public Act 85-670 (1987).

150. ILL. REV. STAT. ch. 38, para. 6-3(a) (1987).

a distinction between "general intent" and "specific intent."¹⁵¹ It was these very difficulties which led Professors LaFave and Scott to recommend that legislatures avoid both these misleading concepts.¹⁵² Similarly, Jerome Hall has flatly stated that "neither common experience nor psychology knows any such actual phenomenon as 'general intent' that is distinguishable from 'specific intent.'"¹⁵³ Why, then, did the Illinois legislature elect to return to a confusing, out-dated scheme which it had abolished nearly three decades before? Moreover, why would it choose to follow a path which is contrary to recent trends in this area?¹⁵⁴

The legislature's choice becomes even more curious when one considers the most basic question of all: what is the definition of "specific intent"? The 1988 amendment does not define the term, nor is the phrase found anywhere else in the 1961 Code. One might expect that Illinois case law would provide a clear definition of the term. Yet, as will be shown, this is also not true.

LaFave and Scott provide a traditional textbook formula for distinguishing specific intent from general intent:

It is sometimes stated that intoxication can negative a 'specific intent' which the crime in question may require (meaning some intent in addition to the intent to do the physical act which the crime requires), but it cannot negative a crime's 'general intent' (meaning an intent to do the physical act—or, perhaps, recklessly doing the physical act—which the crime requires).¹⁵⁵

Thus, a "specific intent" offense can be characterized as an offense having an "extra intent." For example, offenses such as common law murder, manslaughter, and simple assault were considered "general intent crimes" because they merely required one certain act accompanied by one certain mental state.¹⁵⁶ Yet burglary was a "specific intent" offense because it required not only an intent to enter a dwelling, but also an "extra intent" to commit an offense therein.¹⁵⁷ Similarly, larceny was a "specific intent" offense because it required not only an intent to take the personal property of another, but also an "extra intent" to permanently deprive the other person of his property.¹⁵⁸

In his treatise on Illinois criminal law, Professor Decker has identified one vein of Illinois decisions which appears to define "specific intent" in this

151. See *supra* notes 33-42 and accompanying text.

152. CRIMINAL LAW, *supra* note 13, at 344.

153. Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1064 (1944). Hall also criticizes the "specific intent/general intent" distinction as being a "doctrine that is erroneously formulated in terms that are irrelevant to the situations actually found in harms by inebriates." *Id.* at 1065-66.

154. See P. ROBINSON, *supra* note 7, § 65(a), at 291 (describing the "specific intent/general intent" distinction as "somewhat less common since the modern recodification trend").

155. CRIMINAL LAW, *supra* note 13, at 389-90 (footnote omitted).

156. Hall, *supra* note 153, at 1061-62.

157. Note, *Intoxication As A Criminal Defense*, 55 COLUM. L. REV. 1210, 1212 n.13 (1955).

158. *Id.* Other such specific intent offenses were robbery, attempt crimes, and assault with intent to rape or kill. *Id.*

traditional manner.¹⁵⁹ Yet Decker also notes a second vein of decisions with an alternative, and more expansive, view of "specific intent." These latter decisions define a "specific intent" crime simply as any crime which explicitly includes a mental state term—*e.g.*, "intentionally" or "knowingly"—within the statute itself.¹⁶⁰ Thus, under the traditional view reflected in some Illinois cases, murder is a "general intent" offense.¹⁶¹ However, under the alternative view expressed in the second vein of Illinois decisions, murder is a "specific intent" offense because the murder statute¹⁶² provides that it can be committed either "intentionally" or "knowingly."¹⁶³ Conversely, the second vein of decisions would consider simple assault to be a "general intent" crime not because it was so classified at common law,¹⁶⁴ but because the underlying statute requires no particular mental state.¹⁶⁵

The 1988 amendment confines the defense of voluntary intoxication to "specific intent" offenses. Murder, at common law, was a "general intent" offense. Thus, it could be argued that voluntary intoxication is no longer a defense to murder. Such an argument should be emphatically rejected for at least two reasons. First, the 1988 amendment offers absolutely no clue as to the meaning of the phrase "specific intent." The phrase "specific intent" is found nowhere else in the 1961 Code. Not one offense in the 1961 Code is ever defined as a "specific intent" offense. Second, as previously shown, there are several Illinois decisions which explicitly define murder as being a "specific intent crime."¹⁶⁶ Because of this confusion, both in the 1961 Code and case law, it would be highly improper to conclude that voluntary intoxication is no longer a valid defense to the crime of murder in Illinois.

Thus, the 1988 amendment's use of a term which appears nowhere else in the 1961 Code and which has no agreed meaning in Illinois criminal jurisprudence, makes the statute hopelessly vague and ambiguous.

2. *The Requirements that the Power of Reason Be Suspended and the Defendant Be Rendered Incapable of Forming a Specific Intent*

The 1988 amendment also provides that a defendant's voluntary intoxication affords him a defense only if it "[i]s so extreme as to suspend the power of

159. See J. DECKER, *supra* note 56, at 646 n.237-38, citing *People v. Foster*, 23 Ill. App. 3d 559, 559, 319 N.E.2d 522, 523 (4th Dist. 1974) ("[a]n essential element of [burglary] is that defendant enter the building with the specific intent to commit a theft therein . . .") and *People v. Wirth*, 77 Ill. App. 3d 253, 257, 395 N.E.2d 1106, 1109 (1st Dist. 1979).

160. See J. DECKER, *supra* note 56, at 645-46.

161. See *supra* note 159 and accompanying text.

162. ILL. REV. STAT. ch. 38, para. 9-1 (1987).

163. *People v. Lenser*, 102 Ill. App. 3d 214, 217, 430 N.E.2d 495, 497 (3d Dist. 1981); *People v. Zynda*, 53 Ill. App. 3d 794, 368 N.E.2d 1079 (2d Dist. 1977).

164. See *supra* note 159 and accompanying text.

165. *People v. Harkey*, 69 Ill. App. 3d 94, 96-97, 386 N.E.2d 1151, 1153 (5th Dist. 1979). *Harkey* appears to hold that no mental state need be alleged or proved. *Id.* This, of course, is wrong. See ILL. REV. STAT. ch. 38, para. 4-3(b) (1987); *People v. Grant*, 101 Ill. App. 3d 43, 47-48, 427 N.E.2d 810, 813-14 (1981).

166. See *supra* note 163 and accompanying text.

reason *and* render him incapable of forming a specific intent which is an element of the offense."¹⁶⁷ In order to understand the potential significance of the phrase "suspend the power of reason," it is first necessary to discuss the distinction between having the *capacity* to entertain a requisite mental state and *actually entertaining* a requisite mental state.¹⁶⁸

With regard to the concept of "capacity," Robinson said in his 1984 treatise that, "[i]n all cases, the issue is whether the actor *had* the required state of mind, not whether he had the *capacity* to entertain such a state of mind."¹⁶⁹ Three years later, Robinson changed "in all cases" to "in most jurisdictions."¹⁷⁰ Robinson now cites a handful of American decisions which demand the more stringent showing of the defendant's lack of capacity, rather than a mere showing that the defendant did not form the requisite intent in a particular case.

Interestingly, one of the cases which Robinson cites is *People v. Proper*, decided by the Fifth District of the Illinois Appellate Court.¹⁷¹ The *Proper* court held that in order to reduce the offense of murder to manslaughter, a defendant must show that "the intoxication was so extreme as to suspend entirely the power of reason."¹⁷² This rule imposes a more difficult standard upon a defendant than merely showing that he did not possess the requisite mental state for the particular crime. It also suggests that the defendant must show that the requisite mental state *could not have existed*—*i.e.*, that he lacked capacity to form *any* intent—rather than merely showing that the requisite mental state *did not exist* at the time of the offense.¹⁷³

This lack of capacity standard was not the standard adopted by either the MPC or the 1961 Code's version of Section 6-3(a). Indeed, the *Proper* court made no attempt whatsoever to provide any statutory support for this standard.¹⁷⁴ Instead, the only authority for such a standard are those Illinois

167. ILL. REV. STAT. ch. 38, para. 6-3(a) (1987) (emphasis added).

168. The distinction between these two concepts is succinctly expressed by Matthew J. Boettcher: [The 'capacity' standard] focuses not on the actual intent held by the actor, but rather upon the ability of the accused to entertain a specific criminal intent. Consequently, use of this test might be viewed as an indirect approach because the jury is initially diverted from the issue of actual intent to determine the defendant's capacity to entertain such intent. If the defendant lacks sufficient capacity the absence of actual intent is presumed—much like an irrebuttable presumption in strict liability tort law. Boettcher, *Voluntary Intoxication: A Defense to Specific Crimes*, 65 U. DET. L. REV. 33, 39-40 (1987).

169. P. ROBINSON, *supra* note 7, § 65(a), at 287 (emphasis in original).

170. *Id.* § 65(a), at 32 (Supp. 1987).

171. 68 Ill. App. 3d 250, 385 N.E.2d 882 (5th Dist. 1979).

172. 68 Ill. App. 3d at 254, 385 N.E.2d at 885.

173. *See, e.g.*, *People v. Savoie*, 419 Mich. 118, 132-34, 349 N.W.2d 139, 146 (1984) (emphasis added).

174. *See supra* notes 134-35 and accompanying text (discussing the IPI-Criminal's similar failure to rely on statutory authority in the area of voluntary intoxication and recklessness). *See also* *People v. Rosas*, 102 Ill. App. 3d 113, 429 N.E.2d 898 (3d Dist. 1981) (also failed to rely on statutory authority in its holding).

voluntary intoxication cases decided literally *decades* before the changes wrought by the 1961 Code.¹⁷⁵

The courts which decided those cases prior to the adoption of the 1961 Code applied various formulations of the “suspension of the power of reason” concept to suggest the threshold at which the defense of voluntary intoxication would operate.¹⁷⁶ Those courts also applied another formulation which could arguably be construed to be a “capacity” standard. Under this alternate standard, the defendant must be “wholly incapable of forming the requisite intent.”¹⁷⁷

Contrast these “capacity” standards with the decidedly “non-capacity” orientation of the original version of Section 6-3(a) of the 1961 Code. That statute held that the only relevant consideration was whether the voluntary intoxication “negatives the existence of a mental state which is an element of the offense.”¹⁷⁸ Thus, the original Section 6-3(a) was only concerned with whether the defendant “did not” actually have the proper mental state, not whether he “could not” have entertained such a mental state.

The pre-1961 Code “capacity” language therefore stands in stark opposition to the original language of Section 6-3(a). Moreover, the drafters of IPI-Criminal totally relied upon the 1961 Code’s language, and avoided any reference to the “capacity” standard of “suspension of the power of reason.”¹⁷⁹ Nevertheless, cases decided after the adoption of the 1961 Code often invoked the pre-1961 Code “capacity” language as boilerplate without any indication that they recognized the serious contradiction between such language and the 1961 Code.¹⁸⁰

In the 1988 amendment, the drafters apparently intended to settle the matter once and for all by clearly establishing Illinois as a “capacity” jurisdiction. There is no mystery as to the origin of the new language, “so extreme as to suspend the power of reason *and* render him incapable of forming a specific intent which is an element of the offense.”¹⁸¹ Both the “suspend the power of reason” and the “render him incapable” concepts can be found in numerous Illinois cases, decided both before and after the adoption of the 1961 Code.¹⁸² Moreover, both concepts appear to reflect the same “capacity” standard. A different problem arises, however, from the legislature’s use of the word “and” to connect these two concepts. It is unclear whether the 1988 amend-

175. *People v. Hare*, 25 Ill. 2d 321, 185 N.E.2d 178 (1962); *People v. Lion*, 10 Ill. 2d 208, 139 N.E.2d 757 (1957); *People v. Cochran*, 313 Ill. 508, 145 N.E. 207 (1924).

176. *See supra* note 175 and accompanying text.

177. *People v. Gonzales*, 40 Ill. 2d 233, 239 N.E.2d 783 (1968); *People v. Cochran*, 313 Ill. 508, 145 N.E. 207 (1924); *People v. Brislane*, 295 Ill. 241, 129 N.E. 185 (1920).

178. ILL. REV. STAT. ch. 38, para. 6-3(a) (1961).

179. ILLINOIS PATTERN JURY INSTRUCTIONS-CRIMINAL Nos. 24-25.02, 24-25.02A (2d ed. 1981); ILLINOIS PATTERN JURY INSTRUCTIONS-CRIMINAL No. 24.02 (1968).

180. *See infra* notes 184-85 and accompanying text.

181. ILL. REV. STAT. ch. 38, para. 6-3 (1987) (emphasis added).

182. *See infra* notes 184-89 and accompanying text.

ment requires a defendant to establish both prongs in order to assert a successful defense of voluntary intoxication.¹⁸³

Illinois case law may suggest an answer to this question. Similar to the present statute, there are some decisions which join "suspend the power of reason" and "render him incapable" with an "and," thereby suggesting that they are two discrete concepts which both need to be established.¹⁸⁴ Alternatively, several other decisions connect these two concepts with an "or," thus intimating that proving *either* prong will be sufficient to establish the defense of voluntary intoxication.¹⁸⁵

The most logical way of viewing the two prongs, however, is to see them as concepts which are related, rather than discrete. If the defendant's intoxication is so extreme as to suspend his power of reason, then, *a fortiori*, it has rendered him incapable of forming a specific intent. In *People v. O'Shaughnessy*,¹⁸⁶ for example, the first district stated that voluntary intoxication must be "so great as to suspend all reason, *thus* rendering the defendant incapable of any mental act such as forming the specific intent to commit the crime."¹⁸⁷ Likewise, the third district, in *People v. Jones*,¹⁸⁸ spoke of a "level of intoxication at which power of reason is entirely suspended *so as to* render him incapable of any mental action, such as forming the "specific intent" to

183. The new Illinois Pattern Jury Instructions appear to view it as one proposition rather than two. ILLINOIS PATTERN JURY INSTRUCTIONS-CRIMINAL Nos. 24-25.02, 24-25.02A (2d ed. Supp. 1989).

184. *People v. Winters*, 29 Ill. 2d 74, 80-81, 193 N.E.2d 809, 813 (1963) (defendant cannot be convicted of any crime that involves specific intent or malice, if intoxication is so extreme as to suspend entirely the power of reason and render the accused incapable of any mental action); *People v. Fleming*, 42 Ill. App. 3d 1, 3, 355 N.E.2d 345, 348 (3d Dist. 1976) ("[t]he intoxication must be so extreme as to suspend entirely the power of reason and render defendant incapable of forming the specific intent required for the offense."); *People v. Hunter*, 14 Ill. App. 3d 879, 885, 303 N.E.2d 482, 486 (1st Dist. 1973) (usually voluntary intoxication is not a defense, but, "if so extreme as to suspend entirely the power of reason and render the accused incapable of any mental action, he cannot be convicted of any crime involving specific intent or malice."). See also *People v. Strader*, 23 Ill. 2d 13, 21, 177 N.E.2d 126, 130 (1961) ("so extreme as to suspend the power of reason and the accused is incapable of forming the intent."); *People v. Cochran*, 313 Ill. 508, 518, 145 N.E. 207, 211 (1924) ("so extreme as to suspend entirely the power of reason and the accused is incapable of forming an intent"); *People v. Heible*, 29 Ill. App. 3d 452, 453, 330 N.E.2d 556, 557 (5th Dist. 1975) ("so extreme as to suspend all reason and make impossible the existence of a mental state which is an element of the crime"); *People v. Fuller*, 17 Ill. App. 3d 1005, 1007, 309 N.E.2d 96, 98 (2d Dist. 1974) ("so extreme as to suspend all reason and make impossible the existence of a mental state which is an element of the crime").

185. *People v. Jaffe*, 145 Ill. App. 3d 840, 851, 493 N.E.2d 600, 608 (2d Dist. 1986) ("intoxication so extreme as to entirely suspend the power of reason or to render the defendant wholly incapable of forming the requisite intent to commit the crime"); *People v. Crosser*, 117 Ill. App. 3d 24, 28, 452 N.E.2d 857, 861 (2d Dist. 1983) ("so extreme that it suspended entirely the power of reason or rendered the defendant wholly incapable of forming the requisite intent to commit the crime in question").

186. 102 Ill. App. 3d 966, 430 N.E.2d 325 (1st Dist. 1981).

187. *Id.* at 971, 430 N.E.2d at 330 (emphasis added).

188. 67 Ill. App. 3d 477, 384 N.E.2d 523 (3d Dist. 1978).

commit a crime.”¹⁸⁹ Arguably, if it is established that voluntary intoxication had suspended the defendant’s power of reason, it invariably follows that the defendant was incapable of forming a “specific intent.”¹⁹⁰ Thus, only one, not two, findings are required by the 1988 amendment to Section 6-3(a).

Query whether the converse is true. Would it be possible to establish that voluntary intoxication had rendered a defendant incapable of forming a “specific intent,” *but had not* suspended his power of reason? A defendant who asserts this argument might contend that the “power of reason” and “incapable of intention” clauses are severable, and therefore establishing the “incapable of intention” prong alone would be sufficient to exculpate him. Such a defendant might also contend that the court should construe the “and” in Section 6-3(a) as an “or.” That is, that the two clauses should be read in the disjunctive rather than the conjunctive. Although the task would probably be difficult, convincing an Illinois court to read the word “and” in a statute as meaning “or” is by no means an impossible task.¹⁹¹

3. Summary

The 1988 amendment presents two questions. First, by its use of the term “specific intent,” did the Illinois legislature intend to return to the restrictive common law concept of a “specific intent” offense? Alternatively, did the legislature merely intend that Illinois courts should continue to use the expansive reading of “specific intent” adopted in several Illinois decisions? Second, should the two prongs of the amended Section 6-3(a) be read in the disjunctive, the conjunctive, or should they be considered identical? The answers to these questions will determine whether the 1988 amendment constitutes a significant change in the law, or merely a change in language.

VI. POTENTIAL CONSTITUTIONAL CHALLENGES TO ILLINOIS’ NEW VOLUNTARY INTOXICATION DEFENSE

Regardless of how the 1988 amendment is interpreted, it is clear that the law prohibits some defendants from invoking the defense of voluntary intoxication based solely on the *type* of offense with which they are charged. These defendants will be prevented from raising the voluntary intoxication defense either because their offense is a common law “general intent” crime,¹⁹² or because the statute does not explicitly provide for a particular state of mind.¹⁹³

189. *Id.* at 479, 384 N.E.2d at 525, quoting *People v. Hayes*, 37 Ill. App. 3d 772, 774, 347 N.E.2d 327, 329 (1st Dist. 1976) (emphasis added).

190. See *supra* note 168 and accompanying text.

191. See, e.g., *Coalition for Political Honesty v. State Bd. of Elections*, 65 Ill. 2d 453, 465-66, 359 N.E.2d 138, 144 (1976) (admitting that “and” is sometimes meant when “or” is intended, but refusing to interpret “and” as “or” in Section 3 of the Illinois Constitution of 1970); *Pechous v. Slawko*, 64 Ill. 2d 576, 588, 357 N.E.2d 1144, 1151 (1976) (the court opined that the legislature used “and” when it meant “or”).

192. See *supra* notes 30-38 and accompanying text.

193. ILL. REV. STAT. ch. 38, para. 4-3(b) (1987).

However, the issue of which defendants may avail themselves of the voluntary intoxication defense may not simply be a question of legislative discretion, but may implicate serious constitutional questions as well.

It is important to recall that voluntary intoxication is different from most other so-called affirmative defenses. In the usual affirmative defense, such as entrapment¹⁹⁴ or necessity,¹⁹⁵ a defendant admits all the elements of the crime, but demonstrates the existence of certain mitigating factors which the legislature has deemed to be exculpatory. The voluntary intoxication defense, however, is quite different. As discussed earlier,¹⁹⁶ because voluntary intoxication negates an essential element of a particular crime, it is more precisely a "failure of proof" argument, rather than a true affirmative defense.

On the one hand, a legislature could conceivably abolish either the necessity defense or the entrapment defense without raising serious questions as to whether such action would violate a defendant's due process rights. This is because the aforementioned defenses are only available after the defendant's conduct has already been determined to have satisfied the elements of a known criminal offense. On the other hand, a defendant who invokes the voluntary intoxication defense does not merely ask for legislative leniency. Rather, she contends that all the elements necessary to find them culpable of an offense have not been satisfied. In other words, the defendant claims that she never formed the mental state necessary to commit an act which the legislature has defined as criminal.

A defendant has a due process right not to be convicted of any crime unless the state has proven her guilt beyond a reasonable doubt.¹⁹⁷ This concept has a firm basis in our constitutional jurisprudence. In Illinois, this same right is also granted to all criminal defendants by statute.¹⁹⁸ The issue which then arises is whether the Illinois legislature may constitutionally preclude a class of defendants from contending that the state has failed to prove beyond a reasonable doubt the existence of the required culpable mental state.

The Indiana Supreme Court squarely faced this very issue in its 1984 decision in *Terry v. State*.¹⁹⁹ In *Terry*, the court was confronted with Indiana's voluntary intoxication statute which provided: "[v]oluntary intoxication is a defense only to the extent that it negates an element of an offense referred to by the phrase 'with intent to' or 'with an intention to.'"²⁰⁰

The *Terry* court stated that any factor which could dispute whether the defendant possessed the requisite mens rea had to be considered by the jury before they rendered a verdict.²⁰¹ The court viewed the legislature's attempt

194. ILL. REV. STAT. ch. 38, para. 7-12 (1987).

195. ILL. REV. STAT. ch. 38, para. 7-13 (1987); see generally ILL. REV. STAT. ch. 38, para. 7-1.

196. See *supra* note 40 and accompanying text.

197. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970).

198. ILL. REV. STAT. ch. 38, para. 3-1 (1987).

199. 465 N.E.2d 1085 (Ind. 1984).

200. *Id.* at 1087 (citing IND. CODE § 35-41-3-5 (Burns Supp. 1983)).

201. *Terry*, 465 N.E.2d at 1088.

to limit the defendant's ability to use the voluntary intoxication defense to dispute whether he had possessed the requisite mens rea as contravening this "firmly ingrained principle."²⁰² Therefore, the *Terry* court found that the statute posed "an impossible situation in criminal jurisprudence,"²⁰³ and subsequently held the statute to be void and without effect.²⁰⁴

The *Terry* analysis equally applies to the current version of Section 6-3(a). By limiting the availability of the voluntary intoxication defense to those accused of "specific intent" offenses,²⁰⁵ the Illinois legislature has arbitrarily denied a group of defendants the opportunity to contend that the government has failed to prove they possessed the requisite criminal mental state.

Unfortunately, the *Terry* court avoided articulating any constitutional predicate for its decision. However, there are at least two possible constitutional bases which support the *Terry* court's ruling. The first is derived from *Mullaney v. Wilbur*, *In re Winship*,²⁰⁶ and their progeny. This line of cases holds that the due process clause of the fourteenth amendment²⁰⁷ guarantees that a defendant cannot be found guilty of an offense unless the state proves all elements of the particular crime beyond a reasonable doubt.²⁰⁸ The 1988 amendment arguably violates this guarantee because it deprives certain defendants the opportunity to raise the issue of voluntary intoxication. More specifically, the 1988 amendment deprives these defendants the chance to

202. *Id.*

203. *Id.* (quoting *Sills v. State*, 463 N.E.2d 228 (Ind. 1984) (Givan, C.J., concurring)).

204. *Id.* The court explained its holding as follows:

In order to form intent in any event the perpetrator must be acting consciously and competently. Any situation which renders the perpetrator incapable of forming intent frees him from the responsibility of his acts

. . . .
[I]f 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

. . . .
Any 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 legislation to remove the factor of voluntary intoxication, except in limited situations, goes against this firmly ingrained principle.

Terry v. State, 465 N.E.2d 1085, 1088 (Ind. 1984) (quoting *Sills v. State*, 463 N.E.2d 228, 242 (Ind. 1984)).

205. See *supra* notes 30-38 and accompanying text.

206. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970).

207. The due process clause of the fourteenth amendment provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV.

208. In *Winship*, the Court explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. 358, 364 (1970) (emphasis added). See also *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (affirming *Winship*).

attack the state's burden to prove all the elements of an offense beyond a reasonable doubt.²⁰⁹

The second possible basis for the *Terry* ruling is the equal protection clause of the fourteenth amendment.²¹⁰ Arguably, the distinction drawn between those charged with "specific intent" offenses and all other defendants bears no rational relation to a legitimate state interest. There appears to be no logical reason why some Illinois courts, for example, would permit voluntary intoxication to totally exonerate defendants charged with murder,²¹¹ but deny the right to raise the voluntary intoxication defense to defendants charged with assault.²¹²

In light of the increased sensitivity which courts have demonstrated in the areas of due process and equal protection, the time may be ripe to contend that the right to use voluntary intoxication as an exculpatory factor is no longer simply a question of legislative largesse, but rather one of constitutional mandate.

VII. CONCLUSION

The failure of Illinois courts to understand the plain meaning of Section 6-3(a) has resulted in three decades of judicial confusion. Unfortunately, the 1988 amendment to Section 6-3(a) only promises to add to the confusion. However, the challenge of clearly defining the limits of the defense of voluntary intoxication may be *passee*. Rather, the issue of the 1990's may be whether legislative action which denies use of the voluntary intoxication defense to certain kinds of offenses is constitutional. It is time that Illinois courts squarely faced the pressing issues in this area of law.

209. In a related area, it has been argued that Congress' attempt to restrict the use of the insanity defense bears no relation to the issue of the use of mental illness to show a lack of *mens rea*. See Huckabee, *Avoiding the Insanity Defense Strait Jacket: The Mens Rea Route*, 15 PEPPERDINE L. REV. 1 (1987); *United States v. Frisbee*, 623 F. Supp. 1217 (N.D. Cal. 1985); P. ROBINSON, *supra* note 7, § 64(a), at 25-28.

210. U.S. CONST. amend. XIV.

211. See *supra* notes 162-63 and accompanying text.

212. For an excellent discussion of the due process ramification of voluntary intoxication in general, see Special Project, *supra* note 17, at 1202-06.