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NO MORE EXCUSES: CLOSING THE DOOR ON THE VOLUNTARY INTOXICATION DEFENSE

CHAD J. LAYTON*

INTRODUCTION

An intoxicated man deliberately set two fires in the apartment where he, his ex-wife, and his children lived. The court found the defendant not guilty of second degree arson because he lacked the specific intent to damage the building. The court's application of the voluntary[1] intoxication[2] defense excused the defendant from full criminal responsibility for his actions. Although courts generally presume that defendants intend for the natural and probable consequences of their actions,[3] the court in this case failed to explain how a defendant could intentionally start a fire to a building but not intend to damage that building. In order to justify its decision, the court simply asserted that the defendant was drunk.[4] The court's failure to reasonably explain its holding leaves one who reads its opinion with the sour taste of injustice.

The defense of voluntary intoxication enables defendants to

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1. Eugene R. Milhizer, *Voluntary Intoxication as a Criminal Defense Under Military Law*, 127 MIL. L. REV. 131, 135 (1990). Intoxication is voluntary when an actor, knowingly and without force or fraud, introduces an intoxicant into his body. *Id.*

2. *Id.* at 143 (explaining that legal intoxication occurs when a person consumes intoxicating liquors or drugs and is subsequently unable to formulate a specific criminal intent). *See also* TEX. PENAL CODE ANN. § 8.04 (West 1993) (defining intoxication as a "disturbance of mental or physical capacity resulting from the introduction of any substance into the body."); Frederick P. Hafetz, *Alcoholism and Drug Addiction: The Effect on Mens Rea*, *in* CRIMINAL LAW & URBAN PROBLEMS 1985, at 1 (PLI Litig. & Admin. Practice Course Handbook Series No. 140, 1985) (explaining how intoxicants affect individuals). Alcohol reduces an individual's ability to control his behavior. *Id.* Narcotics, as well as alcohol, interfere with a person's ability to function as a normal member of society. *Id.*

3. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, HANDBOOK ON CRIMINAL LAW § 28, at 203 (1972) (explaining that the foreseeable result of a defendant's act is relevant when a jury is determining the defendant's mental state).

4. This illustration is based on an actual case, *New York v. Tocco*, 525 N.Y.S.2d 137, 137-43 (N.Y. Sup. Ct. 1988). See *infra* notes 134-39 and accompanying text for a discussion of the problems associated with the *Tocco* case.

avoid full criminal culpability for their actions.[5] People are fully aware that intoxication impairs their ability to control their actions and think reasonably.[6] In light of this fact, society must no longer allow criminal actors[7] to defend their actions by asserting that they voluntarily became intoxicated.[8]

Early common law courts rejected voluntary intoxication as a criminal defense.[9] Some common law courts provided that voluntary intoxication should not mitigate a crime's punishment, but rather aggravate it.[10] However, this rigid common law rule trou-

5. Hafetz, *supra* note 2, at 2. When intoxication renders a defendant incapable of formulating a requisite intent, the result is rarely an acquittal and the jury will often convict the defendant of a lesser crime. *Id. See, e.g.*, Kemp v. Government of Canal Zone, 167 F.2d 938, 942 (5th Cir. 1948) (reducing the sentence of an intoxicated defendant from the death penalty to life in prison); Massachusetts v. Costello, 467 N.E.2d 811, 819 (Mass. 1984) (stating that voluntary intoxication can lessen a charge of first degree murder to second degree murder); Oregon v. Thayer, 573 P.2d 758, 759 (Or. Ct. App. 1978) (finding that when there is sufficient evidence of intoxication, a jury may find a defendant innocent of a greater offense, like murder, but guilty of a lesser criminal offense, for example first degree manslaughter).

6. South Carolina v. Vaughn, 232 S.E.2d 328, 331 (S.C. 1977). *See also* Montana v. Egelhoff, 116 S. Ct. 2013, 2021 (1996) (noting studies recognizing that intoxicated persons may act violently because they believe that intoxicated persons are supposed to act violently).

7. For the purposes of this Comment, the term "criminal actor" describes a person who has committed an act for which the law prescribes a penalty or punishment. However, that person does not necessarily have the requisite mental state for a court to hold him criminally liable.

8. New York v. Register, 457 N.E.2d 704, 709 (N.Y. 1983) (stating that a rule that exonerates a person who voluntarily drinks and fails to foresee what will result from his actions if he becomes drunk serves no penological or social purpose).

9. Timothy P. O'Neill, *Illinois' Latest Version of the Defense of Voluntary Intoxication: Is it Wise? Is it Constitutional?*, 39 DEPAUL L. REV. 15, 17 (1989). *See also* HASCAL BRILL, CYCLOPEDIA OF CRIMINAL LAW 2328 (1922) (explaining that in England, the ecclesiastical courts considered drunkenness to be an offense against God and the Christian religion); JOHN G. HAWLEY & MALCOLM MCGREGOR, CRIMINAL LAW 21 (1915) ("It is wrong for a man to get drunk."). At one point the United States Constitution, in a fruitless effort to curb drunkenness, outlawed the sale, manufacture, and transportation of intoxicating liquor. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI. Despite the societal aversion to drunkenness, some states allow a defendant to partially avoid criminal responsibility if that defendant was severely intoxicated during the commission of his crime. See *infra* notes 26-39 and accompanying text for a discussion of jurisdictions that allow voluntary intoxication as a criminal defense.

10. O'Neill, *supra* note 9, at 17-18. *See also* Illionis v. Rosas, 429 N.E.2d 898, 900 (Ill. App. Ct. 1981) (explaining that early common law authorities provided that intoxication would aggravate a criminal offense). Early courts did not allow voluntary intoxication as a defense because common law courts recognized that a defendant could feign intoxication too easily. *Id.* In *Rosas*, the Illinois Appellate Court explained that today, courts must hold a person responsible for the consequences of his actions when that person voluntarily chooses to unbind himself from the constraints of conscience and reason. *Id.*

bled many judges and thus, early nineteenth century courts designed a new approach.[11] These courts wanted to find a compromise between their conflicting feelings of reprobation and sympathy for drunken criminal actors.[12] As a result, nineteenth century common law courts developed the theory that intoxication could negate a criminal actor's intent for a crime of which intent is an element.[13]

Most modern jurisdictions agree that voluntary intoxication is not an excuse for criminal conduct.[14] In some jurisdictions, however, if an intoxicated defendant is unable to form the requisite *mens rea*,[15] the defendant is not criminally culpable.[16] Pragmati-

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11. *See* California v. Hood, 462 P.2d 370, 377 (Cal. 1969) (explaining the historical development of the defense of voluntary intoxication).

12. *Id.* English and American courts distinguished between specific and general intent crimes in order to compromise and allow criminal actors to use the defense of voluntary intoxication in some circumstances but not others. *Id.*

13. *Id.* The *Hood* court explained that nineteenth century judges recognized that the moral culpability of an intoxicated offender was generally less than that of a sober criminal. *Id.* Common law judges also felt, however, that if a person deliberately becomes intoxicated and commits a crime, that person should not escape criminal liability for the consequences of his actions. *Id. See also* Hobgood v. Housewright, 698 F.2d 962, 963 (8th Cir. 1983) (stating that voluntary intoxication is an affirmative defense that negates the existence of a requisite element of the crime); Pennsylvania v. Rumsey, 454 A.2d 1121, 1122 (Pa. Super. Ct. 1983) (recognizing that voluntary intoxication can render a criminal actor incapable of formulating some types of *mens rea*). A defendant cannot offer evidence of intoxication to completely exonerate himself of criminal responsibility, and voluntary intoxication is never an excuse for a crime. *Id.*

14. *See, e.g.*, South Carolina v. Vaughn, 232 S.E.2d 328, 330 (1977) (asserting that voluntary intoxication is never an excuse for criminal activity). *See also* Scott A. Anderegg, Note, *The Voluntary Intoxication Defense in Iowa*, 73 IOWA L. REV. 935, 950 (1988) (discussing two different interpretations to the assertion that voluntary intoxication is not an excuse for a crime). On one hand, the assertion that voluntary intoxication is not an excuse for criminal conduct can mean that a defendant cannot assert the voluntary intoxication defense for any criminal offense. *Id.* On the other hand, jurisdictions that do not allow intoxication as an excuse may assert that intoxication is not a complete defense and will not totally absolve a person of criminal responsibility. *Id.* Jurisdictions that do not allow defendants to assert voluntary intoxication as a defense use the former interpretation of the assertion, while jurisdictions that do allow some form of the defense use the latter. *Id.*

15. BLACK'S LAW DICTIONARY 985 (6th ed. 1990) (defining *mens rea* as a wrongful purpose, a guilty mind, or a criminal intent) [hereinafter BLACK'S].

16. LAFAVE & SCOTT, *supra* note 3, § 28, at 201. With the exception of strict liability statutes, a *mens rea* is required for a court to find a defendant criminally liable. *Id. See also* JOEL PRENTISS BISHOP J.U.D., BISHOP ON CRIMINAL LAW 265-66 n.2 (1923) (explaining that a criminal must have sufficient intellectual capacity to have a criminal purpose). If a defendant's mental power and reason are deficient such that he has no conscience, will, or controlling mental power, a court cannot punish that defendant for his criminal acts as that defendant is not a responsible moral agent. *Id. See generally*

cally speaking, however, this theory has created more problems than it has solved.[17]

Courts today have problems creating a workable doctrine that they can consistently apply to cases involving intoxicated offenders.[18] Jurisdictions that allow the voluntary intoxication defense ignore important goals behind the criminal law, including that of holding defendants personally accountable for their criminal acts.[19] In addition, the incongruities that accompany the defense of voluntary intoxication upset one's sense of justice thereby threatening the confidence that people have in our nation's tribunals.[20]

This Comment examines the problems inherent with the defense of voluntary intoxication. Part I explores several approaches that different jurisdictions take to the defense. Part II establishes that jurisdictions that abolish the voluntary intoxication defense do not violate a defendant's constitutional rights of due process. Part III analyzes the rationale that supports jurisdictions that disallow voluntary intoxication as an affirmative defense. Part IV proposes that states must abolish voluntary intoxication as an affirmative defense.

I. A LAND OF CONFUSION: THE DIFFERENT APPROACHES TO THE VOLUNTARY INTOXICATION DEFENSE

Since its creation in the common law, courts have reworked, rewritten, and refashioned the voluntary intoxication defense.[21]

INGO KEILITZ & JUNIUS P. FULTON, THE INSANITY DEFENSE AND ITS ALTERNATIVES: A GUIDE FOR POLICYMAKERS 5 (1984) (asserting that it is morally unacceptable to punish a person who is blameless because penalizing the blameless lends little to the purposes of punishing people for their actions). The purposes of punishing defendants include rehabilitation, protection of the public, retribution, and deterrence. *Id.* Imprisonment does not provide a deterrent for a person who cannot conform his behavior to the law. *Id.* If a person is not able to tell the difference between right and wrong, the deterrence function of the criminal law is not effective because that person is "undeterrable." *Id.*

17. See *infra* notes 97-180 and accompanying text for a discussion of some of the problems that states face in allowing the voluntary intoxication defense.

18. See *infra* notes 114-40 and accompanying text for a discussion of the problems that courts face with a specific approach to the voluntary intoxication defense.

19. See *infra* notes 55-60 and accompanying text for a discussion of the importance of personal responsibility in the criminal law.

20. See *infra* notes 164-65 and accompanying text for a discussion of a case where the court failed to adequately explain why it partially absolved a defendant of criminal responsibility.

21. *See* California v. Hood, 462 P.2d 370, 377 (Cal. 1969) (explaining that common law courts created a distinction between general intent and specific intent crimes to respond to the problems involved with drunken criminal actors). Today, however, there are a number of different approaches that jurisdictions take to the voluntary intoxication defense. See *infra* notes 26-50 and accompanying text for a discussion of various approaches that states take to the voluntary intoxication defense.

Today, state courts administer a variety of different approaches to the defense.[22] Jurisdictions that allow the defense base their approach on the theory that a defendant is not guilty of a crime without the requisite *mens rea*.[23] In practice, however, jurisdictions generally do not agree on exactly how to design the defense.[24] A handful of states refuse to allow any form of the defense of voluntary intoxication in adherence to the criminal law policy of holding defendants fully accountable for their actions.[25]

A. *A Potpourri of Possibilities: Different Approaches that States Take to the Voluntary Intoxication Defense*

There are different approaches that jurisdictions take to the voluntary intoxication defense.[26] For example, Kentucky law pro-

22. *See generally* 1 PAUL H. ROBINSON, CRIMINAL LAW DEFENSES § 65, at 286-300 (1984) (discussing six approaches that American jurisdictions take to the defense of voluntary intoxication). Some jurisdictions allow the defense of voluntary intoxication if intoxication negates a requisite mental element of a crime. *Id.* at 290. Other jurisdictions allow a voluntarily intoxicated defendant to assert that intoxication negated the mental states of acting purposely or knowingly but not recklessly or negligently. *Id.* at 290-91. Another approach that some states take is to permit evidence of voluntary intoxication only to negate an intention or a purpose but not knowledge. *Id.* at 291. Other jurisdictions take the approach of allowing the defense of voluntary intoxication for specific intent crimes but not general intent crimes, in accord with the common law approach. *Id.* at 291-92. Some states allow a defendant to raise the defense of voluntary intoxication for murder if that defendant can demonstrate that the intoxication had the effect of negating his deliberation or premeditation. *Id.* at 292. Finally, there are some jurisdictions that preclude defendants from asserting the defense of voluntary intoxication for any criminal act. *Id.* at 293.

23. *See, e.g.*, United States v. Romano, 482 F.2d 1183, 1196 (5th Cir. 1973) (explaining that a defendant who is voluntarily under the influence of a drug may not be capable of formulating a requisite specific intent).

24. See *supra* note 22 for a discussion of different approaches that jurisdictions take to the voluntary intoxication defense.

25. See *infra* notes 52-60 and accompanying text for a discussion of some states that do not allow voluntary intoxication as a defense.

26. Maine provides that a defendant may introduce evidence of intoxication to create a reasonable doubt as to whether a requisite criminal intent existed at the time of the commission of the crime. ME. REV. STAT. ANN. tit. 17-A, § 37 (West 1987). *See, e.g.*, Maine v. Foster 405 A.2d 726, 729 (Me. 1979) (explaining that intoxication is a defense when it raises a reasonable doubt as to the defendant's ability to knowingly or intentionally desire the act or result). Intoxication is not a defense where the culpable mental state of a crime is recklessness. Title 17-A, § 37.

Arizona's approach to the voluntary intoxication defense differs from Maine's approach. Arizona courts provide that a defendant can assert that voluntary intoxication negated the specific intent required for the commission of a crime. *See, e.g.*, Arizona v. Jamison, 517 P.2d 1241, 1246 (Ariz. 1974) (stating that a defendant may use evidence of voluntary intoxication only to negate a specific intent, and not a general intent). *See generally* Arizona v. Morales, 587 P.2d 236, 243-44 (Ariz. 1978) (explaining that voluntary intoxi-

vides that a criminal actor can assert the defense if, because of his intoxication, an element of the charged crime did not exist when the criminal act was committed.[27] Kentucky courts allow voluntary intoxication as a defense for intentional crimes, but voluntary intoxication does not constitute a defense for unintentional crimes.[28] A defendant in Kentucky can also assert the voluntary intoxication defense to reduce a crime from a higher degree to a lower degree.[29]

Similar to Kentucky, Wisconsin law allows a defendant to assert the voluntary intoxication defense when his intoxication negates the existence of an essential state of mind.[30] A defendant

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cation cannot mitigate murder to manslaughter); Arizona v. Steelman, 585 P.2d 1213, 1226 (Ariz. 1978) (stating that a defendant can introduce evidence of voluntary intoxication to negate a requisite specific intent). In Arizona, a defendant cannot argue that because of voluntary intoxication he could not form the malice aforethought necessary for murder. *Morales*, 587 P.2d at 243-44.

Pennsylvania takes an approach similar to Arizona. In Pennsylvania, voluntary intoxication does not excuse criminal conduct but is legally significant if the defendant's mental capacity is so affected that intoxication renders him unable to form the specific intent element of the crime. *See, e.g.*, Pennsylvania v. England, 375 A.2d 1292, 1301 (Pa. 1977) (explaining that the effect of intoxication can negate the requisite specific intent to kill). The effects of alcohol may render the criminal actor not able to form the requisite intent, thereby reducing the crime to a lesser degree of murder. *Id.* However, voluntary intoxication cannot reduce a criminal act from murder to manslaughter. *Id.*

27. KY. REV. STAT. ANN. § 501.080 (Michie 1990).

28. *See* Brown v. Kentucky, 575 S.W.2d 451, 452 (Ky. 1979) (asserting that while voluntary intoxication is not a defense for unintentional offenses, it is a defense for crimes where a requisite element is knowledge or intent). In *Brown*, the trial court had refused to instruct the jury on the voluntary intoxication defense, and thus the jury found the defendant guilty of first-degree manslaughter, and the Court of Appeals of Kentucky affirmed. *Id.* at 451-52. The Kentucky Supreme Court reversed the conviction, asserting that the trial court was required to submit instructions on the defense of voluntary intoxication to the jury. *Id.* at 452. The court explained that there was sufficient evidence concerning the defendant's intoxicated state from which the jury could conclude that the defendant was unable to form the requisite *mens rea*. *Id.* at 451.

29. *See* Henson v. Kentucky, 314 S.W.2d 197, 198 (Ky. 1958) (explaining that evidence of a defendant's intoxication can reduce that defendant's crime from murder to voluntary manslaughter but intoxication cannot completely exonerate a defendant from criminal responsibility).

30. *See* WIS. STAT. § 939.42 (1982); Roe v. Wisconsin, 290 N.W.2d 291, 297 (Wis. 1980) (asserting that a defendant must prove that alcohol rendered him incapable of formulating the requisite intent to kill); Wisconsin v. Mills, 214 N.W.2d 456, 459 (Wis. 1974) (explaining that a defendant can assert the voluntary intoxication defense if intoxication negated an element of intent required for the crime); Wisconsin v. Hedstrom, 322 N.W.2d 513, 515 (Wis. Ct. App. 1982) (holding that the defense of voluntary intoxication is a negative defense because it negates an element that the state must prove to convict a criminal actor).

must produce sufficient evidence that intoxication materially affected his ability to formulate the required *mens rea*.[31] In addition, Wisconsin law provides that intoxication which provokes a heat of passion can reduce a murder charge to a crime of a lesser degree.[32]

Indiana's approach differs from that of Kentucky and Wisconsin. Indiana law allows criminal actors to assert the voluntary intoxication defense for offenses that either use the phrase "with intent to" or "with an intention to."[33] A defendant can properly raise the voluntary intoxication defense only to show that intoxication negated a requisite element of the offense.[34] Once the defendant has raised the defense, however, the prosecution must prove that the defendant was able to form the requisite *mens rea* despite his intoxicated state.[35]

California takes an entirely different approach from that of Indiana, Kentucky, and Wisconsin. In California, a defendant can submit evidence of intoxication to the trier of fact to assert that he had not formulated a requisite specific intent.[36] If the elements of the crime include a specific intent, a defendant can also argue that because of intoxication he was incapable of deliberating, premeditating, or harboring malice aforethought.[37] California case law is consistent with this statutory limitation on the voluntary intoxi-

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31. *See* Wisconsin v. Strege, 343 N.W.2d 100, 102 (Wis. 1984) (explaining that a defendant must show that intoxication impaired his condition). A defendant is not guilty of first-degree murder if, at the time of a shooting, intoxication rendered him incapable of formulating an intent to kill. *Id.* at 103.

32. *See* Wisconsin v. Heisler, 344 N.W.2d 190, 193 (Wis. Ct. App. 1983) (explaining that Wisconsin law provides for a heat of passion defense that can reduce second degree murder to manslaughter). The heat of passion defense has an objective and a subjective part. *Id.* In *Heisler*, the Wisconsin Court of Appeals explained that a defendant's intoxication is relevant for the subjective effects of that intoxication on the defendant. *Id.* at 193. However, the objective part of the heat of passion defense requires proof of the existence of sufficient provocation such that a high degree of rage, anger, or terror would affect a reasonable, sober person in the same manner that the provocation affected the defendant. *Id.* The objective portion of the heat of passion defense does not allow evidence that the defendant was intoxicated. *Id.* Consequently, this objective part limits the availability of the intoxication defense. *Id.*

33. IND. CODE ANN. § 35-41-3-5 (Michie 1994).

34. *Id. See, e.g.*, Weaver v. Indiana, 643 N.E.2d 342, 344 (Ind. 1994) (stating that a defendant may assert the voluntary intoxication defense where intoxication prevented him from forming the requisite intent).

35. Weaver v. Indiana, 627 N.E.2d 1311, 1313 (Ind. Ct. App. 1994) (explaining that the state bears the burden of proving beyond a reasonable doubt that the defendant was not so inebriated that he could not form the requisite criminal intent), *rev'd on other grounds*, 643 N.E.2d 342, 345 (Ind. 1994); Jones v. Indiana, 458 N.E.2d 274, 276 (Ind. Ct. App. 1984) (explaining that intoxication must deprive the defendant of the ability to form the necessary *mens rea*).

36. CAL. PENAL CODE § 22 (West 1988).

37. *Id.*

cation defense.[38] Many jurisdictions take similar approaches to California and allow the defense only for specific intent crimes.[39]

In general terms, the voluntary intoxication defense consists of two burdens: a burden of introducing evidence and a burden of persuasion.[40] In all jurisdictions, the defendant has the responsibility of producing evidence of intoxication.[41] Once the defendant has presented evidence of his drunkenness, states differ as to whether the defendant or the prosecution bears the burden of persuasion.[42] In some jurisdictions the defendant has the burden of persuasion, which means he has the responsibility of proving by a preponderance of the evidence that he either did not or could not form the necessary criminal intent.[43] In these states, voluntary intoxication operates as a failure of proof defense; that is, the defendant introduces evidence of intoxication to demonstrate that the prosecution failed to prove that he possessed the requisite *mens rea*.[44] On the other hand, some jurisdictions provide that voluntary

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38. *See, e.g.*, California v. Walker, 18 Cal. Rptr. 2d 431, 434 (Cal. Ct. App. 1993) (explaining that voluntary intoxication can negate a specific intent); California v. Page, 163 Cal. Rptr. 839, 842 (Cal. Ct. App. 1980) (finding that voluntary intoxication can negate the requisite specific intent for the crime of robbery).

39. *See, e.g.*, Illinois v. Baczkowski, 535 N.E.2d 484, 487-88 (Ill. App. Ct. 1989) (stating that voluntary intoxication is only a defense for specific intent crimes); Pennsylvania v. England, 375 A.2d 1292, 1301 (Pa. 1977) (explaining that voluntary intoxication is legally significant only if it affects the defendant's ability to formulate a requisite specific intent).

40. Anderegg, *supra* note 14, at 939. *See* BLACK'S, *supra* note 15, at 196 (defining the burden of persuasion as a party's task of convincing a trier of fact of the elements of the case).

41. Anderegg, *supra* note 14, at 939. A party's obligation to introduce sufficient evidence to avoid a judge ruling against that party on that issue is the burden of producing evidence. *Id.*

42. *Id.*

43. *Id.* A defendant may fail to show by a preponderance of the evidence that he was not capable of formulating the necessary criminal intent. *Id.* At the same time, the prosecution could fail to prove, beyond a reasonable doubt, that the defendant was able to able to form the necessary *mens rea*. *Id.* at 940. As a result, prosecutors have a difficult time convicting intoxicated defendants even when the defendant did not prove by a preponderance of the evidence that he was not capable of forming the requisite mental state. *Id.* Despite this problem, jurisdictions do place the burden of proving how intoxication affected the defendant's mental state on the defendant himself. *See, e.g.*, Hobgood v. Housewright, 698 F.2d 962, 963 (8th Cir. 1983) (explaining that the defendant bears the burden of proving by a preponderance of the evidence that voluntary intoxication negated a requisite element of the crime); Massachusetts v. Costello, 467 N.E.2d 811, 819 (Mass. 1984) (stating that the Commonwealth does not have the burden of disproving that the defendant was not intoxicated); Minneapolis v. Altimus, 238 N.W.2d 851, 858 (Minn. 1976) (finding that the defendant must prove the defense of voluntary intoxication by a preponderance of the evidence).

44. *See, e.g.*, O'Neill, *supra* note 9, at 40 (explaining that voluntary intoxication is a "failure of proof" argument because it negates a requisite element

intoxication is an affirmative defense. Accordingly, the prosecution must persuade the trier of fact beyond a reasonable doubt that the defendant's intoxication did not prohibit him from forming the requisite *mens rea*.[45]

Another point on which jurisdictions differ is whether a state will utilize the capacity intoxication defense or the ordinary intoxication defense.[46] The capacity intoxication defense questions whether the defendant was capable of forming the requisite mental state.[47] On the other hand, the ordinary intoxication defense allows a criminal actor to introduce evidence to prove that intoxication negated the *mens rea* required for the crime.[48] The United States Supreme Court has held that any limitations on the defense of voluntary intoxication should be left to the discretion of the individual states.[49] As a result, the individual states have developed many different approaches to the voluntary intoxication defense. The lack of consistency in state courts' treatment of this defense suggests that it is not a protection constitutionally guaranteed to criminal defendants.[50]

B. The Minority Approach: The Advocates of Personal Responsibility

The trend in many states is to allow criminal actors to use the fact that they were intoxicated during the commission of their crime to negate a required element of the crime.[51] There is, how-

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of a crime).

45. Anderegg, *supra* note 14, at 939 (discussing jurisdictions that place the burden of persuasion on the prosecution as opposed to the defendant); *see also* Iowa v. Templeton, 258 N.W.2d 380, 383 (Iowa 1977) (asserting that when the defendant properly raises the voluntary intoxication defense, the burden of persuasion as to the existence of the requisite criminal intent remains with the prosecution); Washington v. Carter, 643 P.2d 916, 918 (Wash. 1982) (explaining that the defendant's due process guarantee may require the prosecution to disprove the defense of voluntary intoxication beyond a reasonable doubt); Wisconsin v. Strege, 343 N.W.2d 100, 105 (Wis. 1984) (stating that the court may not require the defendant to bear the burden of persuasion for the voluntary intoxication defense).

46. Anderegg, *supra* note 14, at 938. This Comment uses the terms "capacity defense" and "ordinary defense". These are the same terms used in the Anderegg N ote. *Id.*

47. *Id.*

48. *Id.* at 939.

49. *See* Montana v. Egelhoff, 116 S. Ct. 2013, 2022 (1996) (explaining that a state can limit the presentation of relevant evidence in appropriate circumstances). The Supreme Court held that the United States Constitution does not preclude a state from limiting or even preventing presentation of evidence of a defendant's intoxication. *Id.* at 2024.

50. *Id.* at 2021 (explaining that the voluntary intoxication defense is not a fundamental element of the criminal justice system).

51. See *supra* notes 26-39 and accompanying text for a discussion of states that allow a defendant to introduce evidence of intoxication to negate the intent element of a crime.

ever, a minority of states that do not allow defendants to assert voluntary intoxication to abolish a requisite *mens rea*.[52] For example, in Texas, courts do not allow defendants to assert voluntary intoxication as a defense to a crime.[53] Texas courts have held that the Federal Constitution does not mandate that a court affirmatively instruct a jury to consider factors that can mitigate a crime, such as evidence of intoxication.[54]

The courts in South Carolina take a similar approach to the Texas courts and assert that voluntary intoxication is not a defense to a crime.[55] In *South Carolina v. Vaughn*,[56] the state su-

52. *See, e.g.*, Lerma v. Texas, 632 S.W.2d 893, 895 (Tex. Ct. App. 1982) (asserting that voluntary intoxication does not render a defendant incapable of acting intentionally and cannot operate as a defense for an individual's criminal acts). *But see* N.Y. PENAL LAW § 15.25 (McKinney 1987) (providing that while intoxication is not a defense, a defendant may aver that intoxication negated a necessary element of the crime); New York v. Lang, 532 N.Y.S.2d 927, 927 (N.Y. App. Div. 1988) (explaining that the trier of fact is entitled to consider the effects of intoxication on a defendant when determining whether that defendant was capable of acting with the requisite mental state); New York v. DiPaola, 532 N.Y.S.2d 606, 608 (N.Y. App. Div. 1988) (explaining that intoxication can render a defendant incapable of formulating the requisite intent for specific intent crimes).

53. *See, e.g.*, Juhasz v. Texas, 827 S.W.2d 397, 406 (Tex. Ct. App. 1992) (asserting that a criminal actor cannot argue that voluntary intoxication is a defense). In *Juhasz*, evidence that the defendant had been consuming alcohol all day and had smoked marijuana confirmed that the defendant had been intoxicated at the time of her crime. *Id.* However, the Court of Appeals of Texas held that because the defendant's intoxication was voluntary, her intoxication would not provide her with a defense. *Id. Compare* Lee v. Texas, 874 S.W.2d 220, 223 (Tex. Ct. App. 1994) (explaining that a defendant may, in order to mitigate his punishment, assert that voluntary intoxication rendered him insane) *with* Tucker v. Texas, 771 S.W.2d 523, 533 (Tex. Ct. App. 1988) (explaining that the Texas Penal Code expressly provides that a defendant cannot claim voluntary intoxication as a defense to a crime).

54. *See, e.g.*, Cordova v. Texas, 733 S.W.2d 175, 189-90 (Tex. Crim. App. 1987) (stating that a court does not have a duty to instruct the jury that it is required to consider mitigating evidence); Demouchette v. Texas, 731 S.W.2d 75, 80 (Tex. Crim. App. 1986) (explaining that it is not necessary for a trial court to affirmatively instruct the jury on how to apply mitigating evidence). In Texas, a defendant can offer evidence of intoxication only to mitigate the punishment for his crime. *Cordova*, 733 S.W.2d at 189. The *Cordova* court explained that a trial court must instruct the jury on voluntary intoxication as a mitigating factor only if the defendant has established that alcohol or drugs rendered him temporarily insane. *Id.* at 190. To prove temporary insanity, a defendant must prove that he did not know that his conduct was wrong or that intoxication rendered him incapable of acting in accordance with the law. *Id.* at 190.

55. *See* South Carolina v. Scott, 237 S.E.2d 886, 892-93 (S.C. 1977) (explaining that voluntary intoxication is not an excuse or a defense for criminal conduct unless it resulted in permanent insanity); South Carolina v. Vaughn, 232 S.E.2d 328, 330 (S.C. 1977) (holding that voluntary intoxication is not a defense to a crime regardless of whether the crime involved a general intent or a specific intent).

preme court of South Carolina held that a man who becomes intoxicated by his own design is accountable for his actions.[57] The *Vaughn* court asserted that people are aware of the effect that intoxication has on their actions.[58] In light of this fact, the court explained that people have a duty to refrain from putting themselves in a condition in which they could potentially endanger others.[59] The *Vaughn* court concluded that the principle of personal accountability supports its decision to preclude defendants from asserting voluntary intoxication as a defense.[60]

II. STATES CAN ABOLISH THE VOLUNTARY INTOXICATION DEFENSE WITHOUT COMPROMISING A DEFENDANT'S DUE PROCESS GUARANTEES

The United States Supreme Court has asserted that a state must prove all elements of a crime beyond a reasonable doubt before the people have the right to hold a criminal actor accountable for his actions.[61] Judges and legal scholars argue that limiting a defendant's use of the voluntary intoxication defense violates a defendant's due process guarantee under the Constitution.[62] Other courts, however, have held that restricting the use of the defense

56. 232 S.E.2d at 328.

57. *Id.* at 331.

58. *Id.* (citing 22 C.J.S. *Criminal Law* § 66 (1961)).

59. *Id.*

60. *Id.*

61. *See* O'Neill, *supra* note 9, at 41 (explaining the due process rights the Constitution guarantees to criminal defendants (citing Mullaney v. Wilbur, 421 U.S. 684, 699 (1975); *In re* Winship, 397 U.S. 358, 364 (1970))). Both *Mullaney* and *Winship* assert that a criminal defendant's due process protection demands that a state must prove all elements of a crime beyond a reasonable doubt before a state can hold a defendant criminally responsible for his actions. *Mullaney*, 421 U.S. at 704; *Winship*, 397 U.S. at 361. *But see* Montana v. Egelhoff, 116 S. Ct. 2013, 2024 (1996) (holding that the Due Process Clause does not preclude a state's right to refuse to allow a trier of fact to consider evidence of a defendant's drunkenness). In *Egelhoff*, the court explained that the defendant had the burden of establishing that the right to present evidence of intoxication to a jury was a fundamental guarantee of the Fourteenth Amendment. *Id.* at 2019. However, the court held that the presentation of such evidence is not constitutionally guaranteed. *Id.* at 2021 n.6.

62. *See* O'Neill, *supra* note 9, at 41 (discussing the constitutional problems that arise when a jurisdiction restricts a defendant's use of the voluntary intoxication defense (citing Terry v. Indiana, 465 N.E.2d 1085, 1088 (Ind. 1984))). In *Terry*, the Supreme Court of Indiana asserted that a trier of fact is compelled to consider any evidence that suggests that the defendant did not have the requisite *mens rea*. *Terry*, 465 N.E.2d at 1088. If a state precludes a defendant from presenting evidence of intoxication, that state avoids proving the existence of a *mens rea* and thereby violates due process. *Id. See also* Sills v. Indiana, 463 N.E.2d 228, 243 (Ind. 1984) (Givan, C.J., concurring in result) (arguing that Indiana's limitations on the voluntary intoxication defense allows persons in similar circumstances to assert different defenses, and this violates a defendant's constitutional rights).

of voluntary intoxication does not infringe upon a defendant's constitutional rights.[63]

A. The Constitution Guarantees Criminal Actors Certain Due Process Rights

To determine whether a defendant has a fundamental right to assert the voluntary intoxication defense, it is necessary to recognize what constitutional protections are afforded criminal defendants.[64] The United States Constitution guarantees criminal defendants the right of due process of law.[65] The fundamental idea behind due process is to protect the life and liberty of American citizens.[66] Generally, in order to ensure that a state does not wrongfully deprive a criminal actor of his freedom, the Constitution provides that prosecutors must prove a criminal charge beyond a reasonable doubt.[67] Specifically, the law demands that the

63. *See, e.g.*, Wyant v. Delaware, 519 A.2d 649, 660 (Del. 1986) (explaining that the Constitution does not guarantee defendants the right to assert the voluntary intoxication defense). In *Wyant*, the defendant argued that when the State prohibited him from asserting voluntary intoxication to negate the requisite element of intent, the State was in effect violating the defendant's constitutional due process rights. *Id.* at 659. However, the Supreme Court of Delaware rejected this argument and asserted that the State still has the burden of proving the elements of an offense beyond a reasonable doubt. *Id.* at 660. Once the State proves the elements of the crime beyond a reasonable doubt, the State has the freedom to provide for additional defenses and assign the responsibility of proving those defenses as they desire. *Id.* at 658. *See also* Hobgood v. Housewright, 698 F.2d 962, 963 (8th Cir. 1983) (explaining that the Constitution does not require that the prosecution disprove a defendant's intoxication to hold the defendant criminally liable).

64. A criminal defendant's due process rights provide that the state must prove the defendant is guilty beyond a reasonable doubt before the state can hold the defendant criminally liable. Mullaney v. Wilbur, 421 U.S. 684, 704 (1975). If a state that disallows the voluntary intoxication defense violates the defendant's due process rights, the defendant has a constitutional right to the voluntary intoxication defense. *See, e.g.*, *Wyant*, 519 A.2d at 660 (refusing to accept the defendant's argument that he had a constitutional right to the voluntary intoxication defense); Wisconsin v. Strege, 343 N.W.2d 100, 105 (Wis. 1984) (stating that the Constitution guarantees that the state must prove all elements of a crime beyond a reasonable doubt before the state can hold a defendant criminally liable).

65. U.S. CONST. amend. V. "No person shall . . . be deprived of life, liberty, or property, without due process of law ." *Id.* The United States Constitution also provides that states must guarantee criminal defendants due process of law. U.S. CONST. amend XIV, § 1. "No State shall . . . deprive any person of life, liberty, or property, without due process of law." *Id.*

66. *In re* Winship, 397 U.S. 358, 362 (1970). *See also Mullaney*, 421 U.S. at 700 (stating that the criminal defendant has a critical interest in protecting his freedom).

67. *Winship*, 397 U.S. at 362. A fundamental, common law idea is that criminal cases require a high degree of persuasion. *Id.* at 361. The "reasonable doubt" formula developed as the standard in approximately the year 1798. *Id.* Common law jurisdictions now accept the formula that the

people cannot punish a criminal actor for criminal thoughts if he has failed to commit a criminal act.[68] In addition, criminal jurisprudence provides that a state cannot punish an actor if he did not have the requisite mental state at the time he committed his crime.[69] Therefore, if society is to take an accused's life or liberty, the prosecution must prove beyond a reasonable doubt that the defendant performed the criminal act.[70] The prosecution must also prove beyond a reasonable doubt that the accused possessed the requisite mental state at the time he committed his crime.[71]

The reasonable doubt standard protects criminal actors from unjust and questionable convictions.[72] This standard also reduces the risk of convicting an accused person based on factual error.[73] Thus, the reasonable doubt standard ensures that individuals will have confidence in our criminal law system because the state cannot punish an individual if a reasonable doubt as to his guilt exists.[74]

B. Constitutional Propriety of Abolishing the Voluntary Intoxication Defense

In states that allow voluntary intoxication as an affirmative defense, the prosecution bears the burden of disproving the defendant's intoxication.[75] Judges and legal scholars argue that disal-

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state must convince the jury beyond a reasonable doubt of the existence of all elements of a crime. *Id.* *See also Mullaney*, 421 U.S. at 701 (stating that the prosecution bears the burden of persuading the trier of fact beyond a reasonable doubt that the defendant is guilty of the crime that the state has charged him with).

68. *See* LAFAVE & SCOTT, *supra* note 3, § 25, at 177.

69. *Id.* § 27, at 191-92.

70. *Mullaney*, 421 U.S. 684, 700-01 (1975). *See also* LAFAVE & SCOTT, *supra* note 3, § 25, at 177 (stating that a person must commit a criminal act for a court to find him guilty of a crime).

71. *See* LAFAVE & SCOTT, *supra* note 3, § 28, at 201 (stating that a court must find that a criminal actor possessed the requisite mental state in order to hold him criminally liable).

72. *Winship*, 397 U.S. at 363 (explaining that if the trier of fact has a reasonable doubt regarding the existence of an element of the crime, the state is not justified under the law in taking a man's life or liberty) (citing Davis v. United States, 160 U.S. 469, 484, 493 (1895)).

73. *See id.* (stating that the reasonable doubt standard supports the fundamental criminal law principle that an accused is innocent until proven guilty).

74. *See id.* at 363-64. As society is interested in preserving an individual's autonomy and reputation, it must not punish a man for a crime if there exists a reasonable doubt as to his culpability. The design of the reasonable doubt standard is to ensure that courts will not punish innocent men, thereby protecting the effectiveness of the criminal law. *Id.*

75. *See* Weaver v. Indiana, 627 N.E.2d 1311, 1313 (Ind. Ct. App. 1994) (explaining that the state must establish beyond a reasonable doubt that intoxication did not render the defendant incapable of forming the requisite intent), *rev'd on other grounds*, 643 N.E.2d 342, 345 (Ind. 1994); Washington v.

lowing voluntary intoxication as an affirmative defense is a constitutional violation.[76] They assert that when a defendant is precluded from affirmatively asserting the voluntary intoxication defense, the government denies the defendant his right to due process of law. Specifically, the defendant is denied the opportunity to argue that the government did not prove beyond a reasonable doubt that the defendant possessed the necessary *mens rea*.[77]

This argument fails, however, because states that disallow voluntary intoxication as an affirmative defense do not pierce the shield of constitutional protections guaranteed to criminal defendants because the state must still prove the defendant's guilt beyond a reasonable doubt.[78] Some states that allow voluntary intoxication as an affirmative defense burden the prosecution with proving, beyond a reasonable doubt, that the accused was not so intoxicated that he was unable to form the requisite mental state.[79] Jurisdictions that place this burden on prosecutors make it more difficult to convict intoxicated offenders because the prosecution must jump an extra hurdle in order to hold the defendant criminally liable.[80] Jurisdictions that do not allow voluntary intoxica-

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Carter, 643 P.2d 916, 919 (Wash. Ct. App. 1982) (stating that the prosecution must prove the defendant was not too intoxicated to form the necessary criminal intent).

76. O'Neill, *supra* note 9, at 40.

77. *Id.* at 41.

78. *See, e.g.*, Hobgood v. Housewright, 698 F.2d 962, 963 (8th Cir. 1983) (holding that the state does not deny a defendant his right to due process of law if that state places the burden on the defendant to prove that intoxication rendered him unable to form the requisite criminal intent); Wyant v. Delaware, 519 A.2d 649, 660 (Del. 1986) (stating that the Delaware Legislature did not violate a defendant's constitutional rights when it abolished the voluntary intoxication defense).

79. *See* Illinois v. Baczkowski, 535 N.E.2d 484, 488 (Ill. App. Ct. 1989) (stating that once an intoxicated defendant produces evidence tending to show that he did not possess the *mens rea*, the prosecution is then burdened with overcoming the defendant's affirmative defense). The prosecution must prove beyond a reasonable doubt that the requisite *mens rea* existed. *See, e.g.*, Brown v. Kentucky, 555 S.W.2d 252, 256-57 (Ky. 1977) (explaining that the Commonwealth has the burden of negating the intoxication defense once the defendant has properly raised it); ILLINOIS PATTERN JURY INSTRUCTIONS: CRIMINAL § 24-25.02A at 310 (West 1992) (stating the Illinois pattern jury instructions for the voluntary intoxication defense). For the state to hold an intoxicated defendant criminally accountable, the prosecution must show "[t]hat at the time of the offense, the defendant's voluntarily intoxicated or drugged condition was not 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 of [the crime charged]." *Id.* The Illinois pattern jury instruction for the voluntary intoxication defense has the effect of placing an additional burden on the prosecution beyond that of proving the existence of the elements of the crime beyond a reasonable doubt. *See id.*

80. Mullaney v. Wilbur, 421 U.S. 684, 699 (1975) (explaining that the state must always prove the defendant's guilt beyond a reasonable doubt). However, jurisdictions that burden the prosecution with disproving a defendant's

tion as an affirmative defense do not force prosecutors to leap this additional hurdle.[81] In these states, it is the defendant who has the responsibility of establishing that alcohol rendered him incapable of forming the requisite criminal *mens rea*.[82] In order to convict the defendant, however, the prosecutor must still prove the elements of the crime beyond a reasonable doubt.[83] Therefore, the defendant's right to due process of law is still protected.

Furthermore, the Constitution does not guarantee that a defendant may assert the defense of voluntary intoxication.[84] In *Montana v. Egelhoff*,[85] the United States Supreme Court held that a defendant has neither a fundamental nor a constitutional right to present evidence of voluntary intoxication to a jury in an attempt to disestablish the existence of a *mens rea*.[86] In fact, the Court went so far as to say that it is not unconstitutional for a state to alter its criminal justice system in order to enable prosecutors to more easily convict defendants of the charged crimes.[87] Therefore, state legislatures have the authority to abolish volun-

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intoxication force the prosecution to prove more than the existence of the essential elements of the crime, and as a result it is more difficult to convict criminal actors. *See, e.g.*, Washington v. Carter, 643 P.2d 916, 918 (Wash. Ct. App. 1982) (explaining that the prosecution may bear the burden of proving that the defendant was not intoxicated).

81. In jurisdictions that preclude defendants from asserting voluntary intoxication as an affirmative defense, the prosecution must prove the existence of the elements of the crime beyond a reasonable doubt. *See* Wyant v. Delaware, 519 A.2d 649, 660 (Del. 1986) (explaining that the state must prove that the intoxicated defendant possessed the requisite *mens rea*).

82. *See, e.g.*, *Hobgood*, 698 F.2d at 963 (stating that the defendant must prove that intoxication negated his ability to form the requisite element of the crime).

83. See *supra* notes 64-74 and accompanying text for a discussion of the reasonable doubt standard in the criminal law.

84. Davis v. Delaware, 522 A.2d 342, 345 (Del. 1987). *See also Wyant*, 519 A.2d at 660 (asserting that the Constitution does not require the defense of voluntary intoxication).

85. 116 S. Ct. 2013, 2013 (1996).

86. *Id.* at 2023. In *Egelhoff*, the court noted that the lack of national acceptance of the voluntary intoxication defense supported the fact that the Constitution does not guarantee the defense. *Id.* at 2020. The court explained that the constitution does guarantee defendants some rights; for example, the right to present evidence of self-defense to a jury may be fundamental. *Id.* at 2023. However, the right to argue the voluntary intoxication defense is not similarly integral to a defendant's constitutional rights. *Id.*

87. Montana v. Egelhoff, 116 S. Ct. 2013, 2023 (1996) (explaining that a statute making it less difficult for the state to prove a criminal's mental state beyond a reasonable doubt is not unconstitutional). *Egelhoff* involved a Montana statute precluding a jury from considering the defendant's intoxication when deliberating the existence of the defendant's *mens rea*. *Id.* at 2016. The Court recognized that this instruction did reduce the prosecution's burden. *Id.* at 2023. However, the statute did not ease the state's burden of proving the defendant's guilt beyond a reasonable doubt but rather made it easier for the state to prove the defendant's guilt beyond a reasonable doubt. *Id.*

tary intoxication as a defense.[88]

Eliminating voluntary intoxication as an affirmative defense, however, does not change the prosecution's burden of proving the existence of the defendant's *mens rea* beyond a reasonable doubt.[89] Therefore, jurisdictions that preclude a defendant from asserting voluntary intoxication as an affirmative defense do not violate that defendant's constitutional right to due process of the law.[90] Moreover, numerous policy and legal justifications champion the removal of the voluntary intoxication defense from the criminal codes of the states that currently allow it.

III. A CRY FOR PERSONAL RESPONSIBILITY: WHY JURISDICTIONS MUST ABOLISH VOLUNTARY INTOXICATION AS AN AFFIRMATIVE DEFENSE

Jurisdictions that allow the voluntary intoxication defense face many problems in applying the defense.[91] These jurisdictions must abolish the voluntary intoxication defense in an effort to hold criminal actors personally responsible for their actions.[92] Many jurisdictions that refuse to allow alcohol induced amnesia[93] as a defense have taken the first step toward eliminating voluntary in-

88. *See, e.g.*, *Egelhoff*, 116 S. Ct. at 2024 (providing that Montana's jury instructions that precluded a jury from considering evidence of voluntary intoxication when contemplating the defendant's mental state does not violate the Due Process Clause); *Wyant*, 519 A.2d at 660 (asserting that as the legislature has the authority to abolish the voluntary intoxication defense for crimes that involve reckless conduct, the legislature also has the authority to disallow the voluntary intoxication defense for crimes involving intentional conduct).

89. *Wyant*, 519 A.2d at 660 (explaining that the state must always prove that the defendant possessed the requisite mental state); *Sills v. Indiana*, 463 N.E.2d 228, 236 (Ind. 1984) (stating that when a court refuses to instruct a jury on the voluntary intoxication defense, that court is not relieving the prosecutor from proving the elements of criminal intent). If a court determines that the jury may believe that intoxication rendered the defendant unable to form the requisite mental state, the court may instruct the jury to determine if there is a reasonable doubt as to the defendant's guilt. *See, e.g.*, DEL. CODE ANN. tit. 11, § 302(b) (1995) (providing that a defendant is entitled to produce any evidence that tends to "negate the existence of any element of the offense").

90. *See Wyant*, 519 A.2d at 660 (holding that a statute that precluded the defendant from asserting the voluntary intoxication defense did not violate the defendant's due process rights because the state still had the burden of proving the defendant's criminal intent).

91. See *infra* notes 97-140 and accompanying text for a discussion of some of the problems that accompany the voluntary intoxication defense.

92. *See* South Carolina v. Vaughn, 232 S.E.2d 328, 331 (S.C. 1977) (explaining that courts that allow voluntarily intoxicated defendants to escape criminal liability subvert the criminal law principle of personal accountability).

93 *See* Illinois v. Lucase, 548 N.E.2d 1003, 1017 (Ill. 1989) (explaining that alcohol induced amnesia is a blackout that can occur if an individual rapidly consumes alcohol).

toxication as an affirmative defense.[94] States must take the next step and preclude defendants from asserting the voluntary intoxication defense altogether. Courts currently recognize that even intoxicated individuals are able to possess a criminal intent while engaging in a criminal act.[95] Some courts have even held defendants criminally liable even though the defendant, because of intoxication, did not possess the requisite *mens rea* during the commission of the crime.[96]

A. *Doomed From its Creation: Problems Inherent with the Voluntary Intoxication Defense*

Jurisdictions recognizing the voluntary intoxication defense would be wise to abolish it because of the problems that accompany the defense.[97] For example, courts continuously struggle in the effort to consistently and evenly apply the defense.[98] Furthermore, courts and legal scholars have, for decades, criticized jurisdictions that distinguish between specific and general intent in their approach to the voluntary intoxication defense.[99] Despite the criticisms, the impracticality, and the struggle, many jurisdictions still allow defendants to assert voluntary intoxication as a defense for their crimes.[100]

1. *Inconsistencies Abound: States Continuously Fail to Evenly Apply the Voluntary Intoxication Defense*

Jurisdictions that allow the voluntary intoxication defense create many problems for themselves because of the way that they

94. See *infra* notes 154-62 and accompanying text for a discussion of how jurisdictions confront alcoholic amnesia in the criminal law.

95. *See* Kansas v. Carr, 634 P.2d 1104, 1108 (Kan. 1981) (explaining that the intoxicated defendant was capable of forming the requisite specific intent of the crimes with which the state had charged him); New York v. Lang, 532 N.Y.S.2d 927, 927 (N.Y. App. Div. 1988) (stating that an intoxicated person is capable of formulating a criminal intent); New York v. Scott, 488 N.Y.S.2d 719, 719 (N.Y. App. Div. 1985) (explaining that an intoxicated person can formulate a criminal intent).

96. See *infra* notes 185-95 and accompanying text for a discussion of courts that have held a criminal actor liable for his actions where he did not possess the necessary mental state during the commission of his crime.

97. See *infra* notes 98-140 and accompanying text for a discussion of the problems that some jurisdictions face in allowing the voluntary intoxication defense.

98. See *infra* notes 101-13, 185-95 and accompanying text for a discussion of jurisdictions that are inconsistent in their application of the voluntary intoxication defense.

99. 1 ROBINSON, *supra* note 22, at 298 (explaining that the distinction between specific intent and general intent is troublesome). It may be pointless for courts to define some intents as specific because a specific intent is no more specific than other requisite criminal intents. *Id.*

100. See *supra* notes 26-39 and accompanying text for a discussion of some jurisdictions that allow voluntary intoxication as a defense.

inconsistently allow the use of the defense.[101] An examination of Wisconsin law illustrates one such inconsistency. The Wisconsin criminal code provides that voluntary intoxication is a defense when intoxication negates "the existence of a state of mind essential to the crime."[102] The Wisconsin Supreme Court has held that defendants can assert the voluntary intoxication defense only for specific intent crimes.[103] In *Wisconsin v. Heisler*,[104] the court of appeals determined that when intoxication excites a defendant into a heat of passion, the voluntary intoxication defense can reduce second-degree murder to manslaughter.[105] The *Heisler* court also explained that second-degree murder is not a specific intent crime because it does not require a particular state of mind.[106] The *Heisler* decision has provided defendants with an additional opportunity to assert the voluntary intoxication defense for non-specific intent crimes.[107] However, this decision effectively opposes the Wisconsin Supreme Court's ruling that voluntary intoxication is only a defense for specific intent crimes.[108]

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101. See *supra* notes 97-100 and see *infra* notes 102-13 for a discussion of the problems that a jurisdiction can face if it fails to develop a consistent approach to the voluntary intoxication defense.

102. WIS. STAT. § 939.42 (1996).

103. Wisconsin v. Strege, 343 N.W.2d 100, 103 (Wis. 1984) (finding that a defendant may assert that his intoxication rendered him unable to formulate the requisite intent when an essential element of the crime includes a specific intent); *see also* Wisconsin v. Kolisnitschenko, 267 N.W.2d 321, 324 n.6 (Wis. 1978) (stating that voluntary intoxication is only a defense for specific intent crimes).

104. 344 N.W.2d 190, 190 (Wis. Ct. App. 1983).

105. *Id.* at 193. *See also* Ameen v. Wisconsin, 186 N.W.2d 206, 212 (Wis. 1971) (reasoning that where a defendant commits a homicide that would normally constitute first-degree murder, if intoxication rendered the defendant unable to form an intent to kill, that defendant's crime is reduced to second-degree murder); Wisconsin v. Brown, 348 N.W.2d 593, 596 (Wis. Ct. App. 1984) (explaining that intoxication can mitigate first-degree murder to second-degree murder if that intoxication negates the requisite intent).

106. *Heisler*, 344 N.W.2d at 193 n.3 In Wisconsin, second-degree murder does not require an intent to perform the act that resulted in the victims death, nor does it require a particular state of mind. *See, e.g.*, Wisconsin v. Bernal, 330 N.W.2d 219, 221 (Wis. Ct. App. 1983) (explaining that the elements of second degree murder include that the defendant's actions were "imminently dangerous to another" person, that the defendant's conduct was of a nature evincing a depraved mind, disregarding human life, and that the defendant caused the decedent's death).

107. *Heisler*, 344 N.W.2d at 193.

108. *Id. See* Wisconsin v. Strege, 343 N.W.2d 100, 103 (Wis. 1984) (stating that a defendant can introduce evidence of voluntary intoxication only to demonstrate that he did not possess the requisite specific intent); Wisconsin v. Kolisnitschenko, 267 N.W.2d 321, 324 n.6 (Wis. 1978) (explaining that the voluntary intoxication defense is only available to defendants for specific intent crimes). *Compare* IND. CODE § 35-41-3-5 (1986) (providing that a defendant can assert the intoxication defense only for offenses that use either the phrase "with intent to" or "with an intention to") *with* Jones v. Indiana, 458

Similar to the courts in Wisconsin, the California courts also have problems with the voluntary intoxication defense. The California Penal Code provides that a defendant can introduce evidence of voluntary intoxication only when the State has charged a defendant with a specific intent crime.[109] However, California case law has expanded the availability of the voluntary intoxication defense beyond that which the legislature contemplated.

For example, in *California v. Saille*,[110] the state supreme court stated that an intoxicated offender could introduce evidence to prove that he was not able to understand his duty to control himself and to act in accordance with the law.[111] The *Saille* decision is inconsistent with established California law allowing defendants to introduce intoxication "solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored express malice aforethought."[112] As a result, the *Saille* decision has created confusion as to when a defendant can and cannot introduce evidence of intoxication.[113]

2. *Semantics and Mental Gymnastics: The Problems with Specific and General Intent*

Common law courts created the distinction between specific intent and general intent crimes in an effort to deal with the problems associated with intoxicated criminal actors.[114] Today,

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N.E.2d 274, 276 (Ind. Ct. App. 1984) (holding that voluntary intoxication is a defense if the defendant is so inebriated that he is not able to form the requisite specific intent). In *Jones*, the Court of Appeals of Indiana expanded the use of the voluntary intoxication defense beyond that which the statute has provided because the court's ruling provided that defendants can assert the voluntary intoxication defense for specific intent crimes that do not use the statutory required phrases "with intent to" or "with an intention to." *Jones*, 458 N.E.2d at 276. For example, in Indiana, murder is a specific intent crime. Sills v. Indiana, 463 N.E.2d 228, 236 (Ind. 1984). However, statutory law states that a person commits a murder when he "knowingly or intentionally kills another human being." IND. CODE § 35-42-1-1 (1986). The ruling in *Jones* would allow a defendant to assert the voluntary intoxication defense for the crime of murder. *See Jones*, 458 N.E.2d at 276. However, the statutory definition of the voluntary intoxication defense precludes a defendant from asserting the voluntary intoxication defense against a murder charge. *See* § 35-41-3-5.

109. CAL. PENAL CODE § 22 (West 1997).

110. 820 P.2d 588 (Cal. 1991).

111. *Id.* at 592.

112. CAL. PENAL CODE § 22 (West 1997).

113. In the future, arguably California courts should follow the legislative mandate and only allow evidence of intoxication if it negated the defendant's ability to form a specific intent, premeditate, deliberate, or harbor malice aforethought. CAL. PENAL CODE § 22 (West 1997). Alternatively, California courts could follow the *Saille* court's ambiguous instruction, and allow a defendant to assert the voluntary intoxication defense when intoxication rendered him unable to act in accordance with the law. 820 P.2d at 592.

114. *See, e.g.*, Montana v. Egelhoff, 116 S. Ct. 2013, 2018-19 (1996)

some jurisdictions that allow the voluntary intoxication defense use that same distinction to decide when a defendant can or cannot assert the voluntary intoxication defense.[115] However, since its creation, courts and legal scholars alike have recognized the incongruities associated with the specific intent-general intent dichotomy.[116]

General intent crimes include those crimes where the definition describes a particular act without referring to an intent to achieve a further consequence.[117] For example, courts often determine that murder, manslaughter, and assault are general intent crimes.[118] On the other hand, a crime that involves a specific intent requires more than a mere intention to perform an act.[119] The actor must have an additional state of mind intending that further consequences result from his act.[120] For example, common law burglary is a specific intent crime.[121] At common law, burglary required that the accused intended to break and enter into a "dwelling of another," and that the defendant specifically intended "to commit a felony therein."[122] This distinction between specific

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(indicating that in the nineteenth century, courts created a doctrine through which a criminal actor could assert voluntary intoxication as a defense for specific intent crimes); California v. Hood, 462 P.2d 370, 377 (Cal. 1969) (explaining that courts distinguished between specific intent and general intent to respond to the problems associated with intoxicated criminal actors).

115. *See, e.g.*, California v. Gutierrez, 225 Cal. Rptr. 885, 887 (Cal. Ct. App. 1986) (explaining that the foundation of the voluntary intoxication defense rests on the distinction between specific intent and general intent crimes); Illinois v. Baczkowski, 535 N.E.2d 484, 487 (Ill. App. Ct. 1989) (explaining that voluntary intoxication is a defense for specific intent crimes); Susan D. Burke, Note, *The Defense of Voluntary Intoxication: Now You See It, Now You Don't*, 19 IND. L. REV. 147, 147-48 (1986) (explaining that the distinction between general intent and specific intent is important with respect to the voluntary intoxication defense).

116. *See Hood*, 462 P.2d at 378 (finding that the difference between general intent and specific intent is "chimerical" with respect to some crimes); Illinois v. Rosas, 429 N.E.2d 898, 900 (Ill. App. Ct. 1981) (explaining that the distinction between specific intent and general intent is illogical with respect to the voluntary intoxication defense); Sills v. Indiana, 463 N.E.2d 228, 242 (Ind. 1984) (Givan, C.J., concurring in result) (questioning the courts use of the words "specific intent" and "general intent"); Carter v. Indiana, 408 N.E.2d 790, 799 (Ind. Ct. App. 1980) (discussing the courts' inability to clearly define what specific intent means); Matthew J. Boettcher, Note, *Voluntary Intoxication: A Defense to Specific Intent Crimes*, 65 U. DET. L. REV. 33, 38-39 (1987) (discussing the differences between specific intent and general intent).

117. *Hood*, 462 P.2d at 378. *See also* Anderegg, *supra* note 14, at 937 n.24 (explaining that a "general intent only refers to the intentional performance of the proscribed act").

118. Jerome Hall, *Intoxication and Criminal Responsibility*, 57 HARV. L. REV. 1045, 1062 (1944).

119. New York v. Tocco, 525 N.Y.S.2d 137, 140 (N.Y. Sup. Ct. 1988).

120. *Id.*

121. LAFAVE & SCOTT, *supra* note 3, § 28, at 196.

122. BLACK'S, *supra* note 15, at 1399 (defining specific intent).

intent and general intent is only a linguistic difference between an intention to do an act that has already been performed, and an intention to accomplish that same act in the future.[123]

It is impractical for courts to use the specific intent-general intent approach because it does not realistically contemplate how defendants form the requisite mental state for a particular offense.[124] In addition, courts have extreme difficulty classifying some crimes as either a specific intent or a general intent crime.[125] For example, in *California v. Hood*,[126] the state supreme court explained that a court could appropriately define assault as either a specific intent or a general intent crime.[127] The *Hood* court explained that an assault is an illegal attempt and a present ability to violently injure another person.[128] A court can classify an attempt as a specific intent crime because the actor intends to achieve a particular result and injure someone.[129] However, an attempt is also a general intent crime because the actor merely intends to commit a violent act.[130]

In another case, the court pointed out that the distinction between general intent and specific intent is illogical. In *Illinois v. Rosas*,[131] the state appellate court explained that if intoxication can negate a specific intent, there is no reason why intoxication cannot negate a general intent.[132] Therefore the distinction between the two intent classifications, with respect to the voluntary intoxication defense, is irrational.[133]

Another problem with specific intent and general intent arises when courts fail to explain why they have defined a criminal act as a specific intent or a general intent crime. For example, in *New York v. Tocco*,[134] the Bronx County Supreme Court explained that voluntary intoxication is not a defense to a criminal charge.[135] In *Tocco*, an intoxicated defendant set an apartment building on fire.[136] The court held that the defendant was not guilty of second

123. California v. Hood, 462 P.2d 370, 378 (Cal. 1969).
124. Anderegg, *supra* note 14, at 937-38.
125. *See, e.g.*, Illinois v. Rosas, 429 N.E.2d 898, 900 (Ill. App. Ct. 1982) (explaining that the difference between a specific intent and a general intent is not clear); Carter v. Indiana, 408 N.E.2d 790, 799 (Ind. Ct. App. 1980) (discussing the courts' inability to clearly determine what specific intent means).
126. 462 P.2d at 370.
127. *Id.* at 378.
128. *Id.* at 378 n.6.
129. *Id.*
130. *Id.*
131. 429 N.E.2d at 898.
132. *Id.* at 900.
133. *Id.*
134. 525 N.Y.S.2d at 137.
135. *Id.* at 139.
136. *Id.*

degree arson because he did not specifically intend to damage the building.[137] Courts recognize that defendants generally intend for the natural and probable consequences of their actions.[138] However, the *Tocco* court never explained how a defendant could intentionally start two fires in a building but not intend to damage the building where the natural and probable result of starting a fire is causing damage.[139]

To suggest that courts must not use the specific intent-general intent distinction simply because it is difficult to classify a crime one way or the other would be unreasonable. However, the other problems that accompany the specific intent-general intent classifications, coupled with the principle of personal responsibility, support the contention that courts must find a more workable approach to the problems associated with the intoxicated offender. The best solution to the dilemma is to abolish the voluntary intoxication defense altogether.[140]

B. Half-Way There: Alcoholic Amnesia is Not a Defense

Sometimes a defendant can experience alcohol induced amnesia if he has consumed so much alcohol that he is unable to recall his criminal act.[141] Alcoholic amnesia, however, is not a defense to a crime in an overwhelming majority of jurisdictions.[142]

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137. *Id.* at 143. New York Penal law defines second degree arson as "intentionally damag[ing] a building . . . by starting a fire . . . ." N.Y. PENAL LAW § 150.15 (McKinney 1997).

138. LAFAVE & SCOTT, *supra* note 3, § 28, at 202. *See also* Jones v. Indiana, 458 N.E.2d 274, 276 (Ind. Ct. App. 1984) (explaining that where a defendant is capable of designing a plan, he is also capable of intending the natural and probable consequences of his actions); New York v. DiPaola, 532 N.Y.S.2d 606, 607-08 (N.Y. App. Div. 1988) (explaining that a court will assume that a defendant is cognizant of what will result from his acts).

139. *Tocco*, 525 N.Y.S.2d at 143 (finding the defendant guilty of fourth degree arson because he "recklessly damag[ed] a building . . . by intentionally starting a fire." (quoting N.Y. PENAL LAW § 150.05[1] (McKinney 1987)). *See also* New York v. Keith, 365 N.Y.S.2d 570, 571 (N.Y. App. Div. 1975) (affirming the lower court's conviction of fourth degree arson where the defendant knowingly threw a cigarette into a hayloft, but did not care whether he started a fire). The court in *Keith* explained that it was appropriate, in light of the defendant's actions, for the jury to infer that the defendant possessed the requisite *mens rea*. *Id.*

140. See *infra* notes 196-201 and accompanying text for a proposed solution to the problems of the voluntary intoxication defense.

141. Illinois v. Lucas, 548 N.E.2d 1003, 1017 (Ill. 1989). In *Lucas*, a certified addictions counselor explained that alcohol induced amnesia can occur when a person consumes alcohol too quickly. *Id.* What results is a "short-term memory loss," and the person who has experienced the blackout will not be able to remember events from a specific time period. *Id.*

142. *See, e.g.*, Jones v. Indiana, 458 N.E.2d 274, 277 (Ind. Ct. App. 1984) (affirming the defendant's burglary conviction). In *Jones*, the defendant explained that, due to intoxication, he could not remember occurrences from the night of his alleged criminal activity. *Id.* However, the Appellate Court of

The rationale as gleaned from the civil law's and the criminal law's approach to alcohol induced amnesia supports why jurisdictions must abolish voluntary intoxication as an affirmative defense.

1. Alcoholic Amnesia in the Civil Law

At least one civil court has dealt with the problems associated with alcohol induced amnesia.[143] In *Parvi v. Kingston*,[144] the plaintiff filed a false imprisonment action against the City of Kingston after the police coerced the intoxicated plaintiff into a police car and drove him outside of the city limits.[145] At trial, the plaintiff explained that he could not remember his confinement in the police car.[146] This presented a problem for the plaintiff's false imprisonment claim because a necessary element of the plaintiff's claim was that he was cognizant of his confinement.[147]

While intoxication may induce a person into an amnesiac state such that he is unable to remember an event subsequent to its occurrence, it is possible that the person was in fact conscious of his actions during the actual event.[148] For instance, in *Parvi* the New York Court of Appeals explained that just because the plaintiff was not sober during the time of his confinement does not mean that he was not cognizant of what was happening to him.[149] The court asserted that the facts of the record reflected that the plaintiff was conscious of his confinement; therefore, the court distinguished between the plaintiff's cognizance at the time of his confinement and his subsequent inability to recollect that consciousness.[150]

Similarly, one could argue that even an intoxicated criminal actor was aware of his actions during the commission of a crime, despite his inability to later recall those actions. A criminal defendant may assert that because of his intoxication he does not re-

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Indiana explained that even though the defendant was subject to blackouts while intoxicated, the defendant was still capable of forming the requisite criminal intent. *Id.*

143. Parvi v. Kingston, 362 N.E.2d 960, 960-63 (N.Y. 1977).

144. *Id.* at 960.

145. *Id.* at 962.

146. *Id.* at 963.

147. *Id.* at 962-63. The elements of false imprisonment require a plaintiff to prove that the defendant intentionally confined the plaintiff, that the plaintiff was cognizant of his confinement, that the plaintiff had not given the defendant consent to the confinement, and that there was no privilege for the confinement. *Id.*

148. *See, e.g.*, Oregon v. Corgain, 663 P.2d 773, 776 (Or. Ct. App. 1983) (noting that a doctor who testified at trial on behalf of the state asserted that despite the defendant's alcohol induced amnesia, he was still capable of having committed his criminal acts with a conscious objective).

149. *Parvi*, 362 N.E.2d at 963.

150. *Id.*

member committing a criminal act.[151] However, this does not mean that the defendant was not conscious of his actions at the time of his crime.[152] Criminal courts must follow the *Parvi* court's reasoning and examine the defendant's actions surrounding the crime; that is, the court must examine the actions that indicate the defendant's awareness and comprehension of his criminal act.[153] A problem arises, however, because awareness of activity is not the same as criminal intent. Thus, the question becomes whether a person could have possessed a criminal intent for an act that they are subsequently unable to remember.

2. *Alcoholic Amnesia in the Criminal Law*

Episodic amnesia occurs when a defendant, because of the ill-effects of alcohol, cannot remember a criminal act subsequent to its commission.[154] However, episodic amnesia is not a defense for criminal acts that the defendant commits during such an episode of amnesia.[155] In fact, courts recognize that intoxicated defendants are capable of forming the intent necessary to commit specific intent crimes.[156] Courts have held defendants criminally liable even if they were so intoxicated that they were not able to remember their criminal act.[157] Courts do not allow alcohol induced amnesia as a defense because an intoxicated defendant is still capable of committing criminal acts with a criminal intent, even if alcohol subsequently renders him unable to remember his criminal activ-

151. *See, e.g.*, United States v. Riege, 5 M.J. 938, 942 (N-M.C.M.R. 1978) (finding that a defendant who had no memory of his crime could not assert alcohol induced amnesia as a defense for his crime).

152. *Corgain*, 663 P.2d at 776 (stating that the defendant could have committed his criminal act with a conscious objective, even though intoxication affected the defendant's ability to later remember those acts).

153. *Parvi*, 362 N.E.2d at 963 (reasoning that the facts of the record indicated that the plaintiff was aware of his false imprisonment despite his later inability to remember the occurrence).

154. Jackson v. Georgia, 253 S.E.2d 874, 876 (Ga. App. 1979).

155. *See id.* (explaining that the inability of an alcoholic amnesiac to remember his criminal act is not a criminal defense).

156. *See, e.g.*, California v. Henderson, 292 P.2d 267, 269 (Cal. Ct. App. 1956) (explaining that the inebriated defendant possessed the specific intent required for the trier of fact to convict him of burglary); Weaver v. Indiana, 643 N.E.2d 342, 344 (Ind. 1994) (holding that the intoxicated defendant possessed the requisite specific intent to justify the jury's conviction of that defendant for attempted murder). *See also* Illinois v. Rosas, 429 N.E.2d 898, 900 (Ill. App. Ct. 1982) (noting "that the intent to become intoxicated can take [the] place of criminal intent, and that criminal intent can simply be presumed from the doing of criminal acts").

157. *See, e.g.*, Illinois v. Hibbler, 274 N.E.2d 101, 103-105 (Ill. App. Ct. 1971) (affirming the defendant's conviction of forgery despite the defendant's contention that he suffered from alcohol induced amnesia during his criminal act and was therefore not responsible).

ity.[158]

The prosecution must always prove beyond a reasonable doubt that the defendant possessed the requisite mental state because without a *mens rea* a court cannot hold a defendant criminally liable.[159] If alcohol erases a defendant's memory of an event, it does not necessarily follow that the defendant was unable to form the requisite specific intent.[160] Courts that hold alcohol amnesiacs criminally responsible still recognize the existence of a criminal intent despite the defendant's inability to remember his actions.[161] Therefore, a defendant can possess a criminal intent during the commission of his crime, even though he does not later remember his criminal act. In order to determine whether a defendant possessed the requisite specific intent, courts must examine a defendant's words and actions surrounding his crime.[162]

C. *Determining Whether a Defendant Possessed the Requisite Mental State During the Commission of His Crime*

Oftentimes a criminal actor, drunk or sober, refuses to explain what he was thinking or intending during his criminal act. As a result, courts examine how the defendant acted before, during, and after the commission of his crime to determine whether or not the defendant possessed the requisite *mens rea*.[163] In order to convict an intoxicated criminal actor of a crime, the court must account for the actions of the defendant surrounding the commission of his crime; most importantly, the court must account for the defen-

158. Oregon v. Corgain, 663 P.2d 773, 776 (Or. Ct. App. 1983) (holding that alcohol induced amnesia does not absolve a defendant of criminal liability). *See also* Williams v. Georgia, 228 S.E.2d 806, 807 (Ga. Ct. 1976) (holding that the defendant's inability to remember his criminal act would not absolve him of the responsibility for raping a woman); McKenty v. Georgia, 217 S.E.2d 388, 389 (Ga. App. 1975) (affirming a defendant's conviction for armed robbery even though the defendant had no recollection of his criminal act).

159. See *supra* notes 15-16 and accompanying text for a discussion of the existence of a *mens rea* as a prerequisite to criminal liability.

160. *See, e.g.*, McDaniel v. Mississippi, 356 So. 2d 1151, 1153 (Miss. 1978) (explaining that the defendant's actions during and after his crime indicated that he was conscious of his illegal activity despite his subsequent inability to remember that activity as a result of alcohol induced amnesia). At trial, the defendant asserted that intoxication rendered him incapable of forming the necessary *mens rea*. *Id.* at 1153. However, the Mississippi Supreme Court affirmed the defendant's conviction, thus recognizing that the defendant did possess the requisite mental state. *Id.* at 1156.

161. *Id.*

162. LAFAVE, *supra* note 3, § 28, at 202. Criminal defendants rarely admit that they possessed the requisite criminal intent during the commission of their crime. *Id.* As a result, a jury must infer from the defendant's words and actions surrounding the crime what the defendant's thoughts were.

163. *See* LAFAVE & SCOTT, *supra* note 3, § 28, at 203 (explaining that a jury can decide whether a defendant possessed a requisite criminal intent based upon his words and actions surrounding the commission of his crime).

dant's actions that corroborate the existence of the requisite criminal mental state despite his drunkenness.[164] Similarly, a court must explain a defendant's actions and mental state at the time of a criminal act to justify relieving him of criminal responsibility. A court's failure to adequately explain its decision will raise a question of its validity. For example, in *Tocco,* the court justified its decision by simply stating that second-degree arson is a specific intent crime and that the defendant was too intoxicated to form the requisite specific intent.[165] The *Tocco* court's failure to fully examine the defendant's actions in that context forces the reader to question the legitimacy of the decision.

A trier of fact must conclude by examining a defendant's actions surrounding his criminal conduct whether that defendant possessed the requisite mental state.[166] Cases involving intoxicated offenders are no different.[167] In an overwhelming majority of cases, juries refuse to allow defendants to escape criminal responsibility, even if the defendants were severely intoxicated.[168]

One Indiana case provides an excellent example of a jury that rejected a defendant's assertion of the voluntary intoxication defense.[169] In *Weaver v. Indiana,*[170] the state court of appeals reversed the jury's conviction of an intoxicated defendant for attempted murder holding that there was no evidence that the defendant had possessed the requisite intent to kill.[171] However, the Indiana Supreme Court reversed the appellate court's decision, reaffirming the jury conviction of attempted murder.[172]

The defendant in *Weaver* had taken two hits of LSD[173] and was extremely intoxicated.[174] The defendant's friends took him to a

164. *See* New York v. Seymour, 474 N.Y.S.2d 638, 640 (N.Y. App. Div. 1984) (explaining that a jury can find that an intoxicated defendant was able to form the requisite mental state if that defendant's actions at the scene justify their decision).

165. New York v. Tocco, 525 N.Y.S.2d 137, 143 (N.Y. Sup. Ct. 1989).

166. LAFAVE & SCOTT, *supra* note 3, § 28, at 202.

167. Weaver v. Indiana, 627 N.E.2d 1311, 1313 (Ind. Ct. App. 1994) (recognizing that on appeal, the court must look at how the intoxicated defendant behaved before, during, and after his crime to determine if a jury was reasonable in finding that the defendant had possessed the requisite mental state), *rev'd on other grounds*, 643 N.E.2d 342, 345 (Ind. 1994).

168. Weaver v. Indiana, 643 N.E.2d 342, 345 (Ind. 1994) (affirming the trial court's conviction of an intoxicated defendant for attempted murder); New York v. Lang, 532 N.Y.S.2d 927, 927 (N.Y. App. Div. 1988) (stating that the jury was correct in finding that intoxication did not negate the defendant's ability to formulate a *mens rea*).

169. *Weaver*, 643 N.E.2d at 342.

170. *Weaver*, 627 N.E.2d at 1311.

171. *Id.* at 1314.

172. *Weaver*, 643 N.E.2d at 343.

173. *Id.* (explaining that lysergic acid diethylamide (LSD) is a chemical that alters sensory input).

174. *Weaver*, 627 N.E.2d at 1313. Subsequently, the defendant was unable

forest retreat because they recognized that he "was not in the right state of mind and [they] really didn't want him to get in trouble."[175] At the retreat, the defendant was acting strangely: he kissed and licked his friend Kurt's neck, and when another friend attempted to help Kurt, the defendant bit her fingers.[176] In an effort to subdue him, the defendant's friends hit him on the head twice with a tire jack, but this did not affect the defendant at all.[177] Subsequently, the defendant attacked yet another friend by slamming her head against the pavement numerous times and kicking her; it was for this attack that the trial court convicted the defendant for attempted murder.[178]

Despite the evidence that the defendant was so intoxicated that he did not know what he was doing, the jury still rejected the voluntary intoxication defense.[179] The Indiana Supreme Court took notice of the fact that the defendant did not have difficulty walking, was able to respond to threats and physical attacks, was capable of throwing his victim down, and was able to kick her and slam her head to the ground.[180] The jury, as well as the Indiana Supreme Court, recognized that even when an intoxicant severely affects a defendant he is still capable of formulating the requisite specific intent for attempted murder.[181]

This case is an excellent example of how juries reject the voluntary intoxication defense even when the defendant is extremely intoxicated.[182] Both the Indiana Appellate and Supreme Court decisions spend considerable time explaining the defendant's actions surrounding his crime to justify the decisions.[183] Unlike the Indiana courts, courts that relieve an intoxicated defendant of criminal responsibility but fail to completely explain their reasons for doing so threaten the confidence that the American people have placed in our nation's justice system.[184]

D. The Final Straw: Is Concurrence a Prerequisite to Criminal Liability?

A fundamental principle in criminal law is that a defendant's

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to read a restaurant menu and paid the waitress before ordering food. *Id.* The defendant later attempted to drive a car, but only proceeded a short distance before he ran into a bush and overturned the car. *Id.* at 1313-14.

175. *Id.* at 1313.
176. *Id.*
177. *Id.*
178. *Id.* at 1312.
179. *Id.* at 1313.
180. Weaver v. Indiana, 643 N.E.2d 342, 344 (Ind. 1994).
181. *Id.*
182. *Id.*
183. *Id.* at 344-45; *Weaver*, 627 N.E.2d at 1313-14.
184. See *supra* notes 163-65 and accompanying text for a discussion of the problems that courts create when they fail to adequately justify their decision to not hold an intoxicated defendant fully responsible for his actions.

wrongful intent and criminal act must concur for a court to find a defendant guilty.[185] Therefore, when a defendant asserts the voluntary intoxication defense he is in essence arguing that because he had no *mens rea* to accompany his *actus reus* he is not criminally responsible.[186] However, courts may still convict a defendant even though intoxication rendered him incapable of formulating the requisite mental state during the commission of his criminal act.[187] For instance, courts hold a defendant criminally liable when a defendant formulates a criminal intent, becomes intoxicated, and then commits a criminal act.[188] If a defendant voluntarily consumes alcohol in order to give him the courage to commit a criminal act, that defendant is criminally liable.[189] Thus, a court will hold that defendant criminally liable if he formulated his criminal intent prior to becoming inebriated.[190]

Courts must ignore the difference between criminal actors who formulate a *mens rea* prior to becoming intoxicated and those who decide to commit a crime after they are intoxicated; courts must hold all intoxicated defendants completely liable for their conduct. People know that alcohol tends to impair their ability to make decisions.[191] Therefore, courts must hold individuals accountable--especially those who know that they have a tendency to commit crimes while drunk--for the consequences of becoming voluntarily intoxicated.[192] No court seeks to allow a defendant to commit a crime with a gun in one hand and a bottle of beer in the other with which to provide himself a defense.[193] Furthermore, many jurisdictions recognize that a defendant has complete control over his level of intoxication; therefore, jurisdictions hesitate to allow the voluntary intoxication defense because it can be easily

185. HAWLEY & MCGREGOR, *supra* note 9, at 1. *See also* PHILLIP E. JOHNSON, CRIMINAL LAW CASES, MATERIALS AND TEXT 1 (1990) (stating that most crimes require that a guilty mind accompany the guilty act).

186. See *supra* notes 15-16 and accompanying text for a discussion of the necessity of a *mens rea* for criminal liability.

187. *See, e.g.*, California v. Asher, 78 Cal. Rptr. 885, 899 (Cal. Ct. App. 1969) (explaining that a defendant is criminally liable where he knowingly armed himself, became intoxicated, and later murdered someone, even though intoxication impaired his ability to formulate a specific intent); Beshirs v. Oklahoma, 174 P. 577, 579 (Okla. Crim. App. 1918) (explaining that voluntary intoxication can provide a criminal actor with a defense only if he did not formulate his criminal intent before he became intoxicated).

188. *Asher*, 78 Cal. Rptr. at 899.

189. New York v. Krist, 60 N.E. 1057, 1061 (N.Y. 1901).

190. *Asher*, 78 Cal. Rptr. at 898.

191. South Carolina v. Vaughn, 232 S.E.2d 328, 331 (S.C. 1977) (stating that people are aware that intoxicating liquors effect their ability to reason (citing 22 C.J.S. *Criminal Law* § 66 (1961))).

192. *Id.*

193. Illinois v. Rosas, 429 N.E.2d 898, 900 (Ill. App. Ct. 1982).

fabricated.[194] Courts would best serve the goals of the criminal legal system if they were to expose intoxicated and drugged offenders to full criminal liability.[195]

IV. PROPOSAL: A TWO PRONGED ATTACK ON THE PROBLEMS ASSOCIATED WITH THE INTOXICATED CRIMINAL ACTOR

Jurisdictions that currently allow any form of the voluntary intoxication defense must make vital changes in their criminal laws to hold intoxicated criminal actors fully accountable for their crimes.[196] The changes that jurisdictions must make are twofold. Initially, jurisdictions must completely abolish the defense of voluntary intoxication.[197] The availability of this defense is unreasonable in light of the criminal law concepts of protecting the public and holding defendants accountable for their actions.[198] Furthermore, all jurisdictions should create legislation empowering courts to hold an intoxicated criminal actor liable for voluntarily putting himself into a situation where he had the potential to behave irresponsibly. For example in Germany, the criminal code provides that "[w]hoever intentionally . . . becomes intoxicated through the use of alcohol or other intoxicating substances is punishable up to five years in prison, if while in that intoxicated condition he commits a wrongful act and if by virtue of the intoxication is not responsible for that act."[199]

Legislation similar to this German law would enable courts to punish drunken offenders without having to deal with the problems associated with an intoxicated mental state. At the same time, such legislation preserves the requisite *mens rea* because a defendant *intentionally* consumes alcohol. In addition, such legislation will have the effect of forcing people to think before they drink.

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194. *See, e.g.*, Pennsylvania v. Rumsey, 454 A.2d 1121, 1124 (Pa. 1983) (explaining that a defendant can easily, though falsely, claim the voluntary intoxication defense because the severity of an actor's intoxicated state is within his own control).

195. *See* KEILITZ & FULTON, *supra* note 16, at 5 (explaining that the goals of the criminal law include "deterrence, rehabilitation, protection of the public and retribution").

196. *See* Powell v. Texas, 392 U.S. 514, 535 (1968) (explaining that the idea of personal accountability is a traditional common law concept).

197. *See, e.g.*, Montana v. Egelhoff, 116 S. Ct. 2013, 2019-20 n.2 (1996) (noting that the following states had either outlawed or never enacted the common law rule of allowing voluntary intoxication as a defense for specific intent crimes: Arizona, Arkansas, Delaware, Georgia, Hawaii, Mississippi, South Carolina, and Texas).

198. *See* South Carolina v. Vaughn, 232 S.E.2d 328, 331 (S.C. 1977) (commenting that the concept of personal responsibility lies at the foundation of all law); KEILITZ & FULTON, *supra* note 16, at 5 (discussing that one of the objectives of the criminal law is to afford protection to the public).

199. GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 847 (1978).

This proposal is not an attempt to eliminate the traditional criminal law concept of *mens rea*.[200] Nor is this proposal suggesting that states should relieve prosecutors of the burden of proving that the defendant possessed the requisite mental state. The focus of this proposal is to advocate personal accountability in the criminal law. All defendants who assert the voluntary intoxication defense have one thing in common: they have committed a criminal act yet claim that because they were drunk they are not responsible for their actions. Courts must ignore this claim and force these defendants to be responsible for the crimes that they commit.[201]

CONCLUSION

Courts that recognize the defense of voluntary intoxication explain that alcohol affects a person's judgment and relaxes controls on anti-social impulses and aggression.[202] While this is true, people are aware of the effects that alcohol can have on their judgment and ability to control themselves.[203] Therefore, courts must hold intoxicated individuals personally responsible for the criminal acts that they commit. Courts must also consider the hardships that victims suffer and impose liability on the party who is in a better position to prevent injurious consequences.[204] The defendant is the party who can prevent injurious consequences with his decision-making power to drink responsibly. Courts have de-

200. *See* LAFAVE & SCOTT, *supra* note 3, § 28, at 201 (discussing the necessity of *mens rea* as a prerequisite to criminal liability).

201. *See Egelhoff*, 116 S. Ct. at 2020 (explaining that there are a number of reasons to support the abolition of the defense of voluntary intoxication). For example, holding intoxicated criminal actors fully responsible for their crimes promotes responsible drinking and generally discourages intoxication. *Id.* In addition, disallowing the defense provides courts with the ability to specifically punish individuals who commit crimes while intoxicated. *Id.* The Court also explained that states that disallow the voluntary intoxication defense are acting consistently with the morals of society which dictate that a person who chooses to become intoxicated must be accountable for his actions. *Id.*

202. *See* California v. Hood, 462 P.2d 370, 379 (Cal. 1969) (explaining that an intoxicated person cannot contemplate the social ramifications of his actions or control aggressive impulses as well as a sober person).

203. *See* Pennsylvania v. Rumsey, 454 A.2d 1121, 1124 (Pa. 1983) (explaining that some inexperienced individuals are unable to anticipate how drugs or alcohol will effect them). In these types of situations, however, courts can use their discretion to impose lesser sentences to remedy any unfairness. *Id.*

204. *Id.* In *Rumsey*, the Superior Court of Pennsylvania explained that intoxicated persons commit almost half of the reported violent crimes in Pennsylvania. *Id.* The court further explained that this demonstrates that the hardships that victims suffer at the hands of intoxicated offenders is considerable. *Id.* The *Rumsey* court concluded that courts must hold responsible those individuals who have a better opportunity to prevent others from being injured. *Id.*

signed the law to protect the freedom of individuals.[205] At the same time, states must mandate that with this freedom comes responsibility. In order to ensure the weal of the body politic and the going concern of our nation, society must no longer accept this easily fabricated defense for criminal conduct.

205. Mullaney v. Wilbur, 421 U.S. 684, 701 (1975) (explaining that the criminal law is slanted in favor of protecting a defendant's freedom).