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# Rape-Specific Or General Intent Crime?

## RAPE—SPECIFIC OR GENERAL INTENT CRIME?

The definition of the mental element required for the commission of a crime provides one of the most difficult problems encountered in criminal law. Insofar as the mental element is concerned, crimes are divided into two broad groups: those requiring a specific intent and those requiring a general intent.[1] A specific intent crime is one in which the defendant desires to accomplish the result that constitutes the crime.[2] Burglary, for example, requires that the defendant have a particular state of mind at the time of breaking and entering another's dwelling in the nighttime; and this state of mind is the specific intent to commit a felony.[3] A general intent crime, on the other hand, is one that may be committed by a person even though he does not intend to accomplish the result that constitutes the crime.[4] Murder, for example, may be committed by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without a premeditated design to effect the death of any individual.[5] Thus, when a defendant shoots into a home in which there are human beings, and a person is killed as a natural consequence of his act, he is guilty of murder even though he did not have a specific intent to kill, but was only recklessly indifferent to human life.[6]

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[1]The distinction between general and specific intent crimes must be found in the differences in the definition of the proscribed conduct because "the paramount fact is that neither common experience nor psychology knows any such actual phenomenon as 'general intent' that is distinguishable from 'specific intent'." Hall, Intoxication and Criminal Responsibility, 57 Harv. L. Rev. 1045, 1064 (1944).

[2]"Specific Intent—When a crime consists, not merely in doing an act, but in doing it with a specific intent, the existence of that intent is an essential element. In such case the existence of criminal intent is not presumed from the commission of the act, but the specific intent must be proved." Miller, Criminal Law 59 (1934). Justice Holmes defines specific intent by stating that "a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed." Abrams v. United States, 250 U.S. 616, 627 (1919) (dissenting opinion). For a clear and concise exposition on specific intent with case references, see Perkins, Criminal Law 671-74 (1957). See also Perkins, A Rationale of Mens Rea, 52 Harv. L. Rev. 905 (1939).

[3]Clark and Marshall, Crimes § 405 (5th ed. 1952).

[4]"General Intent—Intent Presumed from Act. When a person capable of entertaining criminal intent, acting without justification or excuse, commits an act, prohibited as a crime, his intention to commit the act constitutes criminal intent. In such case the existence of the intent is presumed from commission of the act, on the ground that a person is presumed to intend his voluntary acts and their natural and probable consequences." Miller, Criminal Law 57 (1934).

[5]N.Y. Pen. Law § 1044(2). See United States v. Freeman, 25 Fed. Cas. 1208, 1211, No. 15,162 (C.C.D. Mass. 1827).

[6]People v. Jernatowski, 238 N.Y. 188, 144 N.E. 497 (1924).

The importance of classifying crimes into one or the other category becomes apparent when considering the availability of the defense of voluntary intoxication. It is universally stated that voluntary drunkenness is no excuse for crime.[7] Furthermore, evidence thereof will in no way avail one accused of a general intent crime,[8] but when a crime requires a particular state of mind, such as intent to commit a felony in burglary, or deliberation or premeditation in first degree murder, evidence of intoxication can be used to show that the defendant did not have that requisite state of mind.[9] However, when a homicide has been committed by the accused, voluntary intoxication, standing alone as a defense, will at best preclude the existence of the premeditation and deliberation necessary to first degree murder, and will therefore require a conviction of second degree murder or manslaughter;[10] but the homicide will never be *excused* where voluntary intoxication is the only defense.[11]

In determining whether rape is a general or specific intent crime,

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[7]Wheatley v. United States, 159 F.2d 599 (4th Cir. 1946); Helms v. State, 254 Ala. 14, 47 So. 2d 276 (1950); People v. Dorman, 28 Cal. 2d 846, 172 P.2d 686 (1946); Weaver v. State, 86 Ga. App. 699, 71 S.E.2d 901 (1952); Commonwealth v. Farrell, 322 Mass. 606, 78 N.E.2d 697 (1948); Perry v. State, 116 Tex. Crim. 226, 33 S.W.2d 1072 (1930); Pearson's Case, 2 Lewin 144, 168 Eng. Rep. 1108 (1835).

[8]Proctor v. United States, 177 F.2d 656 (D.C. Cir. 1949) (using automobile without consent of the owner); Maddox v. State, 31 Ala. App. 332, 17 So. 2d 283 (1944) (assault and battery); Abbott v. Commonwealth, 234 Ky. 423, 28 S.W.2d 486 (1930) (rape); Commonwealth v. Farrell, 322 Mass. 606, 78 N.E.2d 697 (1948) (assault and battery); State v. Scarborough, 55 N.M. 201, 230 P.2d 235 (1951) (rape); Rogers v. State, 196 Tenn. 263, 265 S.W.2d 559 (1954) (second degree murder). Of course, the defense of insanity induced by intoxication would still be available. See Miller, Criminal Law 138 (1934).

[9]Dyer v. State, 241 Ala. 679, 4 So. 2d 311 (1941) (first degree murder); People v. Henderson, 138 Cal. App. 2d 505, 292 P.2d 267 (1956) (burglary); People v. Freedman, 4 Ill. 2d 414, 123 N.E.2d 317 (1954) (taking immoral, improper, and indecent liberties with a female child); People v. Guillett, 342 Mich. 1, 69 N.W.2d 140 (1955) (assault with intent to rape). Missouri and Vermont refuse to take intoxication into account in determining whether the defendant had the specific intent requisite to constitute the crime charged. State v. Shipman, 354 Mo. 265, 189 S.W.2d 273 (1945); State v. Brown, 181 Mo. 192, 79 S.W. 1111 (1904); State v. Stacy, 104 Vt. 379, 160 Atl. 257 (1932); State v. Tatro, 50 Vt. 483 (1878).

[10]Ray v. State, 257 Ala. 418, 59 So. 2d 582, 584 (1952) (dictum); People v. Burkhart, 211 Cal. 726, 297 Pac. 11, 13 (1931) (dictum); Garner v. State, 28 Fla. 113, 9 So. 835, 845-46 (1891); State v. Wilson, 234 Iowa 60, 11 N.W.2d 737, 746 (1943). Thirty-eight states have passed statutes defining first degree murder. For an examination of the intent necessary under each statute see Keedy, A Problem of First Degree Murder: Fisher v. United States, 99 U. Pa. L. Rev. 267, 268-69 (1950).

[11]Kriel v. Commonwealth, 68 Ky. (5 Bush) 362 (1869); Choate v. State, 19 Okla. Crim. 169, 197 Pac. 1060 (1921); Walden v. State, 178 Tenn. 71, 156 S.W.2d 385 (1941).

the English case of *Director of Public Prosecutions v. Beard*[12] merits consideration. The defendant in perpetration of the rape of a young girl put his hand over her mouth to stifle her cries and suffocated her. On an indictment for murder, his defense was that he was so drunk that he did not know his acts to be dangerous. He was convicted of murder and the conviction sustained. However, in the course of his opinion, Lord Birkenhead said, "My lords, drunkenness in this case could be no defence unless it could be established that Beard at the time of committing the rape was so drunk that he was incapable of forming the intent to commit it...."[13] This seems to imply that rape requires a specific intent, but Professor Stroud, in condemning this statement in the *Beard* case, declares, "How could a man committing a rape be 'so drunk that he was incapable of forming the intent to commit it'? In such a mental condition, he would be as harmless as a log, and incapable of committing the active crime in question. Even if it were possible for him to do so, the admission of such an excuse would be contrary... to the whole collection of authorities which exclude drunkenness as a defence for crime in general."[14]

The difficulties involved in classifying rape as a specific or general intent crime are indicated in *People v. Cheary*,[15] decided by the Supreme Court of California. The defendant testified that a prolonged period of drinking from early afternoon until one o'clock the following morning resulted in a loss of memory from the time he left a tavern until the time he was handcuffed by police officers. The state's evidence showed that after the defendant left the tavern, he went to the home of the deceased and her daughter, apparently for the purpose of having sexual relations with the daughter. When denied admittance by the younger woman, the defendant broke through the locked door, the daughter meanwhile escaping to the home of a neighbor. When the police arrived, the mother was found badly beaten and dying. The bed covers were down to her waist, and her gown was open to below the breast. There was a bruise on her groin and three small semicircular depressions on her thigh, but the pathologist found no evidence of rape. The state obtained a conviction of murder in the first degree on a felony murder theory: that death could have resulted either from a rape or an attempt to rape the deceased, or in perpetration of burglary—breaking and entering with the intent to rape the daughter. The court concluded that the evidence was sufficient to sus-

[12][1920] A.C. 479.
[13]Id. at 504-05.
[14]Stroud, Constructive Murder and Drunkenness, 36 L.Q. Rev. 268, 272 (1920).
[15]48 Cal. 2d 301, 309 P.2d 431 (1957).

tain the conviction. In the course of its opinion a majority of the court said: "It is true that if defendant was so intoxicated that he did not have the *specific intent* to rape, he is not guilty of murder in the first degree .... Whether defendant was so intoxicated, however, was a question for the jury."[16]

The suggestion by the court in the *Cheary* case that rape is a specific intent crime[17] is subject to criticism on four different grounds.

Firstly, if rape is a specific intent crime, then the particular state of mind necessary to the crime must be established. However, the traditional definitions of rape [18] contain no requirement of specific intent such as is set forth in the definitions of recognized specific intent crimes.[19] These specific intent crimes all require something more than

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[16]People v. Cheary, 48 Cal. 2d 301, 309 P.2d 431, 435 (1957) (Emphasis added). The dissenting judge said, "I am convinced that the evidence was not sufficient to give rise to an inference that he intended to perpetrate rape on either Mrs. Inglet [the daughter] or Mrs. McDonald [the deceased]." Id. at 440 (dissenting opinion).

It is submitted that the evidence was clearly conflicting so as to present a question of fact for the jury as to the intent of the defendant. It appears also that the dissenting judge ignored the prevailing California law as to the defense of voluntary intoxication: "No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive, or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive, or intent with which he committed the act." Cal Pen. Code § 22. See also People v. Burkhart, 211 Cal. 726, 297 Pac. 11 (1931).

[17]In its entire opinion the court never distinguished the intent necessary for the crime of rape from the intent necessary for an attempted rape. Moreover, since the facts indicate that a rape may have been committed, the reader is led to believe that the court felt no distinction exists and that both rape and an attempt to rape require a specific intent.

[18]"Rape is the carnal knowledge of a female forcibly and against her will ...." People v. Cieslak, 319 Ill. 221, 149 N.E. 815, 816 (1925); Rape is "unlawful carnal knowledge of a woman without her consent." Adams v. Commonwealth, 219 Ky. 711, 294 S.W. 151, 152 (1927); "Rape is the carnal knowledge of any woman above the age of consent against her will, and of a female child under the age of consent with or against her will; its essence is the felonious and violent penetration of the person of the female ...." Commonwealth v. McCan, 277 Mass. 199, 178 N.E. 633, 634 (1931); " 'Rape' consists in accomplishing the act of sexual intercourse by force and against the will of the female assaulted." Starr v. State, 205 Wis. 310, 247 N.W. 96, 97 (1931).

[19]"Larceny is the trespassory taking and carrying away of the personal property of another with intent to steal the same." Perkins, Criminal Law 190 (1957). "[B]urglary is the nocturnal breaking into the dwelling house of another with intent to commit a felony." Id. at 149. "[R]obbery is 'the felonious and forcible taking from the person of another any goods or money of any value, by violence or putting in fear.' The word 'felonious,' used in connection with the taking of property, means a taking with intent to steal." Id. at 236. "[A]rson is the malicious burn-

the intentional commission of an unlawful act. The act must be accompanied by a state of mind whereby the actor *intends* that certain additional consequences will result from his unlawful act. For example, when a person breaks and enters the dwelling of another in the nighttime, he commits an unlawful act; but he does not commit burglary unless he breaks and enters with the intent to commit a felony. If the state can prove that the accused intended to perpetrate a felony, it makes no difference whether the felony was actually committed.[20] For rape to be a specific intent crime, and to be consistent with the requirements thereof, there must be an act which is unlawful or harmful to society, and the actor would have to intend an additional result, although it need never be achieved. It becomes apparent that it is difficult to conceive of an additional consequence that must be intended, much less consummated, while the defendant is engaging in sexual intercourse by force and against the will of a woman.

Secondly, if rape is a specific intent crime, then evidence of intoxication should be allowed to show that the defendant did not have the requisite state of mind necessary to the crime of rape. Consequently, a defendant could offer evidence of drunkenness to show that he thought the woman had consented, and the evidence would indicate that he did not have the particular state of mind to accomplish a crime of violence against a woman. The result, of course, would be to introduce into the law of rape the defense of mistake of fact resulting from drunkenness, for where any crime requires a specific intent, even

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ing of the dwelling house of another." Id. at 172. "A criminal attempt is a step towards a criminal offense with specific intent to commit that particular crime." Id. at 476. " '[A]ssault with intent' [crimes] are almost the same as ... criminal attempt .... In this type of aggravated assault the intent with which it was alleged to have been committed is a 'specific intent' which must be proved." Id. at 502.

A first degree murder statute may require specific intent. "All murder, which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing ... is murder of the first degree ...." Cal. Pen. Code § 189. When such a statute refers to a willful, deliberate, or premeditated killing, a specific intent is necessary. Note, however, that a general intent may be all that is required under the felony murder provisions of a statute.

Other criminal offenses which require specific intent include: any act which must be done fraudulently (such as forgery, obtaining property by false pretenses), or corruptly (such as perjury), or knowingly (such as receiving stolen property knowing it to have been stolen). Perkins, A Rationale of Mens Rea, 52 Harv. L. Rev. 905, 927 (1939).

[20]This reasoning seems to apply when murder requires a specific intent. In that situation the act of killing would no more satisfy this requirement than would the act of breaking and entering satisfy the requirements for burglary. In burglary the actor must break and enter with intent to commit a felony. In this type of first degree murder the actor must kill with intent to satisfy a premeditated and deliberated design.

an *unreasonable* mistake of fact is a defense if it precludes the requisite intent.[21]

Thirdly, if rape is a specific intent crime, an examination of a typical statute creating the felony murder doctrine is necessary.[22] In those cases in which the prosecution seeks to establish guilt of first degree murder on the ground that it was committed in the perpetration of one of the enumerated felonies, guilt of this particular felony must be clearly shown. In the case of *People v. Koerber*[23] the defendant killed the deceased while he was in the act of robbing him. His defense was, as in the *Cheary* case, that he was intoxicated at the time and did not know what he was doing. The trial court's conviction of first degree murder was reversed and a new trial ordered by the New York Court of Appeals because the jury was not given an opportunity to find the defendant guilty of a lesser degree of homicide. The theory of the appellate court was that since the defendant was alleged to have been in the act of robbing the deceased, the state would have to prove a specific intent to rob before a conviction could be sought under the felony murder doctrine.[24] Applying this principle to the crime of rape, if the suggestion by the court of the *Cheary* case is to be accepted, it follows that if the state offers conclusive evidence that acts normally constituting rape have been committed, the state, in order to secure a murder conviction for the death of the rape victim, must further prove that the defendant had the specific intent to rape. Therefore, if the defendant was so drunk that he did not have the specific intent to rape, he would not be guilty of rape even though he went through the external motions and physically succeeded in the unlawful carnal knowledge of the woman by force and against her will. Consequently,

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[21]"The ultimate question in any prosecution is whether or not all the essential elements of guilt are established. If any such element is found wanting, guilt has not been substantiated; and hence if proof of a mistake of fact, even without the support of reasonable grounds, negatives the existence of such an element, it also disproves the charge itself." Perkins, Criminal Law 827 (1957). Conversely, if a crime merely requires a general intent, mistake of fact is not a defense unless it is based upon reasonable grounds. McQuirk v. State, 84 Ala. 435, 4 So. 775 (1888); Mulreed v. State, 107 Ind. 62, 7 N.E. 884 (1886); State v. Thornhill, 188 La. 762, 178 So. 343 (1938); Hamilton v. State, 115 Tex. Crim. 96, 29 S.W.2d 777 (1930).

[22]"All murder ... which is committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, or mayhem, is murder of the first degree ...." Cal. Pen. Code § 189.

[23]244 N.Y. 147, 155 N.E. 79 (1926).

[24]Compare the Koerber case with Commonwealth v. Simmons, 361 Pa. 391, 65 A.2d 353 (1949), in which a first degree murder conviction was affirmed in spite of the fact that no charge as to the presence of the necessary specific intent to constitute the felony of robbery, on which the conviction was based, was given.

the felony murder requirement would not be satisfied, and the state would have to settle for a lesser conviction.[25]

Fourthly, if rape were a specific intent crime, so that evidence of voluntary intoxication could be used to preclude that intent, the most detrimental effect on society would be to create a situation in which drunkenness could be an *excuse* for acts which would otherwise constitute rape. For example, if the state fails to prove premeditation or deliberation in a prosecution for statutory first degree murder, the proper verdict will normally be second degree murder, which only requires a general intent under most statutory divisions of murder.[26] Likewise, if the state proves all elements of the crime of burglary, except the intent to commit a felony, the defendant will be guilty of unlawful breaking and entering.[27] But if the state in a prosecution for rape should prove all elements of the crime of rape except the specific intent to rape, it follows that the defendant would be guilty of no crime greater than assault and battery. Voluntary intoxication would thus excuse rape as an independent crime.

It is submitted that rape cannot be a specific intent crime. For that reason, voluntary intoxication, short of rendering a person insane, should never be a defense for any criminal who violently and unlawfully penetrates the person of a female. The commission of those acts which constitute rape gives rise to a conclusive presumption of the existence of the intent to commit the crime; and the fact that the accused may have been devoid of inhibition as the result of his alcoholic stupefication is without importance.

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[25]If rape is a general intent crime, as it is normally classified, evidence of intoxication cannot be considered, and the state would only have to allege and prove that a rape was committed and that a homicide resulted in the course of its perpetration. Then, a conviction of first degree murder would be sustained under the felony murder doctrine because "when criminal intent in general is all that need be established, the drunken defendant is treated as if he knew the consequences of his acts...." People v. Koerber, 244 N.Y. 147, 155 N.E. 79, 81 (1926).

Those cases that hold that rape requires a general intent include McGuinn v. United States, 191 F.2d 477 (D.C. Cir. 1951); Abbott v. Commonwealth, 234 Ky. 423, 28 S.W.2d 486 (1930); State v. Scarborough, 55 N.M. 201, 230 P.2d 235 (1951); Walden v. State, 178 Tenn. 71, 156 S.W.2d 385 (1941).

[26]See note 10 supra.

[27]For a comprehensive study of the statutory variations of common law burglary see Note, 51 Colum. L. Rev. 1009 (1951).