

## Possession of Dangerous Drugs in Indiana

### I. INTRODUCTION

The Indiana legislature, like the legislatures in other states, makes "possession" of certain types of drugs criminal.<sup>1</sup> The Indiana statute gives little description of the offense beyond the single word "possession." This lack of legislative guidance has predictably led to some confusion regarding the nature of the offense. This Note attempts to reveal the present nature of the Indiana drug possession law and to suggest what that law may and should become.

The body of the Note is divided into four parts. The first section examines the teachings of the Indiana appellate and supreme courts concerning the elements of the crime. The analysis in the first part will be restricted to the language used by the courts in describing the offense to determine, to the extent possible from language alone, the State's drug possession case. In this vein, the emphasis will be on the courts' own words in defining the nature of the crime. The second division examines what those same courts have accepted as sufficient evidence to support a jury's finding of the required elements. This analysis suggests the hypothesis that, in at least some reported decisions, the Indiana courts have been willing to accept convictions based on evidence arguably inadequate to prove the elements the courts have said they require. The focus of this hypothesis is upon the concept of "constructive possession" and the potential for abusive disregard of the requisite elements of the offense inherent in this concept if allowed application without restraint. In the third section of the Note, analysis shifts to case law from other jurisdictions, examining how other states have handled the law of drug possession. This segment will suggest a solution to the problem discussed in the second topic and discuss the ramifications on Indiana law of this suggested remedy. The final subdivision of the Note presents what may happen if the proposed solution is

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<sup>1</sup>IND. CODE § 35-24.1-4-1(c) (IND. ANN. STAT. § 10-3561, Burns Supp. 1974) provides: "It is unlawful for any person knowingly or intentionally to possess a controlled substance . . ." without proper legal authority. The same section provides for penalties for such possession. "Controlled substances" include, among other things, chemical synthetics such as amphetamines, all forms of cannabis, and opium derivatives. *See id.* § 35-24.1-1-1(e) (IND. ANN. STAT. § 10-3558(e)).

A crime obviously directed at drug sales and therefore distinct from the mere possession of dangerous drugs is possession "with intent to manufacture or deliver." *See id.* § 35-24.1-4-1(a), (b) (IND. ANN. STAT. § 10-3561(a), (b)).

not employed, thus arguing why it should be accepted as the better approach to the law of possession of prohibited drugs in Indiana.

## II. THE ELEMENTS OF THE OFFENSE

The first aspect of the State's case in a prosecution for possession of prohibited drugs is, obviously, to demonstrate that the substance which the accused "possessed" is, in fact, a prohibited drug.<sup>2</sup> Beyond this simple point the question of elements becomes more complicated. Traditional analysis of the elements of a crime mandates a two-fold inquiry into the actus reus, or forbidden act, and the mens rea, or forbidden mental state accompanying that act. While it is not entirely clear from the wording of the statute that the act and the intent are distinct elements in the Indiana offense of drug possession, the discussion will proceed as if the traditional analysis is applicable.

What act or acts constitute "possession" within the meaning of the statute is not completely certain, but it is generally held that a conviction for possession of a dangerous drug may rest upon either actual or constructive possession.<sup>3</sup> "[A]ctual possession means exactly what it implies, *i.e.* actual physical control."<sup>4</sup> Constructive possession is the actus reus which is the source of confusion.

In 1969, the Indiana Supreme Court, in *Williams v. State*,<sup>5</sup> went to great lengths in attempting to define constructive possession and to distinguish it from actual possession. Justice Hunter, speaking for the court, wrote that "the element of custody and control is involved" in both types of possession.<sup>6</sup> The difference between the two types of possession is whether "the ability to control the thing possessed" is a "present ability" (actual possession) or a "past ability" (constructive possession).<sup>7</sup> Since Justice

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<sup>2</sup>The complete list of proscribed drugs is found at *id.* § 35-24.1-1-1(e) (IND. ANN. STAT. § 10-3558(e)). It is not within the scope of this Note to examine problems of forensic proof as to what is or is not a barbituate or the like; mention is made of this point only to alert the reader to this element.

<sup>3</sup>*Rose v. State*, 281 N.E.2d 486 (Ind. 1972).

<sup>4</sup>*Corrao v. State*, 290 N.E.2d 484, 487 (Ind. Ct. App. 1972), *citing Williams v. State*, 253 Ind. 316, 321, 253 N.E.2d 242, 245 (1969).

<sup>5</sup>253 Ind. 316, 253 N.E.2d 242 (1969).

<sup>6</sup>*Id.* at 321, 253 N.E.2d at 245. As to what he meant by "control and custody," Justice Hunter said:

Ordinarily "control" means . . . power or authority to check or restrain; regulating power; restraining or directing influence . . . so too it may imply, or not imply possession depending on the circumstances.

*Id.* at 322, 253 N.E.2d at 246 (emphasis in original).

<sup>7</sup>*Id.* at 321, 253 N.E.2d at 245.

Hunter had already stated in his opinion that actual possession entailed actual "physical control,"<sup>8</sup> it is apparent that for actual possession the accused must be in the process of exercising the ability to control, check, or restrain<sup>9</sup> the substance when he is discovered. The use of the adjective "past" to modify "ability to control" in the definition of constructive possession suggests that the accused need not be presently exercising his power to check or restrain the object—it is enough that he could have done so at one time.

The Indiana Supreme Court dealt with the constructive possession problem again in *Thomas v. State*.<sup>10</sup> The court's opinion did not refer to its decision in *Williams* and cited two arguably different definitions of the constructive possession concept. In its own words, the court held that a conviction on a theory of constructive possession required a showing that the defendant had a "capability to maintain control and dominion over" the thing possessed.<sup>11</sup> That the accused did in fact once exercise that ability does not appear to be crucial in either the *Williams* or *Thomas* definition. The fact that he had the power to exercise control at the time of his arrest is made conclusive of his past or present exercise of control. In this sense, the forbidden act need not be an affirmative act at all—the failure of the accused to take positive action to terminate his "ability to control" the drug is sufficient.

The *Thomas* court, in addition to formulating its own definition of constructive possession, cited with approval and deemed "applicable" to Indiana law the following statements of the Colorado Supreme Court:

A conviction of illegal possession may be based upon evidence that the marijuana, while not found on the person of the defendant, was in a place under his dominion and control. . . . Possession need not be exclusive and the substance can be possessed jointly by a person and another without a showing that the person had actual physical control thereof.<sup>12</sup>

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<sup>8</sup>*Id.*

<sup>9</sup>See note 6 *supra*.

<sup>10</sup>291 N.E.2d 557 (Ind. 1973).

<sup>11</sup>*Id.* at 558. The wording of this definition can be reconciled with that used in *Williams* by reasoning as follows. "Capability" is synonymous with "ability;" "maintain" suggests a "past" ability, yet is less ambiguous since there can be little doubt under the *Thomas* definition that the accused must retain his power to control the object at the time of his arrest whereas the *Williams* wording might be read to mean that the accused need not be able to control the thing when arrested. See note 6 *supra*.

<sup>12</sup>*Feltes v. People*, 178 Colo. 409, 411, 498 P.2d 1128, 1131 (1972), as quoted in *Thomas v. State*, 291 N.E.2d 557, 559 (Ind. 1973).

The Colorado court's remarks broaden the scope of potential application of the constructive possession concept well beyond what the Indiana court's own words imply. Not only is evidence of the ability to exercise control taken as proof that the accused once exercised that ability, but evidence that the substance is in a place over which the accused has power and authority is proof of that ability. Moreover, the accused need not be the only person with power over the premises for the required ability to control the substance discovered therein to be found. Since the actual exercise of control over the premises appears no more necessary than actual exercise of control over the drugs, it seems that a person may be in danger of prosecution under the Indiana statute<sup>13</sup> for failing to inspect thoroughly the premises if drugs are later discovered there by a more thoroughly searching police officer.

Such a danger appears fanciful in light of the fact that both of the Indiana Supreme Court's definitions of constructive possession are qualified to the extent that the defendant must be shown to have had some "intent" to possess the drugs.<sup>14</sup> While intent to possess may be the judicial definition of the mens rea for this offense, intent is clearly not the crucial question since "intent to commit the crime charged may be inferred from the voluntary commission of the act."<sup>15</sup> The critical issue regarding the accused's mental state is his knowledge—he must "have actual knowledge of the presence of the item."<sup>16</sup> It is not entirely clear whether the

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<sup>13</sup>See note 1 *supra*.

<sup>14</sup>The *Williams* court spoke of the necessity of showing "an intent to exclude others from such control." *Williams v. State*, 253 Ind. 316, 321, 253 N.E.2d 242, 245 (1969). The *Thomas* court thought that "an intent . . . to maintain control and dominion" was necessary. *Thomas v. State*, 291 N.E.2d 557, 558 (Ind. 1973). The use of the words "exclude others" by the *Williams* court suggests that the possession must be exclusive, but this clearly is not the case today in light of the *Thomas* court's adoption of the Colorado concept of joint constructive possession and the *Williams* court's failure to use "all" to precede and explain who the "others" are.

<sup>15</sup>*Wojcik v. State*, 246 Ind. 257, 260, 204 N.E.2d 866, 867 (1965). While *Wojcik* is not a drug possession case, this rule has been explicitly applied to Indiana drug possession cases. See *Thomas v. State*, 291 N.E.2d 557 (Ind. 1973); *Corrao v. State*, 290 N.E.2d 484 (Ind. Ct. App. 1972).

<sup>16</sup>*Corrao v. State*, 290 N.E.2d 484, 487 (Ind. Ct. App. 1972), citing *Malich v. State*, 201 Ind. 587, 588, 169 N.E. 531, 532 (1930). *Malich* is a Prohibition case, not a dangerous drugs case, but the rule stated was applied to the possession of dangerous drugs in *Corrao v. State*, 290 N.E.2d 484, 487 (Ind. Ct. App. 1972). The Indiana Supreme Court has, and the appellate courts have, applied to dangerous drug cases precedent from cases concerning illegal alcohol. See *Ledcke v. State*, 296 N.E.2d 412 (Ind. 1973). Explicit references to the requirement of knowledge in drug possession cases in the court's own words can be found in *Von Hauger v. State*, 254 Ind. 297, 298, 258 N.E.2d 847, 850 (1970); *Greely v. State*, 301 N.E.2d 850, 852 (Ind. Ct. App. 1973).

knowledge required is a function of the actus reus or a distinct mens rea, considering that the failure to act affirmatively to eliminate the circumstance whereby the drugs are in a place over which one has dominion and control is a sufficient actus reus for constructive possession.

The failure to act can hardly be said to be voluntary, and thus an act from which the required intent<sup>17</sup> could be inferred,<sup>18</sup> unless the actor has a choice of whether or not to act. A choice of whether or not to take action to eliminate a particular circumstance necessarily requires knowledge of the existence of that circumstance.<sup>19</sup> Judge Lowdermilk, in *Greely v. State*,<sup>20</sup> seemed to share this view of the interrelationship of "intent," "voluntariness," "choice," and "knowledge" by stating that it is "obvious that to have constructive possession one must have some knowledge that the material is present."<sup>21</sup> However, the Indiana Supreme Court, in holding that once "possession is established, knowledge of the character of the drug and the fact that it is possessed can be inferred therefrom,"<sup>22</sup> suggests that knowledge is a distinct mental state that follows and flows from proof of a distinct act of "possession." If it is the case that "knowledge" is separable from "possession," an element inferrable from evidence of the "ability to control" the drugs, then a showing that the drugs were found in a place that the accused could have controlled is, without more, sufficient to establish his culpability. If, on the other hand, knowledge is a prerequisite to constructive possession, it would seem that proof of "knowledge," beyond proof of the fact of the accused's ability to control the place in which the contraband is found, would be necessary to convict him of possession of illegal drugs. The apparent conflict can only be resolved by examining the facts in the cases.

Before proceeding to the question of proof of the elements to discover how knowledge interplays with possession, the question of the *extent* of the knowledge required must be resolved. While the Indiana Supreme Court has never explicitly so held, it seems apparent that knowledge that the substance "possessed" is in fact a prohibited drug is as much an essential element of the offense

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<sup>17</sup>*Thomas v. State*, 291 N.E.2d 557 (Ind. 1973); *Williams v. State*, 253 Ind. 316, 253 N.E.2d 242 (1969).

<sup>18</sup>*Wojcik v. State*, 246 Ind. 257, 260, 204 N.E.2d 866, 867 (1965).

<sup>19</sup>The same logic was used by the United States Supreme Court in a different context in *Lambert v. California*, 355 U.S. 225 (1957).

<sup>20</sup>301 N.E.2d 850 (Ind. Ct. App. 1973).

<sup>21</sup>*Id.* at 852.

<sup>22</sup>*Feltes v. People*, 178 Colo. 409, 411, 498 P.2d 1128, 1130 (1972), as quoted in *Thomas v. State*, 291 N.E.2d 557, 559 (Ind. 1973); accord, *Phillips v. State*, 313 N.E.2d 101 (Ind. Ct. App. 1974).

as knowledge of the presence of the substance.<sup>23</sup> Indeed, these two aspects of knowledge have always been treated as inseparable in Indiana.<sup>24</sup> However, as in the instance of "knowledge of the presence of the item," it is unclear whether knowledge of the illegal character of the item is a distinct means *reaferrable* solely from proof of the *actus reus* of possession or whether such knowledge is a prerequisite of that "possession."<sup>25</sup>

### III. PROOF OF THE ELEMENTS OF THE OFFENSE

In Indiana in recent years, only three convictions for unlawful possession of drugs have been overturned because of insufficient evidence.<sup>26</sup> Most convictions rested upon a theory of actual possession, and none of these were reversed for insufficient evidence.<sup>27</sup> In none of the actual possession cases was the question of the appellant's knowledge discussed in the reported opinion.<sup>28</sup> This

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<sup>23</sup>The courts' statements in *Malich v. State*, 201 Ind. 587, 588, 169 N.E. 531, 532 (1930), as quoted in *Corrao v. State*, 290 N.E.2d 484, 485 (Ind. Ct. App. 1972) (referring to "knowledge" of the "presence" of the "item"), and in *Greely v. State*, 301 N.E.2d 850, 852 (Ind. Ct. App. 1973) (referring to "knowledge" of the "presence" of the "material"), probably sought to lay down rules of general applicability, useful in any possession of contraband case, rather than to exclude a requirement of knowledge of forbidden character. This is especially clear in light of the supreme court's quotation in *Thomas* from *Feltes v. People*, 178 Colo. 409, 411, 498 P.2d 1128, 1130 (1972), that knowledge of the character of the drug can be inferred from proof of possession. 291 N.E.2d at 558. Language similar to that of the Colorado court in *Feltes* was used by the Indiana Court of Appeals in *Phillips v. State*, 313 N.E.2d 101 (Ind. Ct. App. 1974), as to how knowledge of the character of the drug could be shown, again suggesting that such knowledge is essential.

<sup>24</sup>See *Thomas v. State*, 291 N.E.2d 557 (Ind. 1973); *Phillips v. State*, 313 N.E.2d 101 (Ind. Ct. App. 1974).

<sup>25</sup>Logic dictates that a person could not voluntarily possess, and therefore could not intend to possess, a *narcotic* unless the thing over which he has the ability to control is known to him to be a narcotic. See note 19 *supra*.

<sup>26</sup>See *Greely v. State*, 301 N.E.2d 850 (Ind. Ct. App. 1973); *Corrao v. State*, 290 N.E.2d 484 (Ind. Ct. App. 1972). Several convictions for illegal drug possession have been overturned in recent years on grounds other than insufficient evidence. See, e.g., *Ludlow v. State*, 314 N.E.2d 750 (Ind. 1974) (conviction overturned on fourth amendment grounds), but since this Note deals with the definition of the offense of "possession" itself, such cases are not germane to the inquiry and hence are not discussed.

<sup>27</sup>See *McGowan v. State*, 296 N.E.2d 667 (Ind. 1973); *Rose v. State*, 281 N.E.2d 486 (Ind. 1972); *Patterson v. State*, 255 Ind. 22, 262 N.E.2d 520 (1970); *Spright v. State*, 254 Ind. 420, 260 N.E.2d 770 (1970); *Cartwright v. State*, 289 N.E.2d 763 (Ind. Ct. App. 1972).

<sup>28</sup>The absence of such discussion makes it unclear whether or not any of the defendants in these actual possession cases focused on the knowledge element in their general positions that the trial court judgments were supported by insufficient evidence. Lack of urging by counsel on this partic-

fact suggests that the reviewing courts have had no difficulty in accepting the fact-finder's inference of guilty knowledge, not only when the accused was seen holding the drugs openly in his hands,<sup>29</sup> but also when he was seen "throwing away"<sup>30</sup> or "dropping"<sup>31</sup> packets subsequently found to contain drugs. The inference of knowledge is apparently permissible in such cases regardless of whether or not the conduct of the accused or other evidence independent of his physical control of the drugs suggests guilty knowledge.<sup>32</sup> The practical effect of permitting an inference of knowledge from physical control to be sufficient proof of that knowledge without independent support is to create a presumption that an accused is aware of the presence and character of all items on his person.<sup>33</sup> While such a presumption may be reasonable in most

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ular element in these cases may account for the lack of discussion by the courts. In any event, since discussion of the elements of the offense in the first subdivision of this Note revealed that the courts do consider knowledge an element of the State's case—though, as the first section suggested, the actual nature of the knowledge element is unclear—a general claim of insufficient evidence to support a belief beyond reasonable doubt of the existence of *all elements* would necessarily embrace the proposition that there is insufficient evidence of the particular element of guilty knowledge.

<sup>29</sup>Rose v. State, 281 N.E.2d 486 (Ind. 1972).

<sup>30</sup>Patterson v. State, 255 Ind. 22, 262 N.E.2d 520 (1970); Cartwright v. State, 289 N.E.2d 763 (Ind. Ct. App. 1972).

<sup>31</sup>McGowan v. State, 296 N.E.2d 667 (Ind. Ct. App. 1973); Spright v. State, 254 Ind. 420, 260 N.E.2d 770 (1970).

<sup>32</sup>While in Rose v. State, 281 N.E.2d 486 (Ind. 1972); Patterson v. State, 255 Ind. 22, 262 N.E.2d 520 (1970); and Cartwright v. State, 289 N.E.2d 763 (Ind. Ct. App. 1972), the various defendants either fled from police, took overt actions to hide or "throw away" the drugs, or had criminal records with several prior drug convictions, neither the defendant in McGowan v. State, 296 N.E.2d 667 (Ind. 1973), nor the accused in Spright v. State, 254 Ind. 420, 260 N.E.2d 770 (1970) (the defendants "dropped" the covered packets containing drugs), acted in a manner consistent with an inference of guilty knowledge nor were stopped for suspicion of drug possession nor had records of prior drug convictions. Apparently the suspicious conduct of the accused is not necessary to support an inference of guilty knowledge.

<sup>33</sup>It is not clear if this presumption is rebuttable and, if so, by what type of evidence. See note 28 *supra* as to the absence of discussion of knowledge in the actual possession cases. It is suggested that if the accused in McGowan v. State, 296 N.E.2d 667 (Ind. 1973), had been able to show that the coat he was wearing, from the pocket of which the packet of drugs "dropped," was not his own but was borrowed immediately prior to his arrest, the inference of knowledge should not have been supportable without additional facts, such as flight, to buttress the inference. However, no such argument was either pressed or given judicial recognition by the reviewing courts in McGowan v. State, *supra*, or Spright v. State, 254 Ind. 420, 260 N.E.2d 770 (1970).

cases when limited to the defendant's person, it seems questionable if applied to "a place under his dominion and control."<sup>34</sup>

The courts have stated that, to support a conviction for constructive possession, the place in which the drugs are found must be shown to be a place over which the accused has an ability of control.<sup>35</sup> Unless the evidence offered to show this required "ability to control" is scrutinized closely to assure a real link between the accused and the drugs, logic suggests that "constructive possession" could become a vehicle for the conviction and punishment of innocents whose "crime" is merely being in the wrong place at the wrong time. A survey of recent constructive possession cases intimates that such a scrutiny is not always the rule.

Legal authority to control the premises upon which the drugs are found has, in nearly all the constructive possession cases, been deemed a sufficient basis upon which to rest a finding of a real or practical ability to control the place. Thus, the registered owner of a car has been held to be in control of drugs found in the trunk,<sup>36</sup> in the ashtrays,<sup>37</sup> and on the floor;<sup>38</sup> the tenant of an apartment was found in control of drugs discovered therein;<sup>39</sup> the renter of a house was viewed as being in control of drugs in an upstairs bedroom of the house, although the bedroom was not shown to be his.<sup>40</sup> Indeed, legal ownership in at least one case proved to be the dividing line between acquittal for the car's passengers and conviction for its owner.<sup>41</sup>

Legal authority to control the premises, while given great weight, has not been deemed conclusive proof of actual ability to control in at least one case, *Greely v. State*.<sup>42</sup> In *Greely*, a homeowner was not assumed to have a practical ability to control drugs found in his backyard, far from the house itself where he was arrested. In terms of the actus reus of the crime of constructive possession, the result in *Greely* may be reconciled with the results in other cases in which the accused has legal authority over the premises only if the interrelated factors of proximity and access

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<sup>34</sup>*Feltes v. People*, 178 Colo. 409, 411, 498 P.2d 1128, 1130 (1972), as quoted in *Thomas v. State*, 291 N.E.2d 557, 559 (Ind. 1973) (emphasis added).

<sup>35</sup>*Id.* See text accompanying notes 10-12 *supra*.

<sup>36</sup>*Corrao v. State*, 290 N.E.2d 484 (Ind. Ct. App. 1972).

<sup>37</sup>*Weingart v. State*, 301 N.E.2d 222 (Ind. Ct. App. 1973).

<sup>38</sup>*Id.*

<sup>39</sup>*Thomas v. State*, 291 N.E.2d 557 (Ind. 1973).

<sup>40</sup>*Ludlow v. State*, 302 N.E.2d 838 (Ind. Ct. App. 1973), *rev'd on other grounds*, 314 N.E.2d 750 (Ind. 1974).

<sup>41</sup>*Corrao v. State*, 290 N.E.2d 484 (Ind. Ct. App. 1972).

<sup>42</sup>301 N.E.2d 850 (Ind. Ct. App. 1973). As subsequent discussion of this case will show, the reason that the constructive possession conviction was reversed was that the inference of guilty knowledge from control of the premises was not alone sufficient to prove the required knowledge.



to the drug are introduced. In the cases in which the property "owner's" conviction was upheld, not only were the drugs found in or on property which the accused had authority to control, but the drugs were close enough to the defendant so as to be readily accessible to him. The same proximity and accessibility were arguably not present in *Greely*. The term "access" is not meant to imply that the accused must be the only person with access to the place in which the drugs are found, for this is clearly not the case in light of the Indiana Supreme Court's acceptance of the concept of "joint" constructive possession.<sup>43</sup>

*Greely* cannot be reconciled with the other "ownership" constructive cases solely on the grounds of access and proximity in light of the decision in *Corrao v. State*.<sup>44</sup> In *Corrao*, the court overturned the convictions of two passengers of the car but not the convictions of the owner and the driver for constructive possession of marijuana found in the trunk of the car. The Indiana Court of Appeals felt that the passengers had no access to the car's trunk sufficient to amount to control of its contents, despite their proximity to the trunk. The owner, having the legal authority to control the car's contents, was easily found to have a practical ability to control the trunk's contents. The *Corrao* court found similar control by the driver, apparently on the theory that, having the car keys, he could have entered the trunk of the car.<sup>45</sup>

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<sup>43</sup>*Thomas v. State*, 291 N.E.2d 557 (Ind. 1973). The Indiana Supreme Court quoted from *Feltes v. People*, 178 Colo. 409, 498 P.2d 1128 (1972), and the court in *Corrao v. State*, 290 N.E.2d 484 (Ind. Ct. App. 1972), cited the same language from *Feltes*.

<sup>44</sup>290 N.E.2d 484 (Ind. Ct. App. 1972).

<sup>45</sup>*Id.* at 488. The court stated that the driver could be deemed in control of the contents of the automobile trunk by virtue of his practical control of the car. His access to the trunk apparently rested on his physical control, at the time of the arrest, of the keys to the car. The passengers, in light of the court's characterization of them as friends or acquaintances of the driver and the owner, obviously had ready access to the car's trunk by virtue of their proximity thereto and the fact that the driver would probably have opened the trunk for them. The difference, then, between the driver and the passengers, is that the former presumably was in a position to get into the trunk immediately without going through any other party whereas the latter could not have entered the trunk without assistance from the driver or the car owner. However, if this is the distinction, it makes little sense to convict the driver along with the owner since the latter's acquiescence in the former's *driving* of the car hardly compels the notion of the owner's acquiescence to the driver's complete control of all the contents of the car. Few would suggest that the driver could or would go into the car's trunk over the owner's objection. Thus the driver is in the same position as the passengers relative to the contents of the trunk—like the passengers, practically he must first go through another person to enter the trunk of the car.

The conviction of the driver in *Corrao* illustrates the point that practical ability to control may be found to exist without legal authority, if the defendant is in such a position as to have ready access to the place where the drugs are found. Ready access, of course, is easily translated into proximity. When the accused has sole access to the place where the drugs are found, as in *Phillips v. State*,<sup>46</sup> the conclusion that evidence of proximity equals proof of accessibility amounting to an ability to control may well be defensible. But when the accused is only one of many with access to the place where the drugs are found, the technique of transforming proximity to the drugs into the crime of "possession" of those drugs seems dangerous indeed. Thus, in 1970, when the Indiana Supreme Court, in *Von Hauger v. State*,<sup>47</sup> affirmed the conviction of a non-owner driver, who was one of two occupants of the car, for possession of drugs found under the seat, there was a vigorous dissent.

In a subsequent case, *Ledcke v. State*,<sup>48</sup> the supreme court affirmed the conviction for possession of marijuana of a visitor to an apartment occupied by several persons; the marijuana was not even in the same room as the defendant. The majority in *Ledcke* stated that mere proximity to illegal drugs is not sufficient proof of the ability to control the drugs necessary to conviction but avoided the result that such a statement might compel by analogizing the apartment to a "manufacturing-type setting."<sup>49</sup>

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The driver thus has even less claim to the car's trunk than the homeowner to his backyard in *Greely*, but the former was convicted and the latter was not. Accessibility, therefore, cannot be the sole distinction to reconcile the cases.

<sup>46</sup>313 N.E.2d 101 (Ind. Ct. App. 1974). For a discussion of the facts in *Phillips* that demonstrated the appellant's sole access to the place where the drugs were found so that he possessed the exclusive ability to control the drugs, see note 59 *infra*.

<sup>47</sup>254 Ind. 297, 299, 258 N.E.2d 847, 848 (1970) (Jackson, J., dissenting).

<sup>48</sup>296 N.E.2d 412, 421 (Ind. 1973) (DeBruler, J., dissenting).

<sup>49</sup>*Id.* at 416. The phrase "manufacturing-type setting" was lifted from bootlegger cases wherein the theory had developed that a person found near a bootlegger's illegal still was presumed to be a part of the unlawful enterprise. See *United States v. Gainey*, 380 U.S. 63 (1965). The majority in *Ledcke* was careful to limit its holdings to cases in which the scene of the arrest could be characterized as a "manufacturing-type setting." 296 N.E.2d at 418. The evidence upon which the majority relied in its characterization consisted primarily of evidence that (1) the entire apartment was permeated with "very heavy smoke" identified by the officers as burning marijuana, (2) that two skillets of marijuana were being "cured" by being heated in the oven, and (3) that several bags full of cured and uncured marijuana were found in various places around the apartment.

The use of alcoholic beverage cases as precedent for drug cases was also made by the court of appeals in *Corrao v. State*, 290 N.E.2d 484 (Ind. Ct. App. 1972). See note 16 *supra*.

That characterization of the scene was objected to by the lone dissenter, who seemed to feel that the court was doing exactly what it said it could not do, namely, equating proximity and possession.<sup>50</sup>

The Court of Appeals of the Third District, in affirming the conviction in *Smith v. State*,<sup>51</sup> did not feel compelled to discuss whether or not the motel room where the accused was apprehended approximated a "manufacturing-type setting." In *Smith*, a packet of heroin was found in a pocket of Roller's coat, which was hanging in a closet of a room registered in Roller's name. The defendant was one of four people, including Roller, found in the room by police. Of crucial importance to the court was evidence that the defendant had injected himself with heroin sometime before the arrest. This was deemed to be "circumstantial evidence tending to show he was in possession of the drug prior to taking it."<sup>52</sup>

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<sup>50</sup>Justice DeBruler noted that the majority had stated that "merely being or having been present in a place where marijuana is found is not sufficient proof that such person is in possession where he is not in exclusive possession of the place." 296 N.E.2d at 421-22. But he objected to the majority's analogy to *United States v. Gainey*, 380 U.S. 63 (1965), arguing that the

underlying notions of the nature of a place of manufacture do not adhere to this apartment. . . . This was a home where all the homelike activities of human beings take place. . . . No natural presumption arises that all present in such a place of residence are steadfastly engaged in the same activity, no matter how "obvious" such an activity might be.

296 N.E.2d at 422. Thus in light of the fact that the defendant could have been present in the apartment for any number of reasons other than the participation in the "manufacture" of illegal drugs, the value of the presumption of involvement falls away. If the "manufacturing-type setting" can be drawn so easily without regard to the theoretical underpinnings which limit it to cases in which no activity other than the unlawful manufacture is reasonably possible on the premises, then proximity may indeed be "possession" regardless of whether or not the accused is in "exclusive" possession.

<sup>51</sup>316 N.E.2d 841 (Ind. Ct. App. 1974).

<sup>52</sup>*Id.* at 842. The *Smith* court cited two Maryland appellate court cases as authority for the proposition stated in the text. Maryland, however, follows the rule that knowledge is not an element of the offense of drug possession. See *Jenkins v. State*, 215 Md. 70, 137 A.2d 115 (1957). The Maryland rule is contrary to the Indiana view. See *Thomas v. State*, 291 N.E.2d 557 (Ind. 1973).

Though the court did not so state, its reliance on use to show "constructive possession" seems to revive the early definition of the constructive possession doctrine as a "past ability to control." *Williams v. State*, 253 Ind. 316, 321, 253 N.E.2d 242, 245 (1969). If a *past* ability to control is alone sufficient, then even a defendant's termination of his ability to control the drug by destroying it would not exculpate him from "constructive" possession. If this is true, *Smith* could have been convicted of possession

Considering the cases discussed in the preceding paragraphs, it is clear that an individual commits the act of "possession" of an unlawful drug by such diverse conduct as holding the drug in his hands, being under the influence of the drug, owning or renting a house in which drugs are found, and merely being so close to the place where the drugs are that he is capable of being viewed as having access to those drugs.

In the traditional common law view of criminal justice, the mens rea requirement precluded conviction of a person who innocently or inadvertently committed the actus reus of a given offense.<sup>53</sup> As any experienced trial lawyer will attest, proof of the mens rea element is very often supplied by inference from the voluntary commission of an overt act.<sup>54</sup> If the act is by its very nature unequivocal, as would be the firing of a loaded pistol at another's head, our common sense tells us that there is slight danger of convicting an innocent person by supplying the necessary intent from inference from that act. But if, as in the case of constructive possession, the "act" may be as equivocal as being in one place deemed too close to another place, the danger of permitting the inference of guilty knowledge from the commission of the act is obvious. This danger becomes clearer when one considers that the forbidden act may amount to a failure to act affirmatively to eliminate one's proximity, and thus accessibility, to a place where drugs are found. Moreover, a failure to act to remove oneself from the place where drugs may be is hardly voluntary if the actor does not know the drugs are there. Logic thus commands that when the actus reus is really an omission, a strong showing of guilty knowledge should be made, independent of the

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of the heroin, which the court speculated that he flushed down the toilet when the police arrived, on the basis of his prior use of some of that heroin.

If past ability to control a now non-existent drug equals constructive possession, how long ago in the "past" may that once-held ability be? Would the State be able to prove a case of constructive possession simply by producing witnesses to testify that they once saw the accused injecting himself with or holding drugs? In any event, it is unclear whether use may thus be possession even when the drug is gone, because Smith was convicted of possession of the package of heroin found in Roller's coat pocket in the closet. The court speculated that the particular heroin in the coat pocket was more of the same that Smith had possessed "prior to taking it."

<sup>53</sup>"An unwarrantable act without a vicious will is no crime at all."  
2 W. BLACKSTONE, COMMENTARIES \*21.

<sup>54</sup>The Indiana Supreme Court acknowledged the practice, which is of course usually a product of necessity, in saying that "intent may be inferred from the voluntary commission of the act." *Wojeik v. State*, 246 Ind. 257, 259, 204 N.E.2d 866, 867 (1965). See note 15 *supra*. See, e.g., G. WILLIAMS, *THE MENTAL ELEMENT IN CRIME* 10 (1965), and articles and cases cited therein.

equivocal act of being in proximity to the drugs, to separate the blameworthy from the innocent.

In *Thomas v. State*,<sup>55</sup> the Indiana Supreme Court did not reach the question of whether proximity and legal authority to control the premises would be sufficient to "prove" by inference alone the required guilty knowledge, because additional evidence independent of those facts supported the finding of knowledge. For similar reasons, the question did not arise in *Weingart v. State*.<sup>56</sup> In *Ledcke v. State*<sup>57</sup> and *Smith v. State*,<sup>58</sup> cases in which the access to the drugs was shown but legal authority over the place where they were found was not shown, independent evidence aside from proximity showed knowledge. In *Phillips v. State*,<sup>59</sup> no evidence independent of proof of access suggested guilty knowledge, but, under the unique circumstances of the case, the accused had *sole* access to the place where the drugs were found so that proof of knowledge of the presence and character of the drug was not difficult to infer.

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<sup>55</sup>291 N.E.2d 557 (Ind. 1973). Among the additional facts shown pointing to guilty knowledge were that the defendant was a known heroin user with previous convictions, and, more importantly, the package of heroin was open with the heroin itself in plain view of the defendant in her seat inches away from the package in front of her.

<sup>56</sup>301 N.E.2d 222 (Ind. Ct. App. 1973). The accused was the owner, driver, and sole occupant of the car at the time of the arrest. A "roach-clip" was hanging from the front of his shirt. Most importantly, Weingart confessed his knowledge when he admitted "that he was surprised that he would be 'busted' for possessing such a small amount of marijuana." *Id.* at 225.

<sup>57</sup>296 N.E.2d 412 (Ind. 1973). Very heavy smoke permeated the entire apartment, and a great deal of marijuana lay openly all about the premises.

<sup>58</sup>316 N.E.2d 841 (Ind. Ct. App. 1974). The defendant had confessed to injecting himself with heroin immediately prior to the arrest, and apparatus for heroin use lay exposed about the motel room. Furthermore, the accused had "fresh" needlemarks on his arm. See note 51 *supra*.

<sup>59</sup>313 N.E.2d 101 (Ind. Ct. App. 1974). Phillips had been arrested for a non-drug related offense. After his arrest he was placed in the back seat of a police squad car. The back seat of the car was separated from the front by a sealed plastic window extending from the top of the back seat to the roof of the car. The car doors were locked. Phillips was the first and only person picked up by police and put in the back of the car from the beginning to the end of the shift. Immediately prior to picking up the defendant, the two officers assigned to the car had thoroughly cleaned out the inside of the car pursuant to a departmental order. The package of heroin was discovered where it lay in plain view on the floor of the back seat area of the car when the police opened the back door to let Phillips out upon arriving at the police station. Under the unique circumstances of the case it is clear that, assuming honesty on the part of the two police officers, no one but Phillips could have put the heroin in the place where it was found.

However, neither the driver nor the owner of the car in *Corrao v. State*,<sup>60</sup> nor the driver in *Von Hauger v. State*,<sup>61</sup> nor the renter in *Ludlow v. State*<sup>62</sup> had sole access to the places in which the drugs were found, yet the convictions of all these persons were upheld. But in *Greely v. State*,<sup>63</sup> the conviction of a homeowner without exclusive access to the drugs was overturned. If these cases are to be reconciled, it must be on the basis of the evidence presented to show the defendants' knowledge of the presence of the drugs independent of the proof of accessibility. As the subsequent analysis will demonstrate, the independent evidence of knowledge discussed by the courts is so similar in all four of these cases that the differences in results are explainable not by any difference in quantum of evidence but by the difference in approach to and scrutiny of the evidence taken by the *Greely* court on the one hand and the appellate courts in *Ludlow* and *Corrao* and the supreme court in *Von Hauger* on the other.

The reversal in *Greely* turned not upon the accused's proximity to the drugs but rather upon his lack of knowledge of the presence of them. "It is not the law that a homeowner is criminally liable for possession of everything on the grounds of his home. There must be some evidence that he had at least some knowledge of the presence of the material."<sup>64</sup> Thus the court was unwilling to accept an inference of guilty knowledge solely from the proof of the accused's legal authority over and ready access to the place in which the drugs were found. The *Greely* court could have distinguished such cases as *Corrao*<sup>65</sup> or *Von Hauger*<sup>66</sup> on the

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<sup>60</sup>290 N.E.2d 484 (Ind. Ct. App. 1972).

<sup>61</sup>254 Ind. 297, 258 N.E.2d 847 (1970).

<sup>62</sup>302 N.E.2d 838 (Ind. Ct. App. 1973), *rev'd on other grounds*, 314 N.E.2d 750 (Ind. 1974). In both courts, the accused argued that his conviction should be reversed for lack of sufficient evidence and because the search and seizure was unlawful because the police had no search warrant though they had ample time to procure one. The appellate court rejected both of appellant's arguments and discussed the evidence of the elements of the crime of possession. The supreme court reversed the conviction on fourth amendment grounds, thus finding it unnecessary to discuss the sufficiency of the evidence issue. The subsequent discussion in the text is therefore limited to the appellate court's analysis of the sufficiency of the evidence argument.

<sup>63</sup>301 N.E.2d 850 (Ind. Ct. App. 1973). The drugs were found in the defendant's backyard, which was not enclosed. Thus, anyone could enter the place where the drugs were found.

<sup>64</sup>*Id.* at 852.

<sup>65</sup>In *Corrao*, the defendants whose convictions were upheld were only a few feet from the drugs, whereas in *Greely* the accused was in his house at the time of the arrest, separated from the drugs in his backyard by some twenty to thirty feet.

<sup>66</sup>The drugs in *Von Hauger*, unlike *Greely*, were only a few feet from the defendant's reach.

basis of the *distance* which separated the defendant from the drugs, but it chose not to base its holding on proximity but rather on the knowledge element of the offense. In so doing, the *Greely* court made the reasoned judgment that while proximity may suggest knowledge under certain circumstances, it does not *prove* knowledge under any circumstances.

Evidence suggesting Greely's knowledge of the presence of the drugs independent of his ownership of the premises was offered the court but was deemed insufficient. A statement made by the person who had placed the drugs in Greely's yard that he had made "everyone" in Greely's house aware of the presence of the drugs was not sufficient to establish Greely's knowledge because, according to the court, there was no proof that "everyone" included Greely. This was in spite of the fact that the witness made the statement to "everyone" in the house not long before the arrest,<sup>67</sup> which reasonably suggests that Greely was so informed. Clearly, the court closely scrutinized the evidence to assure that Greely knew about the drugs, thus exemplifying its approach to voluntariness of possession and knowledge suggested by the statement that it is "obvious that to have constructive possession one must have some knowledge that the material is present."<sup>68</sup>

No such active scrutiny of the record for evidence of guilty knowledge independent of legal authority to control the place where the drug was found was undertaken by the Indiana Court of Appeals in *Ludlow v. State*.<sup>69</sup> The appellate court succinctly stated the grounds upon which the challenge of insufficient evidence was rejected:

Appellant attempted to prevent entry into the house by police officers. Appellant gave his address when arrested as 3715 North Guion Road which were the premises involved here. Thus, Appellant exerted dominion and control over the house and its contents and therefore possessed the drugs in question via the doctrine of constructive possession.<sup>70</sup>

Though there was evidence in the record that the house was the scene of a continuous and long-standing drug-dealing operation, this evidence was pointed out by the Indiana Supreme Court<sup>71</sup> and

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<sup>67</sup>*Greely v. State*, 301 N.E.2d 850, 853 (Ind. Ct. App. 1973).

<sup>68</sup>*Id.* at 852. The court also quoted from the dissent in *Von Hauger v. State*, 254 Ind. 297, 301, 258 N.E.2d 847, 850 (1970), that "for the element of possession to be established it must be proven beyond a reasonable doubt that the person charged could knowingly exercise dominion or control over it." 301 N.E.2d at 852.

<sup>69</sup>302 N.E.2d 838 (Ind. Ct. App. 1973), *rev'd on other grounds*, 314 N.E.2d 750 (Ind. 1974).

<sup>70</sup>302 N.E.2d at 843.

<sup>71</sup>314 N.E.2d at 751.

was not mentioned by the appellate court. The implication of this omission is that the appellate court simply did not feel that any evidence beyond legal authority to control the premises where the drugs were found, and the defendant's proximity to the drugs, was necessary to "prove" constructive possession.

The only item mentioned by the appellate court in *Ludlow*, beyond defendant's presence and address, in connection with the sufficiency of the evidence issue is the fact that Ludlow tried to stop entry into the house by police. The police had no warrant, and the supreme court found that the forced entry by them without a warrant was, under the circumstances, unreasonable.<sup>72</sup> Hence, Ludlow acted within his constitutional rights in attempting to bar entry by the police. Even if Ludlow's lawful assertion of his constitutional rights were allowed to be presumptive of a motive to conceal something unlawful, illegal drugs were not the only thing Ludlow might have wanted to hide, since a friend of his within the house was a fugitive.<sup>73</sup> The appellate court did mention that the police were acting on a tip that drugs were in the house but, significantly, mentioned this fact in connection with its treatment of the fourth amendment issue, not with respect to the sufficiency argument.<sup>74</sup> The placement of the discussion of this evidence in the opinion suggests that the appellate court thought it only relevant to the fourth amendment issue. Moreover, had the court scrutinized that bit of evidence with the same degree of care for preserving the element of knowledge as did the *Greely* court, it would have recognized that the tip placed the drugs in a room which was not Ludlow's bedroom and which was not occupied by the defendant at the time of the arrest but rather was occupied by several other people.<sup>75</sup> Consequently, this evidence did *not* suggest Ludlow's personal knowledge of the drugs. The opinion of the appellate court in *Ludlow* thus suggests that the court felt that legal authority to control the premises equals practical ability to control its contents which equals constructive possession of drugs found therein.

In *Von Hauger v. State*,<sup>76</sup> the defendant was the non-driver owner and one of several occupants of a car in which a package of drugs was concealed under the front seat. The only evidence that pointed to any knowledge on the part of Von Hauger of the presence of the package was the testimony of the arresting officer that, as he approached the car from the rear, "he observed the appellant attempting to slide an object under the seat. . . . Upon

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<sup>72</sup>*Id.* at 753.

<sup>73</sup>302 N.E.2d at 840.

<sup>74</sup>*Id.* at 839.

<sup>75</sup>*Id.* at 843.

<sup>76</sup>254 Ind. 297, 258 N.E.2d 847 (1970).



investigating, the officer found the object to be an automatic pistol."<sup>77</sup> It was while recovering the *pistol* that the officer found the package containing the marijuana. How conduct of the accused pointing to knowledge of the presence of a pistol on the floor of the car establishes knowledge of the presence and character of a package of marijuana located nearby was never answered to the satisfaction of Justice Jackson and is the basis for his dissent.<sup>78</sup> It is Justice Jackson's emphasis on the necessity of proof of knowledge, apart from proof of proximity, as a prerequisite to a finding of "possession" that the appellate court relied upon in *Greely*, and it is noteworthy that neither the *Greely* nor the *Von Hauger* opinion was mentioned by the appellate court in *Ludlow*.

In *Corrao v. State*,<sup>79</sup> the only evidence tending to show the owner's and driver's knowledge of the marijuana, aside from their proximity and access to the trunk in which the marijuana was found, was the testimony of the arresting officer that he smelled marijuana as he approached the car. The officer did not say that he smelled the smoke of burning marijuana but only that he smelled the "odor" of marijuana.<sup>80</sup> While marijuana smoke coming from the car would imply knowledge of its occupants as to the presence of marijuana therein, the concurring judge aptly pointed out that the place where the incident occurred was a "'marijuana area.' . . . It is not surprising that some odor of the plant was perceptible."<sup>81</sup> In light of this analysis, it is clear that the majority in *Corrao* made little attempt to discover substantial independent evidence to support the inference of guilty knowledge made from the fact of the driver's and owner's access to the car trunk. This is true even as to the driver, whose practical access to the trunk was arguably no greater than the passengers' since he, like them, would need the owner's permission to enter the trunk.<sup>82</sup>

The foregoing discussion suggests that two conceptually different approaches have been employed in constructive possession cases: (1) the *Greely-Von Hauger* dissent approach, which reasons that knowledge is a prerequisite to possession such that possession is impossible without proof of knowledge, and (2) the *Ludlow* (appellate court)-*Von Hauger* majority approach, which views guilty knowledge as a distinct *mens rea* that is inferrable

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<sup>77</sup>*Id.* at 298, 258 N.E.2d at 848.

<sup>78</sup>*Id.* at 299, 258 N.E.2d at 848.

<sup>79</sup>290 N.E.2d 484 (Ind. Ct. App. 1972).

<sup>80</sup>*Id.* at 485.

<sup>81</sup>*Id.* at 486 n.1. By "marijuana area" the judge was referring to the fact that the immediate area surrounding the road was one in which a great deal of marijuana grew wild. It should also be noted that the officer's search of the inside of the car revealed no marijuana.

<sup>82</sup>See note 45 *supra*.

from proof of "possession." Admittedly, there may be little practical difference in result in the vast majority of cases in which factors independent of the accused's access and proximity to the drugs point to a guilty knowledge, for example, a confession, exclusive access to and control of the premises, flight, or the odor of burning marijuana. But in those cases in which proof of access is tantamount to proof of possession and no independent evidence exists of knowledge beyond the showing of proximity of the accused, among other persons, to the place where the drugs are found, the approach employed can make a great deal of difference in distinguishing purposeful action from inadvertent conduct.

#### IV. PROOF OF THE ELEMENTS OF THE OFFENSE IN OTHER JURISDICTIONS

A few states do not require the State to prove beyond a reasonable doubt that the defendant knowingly and/or intentionally "possessed" the unlawful drug.<sup>83</sup> Washington is one such state.<sup>84</sup> Indiana, of course, purports to follow the opposite view, requiring a showing of intent to possess the prohibited drug.<sup>85</sup> Nevertheless, cases from the two states often have the same result. In two Washington cases, the defendant cotenants not having sole access to the houses were convicted when drugs were found in closed containers in a bottle in a cabinet in a "common room," the kitchen,<sup>86</sup> and on the floor in the bedroom of one of the defendants.<sup>87</sup> These defendants' knowledge was not in issue under Washington law, but had these cases taken place in Indiana, the announced rules imply that knowledge would have been in issue if the appeals were taken on the same grounds as the Washington appeals—insufficient evidence. The logic of the appellate court in *Ludlow* and the majority in *Von Hauger* suggests the same result as in the Washington cases—affirmance of the convictions. But the reasoning of the court in *Greely* arguably suggests a dif-

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<sup>83</sup>See the listing of the states' views on the mens rea aspect of drug possession in Annot., 91 A.L.R.2d 821 (1963).

<sup>84</sup>"There is no element of guilty knowledge or intent in the charge of possession of narcotics." *State v. Edwards*, 514 P.2d 192, 193 (Wash. Ct. App. 1973). The Washington Supreme Court has explicitly *rejected* "a California rule that proof of opportunity of access to narcotics, or a place where narcotics are found, without a showing of knowledge or intent . . . will not support a finding of unlawful possession." *State v. Mantell*, 430 P.2d 980, 982 (Wash. 1967).

<sup>85</sup>"The accused must also have actual knowledge of the presence of the item." *Corrao v. State*, 290 N.E.2d 484, 487 (Ind. Ct. App. 1972), *citing* *Malich v. State*, 201 Ind. 587, 169 N.E. 531 (1930). See section II of the text. Regarding "intent," see note 14 *supra*.

<sup>86</sup>*State v. Singleton*, 9 Wash. App. 399, 512 P.2d 1119 (1973).

<sup>87</sup>*State v. Wheatley*, 519 P.2d 1001 (Wash. Ct. App. 1974).

ferent result, especially on the facts of the case in which the drugs were found in the kitchen.

Texas is among the majority<sup>88</sup> of states which, like Indiana,<sup>89</sup> requires the State to show guilty knowledge on the part of the accused in drug possession cases.<sup>90</sup> Oregon<sup>91</sup> and Colorado<sup>92</sup> employ similar rules. In Texas, Oregon, and Colorado, the doctrines of constructive possession and joint possession are followed.<sup>93</sup> However, cases involving similar fact situations have resulted in affirmance of convictions in Indiana but reversals on certain counts in Texas, Oregon, and Colorado, though all four purportedly require that the same elements be proved by the State.<sup>94</sup> This apparent anomaly is explained by the fact that the Texas, Oregon, and Colorado courts employed the approach of *Greely* and the dissent in *Von Hauger*, whereas the Indiana courts in the cases to be discussed considered the problem according to the *Ludlow* (appellate court)-*Von Hauger* majority approach.<sup>95</sup> In these cases the approach does make a difference—it is the *Greely* approach which compels the court diligently to search the record for additional independent evidence of knowledge beyond access and legal authority. Unless such a search is compelled, punishment may be inflicted upon those who are not blameworthy beyond a reasonable doubt.

In *State v. Moore*,<sup>96</sup> the Oregon Court of Appeals reversed the defendants' convictions for constructive possession of the marijuana found in two pipes in plain view on the living room table

<sup>88</sup>Arizona, Colorado, Illinois, Louisiana, Montana, Nevada, New Mexico, New York, and Texas are cited as adherents to the majority rule. Annot., 91 A.L.R.2d 821 (1963).

<sup>89</sup>See note 85 *supra*.

<sup>90</sup>See *Medina v. State*, 164 Tex. Crim. 16, 296 S.W.2d 273 (1956).

<sup>91</sup>"[T]o prove constructive possession of a dangerous drug or narcotic the state must show that the defendant knowingly exercised control of or the right to control the unlawful substance." *State v. Moore*, 511 P.2d 880, 882 (Ore. Ct. App. 1973).

<sup>92</sup>*Petty v. People*, 167 Colo. 240, 447 P.2d 217 (1968). *Petty* is quoted as authority for the inclusion of a mens rea in the offense of unlawful drug possession in *Feltes v. People*, 178 Colo. 409, 498 P.2d 1128 (1972), and the *Feltes* language is quoted verbatim by the Indiana Supreme Court in *Thomas v. State*, 291 N.E.2d 557, 559 (Ind. 1973). See note 22 *supra*.

<sup>93</sup>See cases cited in notes 90-92 *supra*.

<sup>94</sup>Compare *Petty v. People*, 167 Colo. 240, 447 P.2d 217 (1968), and *State v. Moore*, 511 P.2d 880 (Ore. Ct. App. 1973), and *Wright v. State*, 500 S.W.2d 170 (Tex. Crim. App. 1973), with *Ledcke v. State*, 296 N.E.2d 412 (Ind. 1973), *Von Hauger v. State*, 254 Ind. 297, 258 N.E.2d 847 (1970), and *Ludlow v. State*, 302 N.E.2d 838 (Ind. Ct. App. 1973), *rev'd on other grounds*, 314 N.E.2d 750 (Ind. 1974), and *Corrao v. State*, 290 N.E.2d 484 (Ind. Ct. App. 1972).

<sup>95</sup>See text accompanying notes 69-82 *supra*.

<sup>96</sup>511 P.2d 880 (Ore. Ct. App. 1973).

and in a third pipe on top of a dresser in an adjoining bedroom of the apartment in which the defendant resided with several other persons. The reversal was based on an absence of proof of the defendant's knowledge and control of the marijuana. Unlike the Indiana Court of Appeals in *Ludlow v. State*,<sup>97</sup> the Oregon court was apparently unwilling to allow proof of the requisite knowledge and control merely by inference from the accused's access to and legal authority over the premises where the drugs were found. As to the cotenant Smith in *Petty v. People*,<sup>98</sup> the Colorado Supreme Court was unwilling to allow legal authority and the practical access that normally follows proximity to constitute constructive possession where marijuana was found in two open cartons in different rooms of the apartment. The Colorado court felt that independent proof of knowledge was necessary to show voluntary control. In the Pennsylvania case of *Commonwealth v. Florida*,<sup>99</sup> the court refused to allow the convictions of four appellants found in the same room with a jar of marijuana displayed in plain view, thus indicating their ready access and proximity to the drugs though the four appellants had no legal authority to control the premises. The circumstances in the Pennsylvania case compel conviction even more so than the facts in *Von Hauger*, *Corrao*, or *Ledcke*, but the Pennsylvania court refused to hold that the inference of knowledge and control which could be drawn from proof of access is sufficient proof of the control necessary for "constructive possession."

A similar attitude was taken by the Texas Court of Criminal Appeals in *Wright v. State*,<sup>100</sup> in which the court stated succinctly the emphasis in the out-of-state cases discussed which was arguably present in *Greely*, but not in *Corrao*, *Von Hauger*, *Ludlow* and *Ledcke*, and which may explain the different results in those cases:

Thus, in furnishing the "affirmative link" between the accused and the narcotic, additional independent facts and circumstances *must* be established indicating the accused's knowledge of the narcotic as well as his control over such.<sup>101</sup>

It is apparent that this emphasis imports a realization of the fact that "control" or "ability to control," as it has so often been

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<sup>97</sup>302 N.E.2d 838 (Ind. Ct. App. 1973), *rev'd on other grounds*, 314 N.E.2d 750 (Ind. 1974). See the analysis of the evidence of knowledge the appellate court thought necessary to prove the offense at text accompanying notes 69-75 *supra*.

<sup>98</sup>167 Colo. 240, 447 P.2d 217 (1968).

<sup>99</sup>441 Pa. 534, 272 A.2d 476 (1971).

<sup>100</sup>500 S.W.2d 170 (Tex. Crim. App. 1973).

<sup>101</sup>*Id.* at 171.

"proved" in cases of constructive possession, may mean no more than mere accessibility to the drugs and that therefore additional proof of knowledge is necessary to distinguish the inadvertent neighbor from the deliberate possessor. The emphasis on facts independent of accessibility is the practical effect of the *Greely* approach and insures that the failure of a person, without exclusive access to the premises, to take action to eliminate the condition of his proximity to the drugs is a truly voluntary actus reus.

The evidence deemed sufficient to prove the knowledge ostensibly required for constructive possession by the courts in *Von Hauger*, *Ludlow*, and *Corrao* has been analyzed<sup>102</sup> and has been found wanting. The posture of the Indiana courts in those three cases with respect to allowing knowledge to be inferred solely from accessibility and authority in *Ludlow*, and from mere accessibility without lawful authority in *Von Hauger* and *Corrao*, presents a marked contrast to the approach taken by the courts of Pennsylvania, Oregon, and Colorado, as well as to the approach employed in *Greely* and by the dissent in *Von Hauger*. The contrast is not diminished by the fact that the *Corrao* court purported to follow the Colorado rule.<sup>103</sup> Under the *Corrao-Ludlow-Von Hauger* approach, the statement of the Indiana Supreme Court that once "possession is established, knowledge of the character of the drug and the fact that it is possessed can be inferred therefrom,"<sup>104</sup> is, by corruption of the word "possession" by the adjective "constructive," transmuted into "once proximity, and thus accessibility, is established, knowledge of the character and the fact that it is possessed can be inferred therefrom." This trans-

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<sup>102</sup>See section III of the text.

<sup>103</sup>The *Corrao* court quoted from the Colorado court in *Petty v. People*, 167 Colo. 240, 447 P.2d 217 (1968), that "where a person is in possession, but not in exclusive possessive of the premises, it may not be inferred that he knew of the presence of marijuana there and had control of it unless there are statements or other circumstances tending to buttress the inference." 290 N.E.2d at 487-88. The Colorado court was quoted by the Indiana Supreme Court in *Thomas v. State*, 291 N.E.2d 557, 559 (Ind. 1973), but the *Thomas* court failed to include the *Petty* court's requirement of independent proof of knowledge beyond proof of possession of the premises. The appellate court in *Ludlow* cited the supreme court's opinion in *Thomas* as authority for the concept of joint constructive possession and, like the *Thomas* court, omitted the qualification to that concept expressed in the original *Petty* rule as stated above. 302 N.E.2d at 843. The phrase "not in exclusive possession" as referred to in *Petty* has been construed by the courts dealing with joint constructive possession cases to apply to cases where the defendant may be the sole owner of the premises but does not have sole access to the place. See *Petty v. People*, 167 Colo. 240, 447 P.2d 217 (1968); *Wright v. State*, 500 S.W.2d 170 (Tex. Crim. App. 1973). Thus, an individual who is the sole "owner" of the premises is "not in exclusive possession" of that property if people other than himself have easy access thereto at the time of the arrest.

<sup>104</sup>*Thomas v. State*, 291 N.E.2d 557, 559 (Ind. 1973).

mutation is unacceptable because it makes constructive possession an "act" that can be completely inadvertent and involuntary. To prevent this, evidence additional to and independent of proof of proximity must be adduced, or possession of dangerous drugs becomes a crime of strict, absolute liability.

#### V. WHY NOT STRICT LIABILITY FOR POSSESSION OF UNLAWFUL DRUGS

The discussion immediately preceding assumes that it is desirable to punish only those morally blameworthy for the offense of possession of dangerous drugs, that is, those who intend to possess them. As the Washington cases suggest, not all states feel that the crime of possession of unlawful drugs ought be a traditional mens rea crime. Those few states in accord with Washington would suggest that this crime could be one of strict liability.<sup>105</sup> Arguments of authority, policy, and reason compel the conclusion that it is desirable to punish *only* those who knowingly and intentionally possess dangerous drugs and not to force individuals to act at their own peril.

The Indiana courts have repeatedly stated that a person is not guilty of possession of a dangerous drug unless that possession is shown to be knowing, voluntary, and with an intent to possess.<sup>106</sup> Thus, strict liability for this offense would be in direct contradiction to the law as stated by the Indiana higher courts and would be inconsistent with the general state of criminal law in Indiana today.

Indiana has taken what may be characterized as an enlightened or legally correct view in requiring mens rea in many statutory offenses. . . . Strict liability has been restricted by and large to matters which concern the public at large such as in matters dealing with food stuffs or economics. It has been avoided usually in other offenses. To the state's credit, this approach has not been swept along by a modern trend but is deeply engrained in older authorities.<sup>107</sup>

Obviously, unlawful drug possession does not affect the public at large in the same way as matters involving food and economics. The one "glaring exception" to the mens rea approach in

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<sup>105</sup>Maryland, Florida, and Massachusetts agree with Washington that the State need not prove that the possession was knowing or intentional. Annot., 91 A.L.R.2d 821, 826-27 (1963).

<sup>106</sup>See, e.g., *Thomas v. State*, 291 N.E.2d 557 (Ind. 1973); *Corrao v. State*, 290 N.E.2d 484 (Ind. Ct. App. 1972). The most recent version of the Indiana statute for this offense states that the possession must be knowing and intentional. See note 1 *supra*.

<sup>107</sup>*Force, Mens Rea v. Strict Liability*, 9 RES GESTAE 11, 14 (Aug. 1965).

Indiana is the area of statutory rape: "With regard to [statutory rape] the courts have imposed strict liability and have rejected intent as an element of the offense . . . ." <sup>108</sup> The salient feature of statutory rape is obviously illicit sex, hardly a characteristic of unlawful drug possession. The fact that economic regulations and statutory rape have little in common with possession of illegal drugs suggests that the policy considerations which have prompted the courts to depart from their general mens rea approach to make violations of economic regulations and statutory rape strict liability would not apply to possession of dangerous drugs.

The Indiana courts have traditionally used a *malum prohibitum*—*mala in se* distinction <sup>109</sup> to determine which statutory offenses ought be strict liability and which ought entail a mens rea. Such a distinction, requiring as it does a value judgment as to what acts are inherently evil, is of dubious value in a borderline case between good and evil in which drug possession might be considered. Moreover, the distinction seems to lose all force in light of the fact that the only apparent reason for considering statutory rape a strict liability offense is precisely because of an " 'acknowledged public policy' [that] sexual relations between unmarried persons is wrong." <sup>110</sup> A more functional and more useful approach to the problem of distinguishing statutory offenses thought to require a mens rea from those seen as strict liability was articulated by a federal district court applying Indiana law in a pollution case. <sup>111</sup> Pollution was held to be a strict liability offense because the "public is injured just as much by unintentional pollution as it is by deliberate pollution." <sup>112</sup> Applying that logic to the offense of possession of unlawful drugs, it seems clear that the public at large is no more injured by an individual's inadvertent positioning of himself in proximity to a place where illegal drugs are found than by the mistaken taking of another's property, the latter conduct being excused without exception in Indiana today. <sup>113</sup>

Much has been said by the judiciary <sup>114</sup> as well as the com-

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<sup>108</sup>*Id.* at 13.

<sup>109</sup>The notion is that *mala in se* offenses, *i.e.*, those "inherently and naturally evil as adjudged by the senses of a civilized society," require proof of mens rea because such acts are "wrong and criminal by reason of such knowledge or intent." *Gregory v. State*, 291 N.E.2d 67, 68 (Ind. 1973).

<sup>110</sup>Force, *supra* note 107, at 14.

<sup>111</sup>*United States v. United States Steel Corp.*, 328 F. Supp. 354 (N.D. Ind. 1970).

<sup>112</sup>*Id.* at 356.

<sup>113</sup>*See, e.g.*, *Roark v. State*, 234 Ind. 615, 130 N.E.2d 326 (1955).

<sup>114</sup>*See, e.g.*, *Morissette v. United States*, 342 U.S. 246 (1952). In his opinion, Justice Jackson noted the trend towards making certain "public welfare" offenses strict liability and that judicial acceptance of the trend "has not . . . been without expressions of misgiving." *Id.* at 256. He suggested

mentators<sup>115</sup> as to why society should reverse its penal sanctions for the deliberate wrongdoer as opposed to the inadvertent violator of the letter of the law. The mens rea principle has been variously articulated in terms of "intent," "guilty knowledge," "scienter," and the like,<sup>116</sup> but "reduced to its essence it referred to the choice to do a blameworthy act."<sup>117</sup> Blackstone's principle that "an unwarrantable act without a vicious will is no crime at all"<sup>118</sup> emphasizes the common law view that it is the "evil intent" which makes the act criminal, and without such intent the harmful act is simply another example of human fallibility for which the punishment of an individual would be "just plain unfair."<sup>119</sup> The utilitarian view<sup>120</sup> rationalizes the mens rea principle in terms of its logical relationship to an overriding principle of modern punishment—deterrence. This viewpoint asks how unintentional acts can be deterred by threat of punishment since such acts by definition are not committed by choice.<sup>121</sup> Regarding the offense of constructive possession of unlawful drugs, insofar as the actus reus is reducible to a status of proximity to the drug, the requirement of knowledge as necessary to the voluntary bringing about or altering that status may be of constitutional proportions.<sup>122</sup> That reason and a public policy fundamental to the Anglo-

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that judicial acceptance of statutory crimes of strict liability might be limited to "petty offenses" and crimes where the punishment invoked is "relatively small." *Id.* The Indiana Supreme Court has apparently *not* seen the penalty for illegal drug possession to be so "small" as to construe it as a "public welfare offense" *without* a mens rea. See note 14 *supra*.

<sup>115</sup>See, e.g., FREEDOM AND RESPONSIBILITY (H. Morris ed. 1961); G. WILLIAMS, THE MENTAL ELEMENT IN CRIME (1965).

<sup>116</sup>G. WILLIAMS, THE MENTAL ELEMENT IN CRIME 9-10 (1965); see also the discussion in *Morissette v. United States*, 342 U.S. 246, 250-60 (1952).

<sup>117</sup>Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273 (1968).

<sup>118</sup>2 W. BLACKSTONE, COMMENTARIES \*21.

<sup>119</sup>See, e.g., H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); Kadish, *The Decline of Innocence*, 26 CAMBRIDGE L.J. 273 (1968); Perkins, *A Rationale of Mens Rea*, 52 HARV. L. REV. 905 (1939).

<sup>120</sup>See, e.g., J. BENTHAM & J.S. MILL, THE UTILITARIANS 164-66 (1961); Hart, *Murder and the Principle of Punishment: England and the United States*, 52 NW. U.L. REV. 433, 447-53 (1957).

<sup>121</sup>See authorities cited in note 120 *supra*.

<sup>122</sup>See *Robinson v. California*, 370 U.S. 660 (1962); *Lambert v. California*, 355 U.S. 225 (1957). *But cf.* *Powell v. Texas*, 392 U.S. 514 (1968). In *Powell*, Justice Marshall wrote the plurality opinion of the Court stating that *Robinson* only required "some actus reus" but did not say that conduct could not be punished because it is, in some sense, "involuntary." *Id.* at 533. The statement in *Powell* suggests that knowledge is separable from the actus reus and voluntariness has a different meaning than choice. *Contra*, *Kilbride v. Lake*, N.Z.L.R. 590 (1962). A discussion of the confusion as to the precise meaning of these terms can be found in Kadish, Book Review, 78 HARV. L. REV. 907 (1965), reviewing N. MORRIS & C. HOWARD, STUDIES IN CRIMINAL LAW (1964).



American legal system mandate mens rea as a condition of culpability has been succinctly stated by a leading commentator:

Our system does not interfere till harm has been done and has been proved to have been done with the appropriate mens rea. But the risk that is here taken is not taken for nothing. It is the price we pay for general recognition that a man's fate should depend upon his choice and this is to foster the prime social virtue of self-restraint.<sup>123</sup>

## VI. CONCLUSION

A conviction for possession of unlawful drugs in violation of the Indiana statute<sup>124</sup> may rest upon a theory of actual or constructive possession.<sup>125</sup> Proof of either theory may be made by circumstantial evidence alone as well as by direct evidence. Actual possession is essentially physical control of the drugs, which control is exercised by the accused at the time he is approached by the arresting officers.<sup>126</sup> Constructive possession has been held to embrace a wide variety of situations, the key feature being the accessibility of the drugs to the accused. Accessibility has often been inferred from the accused's legal authority to control the place where the drugs are found.<sup>127</sup> Legal authority over the premises is not essential in all cases. The Indiana courts have been willing to accept the inference of access to the drugs from the accused's proximity to the place in which the drugs are located,<sup>128</sup> even when the accused is only one of many persons in proximity to the place where the drugs are found.<sup>129</sup> It has been suggested that the doctrine of constructive possession, so applied, is capable of serious abuse so as to allow the conviction of persons who are inadvertently close to hidden drugs. The approach to mens rea for constructive possession employed by at least some Indiana courts<sup>130</sup> provides no real check on the constructive possession doctrine and allows no guide to distinguish the inadvertent accused from the deliberate law-breaker. Instead, the approach allows the required guilty knowledge to be supplied wholly by

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<sup>123</sup>H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 182 (1968).

<sup>124</sup>See note 1 *supra*.

<sup>125</sup>Rose v. State, 281 N.E.2d 486, 488 (Ind. 1972).

<sup>126</sup>*Id.* See section II of the text.

<sup>127</sup>See, e.g., Ludlow v. State, 302 N.E.2d 838 (Ind. Ct. App. 1973), *rev'd on other grounds*, 314 N.E.2d 750 (Ind. 1974).

<sup>128</sup>See, e.g., Ledcke v. State, 296 N.E.2d 412 (Ind. 1973).

<sup>129</sup>*Id.*

<sup>130</sup>See Von Hauger v. State, 254 Ind. 297, 258 N.E.2d 847 (1970); Ludlow v. State, 302 N.E.2d 838 (Ind. Ct. App. 1973), *rev'd on other grounds*, 314 N.E.2d 750 (Ind. 1974); Corrao v. State, 290 N.E.2d 484 (Ind. Ct. App. 1972).

inference from the equivocal "act" of being close to a place where drugs are hidden. The better approach, employed by the courts of several other states,<sup>131</sup> one district of the Indiana Court of Appeals,<sup>132</sup> and a dissenting Indiana Supreme Court justice,<sup>133</sup> views knowledge as a prerequisite to a voluntary act of possession of a dangerous drug and, to preserve that principle, requires strong evidence of knowledge independent of and in addition to the evidence of accessibility. The approach advocated realizes the vagueness and equivocality of the "act" of "constructive possession," as that term has sometimes been applied to be no more than proximity, and is therefore reluctant to allow from such equivocal conduct the inference of guilty knowledge, the element which draws the line between the unintentional and the deliberate violator. A firm adherence to the requirement of independent proof of knowledge not only preserves the mens rea as an element of this offense, which reason, policy, and authority in Indiana require, but provides a realistic check on the nebulous concept of "constructive possession."

DOUGLAS B. KING

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<sup>131</sup>See notes 90-92 *supra*.

<sup>132</sup>*Greely v. State*, 301 N.E.2d 850 (Ind. Ct. App. 1973) (first district).

<sup>133</sup>*Von Hauger v. State*, 254 Ind. 297, 299, 258 N.E.2d 847, 848 (1970) (Jackson, J., dissenting).