By Graham C. Polando

Markley's forgotten revolution: connecting mental states in Indiana's Criminal Code

The jury submits a question while deliberating a criminal case: "You told us that the State is required to prove each of the crime's elements beyond a reasonable doubt, and that one of these elements is 'knowingly.' We've decided that 'knowingly' really doesn't belong *completely* by itself because someone can only 'knowingly' do or 'know' about *something*. But that doesn't answer our question: For us to convict, which of the other elements does the defendant have to know about? *All? Some?*"

Neither the State, nor the defendant, nor the court knows the answer, and neither do you – because one does not exist. Why one should *and* a possibility are discussed below.

Markley's maze

Ostensibly, a statute answers the question. With deceptive simplicity, Indiana Code §35-41-2-2(d) specifies that "[u]nless the statute defining the offense provides otherwise, if a kind of culpability is required for commission of an offense, it is required with respect to every material element of the prohibited conduct." Those last two words, unique to Indiana, produce the confusion.

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Case law interpreting the statute is no help, as it is riddled with inconsistent interpretation. Courts decide each case in a vacuum, one that frequently features a defendant challenging a perfectly justifiable conviction on apparently technical grounds – hard cases making bad law. Analyzing them produces befuddlement rather than understanding.

At first blush, *Markley v. State*[1] could be a benchmark. Markley challenged the sufficiency of the evidence for his enhanced conviction of battery resulting in "serious bodily injury," and all parties seemed to agree that the State had indeed presented no evidence showing that he "knowingly" caused such a result.

Yet the Court of Appeals affirmed Markley's conviction, reasoning that "[i]f the legislature had intended culpability to apply to every material element, the phrase 'of the prohibited conduct' would be superfluous."[2] "Serious bodily injury," the court continued, simply aggravated the already-criminal conduct constituting a regular battery and therefore required no independent *mens rea* determination.[3]

Markley succinctly stated its broad holding: "'[P]rohibited conduct' and 'element' within [what is now the statute] are not synonymous."[4] Therefore, some statutory elements would be "prohibited conduct," and some would not.

That distinction, like the stat-utory language from which it is derived, is unique to Indiana. By contrast, the Model Penal Code requires prosecutors to connect the prescribed mental state with *all* the offense's "material" elements.[5] Many states substantially agree.[6] The remainder do not approach the subject with sufficient rigor, leaving Indiana's courts without guidance from other jurisdictions.

Markley's idea of a separation between elements that were part of "prohibited conduct" and those that were not was quite novel and, had it been subsequently developed and refined, would have provided a solution to the ambiguity in our criminal code. Unfortunately, it has been almost completely ignored.

New tests on top of old

Markley's atrophy began in *Williford v. State*,[7] where Williford faced an enhanced conviction because he dealt marijuana within 1,000 feet of a school. His proposed jury instruction concluded, "If you are not convinced beyond a reasonable doubt that the defendant knowingly or intentionally delivered marijuana in an amount less than 30 grams within 1,000' of school property then you should return a verdict of 'not guilty.'"[8] The trial court rejected that instruction and adopted its opposite, proposed by the State: "The state of Indiana is not required to prove the defendant was knowingly or intentionally within 1,000 feet of school property at the time the marijuana was delivered."[9] *Markley's* issue was thus squarely before the court again: Did "knowingly" apply to the "1,000 feet" element or not?

The Court of Appeals affirmed the conviction, but included only a perfunctory cite to *Markley*. Even more notably, the court completely ignored the clearly controlling statute, instead concerning itself with the abstract question of whether the legislature, in prescribing the enhancement, *intended* to require a *mens rea* with regard to the deal's location. Observing that "[a] dealer's lack of knowledge of his proximity to the schools does not make the illegal drug any less harmful to the youth in whose hands it may eventually come to rest," the court reasoned that requiring such proof would undercut the legislative intent to create a "drug-free zone" around schools, and therefore upheld the conviction.[10] After *Williford*, then, the

applicable statute and *Markley's* interpretation of it were out; nebulous legislative intent determinations were in.

That shift did not go unnoticed. The Supreme Court denied Williford's request for transfer,[11] but Justice DeBruler dissented from that denial, chiding the Court of Appeals' reliance on case law (and, by implication, its "intent"-based approach) at the exclusion not only of *Markley's* helpful distinction, but a clearly applicable statute. Instead, Justice DeBruler examined the issue through the lens of both of those authorities, asking whether the dealing statute's "prohibited conduct" included the school's proximity to the drug transaction.

One might expect, then, that in emphasizing the statute, Justice DeBruler would have followed *Markley* and required no connection between the prescribed *mens rea* and the enhancement. Instead, he distinguished *Markley*, adding multiple layers of complexity in the process: "[B]eing at a particular location to deliver contraband drugs partakes to a greater extent in the the [*sic*] immediate action and mental activities leading up to the arrival on the street. ... It is not a consequence or harmful result of the prohibited conduct of transferring a contraband drug, in the same way that serious bodily injury is a consequence or harmful result of an illegal touching."[12] *So much for simplicity!* On Justice DeBruler's reading, applying the statute requires the court to determine which circumstances "partake in the immediate action and mental activities" of the offense.

Subsequent cases likewise have failed to provide a satisfactory solution. In *Walker v. State*,[13] the Indiana Supreme Court faced the same issue: whether the State must connect "knowingly" to the "1,000 feet" drug dealing enhancement, and did perfunctorily cite to *Williford*. That citation, however, merely confirmed the Court's conclusion after it again reinvented the wheel, this time turning to seven factors that would determine whether the legislature intended "strict liability" to apply to any elements.[14] This analysis further muddied the waters. However ambiguous the previous attempts to solve the problem, none of them required analyzing seven components. Needless to say, *Walker* did not cite *Markley* and, more alarmingly, completely ignored the statute.

That latter omission prompted another dissent from Justice DeBruler, who, notably, did not identify the issue as whether the crime's proximity to a school was part of the statute's "prohibited conduct," as he had in *Williford*.

Rather, he traversed another of the statute's minefields – whether the "1,000 feet" element was "material" to the offense – and in so doing, directly contradicted *Markley* without even mentioning it. Because the "1,000 feet" enhancement substantially raised the possible penalty for the offense, he reasoned, it must be "material" to it, and he would therefore require the State to prove the defendant "knew" he was dealing in such a location.[15]

Yet a third opinion in the case continued the confusion. Like Justice DeBruler, Justice Sullivan took the majority to task for ignoring the statute and then went a step further, eviscerating *Markley* by effectively declaring that Indiana *did* follow the Model Penal Code: "The statute at issue here requires 'knowing or intentional' culpability

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for the commission of the offense and does not provide for any lesser degree of culpability with respect to the 'one thousand feet of a school' element."[16]

Justice Sullivan's dissent presaged the Supreme Court's holding in *Louallen v. State*,[17] where the Court, continuing to create new tests without commenting on the vitality of the old ones, held that the statute "requires that the level of mental culpability required for commission of the offense itself is required with respect to *every element of the offense*"[18] – not every element of the *prohibited conduct*, as the statute requires, but every element of the *offense*. The statute's distinction simply withered away, denied even the dignity of being overruled.

Yet these cases can be criticized for inconsistency alone, however, as all reach what appear to be fundamentally fair results. But the question still remains: To which elements does a crime's *mens rea* apply? The lack of a mechanism to answer it forces judges and advocates to gloss uneasily over the simmering ambiguity, hoping that no one ever asks about it.

But we must. Appellate courts simply must provide a principled way for trial courts to instruct lay juries (and themselves!) on such important, indeed such frequently *dispositive*, matters.

What about the MPC?

And why not the Model Penal Code approach? Why not say that Justices Sullivan and DeBruler were right all along, and that *Louallen* correctly overruled all other interpretations (especially *Markley's*) *sub silentio*? The statute's use of "prohibited conduct," then, would simply be an elegant variation of the term "offense" and, therefore, include all elements. Indeed, courts frequently list the *mens rea* separately in jury instructions,[19] perhaps indicating that it is connected not to any element or elements in particular, but to all of them collectively. Such an approach might also be an application of the well-established rule of lenity in criminal statutes, requiring courts to interpret them most favorably to the accused.[20]

To so claim, however, would sweep the legislature's unique phrasing under the rug. It is hard to disagree with *Markley's* simple observation: "If the legislature had intended culpability to apply to every material element, the phrase

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'of the prohibited conduct' would be superfluous."[21]

Further, the statute's history indicates that the legislature clearly did not intend such an interpretation. *Tyson v. State*[22] noted an important change in the statute: An older version required culpability with respect to material elements of "prohibited conduct *and its attendant circumstances*."[23]

In 1977, however, the legislature deleted those last four words to give us the current law.[24] According to *Tyson*, this deletion "emphasize[d]" the distinction between Indiana and the MPC: "*[U]nlike the Model Penal Code,* which requires culpability with respect to every material element of the offense, the Indiana Criminal Code requires culpability only with respect to the prohibited conduct."[25]

That deletion was likely no mere oversight. As *Williford* noted, requiring the State to show Williford's knowledge of a school's proximity would effectively reward the hardly blameless Williford for his "ignorance," without a corresponding decrease in the harm caused by drugs near schools. Likewise, the rule of lenity's traditional concern – notice to the accused that he is engaging in criminal conduct – does not apply.

Indeed, the fact that, in many of these situations, the defendant is involved in concededly illegal activity makes the added burden of proving "more" scienter particularly galling, a consideration bluntly noted by *Williford* in support of its conclusion: "[T]hose who choose to deal drugs in the vicinity of our schools do so at their own peril."[26]

Again, wholly defensible – but juries still require a principled basis for determining which elements are the "prohibited conduct" requiring a mental-state connection and which are those in which a defendant engages "at his own peril." Why not enable a court to instruct its jurors (and counsel) which mental state applies to each element, rather than saving the issue for piecemeal resolution at the appellate level?

Why not sift out the 'conduct'?

Perhaps, then, rather than a method of interpretation, courts simply need a good definition for "prohibited conduct." After all, when reduced to black letter, *Markley* simply held that "prohibited conduct" does not necessarily mean "element," and courts must ferret out which is which. In some cases, like *Markley* itself, the court can do so with ease (perhaps why *Markley* painted with so broad a brush): "Serious bodily injury" is nothing if not a "result," rather than, say, "conduct."

Indeed, both advocates and judges frequently treat as axiomatic the existence of a clear distinction between "conduct" or "act" on the one hand and "result" or "circumstance" on the other; the Indiana Code, for example, claims criminal jurisdiction whenever "the conduct that is an element of the offense, the result that is an element, or both, occur in Indiana."[27] Likewise, the Model Penal Code includes under "element[s] of an offense" the "conduct," "attendant circumstances" and "the result[s] of such conduct."[28]

That distinction, however, is far more often noted than made. In the lengthy footnote mentioned above, *Tyson* announced it would try: "[T]he elements of a statute [in this case, rape] must be broken down into those of prohibited conduct and those of attendant circumstances."[29] The attempt must be scored a failure, however, as (perhaps in an attempt to reach a "proper" result) it ended up labeling, as part of "conduct," the element "with a member of the opposite sex."[30] This is more than a little curious; one's gender is a "circumstance" if there ever was one.

The curious designations continued to the other side – the court

declared the "compulsion of the victim" as a "circumstance."[31] How can an element requiring the defendant to "compel" a victim, or, indeed, to *do* anything, be a mere "circumstance"?

The claimed ease in making the distinction between elements is belied not only by the puzzling result above, but by the fact that the court could not reach agreement in the same case. In dissent, Judge Sullivan said that, as noted above, the "conduct" involved in a rape certainly includes the necessary "compulsion."[32] Alas, it does not seem he so concluded out of rigid adherence to available caselaw – our statute, he declared, enacted the Model Penal Code.[33]

Yet again, however, *Tyson's* result, if not its reasoning, is quite defensible, highlighting yet another problem with simply separating "conduct" from other elements: The tail will wag the dog. Courts will simply decide which elements *should* be connected to the *mens rea* and label them "conduct" without a principled mechanism, resulting in the curious results exhibited by *Tyson*.

Indeed, a principled hammer to pound *all* the variegated word groups called "elements" into the rigid categories of "acts," "results" and "circumstances" simply cannot exist. University of Pennsylvania Law Prof. Paul H. Robinson gives an illustrative example: a simple statute prohibiting "recklessly obstructing any highway."[34] Where is the "conduct," and where is the "result"? In the same word: *Obstructs* "is a combination of separate conduct and result elements."[35] Someone must *do* something (*i.e.,* conduct) that *causes* others to have difficulty passing the highway (*i.e.,* a result).

At this point, however, Prof. Robinson falls into the same trap – he proposes that, instead of complex definitions of "conduct," why not just say *verbs*? As he put it, define "'conduct' literally ... to mean pure conduct: bodily movement of the actor, as Model Penal Code section 1.13 defines it."[36] The proposal indeed echoes the Model Penal Code, which defines "conduct" as an "*action* or omission and its accompanying state of mind. ..."[37] Leaving aside for now the circularity problem that the MPC's definition poses for Indiana (we are trying to determine the "accompanying state of mind"!), these narrow, "verb-only" definitions have tempting simplicity, appearing to require only grammatical analysis. Why not adopt them?

The 'verb-only' solution

Indeed, this focus on "movement," *i.e.,* verbs alone, perhaps has more to offer than simplicity: It could more accurately reflect legislative intent. After all, while the legislature may not always exercise the utmost linguistic precision, it has exclusively used adverbs as *mens rea* terms. Adverbs, one recalls from high-school English, typically modify verbs.

Further, on some occasions, the legislature makes very clear when the defendant must be aware of certain facts. For example, it elevates battery to a Class C felony when it causes bodily injury to a pregnant person when the defendant "*knew* the woman was pregnant."[38] Therefore, the absence of this specificity in other situations might indicate that, in general, the legislature does not care whether a defendant knew the facts surrounding his actions.

This solution's simplicity, however, comes at a price: It criminalizes too much. When applied to

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malum in se verbs – for example, "killing"[39] – it indeed provides a satisfying result. "Killing" will be criminal regardless of the circumstances. Frequently, however, the attendant facts are as important, if not more, as the verb(s). As verbs become more benign (*e.g.*, "makes or utters"[40]), the solution might well criminalize perfectly innocent conduct.

Consider the recent case of *Gale v. State,*[41] an archetype of the confusion. Appealing his rape conviction, Gale argued that "knowingly" in the rape statute applied not only to the intercourse element itself, but also to another element in the subsection under which the State charged him: the victim's unawareness of that penetration. As one would expect, he cited the statute, but, curiously, stopped short of claiming that "prohibited conduct" included the victim's apprehension of the circumstances. As seen above, caselaw would have helped both sides (and, therefore, of course, would have helped neither): Gale could have claimed *Louallen*, but would have had to distinguish *Markley* (and good luck to him).

Yet the issue again escaped resolution, as the Court of Appeals blandly chided both parties for missing an on-point case. *Bozarth v. State*[42] held, primarily because the rape statute contained a "knowing" element, that a defendant does indeed need to "know" his victim's mental condition for the State to secure a conviction. Obviously, *Bozarth* contradicts *Markley*, but (of course!) does not cite to it.

Bozarth and *Gale* illustrate the degree to which the lack of an answer causes courts to avoid the question. As is by now evident, *Bozarth* provided inadequate analysis: Of course the statute contained a "knowing" element; the issue was the elements to which it applied. Likewise, *Gale* reminds us of the remarkable fact that at this late date, on this question of fundamental importance, Gale, the State and the Court of Appeals were unable even to argue with one another – the parties simply asserted competing arguments, and the court simply cited *Bozarth*.

But *Gale* also contributes much to evaluating the "verb-only" solution because, when one considers it outside of the caselaw it ignores, it seems absolutely correct. To justify punishment, the rapist *should* be aware of a high probability that his victim's mental condition is in a certain place, in addition to the mere "conduct" of the intercourse. It is that awareness, and subsequent action in spite (or because) of it, that renders his act so reprehensible.

It is for this reason that the U.S. Supreme Court has disapproved similar constructions. In *U.S. v. X-Citement Video,*[43] the Court reviewed a Ninth Circuit determination that, in a federal child pornography statute, "knowingly" modified "only the surrounding *verbs*" and did "not modify the elements of the minority of the performers, or the sexually explicit nature of the material."[44]

The Supreme Court reversed, observing that "positive absurdity" would result from so holding: "If we were to conclude that 'knowingly' only modifies the relevant *verbs* in [the statute], we would sweep within the ambit of the statute actors who had no idea that they were even dealing with sexually explicit material."[45] The Court cited *Liparota v. U.S.*[46] in condemning any constructions that would "criminalize a broad range

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of apparently innocent conduct."[47] Likewise, *Williford* observed that its construction eliminated that potential danger: "[O]ur statute does not allow a conviction for innocent conduct ... however, the penalty may be enhanced upon a showing of additional facts without proof of knowledge of those facts."[48]

What to do

Thus, the (unfortunately competing) goal is clear: The means of determining the elements to which the *mens rea* applies must be mechanical enough to be easily applied, but flexible enough to ensure that it covers all culpable conduct – but no more.

The following solution may work: Courts should simply interpret "prohibited conduct" as those elements which constitute the "base offense." In turn, the "base offense" would be defined simply as the level of offense with the fewest elements (and, typically, the lowest penalty). Thus, the State must connect the *mens rea* to *all* of the elements in the base offense, but only to those, whether seeking an elevated conviction or not. When seeking an elevated conviction, the State must prove the *existence* of the additional elements beyond a reasonable doubt, but need not connect the defendant's mental state toward any of them.

"Base offenses" and enhancements must share the same name and, therefore, statutory section, a procedure necessary to work around the problem of lesser-included, but fundamentally different, offenses. For example, solely in terms of its elements, Class D felony Residential Entry seems no more different from Class C felony Burglary than the latter is from Class B felony Burglary,[49] each adds one element to the one before it. The legislature, however, has separated the first offense from the other two by naming them differently, thereby recognizing that the two "burglaries" share such a fundamental character that they should be listed together and known under the same name. That recognition should be credited.

Take the relatively simple offense of Theft as a Class D felony.[50] As the level of the offense with the fewest elements, the Class D felony is the "base offense," and to sustain a conviction, the State would have to prove the Defendant's knowledge or intent regarding *each* element: the exertion of unauthorized control, the fact that the property belonged to another, and the intent (the occasionally seen "double" *mens rea*) to deprive the rightful possessor of value or use. However, to sustain the enhanced conviction of Class C felony theft (for amounts greater than $100,000), the State need only show that the amount was indeed over that figure, *but need not connect the* mens rea *to it.* The State need not prove the defendant thought the stolen item was worth

$100,000, nor that he did not think it might have been less, nor even that he thought about it all – the State must simply establish the amount itself.

This allows us to finally answer the question that began this essay – or, rather, to prevent the jury's confusion in the first place. Jury instructions should no longer list mental states separately, where juries, advocates and judges must guess at the other elements to which they apply. Instead, the court should simply insert them where appropriate: all of the elements in the base offense and none of those in the enhanced. For example, an instruction in a case where the State has charged the "base offense" of Battery (a Class B misdemeanor) enhanced to a Class C felony because it caused "serious bodily injury" to an "endangered adult"[51] should list the elements of the offense as:

1. The defendant

2. knowingly or intentionally touched

3. an endangered adult

4. in a rude, insolent, or angry manner

5. and said touching resulted in serious bodily injury to that endangered adult.

The U.S. Supreme Court would approve: "[T]he presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct."[52] Likewise, the legislature likely intended "prohibited conduct" to indicate criminal, as opposed to innocent, behavior, and it is easy to see why – one cannot attempt to define "conduct" in a verb-only vacuum without quickly descending into absurdity.

Indeed, *what* is done cannot be separated from where, to whom, and why it is done. Once the defendant has engaged in criminal activity, however, the U.S. Supreme Court went on, the remaining elements become mere "jurisdictional facts,"[53] and the defendant waives the *mens rea* requirement's protection. To illustrate, the Court mentioned *U.S. v. Feola*,[54] a case involving punishment for assaulting "federal officers." The U.S. Supreme Court there, like our own,[55] did not require the Government to prove the defendant knew his victim was a specific type of "officer" because that element simply "enhance[d] an offense otherwise committed with an evil intent."[56]

But, one might argue, this approach will enact the Model Penal Code for most crimes and become the "base" for all of them – isn't that exactly what *Markley* rejected?

In short, no. The proposal perpetuates *Markley's* black-letter holding, requiring *mens rea* for the battery itself, but not for the "serious bodily injury" aggravator. Indeed, cases citing *Markley* have never done so with regard to the "base" elements, but to aggravators: conduct occurring within 1,000 feet of a school or done to a law enforcement officer. The proposal provides a principled mechanism for what courts largely do on an *ad hoc* basis.

Further, both State and defendant benefit from this approach. Occasionally, the State will indeed have to connect the *mens rea* to more elements than it does now. Most prosecutors, however, will gladly trade those few cases for the proposed approach's ease and surety. Generally, particularly when a jury is involved, obfuscation is the defendant's friend, clarity his enemy. Further, the proposal relieves the State from making the often more difficult connections between *mens rea* and "enhancements" or "jurisdictional facts."

Conclusion

This article has two goals: plumbing the depths of the confusion and advancing a solution. Courts should simply instruct the jury that the State must connect the *mens rea* to every element of the base offense, but need only show the existence of any elements providing an enhancement. The very real problems created by the current ambiguity demand a solution that can provide both clarity and fairness – conditions satisfied by the proposed solution. ⚖

1. *Markley v. State,* 421 N.E.2d 20 (Ind. Ct. App. 1981).
2. *Id.* at 21.
3. *Id.* at 21-22.
4. *Id.* at 21.

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5. Model Penal Code §2.02(4).
6. *See, e.g.,* Ala. Code §13A-2-4(a) (1975) (mental state applies to "every element of the offense"), Del. Code tit. 11, §252 (2009) (mental state applies to "all the elements of the offense"), Ky. Rev. St. §501.030(2) (mental state applies to "each element of the offense").
7. *Williford v. State,* 571 N.E.2d 310 (Ind. Ct. App. 1991), *trans. denied,* 577 N.E.2d 963 (Ind. 1991).
8. *Id.* at 311.
9. *Id.*
10. *Id.* at 313.
11. *Williford v. State,* 577 N.E.2d 963 (Ind. 1991).
12. *Id.* at 964.
13. *Walker v. State,* 668 N.E.2d 243 (Ind. 1996).
14. *Id.* at 244.
15. *Id.* at 245-46.
16. *Id.* at 248.
17. *Louallen v. State,* 778 N.E.2d 794 (Ind. 2002).
18. *Id.* at 798.
19. *E.g.,* Indiana Pattern Jury Instruction 2.11 (listing the elements of accomplice liability as "... and the defendant 2. knowingly or intentionally 3. aided ...). *See also, e.g, Davidson v. State*, 849 N.E.2d 591, 593 (Ind. 2006) ("To convict the Defendant, the State must have proved each of the following elements: The Defendant 1. knowingly or intentionally 2. killed. ...")
20. *See, e.g., Smith v. State,* 867 N.E.2d 1286, 1287 (Ind. 2007).
21. *Markley*, 421 N.E.2d at 21.
22. *Tyson v. State,* 619 N.E.2d 276 (Ind. Ct. App. 1993).
23. *Id.* at 293 n.19 (citing Ind. Code §35-41-2-2(d) (1976) (emphasis added)).
24. *Id. See also Rose v. State,* 431 N.E.2d 521, 524 n.1 (Ind. Ct. App. 1982).
25. *Tyson*, 619 N.E.2d at 293 n.19 (emphasis added).
26. *Williford*, 571 N.E.2d at 313.
27. Ind. Code §35-41-1-1(b)(1).
28. Model Penal Code §1.13(9).
29. *Tyson*, 619 N.E.2d at 293 n.19.
30. *Id.*
31. *Id.*
32. *Id.* at 307-08.
33. *Id.* at 307.
34. Paul H. Robinson, *Structure and Function in Criminal Law* 50 (1997).
35. *Id.*
36. *Id.* at 51.
37. Model Penal Code §1.13(5) (emphasis added).
38. Ind. Code §35-42-2-1(a)(8) (emphasis added).
39. Ind. Code §35-42-1-1.
40. Ind. Code §35-43-5-2(a)(1) (defining Forgery).
41. *Gale v. State,* 882 N.E.2d 808 (Ind. Ct. App. 2008).
42. *Bozarth v. State,* 520 N.E.2d 460 (Ind. Ct. App. 1988).
43. *U.S. v. X-Citement Video,* 513 U.S. 64 (1992).
44. *Id.* at 68.
45. *Id.* at 69 (emphasis added.)
46. *Liparota v. U.S.,* 471 U.S. 419 (1985).
47. *X-Citement,* 513 U.S. at 71 (quoting Liparota 471 U.S. at 426).
48. *Williford*, 571 N.E.2d at 313.
49. Curiously, the Burglary statute omits the "knowingly or intentionally" found in the Residential Entry statute. There seems to be general agreement, however, that the elements are the same, implying a *mens rea* in the Burglary statute. *See, e.g., Vincent v. State,* 639 N.E.2d 315, 317 (Ind. Ct. App. 1994) (the "only difference between residential entry and residential burglary is the element of intent to commit a felony therein.")
50. Ind. Code §35-43-4-2(a).
51. Ind. Code §35-42-2-1(a)(6).
52. *X-Citement,* 513 U.S. at 72.
53. *Id.* at 72 n. 3.
54. *U.S. v. Feola,* 420 U.S. 671 (1975).
55. *Owens v. State,* 742 N.E.2d 538 (Ind. Ct. App. 2001) (holding battery Defendant need not know victim's status as law enforcement officer to sustain elevated D felony battery conviction).
56. *X-Citement,* 513 U.S. at 72 n.3.

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