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This Issue in Brief

A Proposal for Considering Intoxication at Sentencing Hearings: Part I.—What sentence should a judge impose on a convicted offender who was intoxicated at the time he committed the crime? The U.S. Sentencing Commission decided that an offender's intoxication is "not ordinarily relevant" to his sentence. Author Charles Felker proposes, instead, that intoxication is a relevant and important factor in determining an appropriate sentence. In Part I of this article, the author surveys current theories about the connection between alcohol and crime, the responsibility of alcohol abusers for their acts, and the way offender intoxication affects the purposes of sentencing. In Part II, the author will develop a specific proposal based on a survey of state laws and cases.

Alcohol and Crime on the Reservation: A 10-Year Perspective.— Author Darrell K. Mills examines the relationship between alcohol abuse and crime on the part of Indian felony defendants in the Federal District Court in Wyoming from 1978-88. The author characterizes the types of crime and typical defendant from the reservation and focuses on the history of alcoholism, treatment, and prior arrest of these defendants. The article also discusses the issue of alcoholic denial.

Practitioners' Views on AIDS in Probation and Detention.—The question of how to provide humane and effective supervision for HIV-positive offenders or offenders with AIDS is an important issue facing policy-makers in corrections. Author Arthur J. Lurigio reports on a survey of probation and detention personnel in Illinois conducted to examine views regarding AIDS and its impact on policies, procedures, and work behavior. Comparisons were made between probation and detention personnel. Survey results indicated that probation and detention respondents anticipate that the AIDS

health crisis invariably will affect their management of cases. Detention participants were more concerned about occupational risk and precautionary measures. Both groups recommended policy and procedural guidelines governing legal liability, confidentiality, mandatory testing, case contacts, and the education of offenders and staff.

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A Proposal for Considering Intoxication at Sentencing Hearings: Part I*

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WHAT SHOULD a trial judge do when the convicted defendant he is about to sentence was intoxicated during the commission of the crime? What if the defendant is a chronic alcoholic? These questions raise important issues which courts and commissions will have to address as efforts to reform the process for sentencing criminals move forward. One major source of sentencing reform--the United States Sentencing Commission--declared in an initial policy statement in its sentencing guidelines that these issues are "not ordinarily relevant" to the sentencing process. At the same time, the Commission called for further research into these and other sentencing issues. This article is both a response to the Commission's call for new research and an alternative proposal for making an offender's intoxication at the time of the crime an important factor in a judge's sentencing decision. Before we provide our response to the Commission, we will review the Commission's initial statement on this issue.

The Sentencing Commission's Challenge

The Sentencing Reform Act of 1984¹ authorized the United States Sentencing Commission to prepare guidelines for sentencing offenders convicted of Federal crimes. The Act directed the Commission to set out a presumptive sentence for each type of Federal crime,² to adjust that range to reflect the mitigating or aggravating circumstances in which particular crimes are committed,³ including various offender characteristics, and to consider overriding penological goals in determining an appropriate sentence.⁴

The Sentencing Commission promulgated guideline sentence ranges for each type of offense and adjusted the guideline ranges to reflect certain mitigating and aggravating circumstances atten-

dant to commission of the crime and to reflect the criminal history of the offender. Recognizing that its initial guidelines are "but the first step in an evolutionary process,"⁵ the Commission provided a flexible process which allows trial courts to "depart" from the presumptive sentence and impose a sentence outside the guidelines.

In addition, in a series of non-binding policy statements, the Commission discussed several major offender characteristics but provided only general instructions to trial judges.⁶ One of the offender characteristics that Congress specifically directed the Commission to consider was "physical condition, including drug dependence."⁷ In its policy statement⁸ on this characteristic, the Commission stated:

Physical condition is not ordinarily relevant in determining whether a sentence should be outside the guidelines or where within the guidelines a sentence should fall. . . Drug dependence or alcohol abuse is not a reason for imposing a sentence below the guidelines.

The Commission's recommendation that judges not reduce a presumptive sentence because of the offender's drug dependence is an exception to the Commission's flexible policy in allowing trial judges to depart from guideline ranges.⁹ The only reason that the Commission gave for its decision to exclude drug dependence as a reason for reducing a sentence was that "[s]ubstance abuse is highly correlated to an increased propensity to commit crime".¹⁰ The Commission called for

¹Comprehensive Crime Control Act of 1984, Chapter II, Public Law 98-473, 28 U.S.C. § 991 et seq. (Supp. III 1985).

²28 U.S.C. § 994(b).

³28 U.S.C. § 994(c) (2).

⁴28 U.S.C. § 994(d).

⁵United States Sentencing Commission, *Sentencing Guidelines*, at 1.4.

⁶*Sentencing Guidelines*, supra, Chapter 5, Part H at 5.29-5.31.

⁷28 U.S.C. § 994(d) (5).

⁸*Sentencing Guidelines*, supra, § 5H1.4 (Policy Statement).

⁹*Sentencing Guidelines*, supra, at 1.6.

¹⁰*Id.* § 5H1.4 at 5.30

*Part II will appear in the March 1990 issue of *Federal Probation*. The author wishes to thank Professor Daniel J. Freed, Yale Law School, for his encouragement and many helpful suggestions.

continuing research to modify or revise the policies in the guidelines.¹¹

This article investigates policy considerations and precedent in American jurisdictions in order to guide sentencing judges in considering intoxication. In Part I, we will consider current theories of the correlation between alcohol and crime, the responsibility of intoxicated offenders for their criminal conduct, and the treatment prospects for alcoholics who commit crime. We will also consider the different purposes of sentencing to see how a defendant's intoxication should affect his sentence. Part I concludes that an offender's intoxication at the time of the crime should be an important factor in determining the length and nature of his sentence. Moreover, theories of incapacitation, retribution, and rehabilitation will call for either aggravated or mitigated sentences in certain cases based on an offender's intoxication at the time of the crime.

In Part II, we will report the results of our survey of state court cases in which the issue of sentencing intoxicated offenders was discussed. The results of our survey in Part II confirm our findings in Part I and provide some specific rules to guide sentencing judges. We have summarized these rules at the end of Part II in the form of a proposal.

We propose that intoxication should be available as a mitigating factor at sentencing to the extent that it impaired the defendant's ability to appreciate the wrongfulness of his conduct at the time he committed the crime. However, if defendant's intoxication, or alcoholism, has repeatedly resulted in criminal conduct to the extent that defendant's decision to become drunk is equivalent to a decision to commit crime, then defendant's intoxication can be an aggravating factor unless the defendant is otherwise a good

candidate for rehabilitation. Before beginning our investigation, we pause to address several difficult issues of definition and context.

Context and Definitions

Intoxication is a "disturbance of mental or physical capacities resulting from the introduction of substances into the body."¹² Alcoholism is a physical or psychological condition characterized by reliance on repeated intoxication as an established way of life. See Section I.B, *infra*.¹³

In the cases we will consider, the offender was intoxicated at the time of the commission of the crime. In many of these cases the offender's intoxication was a product of chronic alcoholism. Thus, we will focus on the sentencing of chronic alcoholics as well. In order to judge how intoxication and alcoholism are treated as *independent* factors in a sentencing proceeding not restrained by guidelines, we avoid reliance on cases in which intoxication is an element of the crime charged, e.g., public drunkenness or driving while intoxicated.

While this article does not focus on other substance abuse problems, e.g., use of narcotics or other drugs, many of the themes developed below will also apply in sentencing all substance abusers. However, there are important differences in criminogenic effect between alcohol and narcotics.¹⁴

The criminal justice process deals with the problem of intoxicated offenders in each of a series of discretionary decisions. The way the process as a whole deals with this issue has an important impact on how intoxication will affect the sentence. Police officers may weigh an offender's intoxication in deciding whether or not to arrest him for an offense. If such an offender is arrested, the prosecutor must take his intoxication into account in deciding whether to let the offender plead guilty to a lesser charge. Prosecutors also must decide whether to send certain offenders into "diversion programs" which are designed to provide therapy outside of prison for non-violent offenders who require substance abuse treatment.¹⁵

The offender's intoxication at the time of the crime will play an important role if his case goes to trial. The Model Penal Code and the laws of many states provide that evidence of intoxication is admissible at trial in order to disprove an element of the offense charged.¹⁶ For example, in most states in which murder charges are divided

¹¹*Id.* at 1.2.

¹²American Law Institute, *Model Penal Code*, § 2.08(5) (a) (1985) See also: Wayne R. LaFave and Austin W. Scott, Jr., *Criminal Law*, (St. Paul, MN: West, 1986) at 387 n.2 and n.3.

¹³Twenty to 30 percent of the cases of alcoholism result from an underlying psychiatric illness. See: *Traynor v. Turnage*, _____ U.S. _____, 108 S.Ct. 1372, 1382 (1988). Offenders for whom alcoholism is a manifestation of such an underlying mental illness should be allowed to raise the insanity defense at trial. Thus, the disposition of such offenders is beyond the scope of this article which addresses the weight to be given to intoxication at sentencing.

¹⁴See: James Q. Wilson and R. J. Herrnstein, *Crime and Human Nature*, (New York: Simon & Schuster, 1985), Chapter 14 at 356 *et seq.*

¹⁵See: Gerhard F. Uelmen and Victor G. Haddox, *Drug Abuse and the Law*, (New York: Clark Boardman & Co., 1983) Chapter 10, at 10.4-10.20.

¹⁶American Law Institute, *Model Penal Code*, § 2.08.

into degrees, a showing of defendant's intoxication at the time of the murder can be grounds for a conviction for second degree murder instead of first degree murder which requires as an element that defendant "intended" to kill.¹⁷ For less serious crimes, a showing of intoxication could provide the basis for an acquittal.¹⁸ In some states a showing of temporary insanity resulting from intoxication can in rare cases exculpate at trial.¹⁹

At sentencing, intoxication can be taken into account in several ways. In some states, and in most capital sentencing proceedings, the sentencer weighs a series of aggravating and mitigating factors in determining the appropriate sentence. Intoxication could count as one of the mitigating (or one of the aggravating) factors in this calculus.

For example, in New Jersey, presumptive sentences set by the legislature are imposed based on the seriousness of the offense: first degree crimes have a specified high range, second degree crimes have a somewhat more lenient range, etc. The sentencing judge weighs a series of aggravating and mitigating factors which take into account the personal characteristics of the offender.²⁰ In New Jersey, intoxication is one such mitigating factor.²¹ These factors guide the judge in choosing a specific sentence within the presumptive range. Moreover, if the mitigating factors "substantially outweigh" the aggravating factors in any one case, the judge may "depart" from the presumptive sentence and, instead, impose a sentence appropriate to a crime one degree below the crime of conviction.²² Likewise, the sentence can be increased by one degree where aggravating factors substantially outweigh mitigating factors. Thus a mitigating factor can allow a judge to reduce the length of a prison

term either within a specified guideline range or below that range.²³

The factors we have just discussed affect the length in number of years of a sentence of imprisonment or probation. (In guidelines systems these factors would be called "durational adjustments" or "durational departures.") But defendant's intoxication at the time of the crime could affect the nature of the sentence as well as its length. (In guidelines systems, changes in the nature of a sentence are termed "dispositional departures.") For example, defendant's intoxication could prompt a judge to impose a term of probation instead of prison. Likewise, a judge might restrict or accelerate parole eligibility. The defendant's intoxication or history of substance abuse might even affect a judge's decision to award consecutive as opposed to concurrent sentences in multiple count crimes.

Policy Considerations

If an offender was intoxicated at the time he committed a crime, should his intoxication be an aggravating factor, a mitigating factor, or not relevant in his sentencing proceeding? In order to answer this question, we will first have to answer four subsidiary questions: (1) Does alcohol contribute to crime? (2) Is intoxication voluntary, willful conduct? (3) What are the prospects for treatment of alcoholism? (4) To what purposes of sentencing is intoxication relevant?

As an example of how the answers to the four subsidiary questions will determine the answer to the central question consider the following argument: If an offender's intoxication caused him to commit a crime he otherwise would not have committed *and* if the offender's intoxication was an involuntary manifestation of a "disease" called alcoholism, then intoxication should be a mitigating factor, perhaps even grounds for acquittal. Moreover, if the offender's prospects for treatment are good and rehabilitation is our goal in sentencing, then a sentence of probation with required treatment--a mitigated disposition--might be appropriate.

Does Alcohol Contribute to Crime?

There is a high correlation between the use of alcohol and crime. One study which examined 588 homicides found that alcohol was a factor in two-thirds of the cases.²⁴ Recent studies suggest that alcohol has an effect in between 30 and 60 percent of all murder cases.²⁵

Although it is difficult to attribute the high correlation between intoxication and crime to a

¹⁷See: *State v. Hall*, 214 N.W. 2d 205, 208-209 (Iowa 1974) (dicta); 40 Am. Jur. 2d Homicide § 129, at 420-21.

¹⁸Special Project, *Drugs and Criminal Responsibility*, 33 Vand. L. Rev. 1145, 1173 (1980), citing, *Commonwealth v. Graves*, 461 Pa. 118, 334 A. 2d 661 (1975).

¹⁹*Id.* at 1197; See also: Annotation, 8 A.L. R. 3d 1236, 1267 (1966).

²⁰See e.g. *State v. Roth*, 95 N.J. 334, 471 A. 2d 370, 383-389 (1984).

²¹*Id.* at 388.

²²*Id.* at 384.

²³*Id.*

²⁴James Q. Wilson and R. J. Herrnstein, *Crime and Human Nature*, (New York: Simon & Schuster, 1985) page 356, citing, M. Wolfgang, *Patterns in Criminal Homicide*, (Philadelphia: U. Pa. Press, 1958).

²⁵*Id.*

causal relationship, recent scholarship suggests that for people with certain personality characteristics and genetic backgrounds alcohol abuse reinforces and increases criminal tendencies. James Q. Wilson and Richard J. Herrnstein thus suggest that there is a direct causal link between alcohol and crime for some people.²⁶ In addition, intoxication can reduce a person's inhibitions, thus making him more likely to commit a crime. "Drinking alcohol impairs judgment, releases inhibitions, and thus permits the drinker to engage in behavior quite different from the normal pattern."²⁷

Judges also recognize the direct contribution of alcohol to crime rates.²⁸

It is unfortunate, but not exceptional, that [offender's] youthful dependence on drugs and alcohol triggered his criminal behavior. Many crimes arise out of drug and alcohol use. His situation, while regrettable, is not rare.

The U. S. Sentencing Commission also concluded that "[s]ubstance abuse is highly correlated with an increased propensity to commit crime."²⁹ Thus, the answer to our first question is yes: Alcohol does contribute directly to crime.

Is Intoxication Voluntary Conduct?

While most people would concede that occasional intoxication is willful conduct, in many cases, intoxication is a manifestation of the underlying condition of chronic alcoholism. One who asks how intoxication should be considered as a factor in sentencing proceedings will thus, first, have to come to grips with the contentious issue of whether alcoholism is a disease. The argument posed by advocates of the disease-model of alcoholism is as follows: If alcoholism is a disease, or a condition beyond the control of the alcoholic, it would be cruel and unusual to punish

someone for being an alcoholic. Likewise, it would also seem to be unconstitutional to aggravate the sentence of an alcoholic because he was intoxicated when he committed the crime. Aggravating an alcoholic's sentence would seem to punish him for a condition beyond his control.³⁰ This argument can be stretched even further. We have seen that intoxication makes criminal conduct more likely. To the extent that an alcoholic's criminal behavior is simply a manifestation of his illness--one might argue--the alcoholic should not be punished even for the conduct. Now that we have seen the ramifications of the proposition that alcoholism is an involuntary condition or disease, we will review the evidence to see if this proposition should be adopted.

In *Robinson v. California*,³¹ the United States Supreme Court struck down a California statute that made it a crime to be "addicted to the use of narcotics" because the statute violated the eighth amendment by making a status or condition itself a crime. Later, a chronic alcoholic relied on *Robinson* in appealing his conviction for violating a Texas statute that made it a crime to be found drunk in a public place. In *Powell v. Texas*,³² the Supreme Court rejected this argument. The Court held that the Texas law was constitutional because it outlawed not the *status* of being an alcoholic, but rather the *conduct* of going into a public place.

The dissent in *Powell* argued that alcoholism was an involuntary condition and that being present in a public place was an equally involuntary "symptom" of the disease. The majority specifically rejected both of these propositions. The majority noted that there is "substantial disagreement as to the manifestations of the 'disease' called 'alcoholism.'"³³ The majority stated: "We are unable to conclude. . . on the current state of medical knowledge, that chronic alcoholics in general. . . suffer from such an irresistible compulsion to drink. . . that they are utterly unable to control their performance. . ."³⁴

In the aftermath of the *Powell* opinion, Herbert Fingarette surveyed the current literature on alcoholism and reached the following conclusions. When doctors describe alcoholism as a disease, they do not mean that alcoholics have no control over their drinking. In fact, alcoholics have "greater or lesser control, widely varying in degree according to the circumstances and the individual."³⁵ Some alcoholics--on their own--choose to stop drinking either permanently or occa-

²⁶*Id.* at 357-364.

²⁷*LaFave and Scott, supra* at 387 n. 4, citing Paulsen, *Intoxication as a Defense to Crime*, 1961 U. Ill. L. Rev. 1, 23-24.

²⁸*Roth*, 471 A.2d at 389.

²⁹*Sentencing Guidelines, supra*, at 1.6.

³⁰*See: Vance v. State*, 475 So.2d 1362, 1363 (Fla. App. 5 Dist. 1985) (drug dependence is a medical problem that cannot justify an extended prison term); *Young v. State*, 455 So.2d 551, 552 (no correlation between punishment and the need for medical treatment caused by addiction), approved on other grounds, 476 So.2d 161 (Fla. 1985); *See also: State v. Salony*, 528 So. 2d 404, *infra*.

³¹370 U.S. 660 (1962).

³²392 U.S. 514 (1968).

³³392 U.S. at 523.

³⁴392 U.S. at 535.

³⁵Herbert Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism,"* 83 Harv. L. Rev. 793, 802 (1970). [emphasis original]

sionally.³⁶ Alcoholics usually choose to drink--at least initially--as a way of dealing with difficult problems or a painful environment. Alcohol becomes, for them, an established way of life. While a person can change his way of life, he will not do so easily or through ordinary pressures.³⁷ Fingarette reaches the following conclusion about the degree to which alcoholism is voluntary.³⁸

Possibly partly due to some abnormal physical condition, the chronic alcoholic is one who for any variety of other reasons has increasingly preferred drinking as a way of adapting to his life problems; he has reached the point where the personal and social consequences of his drinking are such that abandoning heavy drinking and the life that goes with it would require him to make a choice which, though usually genuinely practicable, is so very distressing and so very difficult, both physically and mentally, that he is unlikely to make that choice and carry it out, although he may make it with the aid of special encouragement, professional guidance, or coercive influences.

Fingarette's view of alcoholism was endorsed by the Supreme Court in *Traynor v. Turnage*, *supra*.³⁹ In *Traynor*, two veterans, chronic alcoholics, petitioned the Veterans Administration for an extension of their eligibility to receive education benefits on the grounds that their alcoholism prevented them from making use of the benefits during the period that the benefits were available. The Veterans Administration [hereinafter VA] denied the request because VA regulations classify chronic alcoholism as "willful misconduct." The petitioners claimed that the VA's action violated the Rehabilitation Act of 1973 which forbids discrimination on the basis of a handicap. The Court held that there was no inconsistency between the VA regulation and the Rehabilitation Act because much of the medical profession disputes whether

alcoholism is a disease and alcohol consumption is "not regarded as wholly involuntary."⁴⁰

The Court's opinion in *Traynor* concluded with the following disclaimer. "This litigation does not require the Court to decide whether alcoholism is a disease whose course its victims cannot control. It is not our role to resolve this medical issue on which the authorities remain sharply divided."⁴¹

For the purposes of this article, we will adopt the Fingarette view of alcoholism. While acknowledging that alcoholism is a deeply entrenched way of life that cannot be easily changed, we conclude that alcoholics can legitimately be punished for criminal behavior and that criminal conduct associated with alcoholism can be a reason for aggravating the sentence of an offender.

What Are the Prospects for Treatment?

We have seen that alcohol consumption increases criminal tendencies and that use of alcohol is--to some degree--a voluntary decision that can be punished in appropriate circumstances. Our next inquiry examines the likelihood that treatment will control alcoholism. The effectiveness of treatment is a major factor to be weighed in sentencing alcoholics. In addition, we must ask: Does coercive treatment work? Can courts succeed in forcing alcoholic criminals into treatment? At the heart of these questions is the hope that if alcoholics who commit crimes can be successfully treated for their alcoholism, perhaps they can also be reformed from their criminal tendencies.

The current authorities widely agree that treatment for alcoholism is quite effective. One commentator has written that:

The reader unacquainted with alcoholism may be surprised to discover how high a percentage of alcoholics receive substantial and lasting benefit from treatment and it may astonish him even more to be told that therapeutic outcome seems pretty much the same regardless of the kind of treatment, but depends to a much larger extent on the kind of patient being treated.⁴²

Up to 15 percent of all alcoholics will stop drinking on their own without the benefit of treatment.⁴³ Of those who do seek treatment, empirical studies suggest that one-third will stop drinking altogether; another third will improve.⁴⁴ In addition, surveys have found significantly greater improvement among alcoholics who undergo treatment than those who do not.⁴⁵ However, scholars agree that an alcoholic's personal background may be the most important factor in determining his prospects for success. For example, Professor Baekeland notes that of the alcohol-

³⁶83 Harv. L. Rev. at 805.

³⁷83 Harv. L. Rev. at 806.

³⁸83 Harv. L. Rev. at 808.

³⁹108 S. Ct. at 1382-1383 (1988).

⁴⁰108 S. Ct. at 1383, *citing*, Fingarette, *supra*.

⁴¹*Id.*

⁴²Frederick Baekeland, *Evaluation of Treatment Methods in Chronic Alcoholism*, in B. Kissin and H. Begleiter (eds.), *The Biology of Alcoholism*, Vol. 5: *Treatment and Rehabilitation of the Chronic Alcoholic*. (New York: Plenum Press, 1977) at 386.

⁴³*Id.* at 389-390.

⁴⁴Chad D. Emrick, *A Review of Psychologically Oriented Treatment of Alcoholism*, Part I, 35 *Quarterly Journal of Studies on Alcohol* 523, 533-534 (1974). See also: Edward Gottheil, *An Introduction to the Evaluation of Alcoholism Outcome Studies* in Marc Galanter (ed.), *Currents in Alcoholism*, Vol. 7, (New York: Grune & Stratton, 1980) at 276.

⁴⁵Chad D. Emrick, *A Review of Psychologically Oriented Treatment of Alcoholism*, Part II, 36 *Journal of Studies on Alcohol* 88, 97-98 (1975). See also: Gottheil, *supra* at 276.

ics enrolled in inpatient treatment programs, those from promising backgrounds and those higher in socioeconomic status had success rates of between 32 and 68 percent, while the success rates for skid-row alcoholics ranged between 0 and 18 percent.⁴⁶

So far we have found that those alcoholics that undergo treatment have a good chance of success, and only a small portion of those who do not undergo treatment may recover on their own. But it is unusual for alcoholics to volunteer for treatment.⁴⁷ Will it work to force alcoholics into treatment? The "humanistic tradition" of the medical profession holds that involuntary treatment is generally undesirable and less effective.⁴⁸ In addition, studies suggest that "volition" plays an important role in the effectiveness of treatment for alcoholics.⁴⁹ However, new studies suggest that the distinction between voluntary and involuntary treatment has been overdrawn and that forced treatment may be effective.⁵⁰

Many of the alcoholics who do enroll in treatment programs do not do so voluntarily. Often employers and spouses make ultimatums that induce alcoholics to seek treatment. Moreover, studies indicate that alcoholics that were coerced to seek treatment by such factors are as successful in treatment as voluntary patients.⁵¹ "Social Pressure not only helps get [the alcoholic] into treatment but also helps keep him there until he can benefit from it."⁵² Courts and welfare agencies currently force alcoholics into treatment programs. Four experiments in such court-ordered treatment have found mixed results. Three of the studies that had selected participants from promising backgrounds had high success rates. One experiment with more hardened cases had poor results.⁵³ Professor Baekeland's review of the

prospects for forced treatment of chronic alcoholics concludes as follows:

[S]kid-row alcoholics, if carefully selected, can benefit from compulsory treatment, especially if the sentence for parole violation (i.e. dropping out of treatment) is a stiff one.⁵⁴

To What Purposes of Sentencing Is Intoxication Relevant?

With the above information and discussion as background, we will now consider how four different purposes of sentencing--deterrence, incapacitation, retribution, and rehabilitation--would influence and inform a policy on dealing with intoxication as a factor at the sentencing hearing.

Deterrence—The principle of general deterrence focuses on the message sent to the community by the treatment of offenders. In a deterrent model, the criminal justice system would be structured so as to send to the community the message most likely to discourage potential criminals from becoming actual criminals. Thus, the deterrent model focuses on the needs of the community, not the needs of the individual defendant. The major tools for increasing deterrence are increased swiftness and certainty of apprehension and conviction of criminals. Therefore, the policies and budgets of police departments are the most important factors in the effectiveness of deterrence. Generally, aggravating and mitigating considerations at sentencing are not relevant in a system based on the deterrent model.⁵⁵

Nonetheless, other things being equal, a proponent of deterrence might argue that intoxication should be an aggravating factor at sentencing in order to deter people from drinking. A related argument holds that increasing the sentences of those who were intoxicated while committing a crime would deter problem drinkers from continued drinking. This latter argument is based on principles of special deterrence. Special deterrence attempts to provide disincentives for the particular offender or group of offenders as a way of discouraging further undesirable conduct. This argument has some plausibility given that coercive social pressure does help induce some alcoholics to seek treatment. Note, however, that if society's aim is to deter drinking in general or drinking by problem drinkers, there are many more direct ways to effectuate this goal besides making intoxication at the time of a crime an aggravating factor.

Incapacitation—Like deterrence, incapacitation focuses on protecting the community, not on improving the offender. But instead of attempting

⁴⁶Baekeland, *supra* at 427.

⁴⁷*Id.* at 400.

⁴⁸*Cf.* Richard S. Schottenfeld, "Involuntary Treatment of Substance Abuse Disorders—Impediments to Success," *Psychiatry*, 52, 1989, pp. 164, 168 and citations therein.

⁴⁹*Cf.* *Traynor v. Turnage*, 108 S.Ct. at 1389 (Blackmun, J., dissenting and citations therein).

⁵⁰*See:* Harry K. Wexler, Douglas S. Lipton, and Kenneth Foster, *Outcome Evaluation of a Prison Therapeutic Community for Substance Abuse Treatment: Preliminary Results*. (New York, Narcotic & Drug Research, Inc., 1985); Schottenfeld, *supra*.

⁵¹Baekeland, *supra* at 401.

⁵²*Id.*; *See also:* Schottenfeld *supra* at 172 and citations therein.

⁵³*Id.*

⁵⁴*Id.* at 402.

⁵⁵*See:* Nigel Walker, *Punishment, Danger and Stigma*, (Oxford: Basil Blackwell, 1980) at 118-119.

to discourage citizens in the community from turning to crime, incapacitation aims simply at neutralizing the threat to the community presented by certain offenders. For example, Professor James Q. Wilson argued that an effective way of containing the "epidemic" of illegal drug use in the 1960's and 1970's was to "quarantine" drug users by placing them in mandatory treatment programs.⁶⁶ When drug addicts are in prisons or treatment centers, they cannot infect the rest of the community. Wilson's quarantine epitomizes the approach of incapacitation. Several states have approved this approach with respect to alcohol as well as drugs. The California Court of Appeals strongly advocated incapacitation in *People v. Reyes*.⁶⁷

As a matter of policy, when a defendant has a drug-addiction or substance abuse problem, where the defendant has failed to deal with the problem despite repeated opportunities, where the defendant shows little or no motivation to change his lifestyle, and where the substance abuse problem is a substantial factor in the commission of crimes, *the need to protect the public from further crimes by that individual suggests that a longer sentence should be imposed, not a shorter sentence.* [emphasis added]

Successful incapacitation need not be limited to prison terms. Inpatient treatment at a substance abuse clinic and probation with certain restrictions may successfully incapacitate dangerous alcoholics.

Retribution—The retributive approach is based upon a principle of proportionality that applies equally to all offenders.⁶⁸ The proportionality principle holds that punishment should be proportional to the seriousness of the offense, seriousness being measured by the combination of the amount of harm done and the culpability of

the offender.⁶⁹ Thus, in a retributive model, culpability of the offender is an important consideration which is included in the sentencing process by aggravating and mitigating factors.⁶⁰

Mitigating and aggravating factors at sentencing are justified by two principles. The proportionality principle provides that if a defendant is less culpable than another person convicted of the same offense he should be given a less severe sentence. Thus, reduced culpability is a mitigating factor. The principle of mitigation provides that if particular individual characteristics or unusual circumstances would cause one defendant to suffer more than another person given the same sentence, then that defendant should receive a less severe sentence.⁶¹

For example, one who commits a crime impulsively because he is intoxicated is less culpable than one who commits a crime through dispassionate planning. Because he was in an intoxicated state, his inhibitions were lowered, and his capacity to conform his conduct to the requirements of the law was impaired. Under the retributive model, this person's intoxication should be a mitigating factor at sentencing according to the principle of proportionality.

Thus, nine of the states in our survey, reported in Part II, included in their death penalty statutes provisions that make intoxication a mitigating factor where it impairs the actor's capacity to conform his conduct to the requirements of the law.⁶² In addition, Louisiana and Nebraska include intoxication in non-capital statutes which set forth conditions that impair capacity and mitigate at sentencing. Finally, in three states courts may consider intoxication as a condition that impairs capacity or otherwise reduces culpability.⁶³ One can see the importance of retributive theory in these statutes.

In a retributive model, there are several circumstances in which intoxication might not be mitigating, however. Such circumstances would exist where the intoxication did not actually reduce culpability. For example, if a person planned a crime and then drank or took drugs in order to "get up his nerve," his intoxication would not make him less culpable because it would not have impaired his decision to commit the crime.⁶⁴ Thus, the Indiana Court of Appeals was careful to note in *Fugate v. State*,⁶⁵ that it allowed intoxication as a mitigating factor at sentencing because "Fugate was intoxicated when he committed the burglary and theft *as spontaneous criminal acts.*" [emphasis added] Another circum-

⁶⁶James Q. Wilson, *Thinking About Crime*, (New York: Basic Books, 1983) at 206-220.

⁶⁷195 Cal. App. 3d 957, 240 Cal. Rptr. 752, 756 (1987); See also: *Bloomstrand v. State*, 656 P.2d 584, 591 (Alaska App. 1982).

⁶⁸See: Hymen Gross, *A Theory of Criminal Justice*. (New York: Oxford, 1979), at 448.

⁶⁹Andrew Von Hirsch, *Doing Justice, The Choice of Punishments*. (New York: Hill & Wang, 1976) at 80.

⁶⁰Walker, *supra* at 118; See also: *State v. Roth*, 471 A. 2d at 378.

⁶¹*Id.* at 121.

⁶²Cal., Colo., Ind., La., Mass., Neb., N.J., Tenn., and Tex. See: Table II, Part II; Colorado also provides for negative *mens rea* where the actor drank to "get up his nerve." See: LaFave and Scott, *supra* at 391, n. 31.

⁶³Arizona, California, and North Carolina.

⁶⁴This exception is consistent with the exception at trial that evidence of intoxication cannot be introduced to negative *mens rea* where the actor drank to "get up his nerve." See: LaFave and Scott, *supra* at 391, n. 31.

⁶⁵16 N. E. 2d 75 (Ind. App. 4 Dist. 1987).

stance in which retributive theory would not allow evidence of intoxication to be a mitigating factor at sentencing occurs when a person knows--or has reason to know--that he is particularly likely to commit crimes when intoxicated, and yet he chooses to drink anyway, commits a crime, and is convicted. In such a case, the person's decision to drink becomes a substitute for his decision to commit the crime. As Judge Singleton wrote in *Koteles v. State*.⁶⁶

[T]hose who drink knowing that they have committed crimes when drunk in the past, as well as those who drink knowing that they will be driving or handling weapons, commit a *malum in se* act by their drinking. This justifies punishment on that basis alone, when after they drink they engage in conduct harmful to others.

Retributive theory holds that once a person has been put on notice of the likely consequences of his behavior, then that person is more culpable than a person who has not been put on notice in that way. This proposition justifies the use of a prior criminal record as an aggravating factor at sentencing.⁶⁷ Thus, too, according to the retributive approach past recklessness can be an aggravating factor.⁶⁸

Rehabilitation—Unlike retribution, rehabilitation is not based upon a principle of proportionality. Quite to the contrary, rehabilitation is based primarily on the treatment needs of the individual. Once a person has been convicted, his need for treatment alone determines the nature and the length of his sentence within the statutory limits.⁶⁹

Because we have seen that intoxication increases the likelihood that a person will commit a crime, and because alcoholism can be effectively treated in any number of contexts ranging from forced treatment in prisons or hospitals to outpatient treatment, we must conclude that offenders who were intoxicated at the time of the

crime or who are alcoholics can be rehabilitated. By treating their alcoholism, or desire to become intoxicated, one might be able to remove their criminal tendency. Thus, rehabilitative theory suggests that intoxication should ordinarily be a mitigating factor at sentencing provided that the sentence imposed includes treatment. In other words, as long as the sentencing *disposition* imposes treatment, the sentencing *duration* can be mitigated in many cases.

However, we have also seen that some alcoholics--like the skid-row alcoholics described by Professor Baekeland--cannot be treated as effectively. Either these hard cases are incurable or their rehabilitation will require a longer period of treatment. For offenders who fall into this category, rehabilitative theory might require that their intoxication count as an aggravating factor so that they will have longer sentences and more time for treatment or simply incapacitation. Thus, in such hard cases, the sentencing *disposition* should impose treatment and the sentencing *duration* should be aggravated.

An important factor that judges often consider in deciding whether a defendant's drug or alcohol abuse should be an aggravating or mitigating factor at sentencing is the defendant's treatment history. Judges consider success in past treatment efforts as an indicator of the possibility of future success in treating defendant's addiction and his criminal behavior; thus prior success might mitigate the sentence.⁷⁰ Indeed, the Wisconsin Sentencing Commission included this factor in its proposed guidelines, as follows: "Mitigating factors:...(8) [defendant] will participate in drug treatment and such treatment is likely to reduce criminality."⁷¹ Judges see a history of failure in attempts to treat alcoholism as an indication that the offender is not likely to be rehabilitated.⁷²

Based on the above discussion, one can imagine at least two ways in which an offender's treatment history could qualify him as a good candidate for rehabilitation. An offender who has committed a crime or crimes while intoxicated could enroll in an alcohol treatment program between the time of his arrest and the time of his sentencing. If he is successful during that period in overcoming his desire to drink, the sentencing judge may decide to mitigate the offender's sentence.⁷³ In a second case, an offender with a history of criminal activity linked to intoxication who had successfully undertaken treatment for alcoholism for a period of time but who committed the instant offense as a relapse,

⁶⁶660 P. 2d 1199, 1202 (Alaska App. 1983). See also: LaFave and Scott, *supra* at 393. A.L.I., *Model Penal Code*, § 2.08, comment at 359 (1985); *State v. Loitz*, 366 N.W.2d 744, 746-747 (Minn. App. 1985).

⁶⁷Von Hirsch, *supra*, chapter 10, at 85.

⁶⁸*Id.* at 125-126.

⁶⁹*Id.* at 68.

⁷⁰See: Annotation, 55 A. L. R. 3d 812, 845 and citations therein. Note: Annotation discusses narcotics, not alcohol, use.

⁷¹Cited in: Sandra Shane-DuBow, *Sentencing Reform in the United States*. (Washington: National Institute of Justice, 1985), Table 26 at 273.

⁷²See: *Jackson v. State*, 329 N.W.2d 66, 67 (Minn. 1983); *State v. de la Garza*, 138 Ariz. 408, 675 P.2d 295, 297 (Ariz. App. 1983); *Commonwealth v. Golden*, 309 Pa. Super. 286, 455 A.2d 162, 164 (1983).

⁷³See: *Fugate v. State*, 516 N.E.2d at 81, *infra*.

or a setback on the road to recovery, might also be deemed a good candidate for rehabilitation.⁷⁴

Conclusion

From our review of policy consideration, we draw the following conclusions. Alcohol abuse is highly correlated with criminal activity. Moreover, patterns of alcohol abuse, including chronic alcoholism, that lead to criminal activity can be a basis for either mitigating or aggravating an offender's sentence because such patterns of alcohol abuse appear to be within the offender's control. Finally, alcohol abuse and alcoholism can be treated effectively in many cases.

From our review of the purposes of sentencing, we conclude as follows. Retribution theory indicates that intoxication at the time of the crime should be a mitigating factor in cases where it reduced the offender's ability to appreciate the wrongfulness of his conduct at the time of the crime. But, intoxication should *not* be a mitigating factor if the offender simply drank to "get up his nerve" for the crime or if the offender had frequently committed crimes while intoxicated

to the extent that he was on notice of the likelihood that his decision to drink was a decision to commit the ensuing crimes.

Likewise, rehabilitation theory justifies mitigating an offender's intoxication at the time of the crime if treatment of the offender's pattern of alcohol abuse is likely to reduce his propensity to commit crime and such treatment is imposed as a part of the sentence. Thus, any offender who has demonstrated that he is a good candidate for rehabilitation should also receive a mitigated sentence. However, rehabilitation theory justifies aggravated sentences for intoxicated offenders who are poor candidates for rehabilitation because they are likely to require a long period of forced treatment. Incapacitation theory would also justify an aggravated sentence for such hardened cases of alcoholic criminals in order to protect society from their demonstrated propensity to commit crime.

In Part II, we will see that state courts have been applying these principles in sentencing intoxicated offenders. Based on rules drawn from our survey of state law precedents in such cases, we will present our proposal at the close of Part II.

⁷⁴See *People v. Reyes*, 240 Cal. Rptr. at 756 and *State v. Dobbins*, 221 Neb. 778, 380 N.W.2d 640, 642 (1986).