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I. General

An article by Charles W. Smith, *Intoxication as a Defense to a Criminal Charge in Pennsylvania*, is featured in this issue of the *Dickinson Law Review*. The editors have asked me to introduce and comment on it.

The scope of Mr. Smith's work becomes apparent if one reads it with a model for a comprehensive study of the intoxication defense in mind. A complete examination of that defense is a large undertaking even when focused on the law and practice of a single jurisdiction. It should cover the history of the defense, its present status and future prospects. The study, in describing the defense as it is presently recognized and administered, must consider the relation of intoxication to the entire substantive criminal law: drunkenness as a separate and distinct defense; the relevance of evidence of drunkenness to definitional elements of particular crimes; and the relevance of such evidence to other defenses. It should go into the relation of intoxication to defenses of mistake, insanity and partial insanity (diminished capacity, diminished responsibility). A study of the defense may embrace matters of procedure and proof—admissibility and weight of lay and expert opinion and of scientific evidence; the quantum of evidence necessary to create a jury issue; the burden of persuasion and the content of

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jury instructions. It may extend to the operation of the defense in practice—to the frequency with which the defense is asserted and with which it succeeds; to common beliefs and attitudes about intoxicants which may influence judges and jurors; and to the effect on sentencing in cases where the defense is advanced but fails.

Our model study cannot explain the defense as it now exists nor support recommendations for change unless it deals with very basic questions of medical science, legal philosophy and social policy. The drunken offender is no novelty. He was lurching about, creating problems for society, long before the Yearbooks. Courts and legislatures have shaped the criminal law with him more or less in mind. But the question remains open—does the law as it now stands make just provision for the disordered mind and debatable culpability of the drunk? How comprehensive is Mr. Smith's study of the intoxication defense in Pennsylvania measured against our hypothetical model? In his article Mr. Smith touches on most of the suggested topics. Some topics which he passes by could not readily be explored even if he chose to do so. For instance, the question of how the defense is working in actual practice cannot be fully answered without field research. In my opinion, however, the value of Mr. Smith's work is not compromised by any omission. He identifies and faces up to all the major issues. Mr. Smith's work is more than ambitious in scope and perceptive in uncovering problems. His exposition of Pennsylvania law is enlightening; his criticism of present law and practice and suggestions for change are reasoned and sensible. Not since 1908, when Dean Trickett published *The Law of Crimes in Pennsylvania* has anyone written on this subject with comparable breadth and insight.

II. The Capacity Defense—Drunkenness and Specific Mens Rea

Part of Mr. Smith's article is concerned with voluntary intoxication as the basis for a "capacity" type defense to crimes which require specific mens rea. I shall set down a few observations of my own on the capacity defense. Although my comments are sketchy and not directed to Pennsylvania law, they may complement Mr. Smith's analysis and treatment of the subject.

The essence of the defense is often expressed along these lines: Although voluntary drunkenness generally does not excuse a crime, voluntary drunkenness which renders the defendant incapable of forming the specific mens rea required for a particular crime is a defense to that crime. In states recognizing the defense, voluntary gross intoxication may provide a defense to first degree murder, robbery, burglary, larceny, attempt or any other specific intent crime. The capacity defense has the nice finality of a syllogism. The defendant cannot be guilty of a specific intent crime

absent the required intent. He cannot have that intent if he is incapable of forming it. Thus lack of such capacity induced by alcohol is a defense to a specific intent crime. The capacity defense is neither as inevitable nor as unambiguous as black letter statements of the rule imply. The defense is relatively new; at one time the courts would not permit a defendant who voluntarily deprived himself of his wits to urge his infirmity as a defense to a specific intent crime. Today American courts and legislatures take differing stands on the subject. Although most jurisdictions recognize the defense, they do not agree on such matters as burden of proof or the proper formula for expressing the defense. In Pennsylvania, for instance, the burden of proving incapacity by a preponderance of the evidence falls on the defendant.[1] While in the federal courts, once the issue of drunkenness is raised, the burden falls on the government to prove capacity beyond reasonable doubt.[2] The phrasing of the defense in appellate opinions and jury instructions takes many forms. In some states jurors are simply told to consider evidence of intoxication in determining whether the defendant had the particular intent required for the crime.[3] In other states the courts not only word the defense in terms of capacity or ability but also elaborate on the quality of intent necessary for conviction or the degree of intoxication which is inconsistent with the requisite intent. For example, the Rhode Island Supreme Court said in a recent statutory burglary case:

> When a specific intent is an essential element of the crime, there is no such crime when the degree of the accused's intoxication is such that it completely negates his ability to formulate the requisite intent. . . .
>
> There is nothing in this record which would warrant any inference that . . . [the defendant's drinking] . . . made him drunk to such a degree as to "completely paralyze" his will or took from him "the power to withstand evil impulses" and rendered "his mind incapable of forming any sane design."[4]

A standard California jury instruction relating to premeditated murder reads as follows:

> If you find from the evidence that . . . the defendant

1. Commonwealth v. Barnosky, 436 Pa. 59, 258 A.2d 512 (1969); Commonwealth v. Chapman, 359 Pa. 164, 58 A.2d 433 (1948); Commonwealth v. Jones, 355 Pa. 522, 50 A.2d 317 (1947).

2. *See, e.g.*, 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS, inst. 13.18 (1970); W. MATHES &. E. DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS, inst. 10.01, 10.16 (Supp. 1968).

3. CALIFORNIA JURY INSTRUCTIONS, CRIMINAL (rev. ed. 1958), inst. 78-B (Supp. 1967).

4. State v. Amaral, 279 A.2d 428, 429 (R.I. 1971).

had substantially reduced mental capacity . . . caused by . . . intoxication . . . you must consider what effect if any this diminished capacity had on the defendant's ability to form any of the specific mental states that are essential elements of murder. . . .

Thus, if you find that the defendant's mental capacity was diminished to the extent that you have a reasonable doubt whether he did *maturely and meaningfully* premeditate, deliberate, and reflect upon the gravity of his contemplated act or form an intent to kill, you cannot find him guilty of . . . murder in the first degree.[5]

Virginia is one of the few states which have stayed close to the old law. Although Virginia recognizes voluntary drunkenness which renders a defendant incapable of forming a "willful, deliberate and premeditated purpose or intent to kill" as a defense to first degree murder it does not extend the defense to other specific intent crimes.[6] A Virginia practice manual recommends that jurors be charged as to such crimes:

A person cannot voluntarily make himself so drunk as to become on that account irresponsible for his conduct during such drunkenness. He may be perfectly unconscious of what he does and yet be responsible. He may be incapable of specific intent, but the law imputes specific intent . . . from the nature of the act and the circumstances under which the act was committed.[7]

Why do differences in approach persist among American courts and legislatures? The extent to which a state recognizes the capacity defense represents its answer to interrelated questions. They include the basic issue of whether the law, insofar as specific mens rea crimes are concerned, should continue to reflect common law antipathy towards drunken offenders. The act of getting drunk is still regarded by many people as anti-social and morally reprehensible. A state may look on voluntary drunkenness as sufficiently culpable behavior to warrant different substantive, procedural or evidentiary rules for determining guilt of specific intent crimes when the offender is drunk than when he is sober.

We shall see that most states accept the intoxication defense in principle and disclaim any antipathy towards those who rely on it. But I suggest that the exacting conditions attached to the defense in some jurisdictions stem from a degree of understandable bias against drunken offenders and a mistrust of the defense. For the most part, however, the different approaches to the capacity defense are probably the result of factors other than bias and mistrust. A state which wholeheartedly favors equal treatment for drunks still must contend with vexing problems in translating pol-

5. CALIFORNIA JURY INSTRUCTIONS, CRIMINAL, inst. 8.77 (3d rev. ed. 1970) (emphasis supplied).

6. Chittum v. Commonwealth, 211 Va. 12, 174 S.E.2d 779 (1970).

7. VIRGINIA JURY INSTRUCTIONS (1964), inst. 103.061 (Supp. 1971).

icy into workable legal rules. There may be unique difficulties in proving the mental condition and thought processes of the individual drunken offender, i.e. fact finding may be difficult. Even if the offender's mental state can be established there may be special problems in applying the intent element of a specific intent crime to his particular state, i.e. application of law may be troublesome. Indeed the whole matter of allocating and separating law interpreting, fact finding, and law applying functions may be harder when dealing with a drunken offender than in most other cases. What special rules, if any, are needed to implement a policy of neutrality? After pondering these and other questions involved, two states may come up with quite different rules both intended to achieve parity for drunk and sober defendants.

A. Rejection of the Capacity Defense

The Virginia treatment of voluntary drunkenness is instructive: it reminds us that a state need not take an across-the-board approach to the capacity defense. There may be reasons for recognizing it as to some specific intent crimes and rejecting it as to others. Premeditated murder is the most obvious candidate for the defense. Its definitional elements of premeditation, deliberation and willfulness seem to demand a level of mental activity inconsistent with gross drunkenness. The extreme penalties for premeditated murder and the availability of a lesser degree of homicide,[8] carrying substantial penalties, to which drunken killers can be consigned, further support a capacity defense.

Except for first degree murder, Virginia rejects the capacity defense. The pattern jury charge quoted above is based on *Commonwealth v. Chittum*.[9] In that case the defendant was convicted of attempted rape. According to the evidence, the defendant, who

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8. Evidence of intoxication may prevent a homicide from rising above murder in the second degree, or even manslaughter:

> Where by statutory definition, murder in the first degree requires an intent to kill, premeditation or deliberation, or a combination of these factors, intoxication may preclude the existence of these elements and require a conviction of second degree murder or manslaughter. In the majority of states, however, only murder in the first degree requires an intent or design to kill. Hence in these jurisdictions evidence of intoxication negating such intent would at most tend to reduce the homicide to murder in the second degree. In a minority of states, where an intent to take life is necessary to constitute murder even in the second degree, evidence of intoxication is admissible to reduce the offense from murder to manslaughter.

Note, *Intoxication as a Criminal Defense*, 55 COLUM. L. REV. 1210, 1214-15 (1955) (footnotes omitted).

9. Chittum v. Commonwealth, 211 Va. 12, 174 S.E.2d 779 (1970).

seemed quite drunk, approached a young couple and threatened them with a pistol. He made the boy drive the threesome to an isolated place where he forced him to leave the car. The defendant got into the front seat with the girl and told her to lie down. At that point he began to fumble with his trousers and the girl escaped. The trial judge instructed the jury that a drunken defendant may be perfectly unconscious of what he does and yet be responsible. He refused to give a requested charge that the defendant should be acquitted if by reason of drink he did not have mental capacity to entertain the specific intent required for attempted rape. In affirming the conviction, the Virginia Supreme Court held that from the conduct and discourse of the defendant, the jury was justified in concluding that he had the requisite specific intent, an intent to force the girl to have intercourse against her will. The court went on to approve the content of the instructions, noting that the Virginia law on intoxication differs from that of a majority of jurisdictions. Except in murder cases "[v]oluntary drunkenness, where it has not produced permanent insanity, is never an excuse for crime."[10]

Thus Virginia has not eliminated intent as a necessary element of specific intent crimes. But, in principle, it allows conviction based on a level and kind of mental activity which neither ordinary laymen nor most courts would regard as an actual intent. The intent need not exist at a conscious level. So long as the intent or purpose is somewhere embodied in the mind or person of the defendant, which the jury can only judge from the behavior and words of the defendant or other circumstantial evidence, it is immaterial whether the defendant was a drunken zombie.

This kind of approach which rejects the capacity defense out of hand and allows an unconscious intent or imputed intent to supply the mens rea for a specific intent crime is consistent with the old common law, but runs counter to current legal philosophy. Modern orthodox jurisprudence perceives subjective culpability—an actual, blameworthy state of mind—as the most appropriate basis for criminal liability.[11] When applied to specific intent crimes, this philosophy would require the defendant to have a conscious purpose or knowledge. The offender's conduct is probably more dangerous and certainly more reprehensible and subject to deterrence when he has a conscious intent; he is a candidate for rehabilitation. The thief should be punished not so much for meddling with someone else's goods but because of a conscious intent to steal them.

Despite the contemporary preference for subjective culpability, an approach which rejects the capacity defense has more to recom-

10. *Id.* at 16, 174 S.E.2d at 783.

11. *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 70-77, 113-21, 146 (2d ed. 1960).

mend it than ancient precedent. It has some merit even if it seems to do away with any requirement of a significant intent. Many serious crimes are general intent crimes. These crimes and certain defenses are usually defined so that guilt is determined by objective standards or external criteria. Consider the fate of the man accused of rape who defends on the ground that he mistakenly believed the woman consented. In most courts his error will not provide a legal excuse unless the mistake was reasonable. It can be argued that there are some specific intent crimes which should be treated as general intent crimes when the culprit is drunk. Take robbery as an example. It would not be patently unfair to punish a drunken defendant for robbery who takes property by violence or intimidation from the person or presence of another without regard to the defendant's intent. Even though he lacks one of the usual requisites for robbery—a specific intent to steal—the residual conduct of the drunken "robber" entails harm and danger. Punishment serves retributive functions and may deter others.[12]

In deciding whether the grossly drunk "robber" should be fitted into the same category of crime as the sober robber, a court should consider any semantic difficulties caused by the established definition of robbery, the appropriateness of authorized penalties and alternative criminal categories (e.g., assault, trespass to goods), which might accommodate the intoxicated wrongdoer. Of course, a legislature is not subject to these constraints. It can redefine crimes and adjust punishment levels freely.[13]

A final argument can be made for Virginia's general rejection of the drunkenness defense to specific intent crimes other than murder. Virginia does not completely eliminate the intent element for inebriates. A defendant cannot be convicted unless he at least appears to have the intent required for the particular crime. In most cases, it probably will not make any difference in the verdict whether the jury is instructed in *Chittum* language or in some

12. *See* HOLMES, THE COMMON LAW 40-51 (1st ed. 1881). For an enlightening analysis of the nature and justification of criminal law and punishment, *see* PACKER, THE LIMITS OF THE CRIMINAL SANCTION 1-79, 103-45 (1968). The United States Constitution reserves to the states considerable freedom in defining crimes, including their mental elements, and in determining penalties to be attached to the crimes defined. *See* Powell v. Texas, 392 U.S. 514 (1968); Williams v. Oklahoma, 358 U.S. 576 (1959).

13. The substantive criminal law of a state comprises a body of distinct crimes, each having its own definition and authorized punishment. The capacity defense may be viewed as a tool for classifying offenders who are under the influence of alcohol, for determining into which crime their offenses fit. A few states have decided that they do not need the capacity defense. They are content with the job they can do in fitting drunken offenders into a suitable category of crime without that tool.

conventional capacity language. The *Chittum* case itself is a good illustration. On the evidence before it, the jurors would probably have found Chittum guilty of attempted rape even if the trial court had charged that they must find a conscious intent to rape and that intoxication could negate such intent.

My purpose in rehearsing the arguments for rejection of the capacity defense is not to suggest that other states should follow Virginia's example. Rather it is to point out that respectable arguments can be made for treating a defendant who tries to rely on evidence of intoxication more rigorously than a sober defendant when determining the issue of intent. Thus a state which does recognize the capacity defense might so circumscribe the defense that is seldom available. The defense can be circumscribed without doing frequent or substantial injustice.

B. *Forms of the Capacity Defense*

Unlike Virginia, most states try to deal with drunk and sober defendants on the same footing. In an article in the Illinois Law Forum, Professor Paulsen reported that he found close to unanimous agreement on the fundamentals of the capacity defense:

> Under the exisitng law the fact of intoxication neither aggravates nor excuses. The present position of the law was summarized simply in an Indiana case decided at the turn of the century. Drunkenness is not considered "upon the ground that it of itself excuses or palliates the crime, but is admitted and considered only for the purpose of ascertaining the condition of the mind of the accused in order to determine whether he was incapable of entertaining the specific intent charged, where such intent, under the law, is an essential ingredient of the particular crime. . . .[14]

Paulsen went on to point out that it is now commonly accepted that specific intent crimes require conscious psychological states, i.e., conscious purpose or knowledge. As a matter of logic, extreme drunkenness, because it does affect mental processes, can negative such mental states. Almost all courts and legislatures nowadays are willing to grant evidence of intoxication whatever logical relevancy it may have to disprove specific intent. Paulsen notes, however, that there are not likely to be many cases in which *alcoholic* intoxication will have blotted out a defendant's capacity to know or to entertain a purpose. The ordinary drinker's sensory perception and his comprehension of what he sees, hears or feels are seriously impaired only after he has consumed a large amount of alcohol. Even then he may be capable of the conscious purpose or knowledge, i.e., the specific intent, required for a particular crime.[15]

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14. M. Paulsen, *Intoxication as a Defense to Crime,* 1961 UNIV. OF ILL. LAW FORUM [hereinafter, PAULSEN] 1, 2.

15. *Id.* at 8-9.

Despite the consensus on fundamentals there continue to be rather basic problems connected with the defense and with its administration. In every case the jury is confronted with the questions of how drunk the defendant was and what was going on in his mind. In other words the jury must contend with the factual aspects of the intent issue. The determination is sometimes an easy one; however, the drunker the defendant, the more speculative the search for his mental activity is likely to become. Psychiatrists and other experts may be able to assist the jury with the factual aspects of the intent issue, if they are available and permitted to testify. Courts disagree on whether and to what extent expert witnesses should be allowed to give opinions on the mental processes and intent-forming capacities of defendants who were allegedly drunk or otherwise mentally abnormal but not insane under the jurisdiction's regular sanity test.[16] Expert testimony would seem useful in many cases and indispensible when the defendant asserts that drink had induced some bizarre condition, e.g. pathological intoxication or alcoholic hallucinosis.[17] A state may rule out or limit expert evidence for any of several reasons—doubts about the reliability of expert testimony, fear that it will confuse the jurors or influence them improperly on matters which are the province of law or jury discretion, or a decision to foreclose defenses based on bizarre conditions. The jury is left to judge the defendant according to its own knowledge of how drink affects most people. But with or without expert testimony the fact questions to be decided by the jury will frequently be difficult.

As I said earlier, the difficulties inherent in the intoxication defense transcend fact finding. The defense seems to be susceptible to confusion in law interpreting, fact finding and law applying functions. Substantive statements of the defense are likely to be ambiguous or self-contradictory. The jury may be allowed to make relatively unguided decisions on matters which could be regulated by the substantive law and embodied in the court's charge. A comparison of two jury instructions will illustrate some of the difficulties. Each has counterparts in many states; I am attributing them to particular states simply for convenience. One instruction, the "California form," follows a pattern charge used in that state until 1970;[18] the other, the "Ohio form," is based on portions of a pattern

16. *Compare* People v. Alexander, 6 Cal. Rptr. 153 (1960) *with* Commonwealth v. Weinstein, 442 Pa. 70, 274 A.2d 182 (1971).

17. *See* PAULSEN at 16-18, 22.

18. CALIFORNIA JURY INSTRUCTIONS, CRIMINAL (rev. ed. 1958), inst. 78-B (Supp. 1967). This instruction has been superseded. CALIFORNIA JURY INSTRUCTIONS, CRIMINAL, inst. 4.21 (3d rev. ed. 1970).

charge currently employed in Ohio.[19]

Let us evaluate the two instructions in the context of a specific case by hypothesizing a defendant charged with larceny of a portable radio and a jury which has heard testimony that he was quite drunk. Early in his charge the court would instruct on the elements of larceny, including the intent element and make it clear that the jury cannot convict unless satisfied beyond reasonable doubt as to all elements. If the judge were to use the California form of intoxication charge, he might proceed in this fashion:

> In the crime of larceny a necessary element is the existence in the mind of the defendant of the specific intent to deprive the owner permanently of his radio.
>
> If the evidence shows that the defendant was intoxicated at the time of the alleged offense you should consider his state of intoxication in determining if the defendant had that specific intent.

Were the judge to use the Ohio form he might instruct as follows:

> Intoxication is not an excuse for a crime. However, such evidence is admissible for the purpose of showing that the defendant was so intoxicated he was incapable of forming the intent to deprive the owner permanently of his radio. On this issue, the burden of proof is upon the defendant to establish by a greater weight of the evidence that his mind did not form that intent. If you find by a greater weight of the evidence that the defendant was incapable of forming an intent to deprive the owner permanently of his property then you must find the defendant not guilty.

The most obvious point illustrated by the California charge is that the intoxication defense to crimes of specific intent need not be articulated in terms of capacity or as a distinct defense. The possibility that a defendant might have been so drunk that he could not and therefore did not have the required intent can be argued to the jury by the defense counsel. The jury is left to weigh the argument without any special guidance by the court.

The California form has advantages of convenience. There are situations where evidence of drunkenness may be relevant to disprove specific intent even though the intoxication is not sufficient to render the accused incapable of intent. For example, a burglary defendant's story that he was only seeking shelter and did not intend to commit a felony when he broke and entered may be more plausible if backed by proof of heavy drinking. There are also cases in which the defense relies on intoxication to support alternative theories. For instance, in a first degree murder prosecution where there is testimony indicating that the accused acted playfully when he shot the victim and the defendant testifies that he remembers nothing, the defense counsel may argue that the evidence shows either incapacity or mistake. Under either theory in-

19. 4 OHIO JURY INSTRUCTIONS (CRIMINAL), inst. 411.10 (1970).

toxication is relevant to disprove a deliberate killing. The California instruction can be used in any of these situations. The Ohio form is appropriate only if the drunkenness creates a capacity issue; it needs to be supplemented if the evidence of intoxication is relevant to both an incapacity theory and some other theory of defense. Pennsylvania is one of the states which subscribes to what I have been calling the Ohio form of capacity defense. In his article, Mr. Smith reports that Pennsylvania lawyers and courts seem to lose sight of the possible use of intoxication to support defenses other than a capacity defense. Defense counsel may not be fully exploiting the defensive potential of drunkenness and trial courts may be giving the capacity instruction in inappropriate circumstances.

The California charge avoids a problem of conflicting burdens of persuasion[20] that is inherent in any instruction which, like the Ohio form, makes incapacity a true affirmative defense. Looking back at our sample Ohio charge, we see that the accused has the burden of persuading the jury that he was so drunk he was unable to form the intent to steal, while the state retains the burden of proving beyond reasonable doubt that the accused had that intent. If the jurors have even a reasonable doubt of the defendant's capacity to form an intent to steal, how can they be convinced beyond reasonable doubt that he did in fact intend to steal? The Ohio charge appears to reconcile the conflicting burdens in the only way it can logically be done—by conceiving the capacity defense as working a partial exception to the prosecutor's normal burden of proving the intent element. The jury is told that on the capacity issue the defendant has the burden of proving "that his mind did not form the intent." In many courts, however, which treat incapacity as a true affirmative defense, the jurors are left to resolve the anomaly for themselves.[21]

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20. There is also no problem of conflicting burdens in the federal courts and other jurisdictions which formulate the defense in terms of "capacity" but require the prosecution to prove capacity beyond reasonable doubt. *See* note 2 *supra.*

21. I have seen one Pennsylvania judge's charge form in which he neatly conceals the anomaly behind a sequitur. The charge tells the jury that the Commonwealth has to prove intent beyond a reasonable doubt *therefore* if the defendant proves by a preponderance of the evidence that he was so drunk that he was incapable of the required intent he must be acquitted. In the text, I credited the Ohio-type charge with resolving the anomaly by letting the capacity defense effect a partial exception to the state's normal burden of proving intent. This is true of the portions of the standard Ohio instruction quoted in this article. However, other parts of the full charge as it is used in the Ohio courts tend to restore the anomalous and conflicting burdens of proof. *See* 4 OHIO JURY INSTRUCTIONS (CRIMINAL), inst. 411.10(f) (1970).

Should any effort at all be made in jury instructions to reconcile the apparent conflict in burdens? One way in which this might be done is by charging in substance that the jurors may convict (i) if they are convinced beyond reasonable doubt that the defendant *acted* as if he had the required intent (ii) unless they are convinced by a preponderance of the evidence that, notwithstanding his actions, the defendant was so drunk he was unable to have the required intent in his conscious mind.[22] The most serious question about such an instruction is whether it is worthwhile. A charge reconciling burdens may confuse rather than elighten.

A good jury instruction requires more than a technically correct statement of the law. It should convey to the jurors a feeling for the policies and attitudes which underlie the law. This is doubly true of instructions dealing with such abstract and elusive matters as intent and the degree of drunkenness which precludes intent. Although they are material elements upon which liability depends they are elements which by nature resist precise and easily communicated definition.

The key word in the California type charge is *intent.* In our hypothetical larceny case the jury is simply told they should consider the intoxication evidence in determining whether the defendant had the intent to deprive the owner permanently of his property. Even if the court goes on to define intent as a *conscious purpose,* has the jury been given an adequate picture of the mental process or state they are looking for? What quality or intensity of mental activity constitutes intent or conscious purpose? The jurors can, of course, fall back on their own journeyman understanding of intent and the level of confusion, unawareness or mental impairment which they believe is inconsistent with intent. The courts of a state may regard this as perfectly satisfactory. They may feel it unnecessary or undesirable to give further direction to a jury; ordinarily, jurors are given no substantive definition of intent when called on to determine the intent of a sober person. Verdicts may seem fair and consistent in cases where the intoxication defense is raised. Or the courts may favor the charge because they believe it allows the jury freedom to express community attitudes towards drunken offenders and about the quality of intent which deserves criminal punishment.

If given no further guidance than the California charge, a juror might believe that an inebriate who acts on impulse never acts with specific intent or that specific intent requires relatively clearheaded thought processes. When the proof shows that a defendant was even moderately drunk, he might feel bound by the accused's testimony that "I didn't mean to do it" or "I didn't know what I was doing." The juror would in effect be insisting on a higher

22. *Cf.* CALIFORNIA JURY INSTRUCTIONS, CRIMINAL, inst. 4.31 (3d rev. ed. 1970).

quality of specific intent—a more culpable state of mind—then required by generally accepted legal doctrine.[23]

The Ohio charge includes a verbal formula which conveys the idea that only extreme intoxication precludes intent. It focuses the inquiry on the defendant's *potential* for forming the required intent and implies that any intent will serve (impulsive or at a low level of awareness?) so long as the defendant is *capable* of the kind of intent required by law. If we accept the premises that the criminal law should treat most people alike, that specific intent crimes can be committed by stupid, unstable and quite peculiar people and that intent or conscious purpose does not require a cool head, clear thinking or, indeed, very much in the way of mental activity, the Ohio charge seems more likely to avoid improper verdicts than the California form.

Our discussion of the California and Ohio charges indicate that such terms as intent, conscious purpose, knowledge and incapacitating drunkenness when used in the law and jury charges do not refer to matters which are simply and inevitably matters of fact. They refer to psychological processes and states and therefore do have a factual aspect; but they also imply a policy judgment concerning the kind and quality of mental activity or condition which constitutes a legally significant intent, conscious purpose or the like. In other words, they have a legal dimension. The policy judgment may be left to the jury, which occurs when the terms are not given further definition. The legal aspect then merges into the factual aspect. A state may, however, desire to channel and direct jurors' understanding of intent or of one of the other terms by giving the term a further substantive legal definition.

In our analysis of the California and Ohio charges we dwelled on the risk of unwarranted acquittals. Of course, when formulating its intoxication defense generally, or for particular crimes, a state must guard against unjustified convictions. For example, a court may believe there is a real danger that jurors will misconceive the nature and quality of the thought processes required for premeditated murder and underestimate the relation of intoxication to those processes. The California jury instruction on premeditated murder, quoted earlier,[24] seems designed to meet that

23. The risk that jurors will misjudge the quality of intent required may in fact be lessened by the inclusion of certain matters in the charge which do not purport to define the requisite intent but which give the jury a nudge in the right direction. For example, a comment on the evidence or the inclusion of a charge on proof of intent by circumstantial evidence, like the one in MATHES & DEVITT, may have that effect. *See* W. MATHES & E. DEVITT, FEDERAL JURY PRACTICE AND INSTRUCTIONS, inst. 10.06 (1970).

24. *See* text accompanying note 5 *supra*.

danger. The jury is told to consider the defendant's intoxication on the question of whether he had the capacity to, and did in fact, *maturely* and *meaningfully* go through the mental steps required for premeditated murder.

Obviously, we are talking about a problem for which there is no single, demonstrably superior solution. It is the problem faced by a court or legislature which recognizes the ambiguities inherent in such concepts as intent, conscious purpose, knowledge and incapacitating drunkenness. To what extent is it feasible, necessary, or desirable to refine these concepts by giving them more detailed legal definitions? What are the proper functions of court and jury in determining the scope of the intoxication defense?

These and other issues touched on my comments on the capacity defense become more concrete and manageable when discussed in the context of the law and practice of a single jurisdiction.[25] I shall leave them to Mr. Smith; he has said most of what is worth saying on the subject for Pennsylvania in the article which follows.

25. For whatever it may be worth, my own opinion is that the Ohio-Pennsylvania type of intoxication defense, i.e. one which speaks in terms of capacity and puts the burden on the defendant, is preferable to intoxication defenses which do not explicitly refer to capacity or which impose a burden of proving capacity on the prosecution.