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I. Introduction

The defense of voluntary intoxication from alcohol or drugs[1] in criminal cases has had an uncertain, and since 1971, controversial history in Pennsylvania. The 1976 amendment to section 308 of the Crimes Code marks the fourth major legislative or judicial change in the intoxication defense in five years.[2] Section 308 now provides:

> Neither voluntary intoxication nor voluntary drugged condition is a defense to a criminal charge, nor may evidence of such conditions be introduced to negative the element of intent of the offense, except that evidence of such intoxication or drugged condition of the defendant may be offered by the defendant whenever it is relevant to reduce murder from a higher degree to a lower degree of murder.[3]

What does section 308 mean? Does section 308 provide the best solution—or at least a satisfactory solution—to the problems that surround the intoxication defense? This article addresses these questions of statutory interpretation and of legislative policy and choice along with some constitutional issues that skulk behind the spare language of the statute.[4]

II. The Meaning of Amended Section 308

The great majority of American jurisdictions follow what may be

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1. Although arguably it need not be so, the law consistently deals with intoxication in the same manner whether it results from the consumption of alcohol or use of drugs. In this article the term "intoxication" will be used to refer both to drunkenness and drugged condition. The term "drunkenness" and its synonyms should also be understood to encompass drugged condition unless the context indicates otherwise.

2. The history of the intoxication defense in Pennsylvania from the eighteenth century until 1975 is well documented in an article and two casenotes in earlier issues of this review. Smith, *Intoxication as a Defense to a Criminal Charge in Pennsylvania*, 76 DICK. L. REV. 15, 52-53 (1971); Note, *Intoxication as a Defense to a Criminal Charge in Pennsylvania—Sequel*, 76 DICK. L. REV. 324 (1972); 80 DICK. L. REV. 640 (1976).

3. 18 PA. CONS. STAT. § 308 (1975), *as amended by* Act of April 7, 1976, P.L. —, Act 32 (1976 Pa. Legis. Serv. 55).

4. This article does not deal with the problems of involuntary intoxication and of insanity resulting from the use of alcohol or drugs nor with the legal and factual difficulties in distinguishing between those conditions and simple voluntary intoxication. On these matters see MODEL PENAL CODE 9-12 (Tent. Draft No. 9, 1959); Smith, *supra* note 3, *citing* Pennsylvania cases.

characterized as a "capacity defense" approach to the defense of voluntary intoxication. In employing this defense, a distinction is traditionally made between specific *mens rea* crimes, such as premeditated murder, burglary and receiving stolen property, which for conviction require proof of some particular intent, knowledge or the like, and general *mens rea* crimes, such as common-law murder, rape and assault, which do not require proof of any such specific mental state. In an article in the *University of Illinois Law Forum*, Professor Paulsen reported that he found close to unanimous agreement on the fundamentals of the capacity defense:

> Under the existing 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.'[5]

Paulsen went on to point out that it is now commonly accepted that specific *mens rea* crimes require conscious psychological states, *i.e.*, conscious purpose or knowledge. As a matter of logic, extreme intoxication, because it does affect mental processes, can blot out such mental states. Almost all courts and legislatures nowadays are willing to grant evidence of intoxication whatever logical relevance it may have to disprove specific *mens rea*.[6]

It was this kind of capacity defense approach to voluntary intoxication that the Pennsylvania Supreme Court rejected in 1971 in *Commonwealth v. Tarver*,[7] except for crimes which, like murder, are divided into degrees. It was this kind of capacity defense that the Pennsylvania Legislature accepted apparently inadvertently when it originally enacted section 308 as part of the new Crimes Code in 1972.[8] It was this kind of capacity defense that the Pennsylvania Supreme Court adopted in the 1975 case of *Commonwealth v. Graves*[9] for crimes committed before the effective date of the Crimes Code. And it was this kind of capacity defense that the legislature, reacting to *Graves*, renounced through its 1976 amendment to Crimes Code section 308 except as to murder.

The criminal instructions subcommittee of the Pennsylvania Supreme Court's Committee on Standard Jury Instructions recently proposed pattern jury instructions to implement section 308. The text of the proposed instructions and portions of the subcommittee's explanatory notes are set out in an appendix to this article. Not surprisingly, the author endorses the

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5. Paulsen, *Intoxication as a Defense to Crime*, 1961 U. ILL. L.F. 1, 2 (citation omitted).
6. Paulsen, *supra* note 5, at 8-9.
7. 446 Pa. 233, 284 A.2d 759 (1971).
8. *See* text at note 45 *infra* (text of original § 308).
9. 461 Pa. 118, 334 A.2d 661 (1975).

subcommittee's proposed jury charges and agrees with it that section 308 seeks

> [t]o foreclose the defensive use of voluntary intoxication by disallowing it as a substantive defense, except to reduce first degree murder to third degree murder,[10] and by barring the introduction of evidence of voluntary intoxication when offered to prove the defendant incapable of an 'intent' element of the crime, *i.e.*, a specific *mens rea*. Disallowing intoxication as a substantive defense to specific *mens rea* crimes does create conceptual and policy problems. To the extent that the mental element of certain crimes is ordinarily considered to require a rather high level of conscious awareness and to the extent that gross intoxication is factually inconsistent with such awareness, the legislature has in effect redefined the elements of those crimes when the putative offender is drunk or drugged . . . . Section 308 should be interpreted to redefine the mental elements of specific *mens rea* crimes when the offender is drunk or drugged to require merely a watered-down form of specific *mens rea*.[11]

All that should be necessary is that the required intent, knowledge or other mental state be present somewhere in the offender's besotted mind or be expressed in his acts regardless of whether he is aware of it.[12]

By way of illustration, consider the following hypothetical. Defendant is charged with theft of a portable radio in violation of section 3921(a) of the Crimes Code.[13] The jury has heard testimony about how the defendant carried away the radio including testimony that he was quite drunk. Early in its charge to the jury the court would instruct on the elements of theft by taking, including the element of "intent to deprive permanently or for an extended period,"[14] and make it clear that the jury cannot convict

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10. Although the language of section 308 suggests that evidence of an intoxicated condition may reduce the degree of either first degree or second degree murder, *i.e.*, felony murder, a reduction of second degree murder does not square with the legislature's apparent intent to return to the law of *Tarver*. *Tarver* involved a felony murder defendant; he was not allowed to rely on the intoxication defense. Also, it would be anomalous if the courts were to allow intoxication to rebut the specific intent element of a felony when the felony is part of a second degree murder charge but not when the felony is charged alone. Of course, the reduction of a drunken felony murderer's crime to murder of the third degree lies within the discretionary power of the jury. A jury may always reduce the grade of a felonious homicide as a matter of grace. *See, e.g.*, Commonwealth v. Jones, 457 Pa. 563, 319 A.2d 142 (1974).

11. Pa. Sup. Ct. Comm. on Standard Jury Instructions, Draft Report, at 2 (April 24, 1976). (The author of this article serves as co-reporter to the subcommittee.)

12. An argument might be made that section 308 should be read literally, that it does not alter the normal element of intent in any crime but merely forbids the use of evidence of intoxication to negate the required intent, and that, in doing so, the legislature has invaded the Supreme Court's constitutional prerogative of making rules of evidence, PA. CONST. art. V, § 9(c), has barred the use of relevant evidence with insufficient justification, and allows conviction without proof beyond reasonable doubt in violation of the state and federal constitutions. *See* 80 DICK. L. REV. 640, 644 n.27 (1976). The author regards this argument as untenable. Amended section 308 is susceptible to the different interpretation given it by the subcommittee and, as will appear, that interpretation is constitutional.

13. 18 PA. CONS. STAT. § 3921(a) (1975).

14. Actually the instruction on the intent element of theft must be more elaborate to conform with *id.* § 3901, which defines "deprive" as:

> (1) To withhold property of another permanently or for so extended a period as to appropriate a major portion of its economic value, or with intent to restore only upon payment of reward or other compensation; or
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> (2) To dispose of the property so as to make it unlikely that the owner will recover it.

unless satisfied beyond reasonable doubt as to all elements. The judge, adapting the proposed subcommittee instruction to the case, might then continue:

> Voluntary intoxication is not a defense to a criminal charge. A person who voluntarily uses intoxicants cannot become so drunk that he is for that reason legally incapable of committing a crime.
>
> One of the elements of theft, as I told you, is that the defendant had a certain mental state, that is, the defendant intended to deprive the owner of his radio permanently or for an extended period. A defendant cannot be guilty of theft unless he had that state of mind at the time of the alleged crime. However, in the case of a voluntarily intoxicated defendant it is not necessary that the defendant be conscious or aware of his own state of mind. It is enough if the required intent is present somewhere in his drunken mind or is expressed in his acts.

Our hypothetical case, which assumes that the jury heard testimony that the defendant was drunk, points up a problem dealt with only inferentially by the criminal instructions subcommittee. Section 308 provides that evidence of voluntary intoxication may not be introduced "to negative the element of intent of the offense." Under what circumstances should the trial judge admit or exclude evidence tending to prove the defendant was intoxicated at the time of the crime?

Section 308 should be construed as calling for the exclusion of evidence that is not part of the *res gestae* and that would have no probative value other than to show that the defendant was so intoxicated he was unable to form a specific *mens rea* consciously or at a high level of awareness.

Conversely, if the evidence of intoxication is relevant to "negative the element of intent" in some other fashion, *e.g.*, by establishing or bolstering a claim of accident, mistake or jest, the evidence should be admitted. For example, if our radio thief asserts that he thought the radio belonged to himself, or that he was playing a joke on the owner and intended to return the radio, he should be allowed to support his claim, which otherwise might be unbelievable, with evidence that he was drunk.[15] In drafting section 308 the legislature seems to have been concerned with abolishing the capacity defense as explicated in *Graves*. It is unlikely that its prohibition against introduction of intoxication evidence "to negative

15. A rule of admissibility that turns upon whether proffered evidence of intoxication would be relevant solely to negate capacity or whether it is relevant to negate intent in some other fashion may occasionally be hard to apply. For example, assume that the defendant is charged with intentionally causing bodily injury with a knife. The victim was drunk and is a poor witness; there is little or no other eyewitness testimony describing the defendant's words, conduct or condition. The defendant testifies that he was drunk and does not remember what happened. The defense counsel then proffers evidence that the defendant was grossly intoxicated not long before the crime and argues that the court should admit the evidence because it supports a rational hypothesis that the stabbing was not intentional but rather the result of accident or non-volitional conduct. The defendant may have had the knife in hand for some innocent purpose and lurched or stumbled against the victim. In such a case, and in other doubtful cases, the trial court ought to admit the evidence of intoxication and allow the jury to assess its probative value.

the element of intent'' was intended literally—to bar the defensive use of all such evidence on the issue of intent. This ambiguity in the amended section 308 seems to be the product of a legislative effort to reverse the policy of the original section with minimum alteration of language.[16]

III. Amended Section 308 and Possible Legislative Alternatives

Any legislature considering what to do about voluntary intoxication must decide the basic policy question: Should drunk or drugged persons be treated the same as sober persons? Or should special substantive or evidentiary rules be applied to them?[17] A legislature's answer is likely to be determined, at least in part, by whether its members wish to express antipathy for intoxicated offenders and whether they mistrust the intoxication defense. Even in the most permissive or hedonistic of our American states, many people still regard the act of getting drunk as antisocial and morally reprehensible. Even more people are likely to condemn the use of drugs. Furthermore, one can readily conceive reasons for mistrusting the intoxication defense. It might be abused by defendants, *e.g.*, by a defendant who deliberately gets drunk before commiting a crime to provide himself a fabricated defense.[18] It might confuse the jury or otherwise be difficult to adminster.

There are a variety of ways in which a legislature can deal with intoxication, including the two basic approaches between which Pennsylvania law has vacillated since 1971. Possible legislative alternatives include: (*i*) complete elimination of specific *mens rea* requirements when the defendant is intoxicated; (*ii*) adoption of the ''old common law'' treatment of intoxication, which we shall see is very much like that of amended section 308 or of *Tarver*; (*iii*) adoption of a capacity defense

16. For text of original § 308 of the Crimes Code, see text at note 45 *infra*.

17. The draftsmen of the Model Penal Code's section on intoxication put the question this way when they submitted their work to the members of the American Law Institute for approval:

> 1. Should self-induced intoxication be accorded a significance co-extensive with its relevancy to prove or disprove an element of the offense charged or should its admissibility to exculpate be limited on grounds of legal policy?
> 2. If the exculpating import of intoxication is to be limited, is it a sufficient limitation to provide, as the draft does, that unawareness of a risk, of which the actor would have been aware had he been sober, is immaterial upon a charge of recklessness?

MODEL PENAL CODE xi (Tent. Draft No. 9, 1959). For general discussions of voluntary intoxication as a defense see *id.* at 1-9, 12-13; Murphy, *The Defense of Voluntary Intoxication*, 9 A.B.A.L. NOTES 7 (1972); Murphy, *The Intoxication Defense: An Introduction to Mr. Smith's Article*, 76 DICK. L. REV. 1 (1971).

18. This fear of the criminal who finds not only courage in the bottle but exculpation as well was voiced by Justice Eagen in his dissent in *Graves*:

> Only a person blind to reality could fail to perceive that there is no practical difference between the admission of evidence to negate an element of the crime and the admission of evidence to constitute a defense. The end result is that human life and property would hardly be considered any longer as being under legal protection. An individual will henceforth be permitted to avail himself of his voluntary intoxication to exempt him from any legal responsibility which would attach to him, if sober. As one noted annotator said in speaking of voluntary intoxication as a defense to criminal responsibility, '. . . all that the crafty criminal would require for a well planned . . . [robbery or burglary] would be a revolver in one hand to commit the deed and a quart of intoxicating liquor in the other.'

461 Pa. at 130, 334 A.2d at 667 (citation omitted).

approach, as in the original section 308 or in *Graves*; (*iv*) creation of special crimes which can be committed by intoxicated persons; and (*v*) adoption of some modification or combination of alternatives (*ii*) through (*iv*).[19]

A. Elimination of Specific Mens Rea

A legislature might enact an intoxication rule that would allow an accused charged with a crime ordinarily requiring proof of specific intent, knowledge or similar mental state to be convicted of that crime simply upon proof of all elements of the crime, other than the specific mental element, if the jury believed that the accused was grossly intoxicated. This kind of a statute is more a theoretical than an actual possibility. It deserves some thought, however, because it highlights objections that can be urged, although less persuasively, against amended section 308.

Complete elimination of the mental element would not work too badly with some specific *mens rea* crimes. Common-law robbery is 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 may lack one of the usual requisites for robbery, a specific intent to rob or steal, the residual conduct of the "robber" entails substantial harm and danger. Punishment would serve a retributive function, would get an individual who appears dangerous—at least when drunk—off the streets, and might deter others.

Elimination of the mental element, however, would work very badly with many other specific *mens rea* crimes. Consider burglary as defined in section 3502(a) of the Crimes Code: "A person is guilty of burglary if he enters a building . . . with intent to commit a crime therein . . . ."[20] Burglary is a felony of the first degree punishable by imprisonment for up to twenty years.[21] Assume that the defendant was wandering the streets, grossly intoxicated, entered a store through a door that the owner forgot to lock, and was found asleep in the store. If the requisite "intent to commit a crime" were disregarded in the case of a drunken "burglar" the defendant could be convicted of the first degree felony and even severely punished. He would be entirely dependent for justice upon the discretion and good sense of the prosecutor, court or jury and not in the slightest upon the Code.

The gravamen of burglary is the specific intent to commit a crime when the building is entered. If this element were eliminated our defendant would be punished without having the contemporaneous blameworthy mental state or culpability ordinarily required for true crimes. His only real

19. Another legislative alternative is to leave the whole matter to the courts. This was done everywhere before the days of comprehensive penal codes and in Pennsylvania as recently as 1972.

20. 18 PA. CONS. STAT. § 3502(a) (1975).

21. *Id.* §§ 3502(c), 1103(1).

blameworthiness would be in the relatively minor delict of getting drunk some time earlier. There is little culpability, harm or danger inherent in a simple entry into a building. As Justice Jackson said in *Morrisette v. United States*[22] in holding that the requirement of an "intent to steal" should be read into a federal criminal conversion statute:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil. A relation between some mental element and punishment for a harmful act is almost as instinctive as the child's familiar exculpatory '[b]ut I didn't mean to' . . . . Unqualified acceptance of this doctrine by English common law in the Eighteenth Century was indicated by Blackstone's sweeping statement that to constitute any crime there must first be a 'vicious will' . . . .
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> 'Crime as a compound concept, generally constituted only from concurrence of an evil meaning mind with an evil doing hand, was congenial to an intense individualism and took deep and early root in American soil.'[23]

Subjecting an individual who really has not been proven to be anything but a drunken trespasser to the stigma and potential sanctions of a first degree felony conviction would not be appropriate under any conventional theory of penology. Insofar as retribution and prevention of recidivism by the defendant are concerned, any substantial period of imprisonment in a penitentiary would amount to overkill. With respect to furnishing an opportunity for rehabilitation, the period of incarceration might bear no relation to his problem with alcohol. Insofar as making an example of the defendant to deter others is concerned, his punishment might alarm heavy drinkers but could only amuse would-be burglars.

The United States Supreme Court has not read the Constitution to provide the same pervasive restraints on state substantive criminal law as on state procedure. The United States Constitution reserves to the states considerable freedom in defining crimes, including their mental elements, and in establishing penalties to be attached to the crimes defined.[24]

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22. 342 U.S. 246 (1952).
23. *Id.* at 250-51 (footnotes omitted).
24. *See* Powell v. Texas, 392 U.S. 514 (1968); Williams v. Oklahoma, 358 U.S. 576 (1959). Naturally, the freedom has its limits, but federal deferral to the states' right to control actions within their own borders is great. When Leroy Powell, a chronic alcoholic, asked the United States Supreme Court to set aside his conviction under a Texas statute that prohibited public drunkenness on the ground that he was unable to conform to its mandate, Justice Black, joined by Justice Harlan, concurred with the majority's reluctance to dictate the substantive criminal law for the several states.

> We are asked to tell the most distant Islands of Hawaii that they cannot apply their local rules so as to protect a drunken man on their beaches and the local communities of Alaska that they are without power to follow their own course in deciding what is the best way to take care of a drunken man on their frozen soil. . . . It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs. The constitutional rule we are urged to adopt . . . departs from the ancient faith based on the premise that experience in making local laws by local people themselves is by far the safest guide for a nation like ours to follow.

Powell v. Texas, 382 U.S. at 547-48.

Nevertheless a state statute eliminating, across the board, the mental elements of all specific *mens rea* crimes for grossly intoxicated persons might well be found to violate the United States or Pennsylvania[25] Constitutions, if not on its face at least in its application to crimes that in the absence of mental elements do not involve substantial culpability, harm or danger.

Of the possible federal constitutional objections[26] that might be made to such a statute, it is probably most vulnerable to attack on the ground that the statute, or an application, violates the prohibition against "cruel and unusual punishments" of the eighth and fourteenth amendments. If, for example, the drunken "burglar" in our hypothetical were sentenced to lengthy imprisonment, he could make strong arguments that his incarceration is cruel and unusual under any of the differing standards that the individual Justices advanced in *Furman v. Georgia.*[27] He could argue that the sentence in his particular case is "grossly disproportionate" to his crime, even after great deference is accorded to the judgment of the legislature and of the court that imposed it.[28] He could make an even stronger argument that the combination of the state's burglary and drunken offender statutes gives so much unguided leeway to the sentencing judge that the statutes lend themselves to wholly arbitrary and senseless application[29] and also to impermissible discrimination against minorities and the poor.[30] He could make still more telling arguments that his punishment violates the standards proposed by Justices Brennan[31] and Marshall.[32] Under their criteria, a court reviewing constitutionality measures the punishment against its own perceptions of sound penology and societal attitudes.

B. The Old Common Law and Amended Section 308 Approaches

At old common law 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. His intent was presumed so long as he acted as if he had the required intent.[33] Virginia is one state which has stayed close to the

25. *See* PA. CONST. art. I, §§ 1, 9, 13.
26. Other possible federal constitutional objections include violations of substantive due process and of equal protection.
27. 408 U.S. 238 (1972). In the more recent death penalty cases some of the Justices have reformulated their views on the meaning of the eighth amendment. *See, e.g.*, Gregg v. Georgia, 96 S. Ct. 2909 (1976).
28. *See id.* at 375 (Burger, C.J., dissenting), 414 (Powell, J., dissenting).
29. *See id.* at 306 (Stewart, J., concurring), 310 (White, J., concurring).
30. *See id.* at 240 (Douglas, J., concurring).
31. *Id.* at 257.
32. *Id.* at 314.
33. This view of intoxication is referred to as the "old common law" approach somewhat arbitrarily, as a convenient way to distinguish it from the capacity defense approach. Some courts very early decided that incapacitating intoxication was a defense to specific intent crimes. At present the great majority of states by judicial decision or by statute have opted for a capacity defense. *See* J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 529-33 (2d ed. 1960); J. MILLER, HANDBOOK OF CRIMINAL LAW 137-41 (1937); MODEL PENAL CODE at 2-6 (Tent. Draft No. 9, 1959); note 5 and accompanying text *supra.*

old law.[34] Although Virginia recognizes voluntary intoxication 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 *mens rea* crimes.[35] A Virginia practice manual recommends that jurors be charged as to such crimes in the following terms:

> 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.[36]

A comparison of this jury charge with the pattern instruction prepared by the Pennsylvania criminal instructions subcommittee indicates that the subcommittee proposes to treat intoxication under amended section 308 pretty much as it was at old common law. The only difference between the two charges lies in the language used to reconcile the required element of specific *mens rea* with the general immateriality of intoxication. The Pennsylvania instruction will, perhaps, be more readily understood by jurors and more congenial to students of psychology and of the criminal law.

It might be argued that the old common law-amended section 308 approach is subject to the same criticism as a statute eliminating all elements of specific *mens rea* when the defendant is grossly intoxicated. A requirement of specific *mens rea* that is so watered-down that it can be satisfied by an "imputed intent" or "unconscious intent" does not differ significantly from no requirement for purposes of federal and state constitutions, legal doctrine and penal policy.

The answers to these arguments appear to be substantial enough to support a conclusion that amended section 308's treatment of voluntary intoxication is satisfactory from both a legal and policy standpoint. First, because it is the old common law approach and continues to be used in some states, it is not wholly theoretical and unprecedented. In fact a majority of the Pennsylvania Supreme Court favored this course as recently as the 1971 *Tarver* case. Second, on its face it is not inconsistent with the traditional preference for subjective culpability of which Justice Jackson spoke in *Morrisette*. And, if one believes the maxim "*in vino veritas*" it permits conviction of persons whose acts have exposed their true natures even though they happened to be drunken zombies at the time.

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34. There have been modern decisions in other states adhering to the old common law. *See, e.g.*, Missouri v. Shipman, 354 Mo. 265, 189 S.W.2d 273 (1945); Vermont v. Stacy, 104 Vt. 379, 160 A. 257 (1932).

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

36. M. DOUBLES, E. EMROCH & R. MERHIGE, VIRGINIA JURY INSTRUCTION § 103.061 (Supp. 1975).

More importantly, it might be argued; this approach is less susceptible than a capacity defense to manipulation by defendants and misapplication by jurors. The great majority of moderately to grossly drunk or drugged persons who commit putatively criminal acts are probably aware of what they are doing and the likely consequences.[37] In the case of those who are drunk, alcohol may have diminished their perceptions, released their inhibitions and clouded their reasoning and judgment, but they still have sufficient capacity for the conscious mental processes required by the ordinary definitions of all or most specific *mens rea* crimes.[38] For example, a person can be quite far gone in drink and still capable of the conscious intent to steal, which is an element of common law larceny. Later as the result of retrograde amnesia some drunken offenders may genuinely forget; but inability to remember in such cases is legally immaterial. Even if, in principle, only those who had a conscious *mens rea* should be convicted, it is not feasible at a trial held long after the event for the prosecution to prove and the jury to determine reliably that a particular drunken offender had a conscious as distinguished from an unconscious intent. The argument then concludes: Amended section 308 is more likely to ensure that defendants who did in fact have a conscious specific *mens rea* are convicted than would a capacity defense. It minimizes the opportunities for false claims by defendants and improper acquittals by juries. The relatively small risk of improper convictions—if conviction of persons having unconscious *mens rea* be deemed improper—is justified.[39]

C. The Capacity Defense and Original Section 308 Approaches

Until now the capacity defense has been spoken of as a unitary defense. If the defendant is charged with a specific *mens rea* crime and if at the time of the alleged crime he was so intoxicated that he was unable to entertain the required intent, knowledge or like mental state, the defense is available. The matter is not so simple. The capacity defense can and has assumed a variety of forms.

One proposal which has never been taken up by any state is that the defense of voluntary, as well as involuntary, intoxication should parallel

37. On the effect of alcohol on mental processes see MODEL PENAL CODE 3-4 nn.2 & 4 (Tent. Draft No. 9, 1959); Paulsen, *supra* note 5, at 8-9, 16-18, 22; Stewart, *Medicolegal Aspects of Alcoholism*, 8 CLEV.-MAR. L. REV. 210, 213-41 (1959). The effect of a drug on mental processes depends upon the particular drug. L.S.D., for example, is likely to produce more drastic symptoms than heroin. Expert witnesses will often be needed to enlighten the jury when there is an issue of drug intoxication. *See* MODEL PENAL CODE 12-13 (Tent. Draft No. 9, 1959). It is less clear that experts, other than those who observed or examined the defendant while he was still under the influence after the crime, are needed or should be allowed to testify when the issue is alcoholic intoxication. *See* Murphy, *The Defense of Voluntary Intoxication*, 9 A.B.A.L. NOTES 7, 10 (1972).

38. *E.g.*, willful, deliberate and premeditated murder is defined in some states to require mature and meaningful thought processes clearly beyond the powers of a grossly intoxicated individual. *See* COMMITTEE ON STANDARD JURY INSTRUCTIONS, CAL. SUPER. CT., CALIFORNIA JURY INSTRUCTIONS, CRIMINAL § 8.77 (3d rev. ed. 1970).

39. A critic of section 308 might reply that if the object of that section is to ensure the conviction of defendants who had conscious *mens rea* it is overly broad and therefore violates both federal and state substantive due process. *See* Roe v. Wade, 410 U.S. 113 (1973); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 136-146 (1970).

the state's insanity defense.[40] The premise is that if an individual is mentally handicapped at the moment of crime it should make no difference whether his handicap is the product of disease or chemistry. The objections to the proposal are obvious. Most people can see moral or social differences between self-induced intoxication and mental disease. If intoxication were equated to insanity in a *M'Naghten* jurisdiction, then a drunken defendant would have a defense if he were incapable at the time of the crime of knowing what he was doing *or of knowing that what he was doing was wrong*. Even moderate drunkenness can seriously impair an individual's ethical sense—his knowledge and appreciation of right and wrong. The inhibitions, judgment and discretion of many people fail in early stages of alcoholic intoxication.[41] Furthermore an insanity-type test would not be limited to specific *mens rea* crimes; it would be available to any and all crimes. In sum, a voluntary intoxication defense modeled on the insanity defense would exonerate more defendants than is socially tolerable, especially in a jurisdiction having a liberal test for insanity.[42] No American jurisdiction has been willing to go further than allowing voluntary intoxication to provide a defense when it negates a mental element the actual existence of which is required by the definition of the crime charged.

The states that employ the capacity defense are likely to cast it in one or the other of two basic forms. Recent Pennsylvania law contains examples of both. *Graves* followed the traditional form[43] of the defense in which a distinction is made between specific *mens rea* crimes and general *mens rea* crimes. Voluntary drunkenness can render the defendant incapable of forming the requisite *mens rea* for the former but not for the latter. Crimes Code section 308 when originally enacted roughly followed the Model Penal Code[44] form of the defense. It did not speak in terms of "capacity" or of "specific *mens rea*" but simply provided:

> Intoxication or drugged condition are not, as such, defenses to a criminal charge; but in any prosecution for any offense, evidence of intoxication or drugged condition of the defendant may be offered by the defendant whenever it is relevant to negative an element of the offense.[45]

Some advantages that might be claimed for the traditional form are that since it has been around for a long time it speaks in language which, within each jurisdiction, has practical meaning to judges and lawyers and

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40. J. HALL, *supra* note 33, at 554. Professor Hall, although willing to concede a fully exculpating insanity-like defense to inexperienced drinkers, would not grant the same indulgence to experienced drinkers who had done persons harm on earlier occasions while intoxicated. The latter act recklessly when they voluntarily become drunk and that culpability justifies their conviction of crimes of recklessness committed in that condition. *Id.* at 552-57.

41. *See* note 37 and accompanying text *supra*.

42. *E.g.*, MODEL PENAL CODE § 4.01(1) (Proposed Official Draft, 1962).
A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

43. *See* note 5 and accompanying text *supra*.

44. MODEL PENAL CODE § 2.08(1) (Proposed Official Draft; 1962).

45. Act of 1972, No. 334 § 308 (current version at 18 PA. CONS. STAT. § 308 (1975)).

with which they are comfortable. Furthermore, it has functioned to restrict the availability of intoxication as a defense very substantially. By its terms it confines the defense to the specific mental elements of specific *mens rea* crimes. In practice, in many jurisdictions, relatively few crimes are recognized as specific *mens rea* crimes and hence eligible for the defense.

A Model Penal Code form of the defense can be supported by arguments that the specific *mens rea*-general *mens rea* dichotomy is artificial and obscure,[46] and gives insufficient effect to the fact of intoxication if the law's objective really is to deal with drunk and sober persons on the same footing. Under the Model Penal Code formulation, the courts do not use any intermediate classifying tool in deciding whether intoxication can provide a defense. Rather they look to all elements of the crime alleged to see whether any element has been or should be construed to require proof of some actual purpose, knowledge or other conscious mental state. If so, then evidence of intoxication is admissible for whatever value it may have in disproving the presence of that mental state.[47]

From what has been said, it is obvious that if a legislature enacts either the traditional or Model Penal Code capacity defense, the courts are left with the very considerable task of deciding whether particular crimes are subject to an intoxication defense. How should the courts go about deciding whether a particular crime is a specific *mens rea* crime—the traditional test—or that the crime includes a conscious mental element—the Model Penal Code test—if the legislative and prior judicial definitions do not unequivocally emphasize some conscious mental state or process as being essential for conviction? The problem is, of course, one of interpreting the statute proscribing the crime; the courts may weigh, along with the usual factors that go into statutory construction, all the policy considerations that favor or oppose recognition of an intoxication defense. The courts that use the traditional form of the defense seem to have an easier time of taking such policy considerations into account, perhaps because the principal utility of the specific *mens rea*-general *mens rea* dichotomy is to identify crimes that are eligible for the intoxication defense.[48] For example, they consistently refuse to extend the shelter of the specific *mens rea* category to crimes that by their ordinary definitions require a high degree of conscious recklessness, *e.g.*, certain statutory degrees of murder.[49] On the other hand a court bound by the Model Penal Code defense as it appears in the original Crimes Code section 308 would probably have to conclude that gross drunkenness can negate conscious recklessness. In fact, to avert just that conclusion, the draftsmen of the Model Penal Code recommended that the statutory statement of the intoxication defense include the qualification that

46. J. HALL, *supra* note 33, at 441-45.
47. MODEL PENAL CODE 6-7 (Tent. Draft No. 9, 1959).
48. The dichotomy is also used in some jurisdictions in determining whether an honest (as opposed to an honest and reasonable) mistake of fact can provide a defense and whether mental abnormality short of legal insanity (diminished capacity) is available as a defense.
49. *See* Note, *Intoxication as a Criminal Defense*, 55 COLUM. L. REV. 1210, 1214-15 (1955).

"[w]hen recklessness establishes an element of the offense, if the actor, due to self induced intoxication, is unaware of a risk of which he would have been aware had he been sober, such unawareness is immaterial."[50]

Putting aside the differences between the traditional and Model Penal Code forms of the capacity defense, a number of advantages can be claimed for both forms as compared to the old common law's refusal to recognize voluntary intoxication as a defense. By allowing drunkenness or drugged condition to negate requisite mental elements they tend to deal with intoxicated and sober defendants in the same way. This is desirable because when the definition of a crime requires proof of a mental element the underlying reasons for requiring such proof will almost certainly be present whether the absence of the mental element was due to the defendant's voluntary intoxication or other causes. When the legislature in defining a crime makes a mental element essential for conviction, the reason is very likely to be that in the absence of such a state of mind neither the defendant nor his conduct are as culpable, injurious or threatening. Furthermore, the punishments authorized for the crime are also likely to reflect a legislative judgment that penalties of that severity are suitable, in terms of retribution, deterrence, prevention of recidivism or rehabilitation for defendants who have consciously broken the law.[51]

With respect to fears that a capacity defense will result in unwarranted acquittals because of false claims, difficulties of proof, and jury confusion, the advocates of the defense can argue that rationality and consistency of substantive doctrine should not be sacrificed because of problems of proof. Furthermore, many equally troublesome issues are regularly litigated before juries, such as insanity and voluntariness of confession. They can also point to widespread successful experience with the defense. The majority of states have allowed the defense for many years apparently without any adverse effects on the administration of justice. As a matter of fact until 1971, when *Tarver* told them they were wrong, the lower Pennsylvania courts had been applying a capacity defense to many specific intent crimes besides premeditated murder.[52] The Commonwealth survived.

D. Special Crimes

Another alternative available to a legislature is to create special crimes that can be committed by intoxicated persons who cause serious injury or engage in especially threatening or offensive conduct.[53] This sort of crime is not without precedent. For example, criminal statutes proscribing drunk-

50. MODEL PENAL CODE § 2.08(2) (Proposed Official Draft, 1962).
51. *See* MODEL PENAL CODE 7-8 (Tent. Draft No. 9, 1959). The members of the Advisory Committee that drafted the Model Penal Code's section on intoxication were divided on whether intoxication should be allowed its full relevance in negating an element of conscious recklessness. *Id.*
52. Smith, *supra* note 2, at 15, 27-28, 45.
53. *See* MODEL PENAL CODE 8 (Tent. Draft No. 9, 1959). J. HALL, *supra* note 33, at 553.

en driving and drunk and disorderly conduct are commonplace. Individuals who know from prior experience that they are troublemakers when under the influence might be singled out for harsher punishment.[54] Such "drunk and dangerous" crimes might be useful in a state with a liberal capacity defense. They would provide means for punishing a drunken offender in a situation where there is no appropriate criminal charge to which intoxication is not a defense.

Procedurally, in a case in which the prosecutor anticipated an intoxication defense he might obtain an indictment alleging the drunk and dangerous crime either alone or together with an ordinary offense. In the latter situation the jury would be told they must consider the crimes as alternatives and cannot convict the defendant of both. When the prosecutor did not foresee the intoxication issue and the indictment simply alleged an ordinary crime it would not be unfair to recognize the drunk and dangerous offense as a lesser included offense if the defendant pursued an intoxication defense.

E. Modified or Combined Approaches

A legislature need not be doctrinaire in its treatment of intoxication. Rather than simply opting for an old common law approach or one of the forms of the capacity defense already discussed or creating special crimes for intoxicated persons, it can further refine any one of these alternatives or combine two or more of them.

Consider the capacity defense. When applied to particular crimes it speaks in such terms as intent, conscious purpose, knowledge, and intoxication which renders the defendant incapable of the same. These terms do not refer to matters that are simply and inevitably matters of fact. They refer to psychological processes and states and therefore do have a factual aspect; but they also leave room for a policy judgment concerning the kind and quality of mental activity or condition that constitutes a legally significant intent, conscious purpose or the like. In other words, they have a legal dimension. If the legislature does not give further definition to these terms then the policy judgment is left to the courts. If the courts do not elaborate on the statutory definition then the policy judgment falls to that voice of the community, the jury.

A legislature could decide that, although it does not want to permit an unconscious or imputed *mens rea* to suffice for a drunken offender, it wants the jury to be told that he may be convicted on a lesser quality *mens rea*—*e.g.*, intent or knowledge at a lower level of awareness—than is required for a sober person. This treatment of intoxication represents a

54. One technique that might be used in a jurisdiction normally allowing a capacity defense would be to disallow the defense if the prosecutor proved that the defendant knew from prior experience that he was dangerous when drunk. In effect the jurisdiction would have a dual intoxication defense, a capacity defense for inexperienced or non-dangerous drinkers and the harsher old common law treatment for experienced, dangerous drinkers.

compromise between the usual capacity defenses and the old common law approach and reflects a different evaluation of the principles, policies and pragmatic consideration involved.

Some possible combinations of approaches have already been mentioned. For example, amended Crimes Code section 308, while basically adhering to the old common law, does permit the capacity defense in cases of premeditated murder. Section 2.08 of the American Law Institute's Model Penal Code excepts crimes involving conscious recklessness from the full benefits of its capacity defense. A legislature could consider the major crimes in its criminal code one by one, decide as to each whether the capacity defense should be allowed, and incorporate its decisions into the code. It has been pointed out that the courts that follow the capacity defense already do this. A legislature, however, has more freedom in making wise choices than a court constrained by precedent and principle. The ultimate question becomes: Would the legislature take the time and trouble needed for wise choices?

IV. Conclusions

The Pennsylvania Legislature in its 1976 amendment to section 308 of the Crimes Code treats the intoxication defense pretty much as it was dealt with under old common law. Amended section 308 is not only constitutional but satisfactory from the standpoint of principle and policy. There are other ways of dealing with the intoxication defense; most of them are acceptable. Both the traditional form of the capacity defense and the Model Penal Code form, when it includes the qualification regarding recklessness, are probably superior to amended section 308 on the whole, but not demonstrably so. A legislature's choice of the common law approach or one of the conventional formulations of the capacity defense is not likely to affect the result in many cases. The verdict and the justness of the verdict are much more likely to turn on the adequacy of the evidence, the persuasiveness of counsel, and the clarity of the court's instructions to the jury.[55]

55. On the defense of voluntary intoxication generally and the problems involved in charging a jury on that defense see Murphy, *The Defense of Voluntary Intoxication*, 9 A.B.A.L. NOTES 7 (1972); Murphy, *The Intoxication Defense: An Introduction to Mr. Smith's Article*, 76 DICK. L. REV. 1 (1971).

SUBCOMMITTEE DRAFT - APRIL 24, 1976

TO BE USED WHEN ACT NO. 32 (1976) IS APPLICABLE

§ 8.308A (Crim) VOLUNTARY INTOXICATION OR DRUGGED CONDITION NO DEFENSE

(1) Voluntary (intoxication) (drugged condition) is not a defense to a criminal charge. A person who voluntarily uses (intoxicants) (drugs) cannot become so (drunk) (intoxicated) (drugged) that he is for that reason legally incapable of committing a crime.

[(2) One of the elements of the crime of ——— is that the defendant had a certain mental state, that is the defendant (intended ———) (knew ———) (———). A defendant cannot be guilty of the crime of ——— unless he had that state of mind at the time of the alleged crime. However, in the case of a voluntarily (intoxicated) (drugged) defendant it is not necessary that the defendant be conscious or aware of his own state of mind. It is enough if the required mental state is present somewhere in his (drunken) (intoxicated) (drugged) mind or is expressed in his acts.]

(3) Thus if you are satisfied beyond a reasonable doubt that the defendant committed a particular crime as I defined it in my instructions you should find him guilty of that crime even though you believe he was (intoxicated) (drugged) at the time.

SUBCOMMITTEE NOTE

This instruction is appropriate when the defendant is charged with any crime other than first degree murder, and there is evidence that the defendant was voluntarily intoxicated from the consumption of alcohol or drugs. Subdivisions (1) and (3) constitute a basic instruction of general applicability. Subdivision (2) may be used when the defendant is charged with a crime that includes one or more mental elements which gross intoxication might otherwise negate, e.g., arson, burglary, receiving stolen property. If subdivision (2), or a similar instruction is not given in such a case, the jury will have no guidance on how to resolve the conflict between the normal definition of the crime and the principle that voluntary intoxication is no defense. When subdivision (2) is used it will ordinarily be desirable to include an instruction on proof of intent, knowledge or other mental state by circumstantial evidence, e.g., by the acts and behavior of the defendant and the surrounding circumstances. . . . [Balance of Note omitted.]

APPENDIX

SUBCOMMITTEE DRAFT - APRIL 24, 1976

TO BE USED WHEN ACT NO. 32 (1976) IS APPLICABLE

§ 8.308B (Crim) VOLUNTARY INTOXICATION OR DRUGGED CONDITION AS DEFENSE TO FIRST DEGREE MURDER

(1) The general rule is that voluntary (intoxication) (drugged condition) is not a defense to a criminal charge. Generally speaking, a person who voluntarily uses (intoxicants) (drugs) cannot become so (drunk) (intoxicated) (drugged) that he is for that reason legally incapable of committing a crime.

(2) The general rule is subject to a qualification when the crime charged is first degree murder. The defendant is permitted to claim as a defense that he was so (drunk) (intoxicated) (drugged) at the time of the killing that he did not possess the specific intent to kill required for first degree murder.

(3) The Commonwealth has the burden of disproving this defense. Thus, you cannot find the defendant guilty of first degree murder unless you are satisfied beyond a reasonable doubt that the defendant was not so (intoxicated) (drugged) at the time that he was incapable of judging his acts and their consequences or incapable of forming a wilful, deliberate and premeditated design to kill.

(4) Voluntary (intoxication) (drugged condition) may reduce a crime of murder from first degree to third degree. Voluntary (intoxication) (drugged condition) however is no defense to a charge of (third degree murder) (voluntary manslaughter) (————).

SUBCOMMITTEE NOTE

This instruction is appropriate when the defendant is charged with first degree murder and there is an issue of whether the defendant because of voluntary intoxication induced by alcohol or drugs was incapable of the necessary specific intent.

This instruction is based on Crimes Code §§ 308, 2502; *Commonwealth v. Haywood*, — Pa. —, 346 A.2d 298 (1975); *Commonwealth v. Rose*, 457 Pa. 380, 321 A.2d 880 (1974); *Commonwealth v. Tarver*, 446 Pa. 233, 284 A.2d 759 (1971).