Federal Probation

123144-123152

MARCH 1990

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

BY CHARLES J. FELKER
Associate, Hogan and Hartson, Washington, DC

Introduction

THE UNITED States Sentencing Commission declared in an initial policy statement that an offender's intoxication at the time of the crime is "not ordinarily relevant" to the determination of his sentence. However, our review of policy considerations in Part I found that offender intoxication is a relevant and important factor in sentencing decisions because intoxication is highly correlated with criminal activity and because alcohol abuse can be effectively treated in many cases.

Moreover, we found in Part I that there is no constitutional prohibition on either mitigating or aggravating the sentence of a convicted offender based on his intoxication at the time of the crime. Current theories suggest that even conduct associated with chronic alcoholism can be the basis for an aggravated sentence because such conduct, although it is very difficult to change, is within the offender's control.

Finally, we found that retribution, rehabilitation, and incapacitation, three major theories of punishment, justify the use of an offender's intoxication at the time of the crime as a mitigating factor in many cases. According to retributive theory, intoxicated offenders are less culpable than sober offenders because alcohol affected their decision to commit the crime. Rehabilitative theory also suggests that intoxicated offenders should receive mitigated sentences with required treatment because such offenders are more likely to be reformed of their criminal tendencies by treatment of their desire to drink. But, we also found that these theories of punishment would not justify mitigating the sentence—and might call for aggravating the sentence—of certain offenders. Offenders that have a history of repeated criminal conduct linked to intoxication know that their decision to become drunk is likely to lead to crime and are culpable on that basis. If these repeat offenders are not otherwise good candidates for rehabilitation, retribution, rehabilitation, and incapacitation theories would justify aggravated sentences.

In Part II, we will present the results of our survey of court cases in states where the issue of sentencing intoxicated offenders has been discussed. In these cases, state courts have applied rules consistent with our findings in Part I. State courts consider intoxication at the time of the crime to be relevant and important in determining the appropriate sentence. These state court decisions support the proposition that intoxication should be available as a mitigating factor to the extent that intoxication impaired the offenders capacity to appreciate the wrongfulness of his conduct at the time of the crime. However, if the offender's intoxication has repeatedly resulted in criminal conduct to the extent that defendant's decision to become drunk is equivalent to a decision to commit crime, then the offender's intoxication can be an aggravating factor unless the offender is otherwise a good candidate for rehabilitation. These rules are delineated in more detail in our proposal at the end of Part II. The results of our survey of state law are summarized in tables 1 and 2.

Survey Method

State criminal courts face daily the problem of intoxicated people who commit crimes. Unfortunately, much of the reasoning employed by these courts in dealing with this problem is not available to us. Trial court opinions are not published, and many states do not provide appellate review of legally imposed sentences.[1] Thus, the results of our study are limited to what appellate courts have held in some states that do provide such review. We reviewed the statutes and case law of 30 states[2] of which 22 had addressed the issue of intoxication as a factor at sentencing. Seventeen of these states had dealt with this issue in some detail in the development of their common law.

*Part I of this article appeared in the December 1989 issue of *Federal Probation*.

[1] *See*: American Bar Association, *Standards Relating to Appellate Review of Sentences*, (1967); Gerhard O. W. Mueller, *Penology on Appeal: Appellate Review of Legal but Excessive Sentences*. 15 Vand. L.Rev. 671 (1962).

[2] We selected these states from lists of states which provide appellate review of sentences. As these lists turned out to be out of date, we cannot be certain that we included all the states that provide such review in our survey.

We focused our attention on intoxication as a mitigating or an aggravating factor at state sentencing hearings and as a reason for an upward or downward departure from a presumptive sentence supplied by a guideline system. A brief summary of the findings of our survey follows.

Only six of the states in our survey have specifically addressed by statute the issue of sentencing offenders who were intoxicated at the time of the crime (see table 1). Two states explicitly provide either by statute or by judicial construction of a statute that voluntary intoxication at the time of the crime is a mitigating factor.[3] Three other states, by statute, exclude intoxication as a mitigating factor at sentencing[4]; however, courts in these states have nullified such statutes and continue to consider intoxication as an important factor in sentencing.

All of the other states in our survey have a general statutory mitigating factor—either in their death penalty sentencing laws or in their general sentencing rules—which would arguably be satisfied by the intoxication of the defendant at the time of the crime.[5] But these other state statutes do not specifically address the issue of offender intoxication at sentencing and neither specifically include nor specifically exclude consideration of this issue.[6] At capital sentencing proceedings, eight states specifically provide by statute that intoxication satisfies the general mitigating factor (see table 2).[7]

Of the eleven states that do not specifically address this issue by statute, four consider intoxication a mitigating factor at sentencing, but find a history of substance abuse linked with crime or a history of failure in treating the substance abuse problem an aggravating factor.[8] Six states consider intoxication a potential mitigating factor at sentencing but exclude intoxication from consideration as either mitigating or aggravating where the defendant has a history of substance abuse linked to crime or a history of failure in treating the substance abuse problem.[9]

TABLE 1. INTOXICATION AS AN AGGRAVATING OR A MITIGATING FACTOR AT A GENERAL SENTENCING PROCEEDING

State	Statutory Mitigating Factor	Case Law Mitigating Factor	Case Law Aggravating Factor	Can Reduce Charge at Trial
Alaska	excluded	YES	YES	YES
Minn.	excluded	YES	YES	YES
Wash.	excluded	YES	YES	YES
Calif.	--	YES	YES	YES
Colo.	--	--	YES	YES
Ind.	--	YES	YES	YES
Ill.	--	YES	YES	YES
La.	YES	YES	YES	YES
Pa.	--	YES	YES	YES
Ariz.	--	YES	NO	YES
Fla.	--	YES	NO	YES
Idaho	--	YES	--	YES
Neb.	--	YES	NO	YES
N.J.	--	YES	NO	YES
N.C.	--	YES	NO	YES
Tenn.	--*	YES*	--	YES
Tex.	YES	YES	--	NO

-- neither included nor excluded. *See* 1989 Tenn. Statute discussed in "Some Important Limits," below.

[3]Louisiana and Texas. For a discussion of Tennessee, the sixth state that has a statute discussing intoxication, see "Some Important Limits," below.

[4]Alaska, Minnesota, and Washington.

[5]For example: Mitigating factors may include: Impaired capacity to appreciate the wrongfulness of defendant's conduct or to conform his conduct to the requirements of law; Substantial reasons for excuse not amounting to a trial defense; or a physical or mental condition that reduces culpability. Note: a recently enacted Tennessee statute excludes voluntary intoxication from serving as a basis for finding "impaired capacity." Tenn. Code Ann. § 40-35-113(8) (Michie Supp. 1989). But a prior Tennessee case implied that voluntary intoxication could be mitigating factor where it was a substantial reason for excuse not amounting to a trial defense. *State* v. Leach, 684 S.W.2d 655, 660 (Tenn. Cr. App. 1984). *See also* "Some Important Limits," below.

[6]*But see* discussion of Tennessee in "Some Important Limits," below.

[7]In 1983, Maryland repealed a provision that included intoxication as a condition that could satisfy an "impaired capacity" mitigating factor in Maryland's capital sentencing statute. However, in a preamble to the repealing legislation, the General Assembly stated that it intended that intoxication remain as a potential mitigating factor—among other factors—at capital sentencing proceedings. 1983 Md. Laws, Chapter 296; Md. Code Ann. Art. 27, § 413(g) (4) (1987).

[8]California, Indiana, Illinois, and Pennsylvania. Colorado courts have not discussed whether intoxication is a mitigating factor at a general sentencing proceeding.

[9]Arizona, Florida, Idaho, Nebraska, New Jersey, and North Carolina.

TABLE 2. STATUTORY MITIGATING FACTORS AT CAPITAL SENTENCING PROCEEDINGS

Is Intoxication Included as a Mitigating Factor?	
Ariz.	--
Ark.	--
Calif.	YES
Colo.	YES
Conn.	--
Fla.	--
Ga.	--
Idaho	--
Ill.	--
Ind.	YES
La.	YES
Md.	--*
Mass.	YES
Neb.	YES
N.J.	YES
N.C.	--
Okla.	--
Ore.	--
Pa.	--
Tenn.	YES
Tex.	--
Wash.	--

*See footnote 7.

Intoxication Is Relevant at Sentencing

The United States Sentencing Commission concluded that intoxication is "not ordinarily relevant."[10] The Sentencing Commission is wrong. Both the considerations in Part I and the results of our survey make clear that intoxication is an important factor to be considered in choosing an appropriate sentence.

Every state that we surveyed took into account an offender's intoxication at the time of the crime at sentencing. Indeed, courts in three of the states in our survey took account of the offender's intoxication in imposing sentence even though statutes in those states prohibited the consideration of intoxication as a mitigating factor. The fact that courts in these three states nullified statutes in order to continue to consider intoxication in setting a sentence demonstrates the unworkability of the Sentencing Commission's Policy Statement.

Statutes enacted in Alaska, Minnesota, and Washington limited intoxication as a reason for aggravating or mitigating a sentence. Courts in each of these states in effect nullified such statutes and considered intoxication as an important factor which at times mitigated and at other times aggravated sentences.

In Alaska's presumptive sentencing statutes, the language could not be clearer: "[v]oluntary alcohol or other drug intoxication or chronic alcoholism or other drug addiction may not be considered an aggravating or a mitigating factor."[11] Courts have nullified this statutory prohibition, however, by relying on the Alaska Constitution which requires that "[p]enal administration shall be based upon the principle of reformation and upon the need for protecting the public."[12] Courts, relying on this constitutional provision, have developed an indirect way of aggravating and mitigating the sentences of defendants with substance abuse problems where such action would serve the purposes of rehabilitation and incapacitation. Instead of departing from the presumptive sentence, Alaska courts increase or decrease the amount of time that must be served prior to parole eligibility. The result—a longer or shorter amount of time served for a substance abuser—is similar to what the result would be if substance abuse were a legal aggravating or mitigating factor.

In *Tucker* v. *State*,[13] the Alaska Court of Appeals wrote: "Although evidence of alcoholism and voluntary consumption of alcohol cannot be considered by a sentencing court as an aggravating or mitigating factor in and of itself,. . . such evidence may be considered to the extent that it reflects on a defendant's prospects for rehabilitation." The *Tucker* Court approved the sentencer's decision to give Tucker the maximum sentence in part because of his substance abuse problem combined with past convictions and failed attempts at treatment. In *Yerk* v. *State*,[14] the court approved a trial judge's decision to consider Yerk's substance abuse problem a mitigating factor (even though other aggravating factors required that his overall sentence be aggravated) because Yerk had made progress in treating his addiction; this mitigating factor was based on Yerk's good prospects for rehabilitation. But in two prior cases, the court had affirmed aggravated sentences for defendants that had histories of alcohol-related violence because they had poor prospects for rehabilitation and required incapacitation.[15]

The Minnesota Sentencing Guidelines also limit a sentencing judge's ability to consider voluntary drug or alcohol use at sentencing. The Minnesota Sentencing Commission rejects intoxication as a mitigating factor and as a reason for departing either upward or downward from the recommended guideline sentence.[16] In *State* v. *Loitz*,[17] the Minnesota Court of Appeals announced a major exception to the sentencing guidelines. The court affirmed an upward departure from the recommended sentence because Loitz was intoxicated at the time of the crime, noting that: "appellant has shown a callous disregard for the consequences of chemical use. While intoxication at the time of the offense is not a valid factor [under the guidelines], a history of chemical abuse and disregard for its effects is a valid factor to consider." The court thus appeared to hold that although intoxication was barred from consideration, conduct associated with alcoholism could be an aggravating factor.[18]

The Minnesota Supreme Court took advantage of this *Loitz* exception in two later cases. In *State* v. *Garcia*,[19] the Supreme Court affirmed an up-

---

[10]United States Sentencing Commission, *Sentencing Guidelines*, § 5H1.4 (Policy Statement).

[11]Alaska Stat. § 12.55.155(g) (1984).

[12]Article I, § 12, Alaska Constitution.

[13]721 P.2d 639, 643 n. 1 (Alaska App. 1986).

[14]706 P.2d 341, 342 (Alaska App. 1985).

[15]*Bloomstrand* v. *State*, 656 P.2d 584, 590-91 (Alaska App. 1982); *State* v. *Ahwinona*, 635 P.2d 488, 492 (Alaska App. 1981).

[16]Minn. Sentencing Guidelines II.d.2.a(3) and Comment II.D.201 (1989).

[17]366 N.W.2d 744, 747, *review denied*, (Minn. July 17, 1985).

[18]*Note*: The court could have justified an upward departure in this case because intoxication was an element of the instant offense, reckless driving, but it did not rely on this analysis.

[19]302 N.W.2d 643, 646 (Minn. 1981).

ward durational and dispositional departure from the guidelines in part because Garcia had a chemical dependency, a history of antisocial acts, and a record of failure in treating his addiction. In *State* v. *Trog*,[20] the Supreme Court affirmed a downward durational and dispositional departure from the recommended guideline sentence because Trog, who was intoxicated at the time of the crime, had no prior convictions and was a good candidate for rehabilitation. The court did not explicitly rely on Trog's intoxication in justifying the departure.

More recently, in *Jackson* v. *State*,[21] the Supreme Court adopted a new rule. Jackson had a severe chemical dependency, a long juvenile record, and prior failures in treatment programs. The sentencer had departed both dispositionally and durationally giving Jackson an aggravated prison term. The Supreme Court modified this sentence and declared the following rule: "Factors such as prior failures in treatment and a defendant's drug use or dangerousness are factors which can be considered in determining whether to depart dispositionally but may not be considered as grounds for a durational departure."

The Washington State Sentencing Guidelines exclude the voluntary use of drugs and alcohol as a reason for mitigating a sentence or departing downward from the recommended guideline sentence.[22] Like the Minnesota courts, Washington courts made an exception to this prohibition in order to allow evidence of substance abuse to be considered at sentencing. In *State* v. *Weaver*,[23] the Washington Court of Appeals explicitly adopted the holding in *State* v. *Loitz*, *supra*, and held that although drug and alcohol use was excluded from consideration, a history of substance abuse plus a disregard for its effects was an aggravating circumstance; the court affirmed an upward departure in such a case. In a later case, *State* v. *Ward*,[24] the court held that it was not error for the sentencer to consider Ward's alcoholism as a potential mitigating factor. The court did not discuss the merits of the issue of whether the statutory bar on evidence of intoxication extended to evidence of alcoholism or addiction.

Thus, despite clear attempts by state legislatures to preclude consideration of intoxication or alcoholism as factors at sentencing, courts have either ignored the statutory preclusion in the name of the purposes of sentencing enshrined in the state constitution (Alaska) or carved exceptions to the statutory language in order to allow courts to weigh evidence of a defendant's past history of substance abuse. Clearly sentencing tribunals believe that intoxication is an important factor to weigh in determining sentence.

Intoxication That Impairs Capacity to Appreciate Criminality Is a Mitigating Factor

Now that we have seen that intoxication is relevant, we must ask: Should intoxication be aggravating or mitigating? The results of our survey of state law reveal that judges generally consider intoxication at the time of the crime to be a mitigating circumstance. All but one of the 17 states that have published opinions about intoxication at sentencing have allowed intoxication to be a mitigating factor in some cases (see table 1)[25] Out of all the states included in the survey, eight *only* allow intoxication to mitigate a sentence—not to aggravate—whereas nine states allow intoxication to aggravate in certain circumstances discussed below. In addition, eight of the states in our survey included in their death penalty statutes provisions that make intoxication a mitigating factor where it impairs the actor's capacity to conform his conduct to the requirements of the law.[26] We can see no principle that would make intoxication a mitigating factor only at a capital sentencing but not at other sentencing proceedings. A brief description of the case law of four of the eight states that provide that intoxication can only be a mitigating factor at sentencing follows.[27]

The North Carolina Supreme Court has included intoxication among the circumstances that can establish the mitigating factor of impaired capacity in death penalty cases. The Supreme Court relied in part upon the Model Penal Code in justifying this rule.[28] In *State* v. *Ragland*,[29] the North Carolina Court of Appeals held that intoxication and addiction could qualify as "a mental or

---

[20]323 N.W.2d 28, 29-31 (Minn. 1982).

[21]329 N.W.2d 66, 67 (Minn. 1983).

[22]Wash. Rev. Code Ann. § 9.94-A. 390 (1) (e) (1988); The Guidelines further provide that a sentencer should only consider factors relevant to the crime itself or to the offender's prior record. Wash. Rev. Code Ann. § 9.94-A.340 (1988). This provision suggests that substance abuse should not be a reason for departure upward or downward.

[23]*State* v. *Weaver*, 46 Wash. App. 35, 729 P.2d 64, 68-69, *review denied*, 107 Wash.2d 1031 (1987).

[24]49 Wash. App. 427, 743 P.2d 853, 855-56 (1987).

[25]*Note*: Colorado, the one state that does not provide that intoxication is a general mitigating factor, has not excluded intoxication from consideration; Colorado courts simply have not discussed the issue. *See also*: discussion of Tennessee in "Some Important Limits," below.

[26]*See*: Table 2; Colorado simply makes the influence of drugs or alcohol an automatic mitigating factor in death penalty cases. Colo. Rev. Stat. § 16-11-103(5) (i) (1986).

[27]Case law of the other four states is discussed below.

[28]*State* v. *Moose*, 310 N.C. 482, 313 S.E.2d 507, 518-19 (1984); *State* v. *Irwin*, 304 N.C. 93, 282 S.E.2d 439, 447-48 (1981); N.C. Gen. Stat. § 15A-2000(f) (6) (1988).

[29]80 N.C. App. 496, 342 S.E.2d 532, 533-34 (1986).

physical condition that reduces culpability" or reduces capacity under the state's sentencing statute.[30] The court thus held that the sentencing court would have to decide at its discretion whether the intoxication indeed reduced capacity.

The Idaho Supreme Court also follows the rule that intoxication is a proper mitigating factor where it impairs capacity. The court supports this approach in a death penalty case as being consistent with the Model Penal Code.[31] But, in a later case, the Idaho Supreme Court made clear that such mitigation is not appropriate in every case. In *State* v. *Martinez*,[32] the defendants, brothers, brutally raped their young cousin. The trial court sentenced them to fixed terms of imprisonment in excess of 75 years. The Idaho Appeals Court held that these sentences were excessive because the trial court had relied exclusively on retribution in setting the sentences and had failed to consider the defendants' potential for rehabilitation.[33] The defendants had admitted past problems with alcohol and were intoxicated at the time of the crime. The court noted that "[t]he influence of alcohol weighed heavily in this case."[34] Defendants also had juvenile records and misdemeanor convictions.[35]

The Idaho Supreme Court reversed and held that the trial court's failure to consider defendants' potential for rehabilitation was not an abuse of discretion.[36] However, the court invited the trial court to reconsider the sentences, on defendant's motion, in light of all four purposes of sentencing, including rehabilitation.[37] The trial court refused to modify the original sentences, and the Idaho Supreme Court affirmed.[38] The court approved the trial court's refusal to allow any mitigation of the sentences because the other purposes of sentencing, particularly general deterrence, overrode defendants' rehabilitative needs.[39] In a concurrence, Bistline, J., stated that although "ingestion of drugs and alcohol, . . . resulting in impaired capacity to appreciate criminality of conduct, *could be* a mitigating circumstance,"[40] "[o]ur opinion today now makes it crystal clear that criminal conduct short of murder does not in all instances require consideration of rehabilitation—which is likely a sign of the times.[41]

The Arizona Supreme Court held in *State* v. *Jordan*,[42] that intoxication must be available as a potential mitigating factor in death penalty cases under the statutory mitigating factor of impaired capacity. In *State* v. *Suniga*,[43] the court held that intoxication was a potential mitigating factor for all crimes, not just death penalty cases, and that it was an actual mitigating factor where it impaired the defendant's capacity to appreciate the wrongfulness of his conduct. The court was careful to note, however, that intoxication could only mitigate in cases where it indeed did impair the defendant's capacity to conform his conduct to the law. In *State* v. *de la Garza*,[44] the Arizona Court of Appeals held that defendant's intoxication would not count as a mitigating factor because he had a prior criminal record and several failures in treatment programs; the court cited the purpose of incapacitation.

Nebraska has a death penalty mitigating factor of impaired capacity resulting from mental disease or intoxication.[45] The Nebraska Supreme Court, however, has chosen not to apply this mitigating factor automatically in non-capital cases. The Supreme Court has held that if a defendant purposely becomes intoxicated knowing that he is likely to commit crime in that condition and if he has a history of substance abuse, then intoxication will not count as a mitigating factor, but it will not be an aggravating factor either.[46] But, in Nebraska, successful completion of an alcohol treatment program can mitigate even where the defendant has a history of substance abuse and crime.[47]

Intoxication That Results in Repeated Criminal Conduct Can Be an Aggravating Factor Unless the Offender Is a Good Candidate for Rehabilitation

We noted in Part I that conduct associated with intoxication, even when it results from

---

[30] N.C. Gen. Stat. § 15A-1340 4 (a) (2) (d) and (e) (1988).

[31] *State* v. *Osborn*, 102 Idaho 405, 631 P.2d 187, 196 n.5, 197 (1981).

[32] 109 Idaho 61, 704 P.2d 965, *reversed*, 111 Idaho 281, 723 P.2d 825, *denial of motion for reduction of sentence affirmed*, 113 Idaho 535, 746 P.2d 994 (1987).

[33] 704 P.2d at 972.

[34] *Id.*

[35] *Id.*

[36] 723 P.2d at 828.

[37] *Id.*

[38] 746 P.2d 994.

[39] *Id.* at 995-996.

[40] *Id.* at 996 n.1 [citation omitted] [emphasis added].

[41] *Id.* at 997 [emphasis original].

[42] 126 Ariz. 283, 614 P.2d 825, 832 n. 5 (1980) *cert. denied*, 449 U.S. 986 (1980).

[43] 145 Ariz. 389, 701 P.2d 1197, 1202-1203 (Ariz. App. 1985).

[44] 138 Ariz. 408, 675 P.2d 295, 296 (Ariz. App. 1983).

[45] Neb. Rev. Stat. § 29-2523(2) (g) , and § 29-2521 (1985). *See also*: *State* v. *Reeves*, 216 Neb. 206, 344 N.W.2d 433, 448 (1984), *cert. denied*, 469 U.S. 1028 (1984).

[46] *State* v. *Turner*, 221 Neb. 852, 381 N.W.2d 149, 153 (1986); *State* v. *Gamron*, 186 Neb. 249, 182 N.W.2d 425, 426-427 (1970).

[47] *State* v. *Dobbins*, 221 Neb. 778, 380 N.W.2d 640, 642 (1986).

chronic alcoholism, can legitimately be punished. A state might choose to discourage intoxication in any number of ways because intoxication tends to increase crime rates.[48] Thus, we can see several reasons for providing that intoxication could be an aggravating factor at sentencing in some cases. When chronic alcoholics have become a continuing danger to society, incapacitation theory might call for a long prison term or forced inpatient treatment. Moreover, when an individual continues to persist in conduct he knows to be culpable, or when becoming intoxicated is itself a *malum in se* act because he knows that harm will result, retributive theory also might call for an aggravated sentence. Our analysis in Part I thus provides us with a general outline of an exception to the rule that intoxication should be a mitigating factor where it impairs capacity: Intoxication should be an aggravating factor if the offender has a substantial history of intoxication linked to criminal activity, unless he is otherwise a good candidate for rehabilitation. The six states surveyed below have applied this exception.

In 1979 in *People* v. *Simpson*,[49] the California Court of Appeals addressed a very sympathetic case involving a chronic alcoholic. Simpson was convicted of two burglaries. He was an alcoholic who, after sharing 10 quarts of beer and a fifth of rum, broke into a liquor store and stole liquor and cigarettes. The police found Simpson by following a trail of broken bottles from the liquor store.[50] The Court of Appeals held that the trial court had erred in failing to consider intoxication as a possible mitigating circumstance under a California law which made a "physical condition that reduced culpability" a mitigating factor.[51] *Simpson* was followed by a series of cases that distinguished it and found long-standing addiction combined with a failure to deal with the addiction to be an aggravating factor.[52] In *People* v. *Reyes*,[53] the court reconciled these cases and introduced a new rule.

> Alcoholism or drug addiction may be regarded as a 'mental or physical condition'; but a separate finding that the condition significantly reduced culpability or partially excused the conduct must be made. Where those or any other substance abuse problems are out of control, and the defendant either engages in crime to support his substance abuse habit, or uses that habit as an excuse or explanation for continued criminal conduct [footnote omitted], and the defendant shows little incentive or ability to change, the substance abuse habit does not 'significantly reduce' his culpability for the crime, nor does it make the criminal conduct 'partially excusable'. . .
>
> Indeed, where, . . . the substance abuse problem has led to behavior described as aggravating factors [in the penal code], such as a pattern of criminal conduct dangerous to society, violations of parole or probation, and unsatisfactory performance on probation or parole, the addiction or alcoholism is properly considered as part of those aggravating factors because it suggests a high probability of further depredations on the public whenever the defendant is again out of custody.

The *Reyes* court declared that in certain cases intoxication should be an aggravating factor at sentencing; however, the court provided that if an offender has successfully undergone treatment for his substance abuse problems, then his intoxication might, nonetheless, be a mitigating factor. The court stated:[54]

> We can readily conceive of defendants who have made a serious effort to cope with their substance abuse problems but who, having committed a crime during a time of relapse, might well be considered for a lower term [of imprisonment].

Thus California law makes intoxication a mitigating factor where it impairs capacity, subject to an exception for offenders who have demonstrated their dangerousness to the community unless they are otherwise good candidates for rehabilitation.[55]

Like California, Illinois courts have generally considered intoxication to be a mitigating factor but have recently created an exception that allows chronic alcoholics that have long criminal records to receive aggravated sentences. In *People* v. *Walcher*,[56] defendant, a chronic alcoholic, had consumed nine beers and one mixed drink while traveling with two friends. When the three ran out of money to purchase more alcohol, one of defendant's friends suggested robbing a liquor store. Defendant proceeded to rob a store, killing the store owner in the process.[57] The trial court imposed the death penalty. The Illinois Supreme Court reduced defendant's sentence to 40 to 60 years. The court stated that "[t]here is evidence in the record that appellant was a chronic alcoholic and that he was very responsive to suggestion after drinking."[58] The court also noted that defendant's alcoholism explained many of his prior arrests.[59] The *Walcher* precedent was expanded by the Illinois Court of Appeals in several

---

[48] *See* "Does Alcohol Contribute to Crime" in Part I.

[49] 90 Cal. App.3d 919, 154 Cal. Rptr. 249 (1979).

[50] 154 Cal. Rptr. at 251.

[51] *Id.* at 254; Cal. Rules of Court, Rule 423 (b) (2) (1989).

[52] *People* v. *Regalado*, 108 Cal. App 3d 531, 166 Cal. Rptr. 614 (1980); *People* v. *Lambeth*, 112 Cal. App.3d 495, 169 Cal. Rptr. 193 (1980); *People* v. *Reid*, 133 Cal. App.3d 354, 184 Cal. Rptr. 186 (1982).

[53] 195 Cal. App.3d 957, 240 Cal. Rptr. 752, 756 (1987), *review denied*, (January 6, 1988).

[54] *Id.* at 756; *See also*, *Yerk* v. *State*, 706 P.2d 341 (Alaska App. 1981).

[55] *See also*: *State* v. *Dobbins*, 380 N.W.2d 640, 642 (Neb. 1986) discussed above.

[56] 42 Ill.2d 159, 246 N.E.2d 256 (1969).

[57] 246 N.E.2d at 258-259.

[58] *Id.* at 259.

[59] *Id.* at 260-261.

later cases. In *People* v. *Treadway*,[60] the Court of Appeals wrote:

> We must look beyond the court's findings, however, to examine defendant's potential for rehabilitation. The record reveals that defendant was a 24-year-old high school dropout who had been physically abused as a child and had suffered from a drug and alcohol problem since the age of 14. Significantly, prior to the instant conviction, he had only a minor criminal history. These present offenses, though serious, were perpetrated in a fleeting moment of intoxicated rage upon a stranger.
>
> . . .We conclude that the total circumstances of this particular case indicate that the 60-year sentences imposed on defendant are not warranted. We believe that defendant has a rehabilitative potential that would be poorly served by such a long sentence. A lower sentence will allow defendant at least the possibility of being restored to a meaningful, productive life. . . .

Likewise, in *People* v. *Goodman*,[61] the Court of Appeals held that:

> [F]ailure of trial court to consider, in sentencing defendant to natural life for murder and 6 years for armed robbery, fact that defendant was physically dependent upon alcohol, or evidence demonstrating rehabilitative potential. . . was an abuse of discretion and therefore, defendant was entitled to resentencing.

The Goodman court relied upon a provision of the Illinois Constitution which requires that the rehabilitative potential of a defendant be considered in determining sentence.[62] Finally, in a recent case, the Illinois Court of Appeals held that imprisonment of an addict-defendant constituted reversible error where that defendant was a good candidate for probation plus drug treatment.[63]

In another case, the court required resentencing because the trial court had not permitted defendant to introduce evidence that "personal reversals and frustrations had driven him to drink."[64] In *People* v. *LaPointe*[65] the Illinois Appeals Court reduced defendant's sentence from "natural life" to 60 years, because defendant, who was young and did not have a history of violence, "needed some kind of help and was heavily involved in drugs." But, the Supreme Court reversed and restored the life sentence. The Supreme Court held that the Appeals Court had had no authority to reduce the sentence because the trial court had not abused its discretion in imposing the original sentence.

As the *LaPointe* opinion implicitly suggests,[66] Illinois courts do not always find intoxication or drug dependence to be a mitigating factor. Indeed, Illinois judges have found alcohol dependence to be an aggravating factor also in the name of rehabilitation. In *People* v. *Horn*,[67] defendant was charged with arson for setting fire to his father's shed. Noting that defendant had been an alcoholic for 12 years and that he had several prior convictions related to his alcoholism, the court sentenced defendant to 2 to 20 years in prison. At sentencing, the court explicitly referred to its hope that a long prison stay might cure the defendant of his alcoholism since defendant's uncle had been cured of the same malady after spending a year in prison. Defendant appealed claiming that his sentence was excessive. The Appeals Court, noting that "[c]om-pulsory withdrawal from access to alcohol or the prospect of incarceration may promote an alcoholic's desire to accept and respond favorably to treatment[,]"affirmed the sentence and stated:[68]

> We are of the opinion that the trial court in the instant cause based its determination of the defendant's potential for rehabilitation on proper factors. . . . The record demonstrates that the trial court was justified in imposing a long maximum sentence as an inducement to the defendant to discontinue his addiction to alcohol and the criminal activities he engaged in which were related to that addiction. As such, the maximum sentence imposed was not excessive and not an abuse of discretion by the trial court.

Although Illinois law clearly allows substance abuse to count as an aggravating factor in cases like *Horn*, a trial court cannot give a defendant the maximum sentence based solely upon his substance abuse problem. Other aggravating factors must also be present in addition to substance abuse in such cases. In *People* v. *Blumstengel*,[69] the court required resentencing because a trial judge, who had given defendant the maximum sentence, "was concerned almost exclusively with defendant's addiction to alcohol rather than with his criminal conduct."

Likewise, the Indiana Supreme Court, on grounds of rehabilitation, approved a trial court's refusal to mitigate the sentence of an alcoholic defendant because "he has a history of criminal activity involving violence after the consumption of alcoholic beverages and . . . prior terms of probation have failed to deter his criminal activity."[70]

An Indiana statute provides that any excuse which falls short of satisfying a trial defense may be introduced as a mitigating factor at sentencing.[71] The Indiana Supreme Court in *Gibson* v.

---

[60]138 Ill. App.3d 899, 486 N.E.2d 929, 933 (1985).

[61]98 Ill. App.3d 743, 424 N.E.2d 663, 668 (1981).

[62]Article 1, Section 11, *Illinois Constitution* (1970).

[63]*People* v. *Cattaneo*, 147 Ill. App.3d 198, 497 N.E.2d 1363 (1986).

[64]*People* v. *Sterling*, 62 Ill.App. 3d 986, 379 N.E.2d 660, 664 (1978).

[65]85 Ill. App.3d 215, 407 N.E.2d 196, 203-204, *reversed*, 88 Ill.2d 482, 431 N.E.2d 344 (1981).

[66]*See*: 431 N.E.2d at 349.

[67]65 Ill. App.3d 899, 383 N.E.2d 625, 626-627 (1978).

[68]383 N.E.2d at 627.

[69]61 Ill. App.3d 1016, 378 N.E.2d 401, 404 (1978)

[70]*Sylvester* v. *State*, 484 N.E.2d 1, 3 (Ind. 1985).

[71]Ind. Code Ann. § 35-38-1-7-c(4) (1985); *See also*: *Fugate* v. *State*, 516 N.E.2d 75, 81 (Ind. App. 4 Dist. 1987).

State,[72] held that intoxication can qualify as a mitigating factor under this statute at the discretion of the sentencer. In a later case, the Supreme Court held, however, that a history of criminal activity involving violence after consumption of alcoholic beverages combined with prior failures in treatment justified consecutive as opposed to concurrent sentencing and was in that sense an aggravating factor.[73]

In Louisiana, the State Supreme Court declared that intoxication is a mandatory mitigating factor where it impairs the defendant's capacity to conform to the requirements of law. The Supreme Court accomplished this ruling as a matter of statutory interpretation by reading the death penalty mitigating factor of impaired capacity as a result of mental disease or intoxication into the state's sentencing guidelines.[74] A recent Court of Appeals decision, however, allowed a history of addiction and related violence to militate in favor of imprisonment—a dispositional aggravating factor.[75]

The Pennsylvania Supreme Court has approved alcoholism as a proper factor to consider at sentencing.[76] Following the Supreme Court's lead, the Superior Court held that it was error for a sentencing court not to consider intoxication and a history of drug abuse as potential mitigating factors.[77] But the Superior Court in an earlier case had affirmed a sentencing judge's decision to reject probation and imprison a defendant who had failed in past attempts to rid himself of a substance abuse problem.[78]

The Colorado Supreme Court has held that a history of failure in dealing with a substance abuse problem which predicts future dangerousness can be an aggravating factor at sentencing.[79] Paradoxically, Colorado's death penalty statute declares that "the influence of drugs or alcohol" is a *per se* mitigating factor.[80]

Some Important Limits

So far we have determined the policy for considering intoxication at sentencing that makes the most sense given our findings in Part I and our survey of state law. A court should consider intoxication a mitigating factor where it impaired an offender's capacity to appreciate criminality except if the offender has repeatedly demonstrated his dangerousness to the community as a result of his intoxication and has refused to undergo treatment or failed repeatedly in treatment. We have also concluded that states could legitimately adopt this policy because criminal conduct associated with alcoholism can appropriately be regulated and punished. But we have not considered whether states are generally free to adopt any policy that they want. Could a state provide that intoxication must always be an aggravating factor? Leaving aside any constitutional arguments, we will consider the following limitations. First, states can chose the policy that they want for considering intoxication at sentencing provided that this policy does not contradict the policy for considering intoxication at trial. Second, states should try to avoid double counting of intoxication if they use it as an aggravating factor.

Consistency Between Mitigating Factors at Sentencing and Defenses Available at Trial. States are limited in how they treat intoxication at sentencing by how they treat intoxication at trial. The currently accepted model of the criminal process treats trial and sentencing as discrete stages which address different issues. The trial court weighs issues of liability or culpability, while the sentencer, taking liability for granted, determines the degree of punishment.[81] The sentencer, this current view holds, considers the purposes of sentencing, the seriousness of the offense, and the characteristics of the offender in setting the punishment.

Martin Wasik points out some difficulties with this currently accepted model and calls for a rethinking of the allocation of issues between trial and sentencing. Wasik notes that issues of culpability arise at sentencing as well as at trial.[82] Some important issues of culpability are arbitrarily barred from consideration at trial and should be taken into account at sentencing, Wasik

---

[72]275 Ind. 470, 417 N.E.2d 1111, 1113 (Ind. 1981). *See also*: *Burdine* v. *State*, 515 N.E.2d 1085 (Ind. 1987).

[73]*Sylvester* v. *State*, 484 N.E.2d 1, 3 (Ind. 1985).

[74]*State* v. *Lodridge*, 414 So.2d 759, 761 (La. 1982) For application of the *Lodridge* rule, *see State* v. *Shanes*, 493 So.2d 825, 829 (La.App. 2 Dist. 1986).

[75]*State* v. *Johnson*, 464 So.2d 1049, 1051 (La. App. 1 Cir. 1985).

[76]*Commonwealth* v. *Martinez*, 498 Pa. 387, 446 A.2d 899, 903 (1982).

[77]*Commonwealth* v. *Ruffo*, 360 Pa.Super. 180, 520 A.2d 43, 48 (1987).

[78]*Commonwealth* v. *Golden*, 309 Pa.Super. 286, 455 A.2d 162, 164 (1983).

[79]*People* v. *Hotopp*, 632 P.2d 600, 601 (Colo. 1981) (*en banc*).

[80]Colo. Rev. Stat. § 16-11-103 (5) (i) (1986).

[81]Martin Wasik, *Excuses at the Sentencing Stage*, 1983 Crim. L.Rev. 450, 451.

[82]*Id.*; *See also*: Herbert Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism,"* 83 Harv. L.Rev. 793, 800 (1970) ("A phrase like 'I couldn't control myself' or 'I had no choice' could report variously a strictly physical incapacity, unconsciousness, incapacity to conform due to mental illness, somnambulism, involuntary intoxication, extreme provocation, or [necessity]. . . Some of these circumstances could serve in some jurisdictions as a complete defense to criminal liability, others as complete defenses in certain factual contexts, or as partial 'defenses' in some degree mitigating culpability; others would have no legal effect but might mitigate punishment." [citations omitted])

argues. Lack of *mens rea* is barred as a defense to a strict liability crime, but might be an important consideration at sentencing.[83] Likewise, mistake of law, ignorance of law, and good motive are usually barred from trial but may be relevant at sentencing.[84]

In addition, Wasik notes that there are some issues relating to culpability which are not barred from consideration at trial, but which nonetheless are important considerations at sentencing. These are issues of incomplete or imperfect defenses introduced at trial. Provocation, duress, self-defense, and entrapment are defenses available at trial which could excuse a defendant from liability. But if a defendant fails to meet the standard of proof for such a defense at trial a sentencer may find the alleged defense mitigating to the degree that it was present. In particular, Wasik notes that one such imperfect trial defense which should have a "prior claim" on the attention of the sentencer because it raises the issue of culpability is intoxication.[85]

State laws in the United States differ over the issue of which stage is most appropriate for considering evidence of the intoxication of a criminal defendant. Although the Model Penal Code[86] and most of the states in our survey allow intoxication to be introduced both at the trial stage and at sentencing, Texas law provides a unique method for handling the excuse of intoxication. Texas statutes provide that evidence of temporary insanity caused by voluntary use of drugs or alcohol can mitigate a penalty but is not a defense at trial.[87] In *Hart* v. *State*,[88] the Court of Criminal Appeals clarified that in order to avail oneself, in a sentencing proceeding, of the mitigating factor of temporary insanity due to intoxication, a defendant must show that as a result of his intoxication, he did not know that his conduct was wrong, or he was incapable of conforming to the requirements of law.

Regardless of which stage states choose for considering the issue of intoxication, within each state, courts treat intoxication at sentencing in a way that is equitable given how this issue is treated at trial and in other parts of the state's code. For example, it would be unfair to allow intoxication to be a defense at trial but an aggravating factor at sentencing, but it is not unfair to disallow a defense at trial but allow a mitigating factor at sentencing as Texas does. Because different states have different rules for considering intoxication at trial they have different constraints on how their courts may consider the issue at sentencing. To illustrate this proposition we will compare the approach taken by five states.

The Alaska Court of Appeals holds that Alaska's statutory bar on consideration of intoxication at sentencing is consistent with how Alaska courts treat intoxication at trial. In *Wright* v. State,[89] the court stated:

> Legislative rejection of voluntary intoxication as a mitigating circumstance is consistent with the legislature's treatment of intoxication throughout the criminal code. For example, the legislature has precluded consideration of voluntary intoxication or chronic alcoholism in determining whether an individual acted 'knowingly,'. . . and 'recklessly'.

Unlike Alaska, Florida has adopted a different rule for consideration of intoxication at sentencing because it has a different rule for considering intoxication at trial. The Florida Supreme Court, in *Scurry* v. *State*,[90] held that since intoxication can negative an element of the offense at trial, it would be inconsistent to allow intoxication as a reason to increase a sentence by an upward departure.

Accordingly, in a more recent case, the Florida Supreme Court held that intoxication and drug dependency constituted permissible reasons for mitigating a sentence with a downward departure, but could not justify an upward departure. In *Barbera* v. *State*[91] the Court held that the Model Penal Code rule for admitting evidence of intoxication at trial amounted to a "defense of intoxication" that could be used by a jury to justify convicting a defendant of a lesser included offense.[92] For the sake of consistency, the Court felt constrained by the exculpatory effect of intoxication at trial to declare that intoxication could be considered as a mitigating factor but not as an aggravating factor at sentencing.[93] The Florida

[83] *See e.g. People* v. *Murray*, 72 Mich. 10, 40 N.W. 29, 31 (1888) (Defendant, charged with statutory rape, claimed that he was intoxicated at the time of the crime. Because statutory rape is a strict liability crime, defendant's state of mind was irrelevant at his trial, but evidence of defendant's intoxication could be considered as a potential mitigating factor at sentencing phase.) cited in *People* v. *Roberson*, 167 Mich. App. 501, 423 N.W.2d 245, 253 (1988).

[84] *Id.* at 455.

[85] *Id.* at 455, 463.

[86] American Law Institute, *Model Penal Code*. § 2.08. *See also*: Annotation, *Modern Status of the Rules as to Voluntary Intoxication as a Defense to Criminal Charge*. 8 A.L.R.3d 1236 (1966).

[87] Tex. Penal Code Ann. § 8.04(b).

[88] 537 S.W.2d 21, 24 (Tex. Cr. App. 1976).

[89] 656 P.2d 1226, 1227 (Alaska App. 1983).

[90] 489 So.2d 25, 29 (Fla. 1986).

[91] 505 So.2d 413 (Fla. 1987).

[92] *Id.*; *See also*: *Scurry*, 489 So.2d at 29; *Gibson* v. *State*, 417 N.E.2d 1111, 1113 (Ind. 1981).

[93] Three of the states in this survey provide by statute that imperfect trial defenses may be introduced as mitigating factors at sentencing. *See*: Ind. Code Ann. § 35-38-1-7-c(4) (1985); N.J. Stat. Ann. § 2c:44-1(b) (4) (1982); Tenn. Code Ann. § 40-35-113(3) (Michie Supp. 1989). *See also*: Cal. Rules of Court, Rule 423 (a) (4) (1989).

Supreme Court thus allows as mitigating factors at sentencing imperfect trial defenses[94] just like the Indiana statute and as suggested by the reasoning in Wasik's article, *supra*.

Like Indiana, New Jersey provides by statute that substantial grounds for excuse which do not amount to a trial defense may be considered as a mitigating factor at sentencing.[95] The New Jersey Supreme Court has held that voluntary intoxication is a potential mitigating factor at sentencing.[96] More recently, the New Jersey Superior Court held that voluntary intoxication is included as a grounds for excuse under the New Jersey statute discussed above.[97]

A former Tennessee statute used to provide that imperfect trial defenses would mitigate at sentencing.[98] In *State* v. *Leach*,[99] the Tennessee Court of Criminal Appeals implied that intoxication qualified as such an imperfect trial defense and could mitigate at sentencing. Then, Tennessee enacted the Criminal Sentencing Reform Act of 1989.[100] This Act retained the provision which makes imperfect trial defenses mitigating factors at sentencing.[101] But the Act added a new provision which excludes intoxication as a basis for establishing another mitigating factor—the factor that "[t]he defendant was suffering from a mental or physical condition that significantly reduced his culpability for the offense."[102] Thus, it is unclear whether Tennessee courts would continue to allow intoxication as a mitigating factor on the basis that it is an imperfect trial defense.

Double Counting. One further limitation on our policy for considering intoxication at sentencing should be noted at this point. If our attempt is to make intoxication an aggravating factor for certain repeat offenders who are most dangerous and most culpable, we should observe that these types of offenders will most probably already have long records of arrests or convictions. These past convictions and, in some cases, arrests are already taken into account at sentencing in many states,[103] and habitual offender statutes often drastically increase the penalties after three or more convictions. Thus if intoxication is an independent aggravating factor at sentencing, in some cases it might be counted twice: once for the prior criminal record related to this condition and once for the condition itself.

The problem of double counting was implicitly noted and explicitly compensated for in *Fugate* v. *State*.[104] Defendant in *Fugate* committed arson while intoxicated. He had a prior criminal record associated with incidents of intoxication. The trial court found four aggravating factors and no mitigating factors at defendant's sentencing proceeding. Among the aggravating factors were defendant's prior criminal record and defendant's poor prospects for rehabilitation because of his alcoholism.[105] Based on these aggravating factors, the trial court imposed the maximum sentence.

The Indiana Appeals Court held that the trial court had erred in imposing the maximum sentence for a number of reasons including the following. The trial court failed to consider seven mitigating factors including, defendant's intoxication at the time of the crime, the fact that much of defendant's criminal record was explained by his alcoholism, and the fact that since the time of his arrest for arson, defendant had acknowledged his alcoholism and enrolled in an alcohol treatment program.[106]

Conclusion

Given our findings in Part I and the results of our survey of state law, considered in Part II, we can now answer the question before us. An offender's intoxication at the time of the crime is an important factor for a sentencing judge to consider. Such intoxication should be a mitigating factor to the extent that it impairs the offender's capacity to appreciate the wrongfulness of his conduct. In some cases, however, in which the offender has a significant history of alcoholism linked to criminal activity and in which the offender has refused to undertake treatment for his

---

[94]In *State* v. *Salony*, 528 So.2d 404 (Fla. App.1988), *review denied* 531 So.2d 1355 (Fla. 1988), the Florida Supreme Court approved a downward durational departure based on defendant's "obvious and chronic drug abuse problem which caused him to commit the crimes for which he was being sentenced." *Id.* The court stated that drug dependency was a valid reason for reducing, but not for increasing, a sentence. *Id.* at 405.

[95]N.J. Stat. Ann. § 2C:44-1(b)(4) (1982).

[96]*State* v. *Stasio*, 78 N.J. 467, 396 A.2d 1129, 1136 (1979), *superceded on other grounds*, *State* v. *Cameron*, 104 N.J. 42, 514 A.2d 1302, 1305-1306 (1986).

[97]*State* v. *Merlino*, 208 N.J. Super. 247, 505 A.2d 210, 213 (1984). Note, however, that the New Jersey Supreme Court refused to apply *Merlino* to mitigate the sentence of a 24-year-old drug-dependent offender. *State* v. *Ghertler*, 114 N.J. 383, 555 A.2d 553, 556 (1989) ("We are not about to adopt the proposition that one who demonstrates that the motive for unlawfully acquiring the funds of another was to purchase cocaine has satisfied the mitigating factor of N.J.S.A. § 2C:44-1b(4).")

[98]Tenn. Code Ann. § 40-35-110(4), *superceded by* § 40-35-113 (3) (Michie Supp. 1989).

[99]684 S.W.2d 655, 660 (Tenn. Cr. App. 1984).

[100]*See* Tenn. Code Ann. § 40-35-101 *et seq.* (Michie Supp. 1989).

[101]Tenn. Code Ann. § 40-35-113(3) (Michie Supp. 1989).

[102]Tenn. Code Ann. § 40-35-113(8) (Michie Supp. 1989).

[103]*See*: *Williams* v. *New York*, 337 U.S. 241, 244 (1949); *Cf.* U.S. Sentencing Commission, *Sentencing Guidelines*, Chapter 4, § 4a1.3(d) and (e), and discussion at 4.8 - 4.9.

[104]516 N.E.2d 75 (Ind. App. 4 Dist. 1987).

[105]*Id.* at 79.

[106]*Id.* at 81; *See also*: *People* v. *Walcher*, 246 N.E.2d 256, 261-262 (Ill. 1969); *People* v. *Hotopp*, 632 P.2d 600, 601 (Colo. 1981).

alcoholism or has failed repeatedly in treatment, it may be necessary for the sentencing judge to consider the fact that the offender was intoxicated at the time of the crime to be an aggravating circumstance based upon the theories of incapacitation, retribution, and rehabilitation.

However, even in those cases in which it would be appropriate to treat the offender's intoxication as an aggravating circumstance, the sentencing judge should not find such an aggravating factor if under state law intoxication is generally a defense at trial or if finding such a factor would count the offender's criminal record against him twice. In keeping with our conclusions, we have drawn up the following proposal.

PROPOSAL

In cases in which the defendant is intoxicated at the time of the crime:

I. the trial court may consider defendant's intoxication a mitigating factor in determining the nature and length of the sentence IF:

A. the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of the intoxication, OR

B. the defendant qualifies as a good candidate for rehabilitation in an alcohol treatment program, and such rehabilitation is likely to reduce the defendant's tendency to commit crime.

II. The trial court may decide to consider defendant's intoxication an aggravating factor in determining the nature and length of sentence IF:

A. defendant has a substantial history of substance abuse linked to criminal activity, AND

B. defendant knew, or had reason to know, before becoming intoxicated that once intoxicated he was very likely to commit a crime so that his action in becoming intoxicated was a *malum in se* act, AND

C. defendant is not a good candidate for rehabilitation.

III. The court always has the power *not* to find the defendant's intoxication to be either mitigating or aggravating. It may be appropriate to follow this course if:

A. defendant committed the instant offense according to a plan conceived before he became intoxicated, OR

B. it would be unfair to defendant to find his intoxication an aggravating factor given the treatment of intoxication at trial under state law, OR

C. it would be unfair to defendant to find his intoxication an aggravating factor because his criminal record has already been considered an aggravating factor and his criminal record is explained by his alcoholism.

COMMENTARY

The proposal presupposes a sentencing hearing in which the trial judge considers several mitigating and aggravating factors of which substance abuse is only one. The judge then balances the mitigating factors against the aggravating factors in deciding the nature and length of the sentence. Such a system is currently employed in several states including Illinois, New Jersey, and North Carolina and in capital sentencing proceedings.

I.A. Intoxication or substance abuse would be a mitigating factor if it impaired the actor's capacity to appreciate the wrongfulness of his conduct. A person whose capacity is impaired, for whatever reason, is less responsible for his actions and thus less blameworthy. The wording of this provision is taken from the Model Penal Code's list of mitigating factors at capital sentencing.[107] This provision appears in capital punishment statutes in nine of the states in our survey. In addition, a general impaired capacity provision (with no mention of intoxication) is also used by several states in non-capital sentencing proceeding statutes.[108]

I.B. A defendant could qualify as a good candidate for rehabilitation if he has acknowledged his drinking problem and demonstrated a willingness to undergo treatment. For example, defendants who have successfully undergone treatment between the time they committed the instant offense and the time of sentencing are probably good candidates for rehabilitation.[109] Likewise, defendants who have successfully undertaken treatment for a period of time in the past but committed the instant offense as a failure on the way to success are also good candidates for rehabilitation. See the *Reyes*[110] and *Dobbins*[111] cases. Successful treatment of these offenders could be expected to remove the danger they once presented to the community.

Although intoxication at the time of the crime should be a mitigating factor where it impaired the defendant's capacity to appreciate criminality, in some cases a court may find such intoxication an aggravating factor. The provisions which follow describe the only situation in which a trial court may find such an aggravating factor. In essence, if the defendant has a long history of substance abuse and crime, incapacitation or retribution theories may persuade a judge to aggravate the sentence.

II.A. If a defendant has a long history of substance abuse linked with violence, and he has not acknowledged this problem or taken steps to treat it, the chances that he will commit more crimes in the future are very great.
Incapacitation theory in this case would call for increasing the offender's sentence.[112] Such a defendant may also require a longer sentence on the basis that it would take longer to rehabilitate him.

II.B. An offender who is "on notice" that he tends to commit crimes when intoxicated is culpable in becoming intoxicated according to retributive theory. His decision to become intoxicated can be substituted for his decision to commit crime.[113] In addition, an offender who is reckless in becoming drunk may be criminally liable on that basis.

III. A sentencing judge can always decide in an individual case not to consider defendant's intoxication either aggravating or mitigating. For example, if a defendant had dispassionately planned a crime and then became intoxicated in order to get up his nerve to carry it out as planned, then the intoxication did not impair his capacity to appreciate criminality and should not be a mitigating factor.[114] In addition, it may be

---

[107]Model Penal Code, *supra*, Art. 210.6(4) (g).

[108]*See*: Cal. Rules of Court, Rule 423(b) (2) (1989); Ariz. Rev. Stat. Ann. § 13-702(E) (2) (1989); N.C. Gen. Stat. § 15A-2000(f) (6) (1988); Neb. Rev. Stat. § 29-2521, § 29-2523(2) (g) (1985).

[109]*See*: *Fugate* v. *State*, 516 N.E.2d at 81.

[110]240 Cal. Rptr. 752, 756.

[111]380 N.W. 2d 640, 642.

[112]*See*: *Jackson* v. *State*, 329 N.W.2d 66, 67; *State* v. *de la Garza*, 675 P.2d 295, 297; *Com.* v. *Golden*, 455 A.2d 162, 164.

[113]*See*: *Koteles* v. *State*, 660 P.2d 1199, 1202; Model Penal Code § 2.08, comment 359; Wayne R. LaFave and Austin W. Scott, Jr., *Criminal Law*, (St. Paul, Minn.: West, 1986) at 393.

[114]LaFave and Scott, *supra*, at 391 n. 31.

appropriate to find the intoxication neither aggravating nor mitigating if the defendant falls into the category of offenders whose intoxication normally would be aggravating, but defendant's intoxication could have reduced the charge against him at trial. It may also be appropriate to withhold finding an aggravating factor if an aggravating factor based on defendant's past criminal conduct has already been found. In this way, double counting could be avoided.