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THE CRIMINAL RESPONSIBILITY OF CHRONIC ALCOHOLICS

A 1965 report estimates that there are 700,000 alcoholics in New York State.¹ Over sixty percent of the inmates of the Monroe County, New York, Penitentiary are alcohol offenders.² In 1963, Portland, Oregon, listed 11,000 alcohol-related crimes by 2,000 persons.³ These statistics illustrate the scope of the problem of alcoholism in the United States, where it is ranked fourth among major health problems, behind cancer, heart disease, and mental illness.⁴ Despite the fact that the members of the medical profession unanimously recognize alcoholism as a disease requiring clinical therapy and rehabilitation,⁵ until recently the law has treated the alcoholic as a criminal whenever he displays his disease in public.⁶

Recent Developments—A Change in Judicial Attitude?

A recent case in the District of Columbia, *Easter v. District of Columbia*,⁷ held that chronic alcoholism is a defense to the criminal charge of public intoxication.⁸ It follows two other recent federal decisions⁹ suggesting that a judicial trend reflecting modern medical and psychiatric knowledge may be developing. DeWitt Easter had been arrested seventy times since 1937 for alcohol-related offenses, twelve times in 1963 alone.¹⁰ In the present prosecution, Easter claimed that, as a chronic alcoholic, he could not be convicted of public intoxication,¹¹ since he would, in effect, be punished for displaying symptoms of an illness. The trial and intermediate appellate courts refused to accept this argument.¹² The court of appeals unanimously reversed the decision of the lower courts.¹³

The court of appeals relied first on an interpretation of two sections of the District of Columbia Code,¹⁴ which indicates that individuals who have lost the

¹ Report of the Task Force on Addictions, N.Y. State Planning Committee on Mental Disorders 11 (1965).

² *Ibid.*

³ Pittman, "The Chronic Drunkenness Offender: An Overview," Conference on the Court and the Chronic Inebriate 6 (1965).

⁴ Celebrezze, "Opening Remarks," HEW National Conference on Alcoholism at iii (1963), cited in *Easter v. District of Columbia*, 361 F.2d 50, 60 (D.C. Cir. 1966).

⁵ See Guttmacher & Weihofen, *Psychiatry and the Law* 318-22 (1952); Jellinek, *The Disease Concept of Alcoholism* 41-44 (1960); Pittman & Gordon, *Revolving Door, A Study of the Chronic Police Case Inebriate* 141 (1958); Keller, "Definition of Alcoholism," 21 *Quart. J. Stud. Alcoholism* 125 (1960); Moore, "Legal Responsibility and Chronic Alcoholism," 122 *Am. J. Psych.* 748 (1966).

⁶ See, e.g., N.J. Stat. Ann. § 2A:170-30 (1953); N.Y. Pen. Law § 1221 (McKinney Supp. 1966) which provides for the arrest and disposition of any person intoxicated in a public place. The courts are given discretion to release the offender, commit him to the board of inebriety, or impose fines and/or up to six months imprisonment for a first offense. Recidivist offenders may incur penalties up to three years in the penitentiary.

⁷ *Easter v. District of Columbia*, supra note 4.

⁸ "No . . . person shall be drunk or intoxicated in any street, alley, park . . ." D.C. Code Ann. § 25-128(a) (1961).

⁹ *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966); *Sweeney v. United States*, 353 F.2d 10 (7th Cir. 1965).

Driver has been extensively noted; see, e.g., Notes, 1966 *Duke L.J.* 545, 54 *Geo. L.J.* 1422 (1966), 44 *N.C.L. Rev.* 818 (1966), 18 *S.C.L. Rev.* 504 (1966); 3 *Tulsa L.J.* 175 (1966), 7 *Wm. & Mary L. Rev.* 394 (1966).

¹⁰ *Easter v. District of Columbia*, 361 F.2d 50, 55 (D.C. Cir. 1966).

¹¹ See note 8 supra.

¹² *Easter v. District of Columbia*, 209 A.2d 625 (D.C. Ct. App. 1965).

¹³ *Easter v. District of Columbia*, supra note 10. Four judges concurred in two separate opinions.

¹⁴ D.C. Code Ann. §§ 24-501 to 24-502 (1961).

power of self-control over the use of alcoholic beverages should be treated as sick persons rather than as criminals.¹⁵ Therefore, a chronic alcoholic cannot be punished for his drunkenness since he lacks "the ability to avoid the conduct specified in the definition of the crime"¹⁶ which is "an essential element of criminal responsibility"¹⁷

The case is perhaps more significant because of the court's second and, by its own statement,¹⁸ independent basis for the decision—that the punishment of chronic alcoholics for public intoxication constitutes cruel and unusual punishment in violation of the eighth amendment.¹⁹ This holding rests squarely on the authority and rationale of the recent Fourth Circuit opinion in *Driver v. Hinnant*,²⁰ where the court reversed the district court's denial of the defendant's habeas corpus petition.²¹ The North Carolina Supreme Court had previously upheld Driver's conviction for public intoxication,²² despite his chronic alcoholism.²³ The reversal was based on an extension of a United States Supreme Court ruling in *Robinson v. California*²⁴ that punishment of the "status" of dope addiction²⁵ violated the eighth amendment. Drug addiction was found to be a disease comparable to mental illness, leprosy, or venereal disease, any punishment of which would "be universally thought to be an infliction of cruel and unusual punishment"²⁶

Driver is somewhat different from *Robinson* since the North Carolina statute involved in *Driver* punished the *act* of public intoxication rather than the *status* of chronic alcoholism. The court found this act to be a "symptom" of the status of chronic alcoholism over which the defendant had no control and thus *Robinson* was deemed controlling. Punishing the involuntary symptoms of the status of chronic alcoholism was equally cruel and unusual.²⁷ Not all courts

¹⁵ "The purpose . . . is . . . to substitute for jail sentences for drunkenness medical and other scientific methods of treatment which will benefit the individual involved and more fully protect the public." D.C. Code Ann. § 24-501 (1961). For purposes of the statute, the alcoholic is defined as one who "chronically and habitually uses alcoholic beverages to the extent that he has lost the power of self-control with respect to the use of such beverages" D.C. Code Ann. § 24-502 (1961).

¹⁶ *Easter v. District of Columbia*, 361 F.2d 50, 52 (D.C. Cir. 1966).

¹⁷ *Ibid.* The court cited the Supreme Court's holding in *Morissette v. United States*, 342 U.S. 246 (1952) that even though a statute did not expressly require a "voluntary" commission of the prohibited act, the presence of "intent" may nevertheless be required for conviction.

¹⁸ *Easter v. District of Columbia*, supra note 16, at 52 n.6.

¹⁹ *Id.* at 54.

²⁰ 356 F.2d 761 (4th Cir. 1966).

²¹ *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966), reversing 243 F. Supp. 95 (E.D.N.C. 1965).

²² N.C. Gen. Stat. § 14-335 (1953 & Supp. 1965).

²³ *State v. Driver*, 262 N.C. 92, 136 S.E.2d 208 (1964).

²⁴ 370 U.S. 660 (1962).

²⁵ Cal. Health & Safety Code § 11721 (West 1964).

²⁶ *Robinson v. California*, 370 U.S. 660, 666 (1962).

²⁷ *Driver v. Hinnant*, 356 F.2d 761, 765 (4th Cir. 1966). The Supreme Court did not extend its decision in *Robinson* to include "symptoms" since the offense in that case did not require it. *Robinson v. California*, supra note 26, at 666. The opinion indicated that such offenses as sale or possession of narcotics might be punished. *Id.* at 664.

This extension of the *Robinson* theory was first suggested in *Sweeney v. United States*, 353 F.2d 10 (7th Cir. 1965), when petitioner's probation was revoked because he violated the condition that he remain sober. Since the record indicated that the district court knew of Sweeney's chronic alcoholism, the court of appeals indicated that "the probation condition . . . would be unreasonable [citing *Robinson*] as impossible if psychiatric or other expert testimony was to establish that petitioner's alcoholism has destroyed his power of volition and prevented his compliance with the condition." *Id.* at 11.

are prepared to accept the rationale adopted by *Driver* and followed in *Easter*. For example, a recent Michigan decision, *People v. Hoy*,²⁸ reached the opposite conclusion, upholding a conviction for public intoxication²⁹ despite a defense that the accused was a chronic alcoholic.³⁰

The Supreme Court recently refused to resolve the differences in this area when it denied certiorari in *Budd v. California*.³¹ Mr. Justice Fortas dissented, arguing: "The use of the crude and formidable weapon of criminal punishment of the alcoholic is neither seemly nor sensible, neither purposeful nor civilized."³² Mr. Justice Douglas agreed, citing *Robinson* as probably controlling.³³

Traditionally the eighth amendment protection against cruel and unusual punishment applied only to the post-conviction treatment of a criminal.³⁴ The Supreme Court held sentences whose severity was disproportionate to the seriousness of the crime³⁵ and sentences which, by their very nature, affront the "evolving standards of decency that mark the progress of a maturing society"³⁶ to be cruel and unusual. Other federal courts applied the cruel and unusual punishment clause to the treatment of convicts by prison authorities.³⁷ *Robinson v. California* is a significant expansion of the concept of cruel and unusual. There, for the first time, the Supreme Court used the eighth amendment to strike down the imposition of criminal liability per se. Noting that the punishment awarded, ninety days imprisonment, was not cruel and unusual in the abstract, the Court nevertheless said: "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."³⁸ When no "crime" has been committed, any punishment, however slight, is necessarily cruel and unusual. While the ultimate significance of this aspect of *Robinson* is still speculative,³⁹ *Easter* and *Driver* testify to the fact that the eighth amendment has become a substantial new weapon in the arsenal of criminal law reform.

²⁸ 3 Mich. App. 666, 143 N.W.2d 577 (1966).

²⁹ Mich. Stat. Ann. § 28.364 (1962) provides that anyone intoxicated in a public place is a disorderly person whom § 28.365 makes a misdemeanor.

³⁰ *People v. Hoy*, 3 Mich. App. 666, 143 N.W.2d 577 (1966). The Michigan court held that the offense was a violation of a police regulation (*malum prohibitum*) and therefore the issue of voluntariness was not present. While acknowledging the decisions in *Easter* and *Driver*, the court refused to follow them because they were not convinced that *Hoy* was an alcoholic and because they were not prepared to say that punishment of chronic alcoholics is cruel and unusual. *Hoy's* counsel has taken the necessary preliminary steps for appeal to the Michigan Supreme Court. Letter from W. Charles Kingsley, Attorney at Law, to the Cornell Law Quarterly, Sept. 28, 1966.

³¹ 87 Sup. Ct. 209 (1966). *Budd*, an alcoholic, was convicted of public intoxication in violation of Cal. Pen. Code § 647(f) (West Supp. 1966).

³² *Budd v. California*, 87 Sup. Ct. 209, 211 (1966) (dissenting opinion).

³³ *Ibid.*

³⁴ See Comment, 46 B.U.L. Rev. 409, 410-11 (1966).

³⁵ See *Weems v. United States*, 217 U.S. 349, 364-65, 382 (1910) (minimum penalty for a single false entry in official records: imprisonment for 12 years and a day with chain at ankle and wrist, hard and painful labor, loss of family status during the term of imprisonment, and loss of the right to vote, hold office, and travel freely forever).

³⁶ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (deprivation of citizenship as punishment for wartime desertion from the armed forces).

³⁷ E.g., *Talley v. Stephens*, 247 F. Supp. 683, 687 (E.D. Ark. 1965) (convict required to perform work beyond his physical capacities).

³⁸ *Robinson v. California*, 370 U.S. 660, 667 (1962).

³⁹ See Broeder & Merson, "Robinson v. California: An Abbreviated Study," 3 Am. Crim. L.Q. 203 (1965), for an undocumented but provocative analysis of the importance of the case.

Intoxication as a Defense to Crime

Voluntary intoxication is no defense to a criminal charge⁴⁰ except to the extent that it may negate specific intent when the intent is an essential element of the crime.⁴¹ *Involuntary* intoxication, on the other hand, furnishes a defense even when the crime requires only a general criminal intent.⁴² The paucity of successful pleas of involuntary intoxication has led one commentator to conclude that "*involuntary intoxication is simply and completely nonexistent.*"⁴³ This is an overstatement,⁴⁴ but in an overwhelming majority of the cases in which this defense was interposed, the defendant was unsuccessful.⁴⁵ The defense is limited because the courts have restrictively defined the term. Unless an individual drinks because of force, actual or threatened, exerted by another or is innocently unaware that what he is consuming is intoxicating, his drunkenness is deemed voluntary.⁴⁶

Both *Easter* and *Driver* placed great emphasis on the "involuntary" nature of the alcoholic's intoxication.⁴⁷ In allowing chronic alcoholism as a defense to the charge of public intoxication, they expanded the traditional defense of

⁴⁰ See, e.g., *Hopt v. People*, 104 U.S. 631, 633 (1881); *Saldiveri v. State*, 217 Md. 412, 424, 143 A.2d 70, 77 (1958).

⁴¹ E.g., *Heideman v. United States*, 259 F.2d 943, 946-47 (D.C. Cir. 1958), cert. denied, 359 U.S. 959 (1959); *Roberts v. People*, 19 Mich. 400, 417 (1870). But cf. *State v. Shipman*, 354 Mo. 265, 189 S.W.2d 273, 274 (1945); *State v. Stacy*, 104 Vt. 379, 407, 160 Atl. 257 (1932).

An enlightening case on specific intent requirements is *Simpson v. State*, 81 Fla. 292, 87 So. 920 (1921), where the accused was acquitted of a charge of breaking and entering a dwelling house with intent to commit rape. The prosecution proved breaking and attempting to enter, but not the specific intent of rape.

Voluntary intoxication may be a factor in reducing a first degree murder charge to second degree or manslaughter. E.g., *State v. Anselmo*, 46 Utah 137, 148 Pac. 1071 (1915).

⁴² E.g., *Bartholomew v. People*, 104 Ill. 601 (1882); *Choate v. State*, 19 Okla. Crim. 169, 197 Pac. 1060 (1921); Colo. Rev. Stat. Ann. § 40-1-9 (1963); Ga. Code Ann. § 26-403 (1953); *Perkins, Criminal Law* 787 (1957); *Williams, Criminal Law: The General Part* 564-68 (2d ed. 1961); Hall, "Intoxication and Criminal Responsibility," 57 Harv. L. Rev. 1045, 1054-56 (1944); Paulsen, "Intoxication as a Defense to Crime," 1961 U. Ill. L.F. 1, 18.

⁴³ Hall, *supra* note 42, at 1056.

⁴⁴ There are a few cases where the defense of involuntary intoxication was successfully interposed. *Perkins v. United States*, 228 Fed. 408, 420 (4th Cir. 1915) (accidental overdose of medicine); *State v. Brown*, 38 Kan. 390, 396-97, 16 Pac. 259, 262 (1888) (innocent mistake of fact as to alcoholic nature of liquid consumed); *People v. Koch*, 250 App. Div. 623, 294 N.Y. Supp. 987 (2d Dep't 1937) (accidental overdose of luminal prescribed by physician); *State v. Alie*, 82 W. Va. 601, 608, 96 S.E. 1011, 1014 (1918) (defendant drugged by his eventual victim).

⁴⁵ See note 42 *supra*. See also *Burrows v. State*, 38 Ariz. 99, 297 Pac. 1029 (1931); *Borland v. State*, 158 Ark. 37, 249 S.W. 591 (1923); *McCook v. State*, 91 Ga. 740, 17 S.E. 1019 (1893); *Johnson v. Commonwealth*, 135 Va. 524, 115 S.E. 673 (1923).

In *Burrows* the court upheld a jury finding of voluntary intoxication on the following extreme facts. Defendant, a student, 18 or 19 years old, requested a ride to Phoenix at a gas station. The driver became drunk and urged defendant to drink with him. Defendant, who had never had alcoholic beverages, refused. The driver threatened to put him out of the car. Afraid of being left alone in the desert without money, defendant drank and became intoxicated. While intoxicated, he shot and killed the driver. The murder conviction was reversed on other grounds, and a new trial ordered.

⁴⁶ The test applied in *Burrows v. State*, *supra* note 45, at 116, 297 Pac. at 1035, "the influence exercised on the mind of a defendant must be such as to amount to duress or fraud," is typical. Model Penal Code, §§ 2.08(4)-(5) (Proposed Official Draft 1962) is in accord with the decided cases.

⁴⁷ *Easter v. District of Columbia*, 361 F.2d 50, 53 (D.C. Cir. 1966); *Driver v. Hinnant*, 356 F.2d 761, 763-64 (4th Cir. 1966). See also *Sweeney v. United States*, 353 F.2d 10 (7th Cir. 1965).

involuntary intoxication. But both courts indicated that chronic alcoholism will be a defense only to those acts which are symptomatic of the disease.⁴⁸ *Driver* expressly stated that in all other cases the chronic alcoholic would be treated as a normal person.⁴⁹ Thus, in crimes not directly related to alcoholism in such a way that the acts punished are symptomatic of the disease, the law continues to require the existence of outside influences amounting to fraud or duress; otherwise intoxication is voluntary and no defense.

The Chronic Alcoholic and Non-alcohol Offenses

Medical authorities are in complete agreement that chronic alcoholism is a disease,⁵⁰ manifested by the "inability of the alcoholic consistently to control either the start of drinking or its termination once started."⁵¹ Loss of control over consumption has been described as the characteristic symptom of the disease, the essence of which is "helpless dependence or addiction."⁵² The *Easter* court recognized that the alcoholic "has lost the power of self-control in the use of intoxicating beverages,"⁵³ and *Driver* states clearly that "the chronic alcoholic has not drunk voluntarily . . ."⁵⁴ In the future courts must meet the argument that the recognized involuntary intoxication of the chronic alcoholic should be included within the legal definition of "involuntary," alongside fraud, duress, or innocent mistake, as a complete defense to crime whether an alcohol offense or not.

There is general agreement that a "crime" is composed of two essential elements, an act (*actus reus*) and an intention (*mens rea*)⁵⁵ which must be simultaneously present.⁵⁶ There is some disagreement among scholars as to what constitutes an act,⁵⁷ but the necessity that the physical occurrence be occasioned by an exertion of the will is commonly accepted.⁵⁸ Spasms (involuntary muscular contractions) are not "acts" in this sense of the word.⁵⁹ Thus, it can be argued

⁴⁸ In *Driver v. Hinnant*, supra note 47, at 764, the court clearly indicated that it did not intend to extend this defense to crimes which were not "symptomatic of the disease." See also *Easter v. District of Columbia*, supra note 47, at 61 (Danaher, J., concurring) where the same idea is expressed.

⁴⁹ *Driver v. Hinnant*, supra note 47, at 764.

⁵⁰ See note 5 supra.

⁵¹ Keller, supra note 5, at 127.

⁵² Id. at 128.

⁵³ *Easter v. District of Columbia*, 361 F.2d 50, 52 (D.C. Cir. 1966).

⁵⁴ *Driver v. Hinnant*, 356 F.2d 761, 764 (4th Cir. 1966).

⁵⁵ The leading American case on this point, *Fain v. Commonwealth*, 78 Ky. 183, 193 (1879), requires "overt acts done by responsible moral agents."

⁵⁶ Generally the concurrence of *mens rea* and *actus reus* in a causal relation is required for conviction. See *Brown v. State*, 28 Ark. 126 (1873); *State v. Johnson*, 77 Idaho 1, 287 P.2d 425 (1955), cert. denied, 350 U.S. 1007 (1956); *Meadowcroft v. People*, 163 Ill. 56, 45 N.E. 303 (1896); *Jackson v. Commonwealth*, 100 Ky. 239, 38 S.W. 422 (1896); *Commonwealth v. Mixer*, 207 Mass. 141, 93 N.E. 249 (1910); *Commonwealth v. Pierce*, 138 Mass. 165 (1884).

⁵⁷ Holmes defined acts as mere physical activity—e.g., the famous "crooking the finger." Holmes, *Common Law* 54 (1881). Salmond on the other hand felt that the term act must include its origins, circumstances, and consequences. Salmond, *Jurisprudence* 401 (11th ed. 1951).

⁵⁸ Holmes, *Common Law* 54 (1881); 4 Pound, *Jurisprudence* 410 (1959); Salmond, supra note 57, at 399.

⁵⁹ See *Stokes v. Carlson*, 362 Mo. 93, 240 S.W.2d 132 (1951) for a discussion of "act." The court there held that there cannot be an act without volition; thus the convulsive movements of an epileptic or the movements of the body during sleep are not "acts" which can impose liability on the actor.

that certain behavior by a chronic alcoholic when intoxicated may fail to satisfy the first of the two essential elements of a crime, the *actus reus*, and, since even the physical aspect of criminality is lacking, punishment in such instances would be unreasonable.⁶⁰

The mental element of criminality, *mens rea*, requires both knowledge and understanding of the "nature and quality of the relevant conduct,"⁶¹ and of the fact that a criminal result will necessarily follow from that conduct. Drunkenness, voluntary or involuntary, is a defense to those crimes requiring specific intent.⁶² In regard to those crimes which require only general intent, the rationale of *Easter* and *Driver* is of potential significance in extending the defense of chronic alcoholism. General intent requires that the actor know what he is doing and understand the criminal consequences likely to result from his acts.⁶³ The requirement is common to all crimes except where absolute liability is imposed by statute.⁶⁴ If knowledge or volition or both are not present, there is no crime.⁶⁵ When a person attains a certain degree of intoxication, he cannot form the necessary knowledge and volition and should not be convicted of any crime unless the intoxication is voluntary, in which case the drinker assumes responsibility for the consequences of his voluntary intoxication. The chronic alcoholic differs in this regard from the "social drinker" who occasionally voluntarily imbibes excessively, since the alcoholic's intoxication is involuntary at the outset. To say that one is not responsible for his drinking and yet assumes responsibility for his acts when drunk defies logic. Thus, a sound penal theory should provide for the situation where the offender is addicted: "it is unrealistic to say that on the occasion in question the getting drunk was his voluntary act, in the sense that it was something he could have avoided."⁶⁶

If, because of involuntary intoxication, the chronic alcoholic is either incapable of "acting"⁶⁷ or of "intending,"⁶⁸ he has committed no crime and cannot be held criminally liable. This would end the argument were it not for the further constitutional issue based on the *Robinson v. California* decision that, when there is no crime, any punishment is cruel and unusual and violates the eighth and fourteenth amendments.⁶⁹ This argument in no way alters the alcoholic's basic contention of innocence; it does add significantly to the force of his contention.

The decision to excuse chronic alcoholics from criminal liability requires a further decision as to when such a rule should apply. An alcoholic is not always intoxicated, and even when he is intoxicated, his mind is not always so overcome by drink that his knowledge and volition are impaired. Some standards must be

⁶⁰ Even a police regulation requires the performance of an act. *Mens rea*, however, is not required. *People v. Hoy*, 3 Mich. App. 666, 143 N.W.2d 577 (1966). But see *Easter v. District of Columbia*, 361 F.2d 50, 54 (D.C. Cir. 1966), citing *Morissette v. United States*, 342 U.S. 246 (1952).

⁶¹ Hall, *General Principles of Criminal Law* 107 (2d ed. 1960).

⁶² See text accompanying note 41 *supra*.

⁶³ See, e.g., *Smith v. State*, 71 Fla. 639, 71 So. 915 (1916).

⁶⁴ See *United States v. Balint*, 258 U.S. 250 (1922); *Shevlin-Carpenter Co. v. Minnesota*, 218 U.S. 57 (1910), where the constitutionality of criminal strict liability statutes is upheld.

⁶⁵ "Actus non facit reum, nisi mens sit rea." 3 Coke, *Institutes* 107 (5th ed. 1671).

⁶⁶ Williams, *supra* note 42, at 567.

⁶⁷ See text accompanying notes 56-58 *supra*.

⁶⁸ See text accompanying notes 62-64 *supra*.

⁶⁹ See text accompanying notes 38-39 *supra*.

developed which will indicate how "drunk" the alcoholic must be in order to avail himself of the defense. At this point the alcoholism problem necessarily intermingles with the insanity problem.⁷⁰ Some authorities indicate that the mental state which will excuse will be the same whether brought on by involuntary intoxication or by insanity and that the same test should be used.⁷¹ The abstract logic of this approach is not open to criticism, but, as a practical matter, the myriad variations of insanity rules from jurisdiction to jurisdiction⁷² cast serious doubt on the wisdom of further extending and thereby perpetuating such an unsatisfactory system.⁷³ Perhaps a new approach to the mental-state requirements by courts deciding alcoholism cases will lead to an eventual reform in the area of insanity as well.

Practical Obstacles to Extending the Alcoholism Defense

If the law is to excuse the chronic alcoholic from criminal liability, courts and legislatures will be faced with a number of practical problems. At the trial level, the immediate problem will be the identification of a chronic alcoholic. Some courts have expressed the fear that there will be many "pretenders" to the status of alcoholism who are not, in fact, suffering from the disease.⁷⁴ This objection alone would appear insufficient to prevent the genuine alcoholic from obtaining justice. No one would claim that insanity is easy to identify, yet our sense of justice requires that an insane person be excused from criminal liability under certain circumstances. There seems to be no more difficulty in identifying alcoholism than in identifying insanity, and the demands of justice are equally strong. The same court procedure used in insanity cases, expert testimony, is appropriate for alcoholism cases as well. In many cases prior arrests and convictions for alcohol offenses may make the proof of alcoholism easier.⁷⁵ As one

⁷⁰ Insanity caused by drinking is treated by the criminal law just as any other type of insanity, but abnormal and insatiable craving for alcohol, which is characteristic of chronic alcoholism, is not included. *Choice v. State*, 31 Ga. 424 (1860); *State v. Potts*, 100 N.C. 457, 6 S.E. 657 (1888); *Flanigan v. People*, 86 N.Y. 554 (1881).

⁷¹ "[I]ntoxication must be sufficient to affect the reason of a defendant to the extent that he does not understand and appreciate the nature and consequences of his act." *Burrows v. State*, 38 Ariz. 99, 115, 297 Pac. 1029, 1035 (1931); compare *McNaughtens Case*, 8 C. & F. 200, 8 Eng. Rep. 718 (1843). A comparison of the sections of the Model Penal Code (Proposed Official Draft, 1962) on intoxication and insanity illustrates a similar intent:

§ 2.08(4) Intoxication which (a) is not self-induced or (b) is pathological is an affirmative defense if by reason of such intoxication the actor at the time of his conduct lacks substantial capacity either to appreciate its criminality [wrongfulness] or to conform his conduct to the requirements of law.

§ 4.01(1) 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.

⁷² Compare the well known "right-wrong" test of *McNaughten's Case*, supra note 71, which is followed in many American jurisdictions (e.g., *State v. Trantino*, 44 N.J. 358, 209 A.2d 117 (1965)) with the "irresistible impulse" test (as it appears in *Braham v. State*, 143 Ala. 28, 38 So. 919 (1905); *People v. Lowhone*, 292 Ill. 32, 126 N.E. 620 (1920); *Terry v. Commonwealth*, 371 S.W.2d 862 (Ky. 1963); *State v. Noble*, 142 Mont. 335, 384 P.2d 505 (1963); *Commonwealth v. Cavalier*, 284 Pa. 311, 131 Atl. 229 (1925)) and with the more modern rule of *Durham v. United States*, 214 F.2d 862 (D.C. Cir. 1954), where the test is whether the criminal act is the product of mental disease or defect.

⁷³ See Goldstein & Katz, "Abolish the 'Insanity Defense'—Why Not?" 72 Yale L.J. 853 (1963).

⁷⁴ See *Choice v. State*, supra note 70; *Flanigan v. People*, supra note 70.

⁷⁵ See *Sweeney v. United States*, 353 F.2d 10 (7th Cir. 1965), where expert testimony

medical authority points out: "The lack of physical or biochemical instruments or tests by which the diagnosis can be verified does not prevent a diagnostician from establishing it [alcoholism] by adequate anamnesis."⁷⁶

Assuming that identification of the chronic alcoholic is possible, and that the genuinely ill can be distinguished from the imposters, what is to be done with the accused if a court decides that he is an alcoholic and was intoxicated at the time the "crime" was committed and therefore cannot be subjected to criminal liability? He cannot simply be released and forgotten. This would be an abdication of the law's responsibility for the preservation of order in society and would be of no benefit to the individual concerned.⁷⁷ Many states have provisions for medical treatment of alcoholics,⁷⁸ and a few jurisdictions have provided by statute for enforced civil commitment.⁷⁹ This solution is beneficial to the individual who may be "cured,"⁸⁰ and also promotes stability in the community by removing a threat to the peace.⁸¹ Further, such enforced civil commitment may serve as a deterrent to those who would seek to "beat the rap" by feigning chronic alcoholism, although there are probably those who would prefer the relative comfort of a hospital to confinement in a penitentiary.⁸²

Such a program necessarily involves a great increase in government expenditures.⁸³ Present treatment facilities would require thorough expansion to meet increased demands on the system.⁸⁴ Individual states embarking on this program will probably not have to face the financial burdens alone; the federal government is presently planning expenditures in this area on a cooperative basis with state and local governments.⁸⁵ The benefits of proper treatment and rehabilitation may be well worth the additional expense involved, if the alcoholic can be made a productive member of society.

was apparently used. Easter and Driver, on the other hand, relied heavily on long histories of alcohol offenses as proof of illness.

⁷⁶ Keller, "Definition of Alcoholism," 21 *Quart. J. Stud. Alcoholism* 125, 128 (1960). "Amamnesis" is the collection of information concerning a medical or psychiatric patient and his background for use in analyzing his condition.

⁷⁷ See Moore, "Legal Responsibility and Chronic Alcoholism," 122 *Am. J. Psych.* 748, 754 (1966), where the author says that complete excuse of the alcoholic is unreasonable "particularly as we consider the immature expectations of many alcoholics."

⁷⁸ E.g., Ala. Code tit. 55, §§ 373(11)-373(13f) (1960); N.J. Stat. Ann. §§ 26:2B-1 to 2B-5 (1964); Cal. Health & Safety Code §§ 427-427.11 (West Supp. 1966).

⁷⁹ E.g., Conn. Gen. Stat. Ann. § 17-155g (Supp. 1965); N.C. Gen. Stat. §§ 122-60 to 122-65.5 (1964); D.C. Code Ann. §§ 24-501 to 24-514 (1961); California has provided such a procedure for drug addicts. Cal. Welfare & Inst'n's Code §§ 5625-5635 (West 1966).

⁸⁰ A dramatic example of the possibility of cures is found in the story of Judge Ray Harrison of the Des Moines, Iowa, Municipal Court, a former alcoholic who has been sober for more than 20 years. In 1956 he was appointed to the bench before which, years earlier, he had been sentenced 18 times for drunkenness. Harrison, "A Court Program for the Chronic Inebriate," in Conference on the Court and the Chronic Inebriate 25 (1965).

⁸¹ *Robinson v. California*, 370 U.S. 660, 664-65 (1962) indicated that such a process would be constitutional.

⁸² Civil commitment may result in longer confinement than the penalty for criminal conviction. Conn. Gen. Stat. Ann. § 17-155i (Supp. 1965) provides for discharge by the hospital superintendent "when in his medical judgment such discharge is indicated."

⁸³ Monroe County, New York spends \$6.50 per day for confinement in the penitentiary. The cost increases to \$45 per day when hospitalization is required.

⁸⁴ The lack of proper facilities for the care of alcoholics has led some judges to sentence them to jail for their own protection. See *People v. Hoy*, 3 Mich. App. 666, —, 143 N.W.2d 577, 578 (1966). But in *Easter v. District of Columbia*, 361 F.2d 50, 53 (D.C. Cir. 1966), the court said that the lack of proper facilities is an insufficient reason for criminal punishment and ordered release as the only acceptable alternative.

⁸⁵ See 122 Cong. Rec. 4145, 4147 (1966) (message of President Johnson).

CONCLUSION

Chronic alcoholism, a major health problem in the United States, has until recently been treated by the law as a penal problem. The decision in *Easter v. District of Columbia*⁸⁶—that punishment of the chronic alcoholic for the offense of public intoxication is “cruel and unusual”—together with a similar decision in *Driver v. Hinnant*,⁸⁷ indicates that a trend is developing toward a more constructive and humane solution—medical care in hospitals in lieu of incarceration for penal purposes in the penitentiary. These decisions have extended the Supreme Court’s prohibition of the punishment of an involuntary status to include *symptoms* of the status as well.⁸⁸ Courts in the future must face the problem of whether to further extend this theory to include the *products* as well as the symptoms of the status and excuse chronic alcoholics from liability for acts committed when sufficiently overcome by drink to lack the requisite *mens rea* element of criminality. Such a result could be achieved by expanding the traditional concept of involuntary intoxication, presently limited to fraud, duress, and mistake, to include chronic alcoholism.

Serious consideration should be given to this extension. A workable procedure in lieu of punishment has been suggested by an eminent medical authority:

If intoxication is a result of the illness of alcoholism in a particular case, the medical rights of the person must be considered and he should have his medical condition brought before the court as a possible mitigating factor. The court should then act to bring the alcoholic offender to enforced treatment rather than punishing him. Failure to profit from treatment would then result in some degree of quarantine for the benefit of society.⁸⁹

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⁸⁶ 361 F.2d 50 (D.C. Cir. 1966).

⁸⁷ 356 F.2d 761 (4th Cir. 1966). See also *Sweeney v. United States*, 353 F.2d 10 (7th Cir. 1965).

⁸⁸ See *Robinson v. California*, 370 U.S. 660 (1962).

⁸⁹ Moore, *supra* note 77, at 755.

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