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PUBLIC DRUNKENNESS: CRIMINAL LAW REFORM

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INTRODUCTION

In *Powell v. Texas*,[1] the Supreme Court recently considered whether the imposition of criminal punishment for acts that are the involuntary result of an illness is consistent with the Eighth Amendment's cruel and unusual punishment clause.[2] The Court affirmed the public drunkenness conviction of an alleged alcoholic in a 4—1—4 decision.[3] Since the decisive concurring vote rested upon a determination that the facts of the case were insufficient to establish that the defendant's acts were involun-

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1. 392 U.S. 514 (1968).

2. The principle that involuntary conduct cannot be punished as criminal is fundamental in our criminal law. Punishment of involuntary behavior neither deters the defendant nor protects the public. Such punishment is neither logical nor moral. It serves no socially redeeming purpose and must be condemned as unconscionable by a civilized society . . . . A conviction that affronts this fundamental principle constitutes "cruel and unusual punishment" prohibited by the Eighth Amendment to the United States Constitution.

Brief for A.C.L.U. and others as Amici Curiae at 15, Powell v. Texas, 392 U.S. 514 (1968).

3. The dissent relies upon *Robinson v. California*, 370 U.S. 660 (1962) which barred the conviction of a narcotic addict for the crime of addiction. The subtle principle stated in *Robinson* is that "[c]riminal penalties may not be inflicted upon a person for being in a condition he is powerless to change." Powell v. Texas, 372 U.S. 514, 567 (1968).

The majority opinions in *Powell* and *Robinson* contest: 1) the proven involuntary nature of alcoholic drinking; 2) Justice Fortas' subtle interpretation of *Robinson;* and 3) the ability of the community to handle the public alcoholic in any manner other than by arrest and conviction. Perhaps of greater importance, however, is the Court's emphasis upon the facts of the case. The record supporting the allegations of the defense consisted of the testimony of one expert witness, the testimony of the defendant, and proof of the defendant's history of numerous prior public drunkenness arrests. The Court found significant ambiguities in the proofs and refused to accept the lower court's finding that the defendant was an "alcoholic" whose public drinking was involuntary.

The opinions of both Justice Marshall and Justice Black correctly note that significant ambiguities exist concerning the proper definition of "alcoholism." *See* ALCOHOLISM (R. Catanzaro ed. 1968); W. SCHMIDT, R. SMART & M. MUSS, SOCIAL CLASS AND THE TREATMENT OF ALCOHOLISM (1968); JOINT INFORMATION SERVICE OF THE AMERICAN PSYCHIATRIC ASS'N TREATMENT OF ALCOHOLISM: PROBLEMS AND PROGRAMS (1967).

Despite this definitional uncertainty, medical opinion is virtually unanimous to the effect that the "disease" of alcoholism exists. This unanimity must be taken, however, as being expressive of the recognition by the medical profession that drinking problems should be medically treated. *See* E. JELLINEK, THE DISEASE CONCEPT OF ALCOHOLISM 12 (1960). A further point of agreement concerns the existence of both addictive and non-addictive "alcoholics." The addictive category is probably less prevalent. ALCOHOLISM 10 (R. Catanzaro ed. 1968). *See* note 32 *infra.*

tary,[4] *Powell* arguably represents the Court's acceptance of the position that involuntary conduct may not be punished.

The involuntary conduct argument in *Powell* rests upon an asserted application of *Robinson v. California*.[5] The *Robinson* decision interpreted the Eighth Amendment to bar the conviction of a narcotic addict for the crime of addiction. Prior to *Powell*, two federal appellate courts applied the *Robinson* rationale to the public intoxicant-alcoholic.[6] They established a test prohibiting punishment of acts "symptomatic of the disease."[7] Although these decisions met with indifference at the state appellate level,[8] published expert opinion is generally favorable.[9]

Powell and its predecessors were test cases designed to promote social reform by disrupting the status quo with respect to the administration of criminal laws relating to public intoxication. However, the position that the cases espouse are potentially significant in forming contem-

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4. Justice White summarized the impact of this deficiency as follows:

> It is unnecessary to pursue at this point the further definition of the circumstances or the state of intoxication which might bar conviction of a chronic alcoholic for being drunk in a public place. For the purposes of this case, it is necessary to say only that Powell showed nothing more than that he was to some degree compelled to drink and that he was drunk at the time of his arrest.

Powell v. Texas, 392 U.S. 514, 553 (1968).

5. 370 U.S. 660 (1962).

6. *See* Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966); Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966).

7. Justice Fortas, writing for the dissent in *Powell*, modifies this test by referring to the defendant's being in a "condition" which he had no capacity to change.

> But the essential constitutional defect here is the same as in *Robinson*, for in both cases the particular defendant was accused of being in a condition which he had no capacity to change or avoid. . . . [A]ppellant was powerless to avoid drinking; that having taken his first drink, he had an "uncontrollable compulsion to drink" to the point of intoxication; and that, once intoxicated, he could not prevent himself from appearing in public places.

Powell v. Texas, 392 U.S. 514, 567 (1968).

8. *Compare* Driver v. Hinnant, 356 F.2d 761 (4th Cir. 1966); Easter v. District of Columbia, 361 F.2d 50 (D.C. Cir. 1966); People v. Dobney, No. D 475555 (L.A. Mun. Ct., May 12, 1966), reprinted in 112 Cong. Rec. 22718 (daily ed. Sept. 22, 1966) *with* State v. Brown, 440 P.2d 909 (Ariz. 1968); Michigan v. Hoy, 3 Mich. App. 666, 143 N.W.2d 577 (1966), *aff'd* 3 Crim. Rep. 2167 (1968); (*and*) Seattle v. Hills, 435 P.2d 692 (Wash. 1967).

9. *See* Hutt, *Recent Forensic Developments in the Field of Alcoholism*, 8 WM. & MARY L. REV. 343 (1967); Moore, *Legal Responsibility and Chronic Alcoholism*, 122 AM. J. PSYCH. 748 (1966); Murtagh, *Arrests for Public Intoxication*, 35 FORDHAM L. REV. 1 (1966). *See also* Lieb, *Cruel and Unusual Punishment and the Durham Rule*, 59 J. OF CRIM. L.C. & P.S. 227 (1968); Neibel, *Implications of Robinson v. California*, 1 HOUS. L. REV. 1 (1963); Note, *Narcotics Problem: Outlook for Reform*, 12 BUFFALO L. REV. 605 (1963); Note, *Cruel and Unusual Punishment: Traditional Concepts and the Emergence of Criminal Responsibility Standards*, 1 COLUM. SURV. OF HUMAN RIGHTS 1 (1967); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635 (1966); Note, *Penal Sanctions Applied to Narcotics Addiction Are Unconstitutional as Cruel and Unusual Punishment*, 41 TEX. L. REV. 444 (1963); Note, *Punishment of a Narcotic Addict for the Crime of Possession: Eighth Amendment Implications*, 2 VAL. U.L. REV. 316 (1968).

porary theories of constitutional law.[10] Because of its potential importance, *Powell* is a decision in which the legal theories involved may eventually obscure the purpose for which the appeals were made; to insure needed social change. This article discusses *Powell* in the pragmatic context of its role as an instrument of social change, the present status of reforms and the need for further change.

The Present Approach

A cursory examination reveals a social problem with staggering quantitative dimensions. The FBI National Crime Report annually lists over 1,500,000 arrests for public intoxication.[11] When arrests in non-reporting jurisdictions are considered, the number of drunkenness arrests may be estimated at over 2,000,000—almost forty percent of the total non-traffic arrests made in this country.[12] As these figures indicate, the inclusion of public intoxication as a criminal offense creates an overload in the criminal court system. The result is frequently a mass production model of criminal justice. Arrests are made in groups, frequently by a "bum squad" whose task it is to keep the streets clear of drunks. The arrestees are crowded into small cells with inadequate facilities, traditionally referred to as *drunk tanks*. Typically, no medical services are available and the physical condition of the arrested men contributes to the filth and stench of the tank.

The defendants appear before the court on the morning following their arrest. The men are led before the judge in groups and *justice* is rapidly dispensed.[13] It is not uncommon for the trial of over one hundred defendants to last less than one hour. Most of the men who appear before

10. The similarity of the *Driver, Easter* and Fortas rationale to the various tests that are employed with respect to the "insanity defense" is striking. *See* Salzman v. United States, 4 Crim. L. Rep. 2071 (D.C. Cir.) (Oct. 4, 1968); Lieb, *Cruel and Unusual Punishment and the Durham Rule,* 59 J. CRIM. L.C. & P.S. 227 (1968).

11. Six recent editions of the F.B.I. National Crime Report list the following figures:

1961: 1,504,671 arrests.
1962: 1,593,076 arrests.
1963: 1,514,680 arrests.
1964: 1,458,821 arrests.
1965: 1,535,040 arrests.
1966: 1,485,562 arrests.

12. The accuracy of criminal statistics has been the subject of much debate during recent years. Generally, a concensus supports the notion that the figures are unreliable and incomplete. This seems clearly accurate with respect to misdemeanant offenders, about whom local police departments seldom attempt to maintain thorough information. *See* Biderman & Reiss, *On Exploring the "Dark Figure" of Crime,* 374 ANNALS 1 (Nov. 1967); H. Mattick & R. Chused, *The Misdemeant Offender,* REPORT TO THE PROFESSIONAL CONFERENCE OF THE ILLINOIS COMMITTEE OF THE NATIONAL COUNCIL ON CRIME AND DELINQUENCY (1967).

13. *See* U.S. DEPT. OF HEW, THE COURT AND THE CHRONIC INEBRIATE (1965); Foote, *Vagrancy-Type Law Administration,* 104 U. PA. L. REV. 603 (1956).

the judge have been there before. The element of repetition creates a degree of familiarity. Thus, it is not rare to find the judge calling defendants by their first names.

Although only a small percentage of the original arrestee population receives a jail sentence, the number remains large enough to contribute to the overcrowding of jails and other short-term penal institutions. Furthermore, these institutions seldom have either the funds or the inclination to develop the necessary services for such inmates. Therefore, the incarceration seldom serves a substantial correctional objective[14] and merely functions as a means of *drying out* the derelict.

The typical public drunkenness statute under which this process is conducted is not complex. Two elements of the crime are normally described: 1) the act of being drunk; and 2) the actor's presence in a public place.[15] There are variations of these elements. For example, a number of statutes require loud, boisterous or disorderly conduct.[16] In several jurisdictions, the crime is described as "common drunk" and is included in a vagrancy statute.[17] Occasionally, public drunkenness is labeled disorderly conduct.[18]

In most jurisdictions public drunkenness is a misdemeanor. In others it is an ordinance violation, proven by a preponderance of the evidence and tried before the municipal courts. Typically, the statute specifies a series of sentences, the maximum penalty increasing as the number of prior convictions increases. Maximum punishment seldom exceeds six months incarceration,[19] and in many jurisdictions the only penalty is a fine.[20] Even in the latter jurisdictions, however, incarceration is often the end result since a typical public drunkenness offender must "work off" the fine.

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14. National Council on Crime and Delinquency, *Correction in the United States*, 13 CRIME & DELINQ. 147 (1967); D. PITTMAN & W. GORDON, REVOLVING DOOR (1958).

15. *See, e.g.*, ARK. STAT. ANN. § 49-943 (1947); IND. ANN. STAT. § 12-611 (1964).

16. ALA. ANN. CODE tit. 14, § 120 (1958); GA. CODE ANN. § 58-608 (1965).

17. CONN. GEN. STAT. ANN. § 53-340 (1966).

18. *See, e.g.*, § 193-1 of the Chicago Municipal Code which provides:

> A person commits disorderly conduct when he knowingly: (g) Appears in any public place manifestly under the influence of alcohol, narcotics or other drug, not therapeutically administered, to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.

CHICAGO CITY COUNCIL JOURNAL 2562 (1969).

19. The following statutory punishments are illustrative. ALA. ANN. CODE tit. 14, § 120 (1958), thirty days and/or $5-$100; IOWA ANN. CODE § 125.11 (1956), thirty days or $5-$25; KY. REV. STAT. ANN. § 244.990(2) (1969), five to thirty days and/or $10-$100.

20. *See, e.g.*, ME. REV. STAT. ANN. tit. 17, § 2001 (1964) which imposes a fine of not more than $20 and/or thirty days for the first offense and a fine of not more than $60 and/or ninety days for subsequent convictions.

Status Quo: Reasons and Justifications

The description presented above is sufficient to reveal several objections to the present approach of dealing with public drunkenness as a criminal offense. It does not explain the basis by which the system continues to operate in most jurisdictions, despite its obvious ineffectiveness. In order to fully understand the basis for the system's continued existence, it is necessary to obtain a thorough understanding of the actual operations of the process.

The drunkenness statutes produce a class-related discrimination. The discrimination results from the "public place" requirement of the laws.[21] Cultural and economic characteristics strongly suggest that the middle and upper-class drinker is likely to confine his activities to a private locale. Class differences are also present in police enforcement policies. Respectable middle or upper-class inebriates are seldom arrested.[22] Rather, they are ignored unless they appear incapable of self-protection and, if picked up, they are held in protective custody until sober or are immediately returned to their homes. Further, drunkenness arrests are more frequent in Negro areas, especially during weekends. Cultural drinking patterns and the desire of the police to avoid future violence are factors in producing this higher arrest rate.[23]

In all jurisdictions, the bulk of the drunkenness arrests and most of the recidivism results from the police use of the statutes as a method of controlling the public presence of Skid Row men. For years Skid Row has served as a convenient dumping ground for the dregs of American society.[24] Popular stereotypes notwithstanding, most of the men who find their way to the Row are from lower-class backgrounds and have failed to achieve any class standing in our success-oriented society. The men of the Row share one common characteristic—their almost total destitution. This common result is caused by a myriad of human problems including alcoholism, medical disability, disease and inadequate retirement programs.[25]

Contemporary indications are that Skid Row, as a clearly observ-

21. REVOLVING DOOR: A FUNCTIONAL INTERPRETATION, ALCOHOLISM AND DRUG ADDICTION RESEARCH FOUNDATION OF TORONTO 1 (1966).

22. W. LAFAVE, ARREST 108 (1965). *See generally*, D. MCINTYRE, LAW ENFORCEMENT IN THE METROPOLIS (1967).

23. The phenomenon of the high rate of Negro drunkenness arrests on weekends was identified in the study of Atlanta arrest processes made by the Emory University staff. *See* REPORT OF THE ALCOHOL PROJECT OF THE EMORY UNIVERSITY DEPARTMENT OF PSYCHIATRY 10 (1963).

24. *See* J. KUNZ, AN OUTLINE FOR THE SOCIAL STUDY OF SKID ROW (1969) (unpublished on file at the American Bar Foundation).

25. *See* H. BAHR, HOMELESSNESS AND DISAFFILIATION (1969); D. BOGUE, SKID ROW IN AMERICAN CITIES (1961); S. WALLACE, SKID ROW AS A WAY OF LIFE (1965).

able concentration of inadequate, filthy housing and derelict men, is disappearing. A wide range of factors appears to be responsible. Perhaps the most important variables involve the macroscopic effects of economic prosperity and the growing welfare state, abetted by the more specific influence of the urban renewal bulldozer.[26] However, the men of the Row are not becoming extinct. Rather, the men and their problems are dispersing throughout our cities. To the delight of the urban planner, this frees valuable land near the central business districts—the typical locale of the Skid Row neighborhoods—for the beautification and the economic growth of the central city. To the dismay of the social worker and social scientist, this dispersal makes the Skid Row more difficult to locate, study or assist.

An assortment of agencies service the Skid Row inhabitant. Each agency tends to settle into its own role and deal with its own peculiar population. The Salvation Army peddles soup, soap and Salvation, while welfare offices provide a minimal subsistence. Day labor agencies provide employment—frequently for exorbitant commissions.

Within this network, the police and the criminal justice system perform several functions.[27] Generalizations concerning the nature of the police role are dangerous. The nature of police activity in any jurisdiction depends upon demographic characteristics of the city, the area in which the Skid Row men are domiciled and other factors. The degree of variation is extreme. For example, New York and Chicago, cities with large Skid Row populations, experience radically different arrest rates. In Chicago public drunkenness arrests total 70,000 annually, while in New York the number has been reported to be approximately 10,000. Even within a single jurisdiction, police activity is likely to vary in separate Skid Row sections.

With this qualification in mind, it is possible to identify several factors that influence police activities in most cities. The dispersion of the derelict makes the populace of Skid Row less visible and less important. Coupled with this factor, the increasing disorder in other segments of

26. *See generally* H. Bahr, *The Gradual Disappearance of Skid Row,* 15 Soc. Pub. 41 (1967).

27. The following description of Skid Row arrest practices represents a combination of information from various sources, supplemented by observations made by the author and his staff in several cities. It should be taken as a tentative formulation pending thorough analysis of the field research presently being conducted in four jurisdictions as a portion of the American Bar Foundation's study of the non-disorderly derelict arrest process. *See, e.g.,* W. LaFave, Arrest (1965); D. McIntyre, Law Enforcement in the Metropolis (1967); Foote, *Vagrancy Type Law Administration,* 104 U. Pa. L. Rev. 603 (1956); Miller, *Arrest for Public Intoxication in Cleveland,* 3 Q.J.S.A. 38 (1942); Stern, *Public Drunkenness: Crime or Health Problem?,* 374 Annals 147 (1967); Note, *The Law on Skid Row,* 38 Chi.-Kent L. Rev. 22 (1961).

society contrasted with the docile character of the Skid Row men contributes to a police attitude which emphasizes efficiency and minimal manpower commitments to the task of controlling Skid Row. Thus, Skid Row control is a low priority problem for most police departments.

Specialized arrest procedure is one result of police efficiency. For example, on Chicago's largest Skid Row, drunken derelicts are not disturbed by regular patrolmen, but are left on the streets to be arrested by the "bum squad." This squad spends its entire day patrolling the Skid Row area in a police van, arresting derelicts. The operations of the "bum squad" become highly routinized. Its policy objectives, never clearly formulated and seldom re-examined, become obscure—a curious mixture of numerous factors.

A similar confusion of objectives occurs in cities where the "bum squad" or its equivalent does not exist—typically jurisdictions in which derelicts are scattered, rather than concentrated in large, identifiable Skid Rows. Discussions with police officers and observations of their daily activities in arresting drunken Skid Row derelicts identifies three broad policy categories that are typically cited as justifying the arrests of derelicts: 1) making the men of the Row less visible to "normal" citizens; 2) controlling the level of violence on the Row; and 3) providing minimal medical assistance. The officers engaged in operating the system seldom justify the arrest of drunken derelicts as punishment for public intoxication.

Perhaps the most frequently stated justification is the minimization of the derelict's contacts with "normal" persons. This *aesthetic* motivation is especially influential in the arrest of derelicts who are not on Skid Row. "Respectable" people are offended when accosted by disheveled, foul smelling men; thus, the police frequently resort to a policy of containment.

Although there are exceptions, as long as the derelict remains in the Skid Row area, aesthetics are less important. Skid Rows, even the pocket sections that result from a scattering of the derelicts, tend to develop in areas of the city that are near the central business districts, yet outside of the normal flow of activity. Typically, visitors to the cities seldom pass through the Skid Row areas, unless the area becomes, perversely, a tourist attraction. Exceptions occur in at least the following two situations. First, drunken derelicts may congregate near Skid Row-located businesses which attract clientele from the non-Skid Row community. Frequently, the derelicts, police and businessmen develop a tacit understanding of nonintervention so long as the derelicts avoid the area near the business district. Secondly, certain Skid Rows—such as the South State Street Skid Row in Chicago—have developed along heavily traveled

routes into the central business district. When this occurs, the existence of Skid Row inhabitants becomes apparent to "normal" citizens. Strict police enforcement of public intoxication statutes is the predictable result.

Drunkenness arrests represent an effort to control the level of violence of Skid Row. The intoxicated derelict presents little threat of violence, especially to the Skid Row visitor. However, the derelict is a potential victim of "jackrolling"—a name coined for the strong-armed robbery of Skid Row men. Both the police officers on the Skid Row beat and the Skid Row derelicts indicate that much of the violent "jackrolling" is perpetrated by outsiders who enter Skid Row areas for this limited purpose. However, the police also recognize that a good deal of "jackrolling" is done by the derelicts and assert that all of the men are potential "jackrollers." While the latter generalization may be overstated, the destitution of the men and their emphasis upon individualism does produce a code emphasizing *survival of the fittest.* Attempts to control the level of "jackrolling" by more stringent penalties and through the use of special task forces are typically ineffective. Skid Row inhabitants are reluctant to pursue the prosecution of a "jackrolling" complaint or to testify against the alleged "jackroller" in court. Since the activities cannot be controlled by normal police efforts against the perpetrators, the police utilize the drunkenness arrest and control "jackrolling" by removing the most likely victims from the streets. Thus, the drunkenness arrest and prosection functions as a form of protective custody.

The third justification of drunkenness arrests relates to the medical well-being of the derelicts. The police speak of their operation as an *ambulance service,* designed to *safeguard* the derelicts and *prolong their lives.* Several factors are involved. Especially during the winter months in northern cities, there is a danger of serious injury by exposure to the elements. Derelicts frequently come to a police stationhouse during the winter and ask to be arrested. Also, the drunkenness arrest interrupts extended drinking bouts and forces the derelict to accept nourishment, at least during his day(s) in jail.[28]

The extent to which the drunkenness arrest procedure results in a medical benefit to the derelict must be taken with some qualification.

28. A recent study in Toronto suggests that repeated jailing prevents severe malnutrition and serves to slow the general debilitation of the derelict arrestees.

> [T]he research team had a chance to observe arrested inebriates in two United States cities that follow a policy of containing Skid Row alcoholics within a clearly demarcated Skid Row area instead of arresting them frequently. The observers were impressed with the contrast between the highly debilitated appearance of the men who came into court under this laissez-fair system and the relatively healthy appearance of most of the Toronto "regulars."

J. OLIN, THE CHRONIC DRUNKENNESS OFFENDER: PHYSICAL HEALTH 62 (1968).

With the exception of being inside, little else of medical value is available to the derelict during his pre-trial confinement.

> There are at least two men in each four by eight cell and three in some. The stench of cheap alcohol, dried blood, urine and excrement covers the cell blocks . . . . There are no lights in the cells . . . . There are no mattresses. Mattresses wouldn't last a night . . . and with prisoners urinating all over them, it wouldn't do any good if they did last.[29]

Typically, medical help is not available to deal with problems of withdrawal, delirium tremens and the symptoms of illnesses not related to intoxication, but frequently afflicting inhabitants of the cell. Each year several unnecessary deaths occur because of inadequate medical care.

The motivation for the drunkenness arrest process, like any other social process, is not fully described by two or three variables. Departmental tradition, reinforced by training techniques and the low priority of the problem, plays an influential role. Individual circumstances and the personalities of the arresting officers may be important. Not infrequently, men are arrested even though they are not intoxicated at the time.[30] Political and business pressure is a constant factor. Streets are frequently "cleaned" for the visits of famous people to the city. Occasionally, campaigns of harrassment are mounted to drive the derelicts out of the city.

Frequently, the process functions in response to some internal objective, unrelated to the factors mentioned above. For example, in New York City's Bowery, *condition men* are assigned the responsibility of maintaining the condition of the streets, primarily by arresting drunken derelicts. This special squad enters the Bowery to make arrests once or twice a week, and even on these occasions an effort is not made to pick up all severely intoxicated men. A second example involves situations in which patrolmen ignore apparently helpless derelicts on one day and on other occasions arrest men who appear neither intoxicated nor helpless.

The common objective in these situations is numerical in orientation

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29. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS 2 n.17 (1967).

30. On the basis of the Breathalyzer test, only 73% were actually legally intoxicated . . . . others were apparently picked up because of their gait which was unsteady due to other reasons, such as severe malnutrition, other debilitating diseases, the withdrawal phase of intoxication, or neurologic or orthopedic defects which altered their walking pattern. Still others may have been captured accidentally.

PHILADELPHIA DIAGNOSTIC AND RELOCATION SERVICE CORPORATION, ALTERNATIVES TO ARREST 15 (1967). *See also* REPORT OF THE ALCOHOL PROJECT OF THE EMORY UNIVERSITY DEPARTMENT OF PSYCHIATRY (1963).

and relates to the establishment and maintenance of police presence on Skid Row. At the heart of the continued use of drunkenness arrests as a means of control is a token effort to satisfy the community desire that "something be done" about the Skid Row men. The strength of the community desire is revealed by the nature of the effort that is sufficient to satisfy it. The arrest process does not fulfill punitive, rehabilitative or aesthetic objectives. Only minimal short-term social services are provided. However, although the cost of the system seems enormous, if considered in the abstract, it is much less than the expenditure necessary to serve any of the community objectives effectively.

Years of continued use establish the criminal system as the traditional response to Skid Row deviancy. Despite the continued relevance of the Puritan ethic, community interest sustaining the process is no longer morality based or punitively oriented. Rather, the criminal process represents a simplified *solution* to an unattractive and complex social problem. Certainly, this is not a unique application of the criminal law. However, the derelict's docile characteristics, his political and economic impotency and the comparative invisibility of his problems to the majority of "normal" citizens have permitted the simplified solution to continue unchallenged.

Impetus for Reform

Thus, the initial stumbling block to reform of the present system is in surmounting the general refusal to acknowledge that the Skid Row derelict presents a complex psycho-socio-medical problem. The series of appellate court actions, including *Powell,* were designed to deal with this obstacle to the process of social change.

The argument that alcoholics cannot be convicted under a public intoxication statute is designed to disrupt the functioning of the traditional process.[31] Contrary to the impression of certain commentators, a favorable decision does not totally proscribe the process. Under any accepted definition of "alcoholism" a sizeable portion of drunkenness offenders are not alcoholics.[32] The contemplated disruption seeks to force local officials

31. *See* Merrill, *Drunkenness and Reform of the Criminal Law* 34 VA. L. REV. 1135 (1968).

32. The "disease concept" of alcoholism is a comparatively modern notion. *See* ALCOHOLISM (R. Catanzaro ed. 1968). An important factor in the eventual recognition given the concept by the A.M.A. was the work of the late E.M. Jellineck. E. JELLINECK, THE DISEASE CONCEPT OF ALCOHOLISM (1960). When it was first enunciated it represented an attempt to refocus the efforts of the medical profession. Until that time, health authorities had refused to handle the "alcoholic," heavy drinking popularly being conceived as symbolic of weak character. Although the changeover has been gradual, the bulk of contemporary professional opinion, if not public opinion, at least pays lip service to the assertion that alcoholism is not a moral issue.

to search out new solutions to the problem of handling the public, inebriated derelict.

With respect to this purpose, it is possible to observe that a favorable court decision is neither a necessary nor a sufficient factor to achieve social change. One of the early decisions allowing the defense of alcoholism to a charge of public drunkenness, *Driver v. Hinnant,*[33] was issued in the Fourth Federal Circuit Court of Appeals. Three years later, despite this decision, the traditional arrest-prosecution-release pattern continues in most Fourth Circuit municipalities.[34] On the other hand, the decision of *Easter v. District of Columbia*[35] has lead to a significant change of the process in the District of Columbia. The factor present in the District of Columbia that is lacking in the other cities is continued pressure for change by interested parties. Indeed, the existence of interested and influential persons willing to apply continuing pressure is the key factor; as exemplified by the reform of the drunkenness arrest system in St. Louis without the aid of judicial activities.[36]

There has, however, been significant reliance on judicial decisions as a lever to prod official action. Frequently, during the period prior to the formal opinion in *Powell,* newsletters and other communications of agencies interested in reform referred to the likelihood that a change would soon be required by Supreme Court mandate. These efforts frequently raised the question of "whether our community is ready for such

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This consensus may be misleading. There is substantial disagreement concerning the proper definition and treatment format for alcoholic behavior. A recently suggested composite definition describes alcoholism as an:

> [I]llness characterized by preoccupation with alcohol and loss of control over its consumption such as to lead usually to intoxification if drinking is begun; by chronicity; by progression; and by tendency toward relapse. It is typically associated with physical disability and impaired emotional, occupational, and/or social adjustments as a direct consequence of persistent and excessive use.

AMERICAN MEDICAL ASSOCIATION, MANUAL ON ALCOHOLISM 7 (1968). Literally hundreds of other definitions, equating alcoholism with addiction, biochemical disturbances and various other social and medical conditions, have been suggested.

This definitional uncertainty does not indicate that a treatment approach to drinking problems is improper. Rather, it illustrates that "alcoholism" is a conglomerate term, similar to "mental illness," referring to a variety of medical and social conditions. This fact would certainly produce extensive controversy in the case by case application of the defense asserted in *Powell.* The conglomerate nature of the term also casts doubt upon its usefulness as a basis for framing social control techniques which modify or replace the criminal system.

33. 356 F.2d 761 (4th Cir. 1966).

34. *See* Hutt, *Modern Trends in Handling the Chronic Court Offender: The Challenge of the Courts,* 19 S. CAR. L. REV. 305 (1967).

35. 361 F.2d 50 (D.C. Cir. 1966).

36. *See* D. GILLESPIE, ALCOHOL, ALCOHOLISM AND LAW ENFORCEMENT 40 (1960); Pittman, *Public Intoxication and the Alcoholic Offender in American Society,* in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS (1967).

change."[37]

Powell and its predecessors have served to focus attention on the problems of handling the drunken derelict. Of course, several other factors are involved in what appears to be a generalized increase in interest. Among the factors is the heightened awareness among the healing professions that heavy drinking produces problems for which treatment solutions are relevant,[38] the report of a Presidential task force studying Drunkenness and Criminal Law Administration[39] and the increasing prevalence of urban renewal programs directed against Skid Row areas.[40]

Heightened interest in the problem, assuming that this interest will be sustained, might produce significant alterations in the criminal process since even a superficial analysis reveals the process to be abjectly poor. The present criminal process is objectionable from virtually any vantage point. The process fails to adequately serve punitive or medical objectives and functions to preserve rather than eliminate Skid Row.

The argument that was used in *Powell* was premised upon involuntary conduct as resulting from the actor's alcoholism. This is only one of a variety of theoretical presentations that could have been leveled against the present system. It was selected because of the heavy drinking of the men involved in the process and because medical recognition of alcoholism as a disease is widespread. Thus, the alcoholism argument appears closest to the rationale of *Robinson v. California.*[41] The *Robinson* decision voided a California statute proscribing the status of narcotics addiction. The Court relied upon a medical consensus that addiction is an illness.

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37. *See, e.g.,* CHICAGO ALCOHOLIC TREATMENT CENTER NEWSLETTER, August, 1969. The first paragraph states:

> Recent judicial decisions, medical and psychiatric opinions, and police experience have indicated that chronic public intoxication and alcoholism are medical problems requiring appropriate remedial and preventive attention. It is the immediate goal of the proposed program, therefore, to relieve the pressure on police and courts by transporting public intoxicants to an appropriate detoxification, diagnostic, and referral facility.

Id. at 1.

38. For further discussion *see* note 32 *supra.*

39. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: DRUNKENNESS (1967).

40. An incomplete listing includes completed renewal programs in St. Louis and Minneapolis, continuing and planned programs in Philadelphia and a planned program in Chicago. These renewal efforts are typically accompanied by extensive surveys of the area and its residents. *See, e.g.,* D. BOGUE, SKID ROW IN AMERICAN CITIES (1961); UNIVERSITY OF MINNESOTA & MINNEAPOLIS HOUSING AND REDEVELOPMENT AUTHORITY, THE PROBLEM OF RELOCATING THE POPULATION OF THE LOWER LOOP REDEVELOPMENT AREA (1958); REPORT OF THE PHILADELPHIA DIAGNOSTIC AND RELOCATION SERVICE CORPORATION (1967).

41. 370 U.S. 660 (1962).

Two related, theoretical arguments against the present system illustrate another popular approach. Professor Norval Morris includes the criminal method of handling public drunkenness as an illustration of an alleged "overreach of the criminal law."

> The function, as we see it, of the criminal law is to protect the citizen's person and property, and to prevent the exploitation or corruption of the young and others in need of special care or protection. We think it improper, impolitic, and usually socially harmful for the law to intervene or attempt to regulate the private moral conduct of the citizen.[42]

Drunkenness laws represent a misguided, exaggerated conception of the capacity of the criminal law to influence men. The price paid for catering to this conception is that we overload the criminal system, rendering it defective in the areas where protection is really needed.[43]

The second argument involves the so-called "victimless crime" concept.[44] This approach also declaims certain criminal regulations as attempted regulation of morality. The inebriate's non-violent characteristics are emphasized. A person should be free to guide the course of his own life so long as his chosen direction neither harms nor threatens to harm unwilling individuals.

A counter argument to the "victimless crime" thesis asserts society's right or obligation to prevent an individual's self-inflicted injury. The contention is most persuasive with respect to unintentional self-destruction. The argument, however, is subject to the objection that it is only raised with respect to members of the "lower classes" and then, only when the means of self-destruction is not "acceptable."

Suggested Approaches

There have been a large number of studies of the existing criminal process in recent years. Invariably, the reports of these studies have advocated repeal of the present criminal approach.[45] There is less agree-

42. Morris & Hawkins, *The Overreach of the Criminal Law*, 9 MIDWAY 73 (1969).

43. A similar argument has been made by Dean Allen, University of Michigan School of Law. He cites the public drunkenness process as an illustration of the negative effects produced by the attempt to handle, in a criminal structure, the provision of "social services." He uses the drunkenness arrest to illustrate his point that such activity impairs the ability of the criminal agencies to administer other laws. His other two points, namely that there results a deterioration of the social services and a corruption of the administering agencies, appear equally applicable. F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 7-9 (1960).

44. *See* E. SCHUR, CRIMES WITHOUT VICTIMS (1965); J. SKOLNICK, COERCION TO VIRTUE (1968).

45. *See, e.g.*, E. LASANSKY, THE CHRONIC DRUNKENNESS OFFENDER IN CONNECTICUT (1967); H. MATTICK & R. CHUSED, THE MISDEMEANANT OFFENDER (1967); PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA REPORT (1966).

ment, however, concerning the course to be followed after repeal. It is no longer true that the "strongest barrier" to reform is the lack of viable alternatives.[46] Rather, the issues with respect to alternative programs include the question of whether a new program is a prerequisite for abandoning the old, the problem of selecting among multiple program possibilities and the task of framing appropriate objectives that are relevant to the concerns of the community and to the community's willingness to pay.

There is a tendency to assume that treatment—oriented programs emphasizing medical care objectives are the appropriate alternatives. This reflects the influence of the medical concept that alcoholism is an illness and recognizes the obviously poor medical condition of the men who are arrested under the present system. Even if the criminal-medical dichotomy is observed, several collateral issues concerning the structure of the appropriate program exist. Most important of these is the question of whether coercion, in picking up and detaining the men for treatment, is a justified infringement of their liberties. Professor Herbert Packer recognizes several important points in his comments on this problem.

> The appropriate predicate for invoking compulsion against a drunken person is that he poses a threat to himself or others, or is a nuisance to others. The threat cases are few and far between . . . . As for the nuisance aspect of drunkenness, it is very easy to overstate the extent to which the alcholic bothers others, especially if he is part of Skid Row culture. In those cases, and they are probably a substantial majority, in which danger or offense is not a factor, there is no solid case for compulsion.[47]

Packer suggests that rehabilitation and medical care objectives can and should be served by voluntary programs operating independently of the criminal system.

Although a highly successful project continues to operate in New York's Bowery,[48] the voluntary approach remains unproven as to its ability to function as a replacement for all police activity in this area. Further, the voluntary approach has gained little legislative acceptance. Rather, the contemporary trend favors the notion that civil, "coercive detoxification systems" are appropriate. Several cities, including St. Louis, Washington and Atlanta, have operative programs and many other jurisdictions have proposed similar efforts.

The coercive detoxification concept involves an alteration of the

46. Powell v. Texas, 392 U.S. 514 (1968).
47. H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 346 (1968).
48. *See* FIRST ANNUAL REPORT OF THE MANHATTAN BOWERY PROJECT (1969).

facility to which the inebriate is taken. The "pick-up" is made by the police under the justification of either a criminal or a public health statute relating to public intoxication. Where a criminal law is employed, prosecution may be deferred and eventually dropped upon the inebriate's full term stay in the program. The *patient* is taken to the detoxification center where immediate medical diagnosis, medical care during the "drying out process" and referral to long term treatment services are available. The patient remains at the center for only a few days.

Although this approach represents a relabeling, it maintains the view, exemplified by the traditional criminal process, that the inebriate is a community problem requiring affirmative action regardless of his initial acquiescence. Thus, the "problem" is defined differently. The public drunkenness offender is a public health, not a criminal, concern. Rather than reflecting negative aesthetic values, the subject population exhibits a spectrum of medical and personality difficulties. The arrestee is not blameworthy, but is unmotivated to seek treatment of his "alcoholism."

There have been few studies of the treatment-related effects of such a program. The one reported study indicates a significant "cure" and improvement rate.[49] Nevertheless, the data are insufficient to justify what appears to be a tendency to view the detoxification approach as an optimum balancing of treatment objectives, cost realities and respect for the inebriate's personal liberties. Also, the detoxification approach requires large amounts of funding, the majority of programs being initiated with federal funds as limited duration "demonstration" programs.[50] As federal funding is exhausted, an important issue is whether state or local finances will be available.[51] The problem may become acute as years pass and success rates drop because of an increasing involvement with hard-core "incurables." If funding decreases there is a danger, yet to occur in any of the present programs, that staff and service cutbacks may create a new "drunk tank" which bears the label "hospital" or "detoxification center."

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49. *See* J. WEBER, THE ST. LOUIS DETOXIFICATION AND DIAGNOSIS EVALUATION CENTER, FINAL EVALUATION REPORT (1959).

50. Total funding for the first year of operation for a fifty-bed facility in New York was $618,615; a thirty-bed facility in St. Louis required over $200,000 for its first full year; and a planned ten-bed detoxification center in Chicago will cost over $117,000.

51. The St. Louis detoxification program, which is the oldest in this country in terms of actual operation, recently experienced a period of severe financial strain. Federal funds, supplied as a limited duration "demonstration grant," were discontinued. The city government and the metropolitan police department were unable to provide sufficient additional funds. Eventually the state alcoholism program provided funding, but required that the Detoxification Center move to St. Louis State Hospital which is located in an area far removed from the locale of the highest arrest rates. For documentation of this financial crisis see ST. LOUIS DETOXIFICATION CENTER, QUARTERLY REPORTS (1968-69).

The danger in relying upon the criminal-medical treatment dichotomy is that it excludes a number of other possibilities that could provide realistic solutions to the problem. For example, Professor Morris proposes a "social welfare" model.[52] His proposal involves voluntary "pick-ups" of inebriates who are taken to overnight house for shelter. Referral is available if requested. By de-emphasizing treatment variables, this proposal may prove less "effective", but certainly requires less funding and represents a significant improvement over the present system.

Conclusion

"Conclusion" is an inappropriate label for the final section of this article, since the process of social change is presently at midstream at best. Although it would be naive to assume an overly optimistic attitude, change does appear inevitable.

Among the many warning signs implicit in the discussion presented here, two deserve additional emphasis. In this area, as in most other social problem areas, there is a tendency to overstudy and underact. Seldon Bacon, Director of the Rutgers Center of Alcoholism Studies, recognizes this as a pattern in our failure to change the criminal approach.

> Surely it must become clear that the "problem" includes the ineffective responses of the "task forces" and those to whom they report as well as the obvious failure of the current means adopted for their control.[53]

We already know that the existing system is morally, medically and economically objectionable. Contemporary effort should be focused upon drafting, implementing and evaluating new procedures rather than criticizing old methods.

The second factor to be specifically noted involves the tendency of would-be reformers to both promise and expect too much. It should be obvious at this point that the community does not wish to expend substantial resources for the solution of this problem. Especially in view of the availability of federal funds in the form of short-term grants, substantial financial support may be readily available for the first few years of operation of promising new programs. As the federal grants expire and the initial community interest wanes, however, it will become difficult to maintain support levels. Thus, any program which keys its success to the *continuing* availability of high levels of support may be unrealistic.

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52. Morris & Hawkins, *The Overreach of the Criminal Law*, 9 Midway 9 (1969). For a fourth approach see Rubington, *Alcoholic Control on Skid Row*, 13 Crime & Delinq. 531 (1967).

53. Bacon, *Alcoholism and the Criminal Justice System*, 2 Law & Soc'y Rev. 489, 491 (1968).