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Constitutional Law -- Cruel and Unusual Punishment -- Chronic Alcoholism

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agreed with the plaintiff that no diversity should be required. It has been suggested that an acceptance of the minority position would be desirous "because there is little logic in a system of law which affords a seaman suing on a maritime cause of action a federal jury trial if there happens to be diversity of citizenship but which denies him a jury in the same federal court if there is no diversity."[40] If this rationale were adopted, it would apply to passenger claimants as well as seamen and be an additional inducement to seeking maritime jurisdiction.[41]

The advantages, disadvantages, and problems evidenced in the previous discussion must be considered in the light of possible departure of the Warsaw Convention from the transoceanic flight scene in the United States.[42] If these rules disappear, admiralty is a logical replacement.

Some aspects of admiralty, like the tonnage provision,[43] would be difficult to employ. It is submitted that a selective process would be in order, a new set of rules governing transoceanic air travel using the basic concepts of admiralty as a foundation with liberal provision for adjustment to the rapid developments that characterize modern aviation.

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Constitutional Law—Cruel and Unusual Punishment—Chronic Alcoholism

In *Driver v. Hinnant*[1] defendant had been found guilty and sentenced[2] to imprisonment for two years for violation of a North Carolina statute making it a misdemeanor for "any person . . . [to] be found drunk or intoxicated on the public highway, or at any public place or meeting . . . ."[3] Defendant had been convicted of

[40] BAER, *op. cit. supra* note 37, at 69.

[41] The problem does not arise if the state forum is chosen. But if contributory negligence is an issue, it may nullify any prospective advantage of jury trial. In *Notarian,* contributory negligence was not an issue but this writer is informed that a three- or four-year backlog in the Pennsylvania courts played a significant role in the decision to sue in admiralty. Letter from plaintiff's attorney to the writer, Jan. 31, 1966.

[42] See text accompanying note 21 *supra.*

[43] See text accompanying note 22 *supra.*

[1] Driver v. Hinnant, 34 U.S.L. Week 2422 (4th Cir. Jan. 22, 1966).

[2] Driver v. Hinnant, 243 F. Supp. 95, 96 (E.D.N.C. 1965).

[3] N.C. GEN. STAT. § 14-335 (1953).

the same offense over 200 times previously and had spent two-thirds of his life "on the roads" for drinking.[4] He appealed to the North Carolina Supreme Court contending that his conviction under this statute was cruel and unusual punishment.[5] In a per curiam opinion the court affirmed the conviction saying that the sentences were authorized by the statute and that the prison authorities provided adequate medical treatment for prisoners during their confinement.[6] The defendant then petitioned for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina.[7] The district court denied the writ, holding that the application of the statute to the defendant does not subject him to cruel and unusual punishment.[8] On appeal the United States Court of Appeals for the Fourth Circuit held that the conviction violated the eighth amendment to the Constitution as being a cruel and unusual punishment.[9]

The eighth amendment has been held applicable to the states through the due process clause of the fourteenth amendment.[10] It has been held to prohibit punishment disproportionate to the offense for which it was imposed[11] and denationalization for wartime desertion.[12] In *Robinson v. California*[13] the Supreme Court of the United States held that drug addiction was an illness and a statute punishing such an illness inflicted cruel and unusual punishment in

[4] Driver v. Hinnant, 243 F. Supp. 95, 96 (E.D.N.C. 1965).
[5] State v. Driver, 262 N.C. 92, 136 S.E.2d 208 (1964).
[6] *Ibid.*
[7] Driver v. Hinnant, 243 F. Supp. 95 (E.D.N.C. 1965).
[8] *Id.* at 101.
[9] 34 U.S.L. Week 2422 (4th Cir. Jan. 22, 1966).
[10] In Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462-63 (1947), the Supreme Court assumed without deciding the issue that a violation of the eighth amendment by a state would violate the due process clause of the fourteenth amendment. In Robinson v. California, 370 U.S. 660, 666 (1962), the Court specifically decided that the eighth amendment applied to the states through the due process clause.
[11] Weems v. United States, 217 U.S. 349 (1910), where the defendant made false entries in public records and was sentenced to imprisonment attended by punishment that included the carrying of chains, deprivation of civil rights during imprisonment, and thereafter perpetual disqualification from holding office.
[12] Trop v. Dulles, 356 U.S. 86 (1958).
[13] 370 U.S. 660 (1962). For cases in which the Supreme Court has held that the particular punishment did not violate the eighth amendment see, *e.g.*, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), where the court denied petitioner's contention that it was cruel and unusual punishment for Louisiana to electrocute him after a prior abortive attempt. *Accord, In re* Kemmler, 136 U.S. 436 (1890) (electrocution).

violation of the fourteenth amendment.[14] In *Driver,* the court said that chronic alcoholism is a disease and punishment by criminal prosecution for those acts on the part of a chronic alcoholic " 'which are compulsive as symptomatic of the disease' " is a cruel and unusual punishment.[15] Thus the defendant could not be convicted under a public drunkenness statute, since the symptoms of chronic alcoholism may appear as a disorder of behavior, and this " 'obviously . . . includes appearances in public, as here, unwilled and ungovernable by the victim.' "[16]

Although the court did limit its decision to the " 'excusal of the chronic alcoholic from criminal prosecution . . .' " for " 'those acts on his part which are compulsive as symptomatic of the disease,' "[17] the case raises numerous questions with respect to its immediate application to the public drunkenness statute and its potential application to other areas of the law. Perhaps the most immediate problem inherent in the decision is the determination of the symptoms of chronic alcoholism. It would seem to be extremely difficult, if not impossible, for the medical profession, much less the courts, to make a definitive determination of those acts which are symptomatic of the disease.[18] Consequently, whether or not an act of a chronic alcoholic is a symptom of his illness will hinge upon the facts of each case; thus the general limitation imposed by the Fourth Circuit would seem to be too vague for application in subsequent cases.

Does it follow from the *Driver* decision that a chronic alcoholic cannot be convicted for a crime, other than public drunkenness, committed while he is intoxicated? The answer to this question would seem to turn on the question of whether or not a chronic alcoholic could be classified as insane or whether his drinking had destroyed his will so that his act was involuntary. Professor Paulsen has said: "At present psychiatry does not seem to recognize a psychosis which gives rise to an uncontrollable urge to drink although heavy drinking may be a symptom of a psychosis having other

[14] Robinson v. California, 370 U.S. 660, 667 (1962).
[15] 34 U.S.L. Week at 2422.
[16] *Ibid.*
[17] *Ibid.*
[18] Comment by Dr. John Ewing, A Panel on Alcoholism and the Law, at the University of North Carolina School of Law, February 10, 1966.

related characteristics of disordered behavior and psychic life."[19] Thus it would seem that chronic alcoholism itself would not be a defense to a crime other than a violation of a public drunkenness statute, but that insanity caused by chronic alcoholism would be a defense.[20] In essence, only insanity would be a defense to the crime and alcoholism would be only a symptom to be admitted into evidence on the question of insanity.

The only other means by which a chronic alcoholic could be exculpated for a crime committed while he was intoxicated would be to say that the intoxication destroyed his will.[21] The Fourth Circuit said: " 'This conclusion does not contravene the familiar thesis that voluntary drunkenness is no excuse for crime. The chronic alcoholic has not drunk voluntarily, although undoubtedly he did so originally. His excess now derives from disease.' "[22] The normal rule is that voluntary intoxication is no excuse for crime[23] but that involuntary intoxication may exculpate the accused.[24] At first glance, by saying that the intoxication of the chronic alcoholic is involuntary, the Fourth Circuit seems to imply that a chronic alcoholic would be exculpated for any crime he committed while intoxicated. But it is possible that the court considers the intoxication of a chronic alcoholic involuntary only in connection with the violation of a public drunkenness statute. The statute under which Joe Driver was convicted requires no mens rea[25] and voluntary intoxication would be no defense to the conviction.[26] But, by saying that the defendant's intoxication was involuntary, the court pro-

[19] Paulsen, *Intoxication as a Defense to Crime,* 1961 U. ILL. L.F. 1, 20. See generally VI JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION OF THE AMERICAN LAW INSTITUTE AND THE AMERICAN BAR ASSOCIATION, THE PROBLEM OF INTOXICATION (1961).

[20] Generally, legal insanity brought on by intoxication is a complete defense to a crime. *E.g.,* People v. Herrin, 295 Ill. App. 590, 15 N.E.2d 598 (1938); State v. Painter, 135 W. Va. 106, 63 S.E.2d 86 (1950).

[21] Involuntary intoxication is a complete defense to a crime if it destroys the criminal capacity of the defendant's mind. *E.g.,* Choate v. State, 19 Okl. Crim. 169, 197 Pac. 1060 (1921). See generally PERKINS, CRIMINAL LAW 781, 787 (1957).

[22] 34 U.S.L. Week at 2422.

[23] See generally PERKINS, CRIMINAL LAW 787 (1957).

[24] See note 21 *supra.*

[25] N.C. GEN. STAT. § 14-335 (1953). This type of statute provides that the doing of certain acts is a crime and no mens rea is required.

[26] For cases illustrating that voluntary intoxication is no defense to a crime that requires no general mens rea see, *e.g.,* People v. Cochran, 313 Ill. 508, 145 N.E. 207 (1924) (homicide); Walden v. State, 178 Tenn. 71, 156 S.W.2d 385 (1941) (rape).

vides the defendant with a defense since involuntary intoxication completely exculpates a defendant from a crime whether or not mens rea is required.[27] It is doubtful that the court would say that a chronic alcoholic's intoxication was involuntary if he committed any crime other than violation of a public drunkenness statute, since that would mean that no chronic alcoholic could be convicted for any crime committed while he was intoxicated.[28] A conclusion such as this would seem to violate the principle purpose of incarceration—protection of the public from the criminal.[29]

Although it was conceded in this case that Joe Driver was a chronic alcoholic,[30] the question arises how the court should determine who is and who is not a chronic alcoholic. The Fourth Circuit said, " '[W]hen on arraignment the accused's helplessness comes to light . . . [the Constitution intercedes so that] . . . no *criminal* conviction may follow.' "[31] But the court provides no guidance regarding how the determination should be made if it does not appear at arraignment that the defendant is a chronic alcoholic. One plausible method of deciding this issue could be found in the District of Columbia Code where Congress has provided that in any criminal case in which the evidence indicates that the defendant is a chronic alcoholic, the judge may suspend the proceedings so that the person can be confined in a rehabilitation center and treated.[32] If the experts at the rehabilitation center should determine that the accused is actually a chronic alcoholic, it would seem that the court would be required to accept this evidence, and no conviction for public drunkenness could follow.[33] Perhaps a better means by which to determine whether a defendant is a chronic alcoholic would be to place the burden of proof on the defendant, thereby retaining an

[27] See note 21 *supra.*

[28] *Ibid.*

[29] Commonwealth v. Ritter, 13 Pa. D. & C. 285, 291 (Oyer & Terminer Ct. 1930).

[30] Driver v. Hinnant, 243 F. Supp. 95, 97 (E.D.N.C. 1965).

[31] 34 U.S.L. Week at 2422.

[32] Under this statute, the judge may suspend the proceedings and order a hearing to be held to determine whether the defendant is a chronic alcoholic. If the judge or jury should find that the defendant is a chronic alcoholic, he can then be committed to a clinic for diagnosis and treatment for ninety days. After the ninety-day period has expired, the director of the clinic can recommend that the defendant be set free conditionally and under supervision, or be placed in an institution for treatment as a chronic alcoholic, or be returned to stand trial for the offense charged. D.C. CODE ANN. §§ 24-504 to -514 (1961).

[33] *Ibid.* This idea seems to be implied in the statute. *Cf.* Easter v. District of Columbia, 34 U.S.L. Week 2534 (D.D.C. Mar. 31, 1966).

independent evaluating function for the judge or jury.[34] Medical testimony, subject to cross-examination, could be introduced by either side in the proceedings. Thus, the determination would not be for the police on arraignment or for the doctors in a rehabilitation center.

If a person is deemed a chronic alcoholic and cannot be convicted for violating a public drunkenness statute, the problem arises what the state can do with him to protect him and the public. In the *Robinson* decision the Court speaking of narcotics addicts said:

> In the interest of discouraging the violation of such laws, or in the interest of the general health or welfare of its inhabitants, a State might establish a program of compulsory treatment for those addicted to narcotics. Such a program of treatment might require periods of involuntary confinement. And penal sanction might be imposed for failure to comply with established compulsory treatment procedures.[35]

In the *Driver* case the court said, " '[N]othing we have said precludes appropriate detention of him for treatment and rehabilitation so long as he is not marked a criminal.' "[36] It would seem to follow that a state could commit a chronic alcoholic to a rehabilitation center but could not call him a criminal. This could be accomplished by means of a civil commitment statute such as is found in North Carolina.[37] But, before a state enters upon any program to provide for chronic alcoholics, the courts must make it clear what type of confinement would be permitted.

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[34] In a criminal case where the defendant interposes the defense of intoxication the normal rule is that he has the burden of proof to that fact and the ultimate issue is for the jury to decide. *E.g.*, State v. Tansimore, 3 N.J. 516, 71 A.2d 169 (1950). Since the court considers chronic alcoholism a disease, it would seem to follow that the rules governing the proof of insanity could possibly apply to chronic alcoholism. In a trial during which insanity is brought into issue the burden of proof of insanity is on the party alleging it. *E.g.*, Handspike v. State, 203 Ga. 115, 45 S.E.2d 662 (1947); State v. Creech, 229 N.C. 662, 51 S.E.2d 348 (1949). If the party asserts insanity that was only temporary, the burden is on him to prove that he was insane at the time alleged. *E.g.*, Barbour v. State, 262 Ala. 297, 78 So. 2d 328 (1954); State v. Shackleford, 232 N.C. 299, 59 S.E.2d 825 (1950). The existence of insanity is a question to be decided by the jury. *E.g.*, Wilson v. State, 9 Ga. App. 274, 70 S.E. 1128 (1911); State v. Creech, 229 N.C. 662, 51 S.E.2d 348 (1949); State v. Harris, 223 N.C. 697, 28 S.E.2d 232 (1943). See generally 44 C.J.S. *Insanity* § 7 (1945). For an excellent bibliography on insanity and the criminal law see TOMPKINS, INSANITY AND THE CRIMINAL LAW (1960).

[35] Robinson v. California, 370 U.S. 660, 664-65 (1962).

[36] 34 U.S.L. Week at 2422.

[37] N.C. GEN. STAT. § 35-2 (Supp. 1965).